BRB No. 10-0495 BLA

WILMA SINGER, on behalf of JAMES SINGER (Deceased Miner)	)	
Claimant-Respondent	)	
v.	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 06/17/2011
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Sarah M. Hurley (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (2006-BLA-05098) of Administrative Law Judge Donald W. Mosser awarding benefits on a miner's claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case is before the Board for a second time. In a Decision and Order issued on June 12, 2008, the administrative law judge credited the miner with at least seventeen years of coal mine employment and adjudicated this claim under the regulations at 20 C.F.R. Part 718. The administrative law judge found that while the evidence was sufficient to establish that the miner was totally disabled, claimant failed to establish the existence of pneumoconiosis. Accordingly, benefits were denied.

Claimant appealed, and the Board affirmed, as unchallenged, the administrative law judge's finding that the miner was totally disabled pursuant to 20 C.F.R. §718.204(b)(2). *See W.S.* [*Singer*] *v. Peabody Coal Co.*, BRB No. 08-0707 BLA, slip op. at 2 n.3 (July 10, 2009) (unpub.). The Board, however, vacated the administrative law judge's findings that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), (4). *Id*. at 3-4. The Board instructed the administrative law judge to address whether the CT scans were medically acceptable, in accordance with 20 C.F.R. §718.107(b), and to explain the weight he accorded the CT scan evidence. *Id*. at 4. With regard to the medical opinion evidence, the Board affirmed the administrative law judge's decision to assign little weight to the medical opinions of Drs. Theertham, Harris, Repsher and Renn, as he permissibly determined that none of their opinions was sufficiently reasoned. *Id*. at 4-6, n.7. The Board, however, agreed with claimant, that the administrative law judge erred in discrediting the opinion of Dr. Cohen, and instructed the administrative law judge to reconsider Dr. Cohen's opinion and rationale, and explain the basis for his credibility determination. *Id*. at 7. The Board also instructed the administrative law judge to reconsider whether claimant was entitled to submit a supplemental report from Dr. Cohen in response to Dr. Repsher's deposition testimony. *Id*. at 7-9. Finally, the Board instructed the administrative law judge to

[1] The miner filed his claim on March 19, 2002, but later died on January 19, 2006. Director's Exhibit 2. The miner's claim is being pursued by his widow, Wilma Singer, the claimant herein.

[2] On March 23, 2010, amendments to the Act, affecting claims filed after January 1, 2005, were enacted. The recent amendments do not apply to this case, as the miner's claim was filed before January 1, 2005. Director's Exhibit 2.

explain the basis for his finding that the miner had a smoking history of between fifty and seventy-five pack years. *Id*. at 10.

On remand, the administrative law judge found that claimant was entitled to "obtain a rehabilitation report from Dr. Cohen pertaining specifically to the criticisms discussed by Dr. Repsher." November 16, 2009 Order. Accordingly, claimant submitted a supplemental report by Dr. Cohen dated December 10, 2009. Claimant's Exhibit 7. In reconsidering the evidence, although the administrative law judge found that the CT scan and medical opinion evidence did not establish that the miner suffered from clinical pneumoconiosis, he determined that Dr. Cohen's opinion, that the miner had chronic obstructive pulmonary disease (COPD) due, in part, to coal dust exposure, was reasoned and documented, and sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found, based on Dr. Cohen's opinion, that the evidence established that the miner's disabling respiratory impairment was due, in part, to his legal pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer resurrects its argument in the prior appeal that the administrative law judge mischaracterized the evidence and erred in relying on the preamble to the regulations to discredit the opinions of Drs. Renn and Repsher, that the miner's disabling respiratory impairment is unrelated to coal dust exposure. Employer contends that the administrative law judge applied "incorrect legal standards to discredit and credit evidence in the record." Employer's Brief in Support of Petition for Review at 9. Employer further contends that Dr. Cohen's opinion is legally insufficient to satisfy claimant's burden of proving both the existence of legal pneumoconiosis and disability causation, and that the administrative law judge was inconsistent in his requiring that employer's experts rule out coal dust exposure as a causative factor in the miner's respiratory condition, while not requiring Dr. Cohen to "rule in" that pneumoconiosis was a factor. *Id*. at 13-14. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response brief, asserting that the administrative law judge properly considered the preamble in resolving the conflict in the medical opinion evidence. Employer has filed a reply brief, reiterating its argument that the administrative law judge erred in weighing the conflicting medical opinions.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated into the

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's coal mine employment was in Indiana. *See Shupe v. Director, OWCP,* 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 3.

Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc*., 380 U.S. 359 (1965).

In order to establish entitlement to benefits in the miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must prove that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that the miner was totally disabled and that his disability was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

I. Legal Pneumoconiosis

Initially, we reject employer's assertion that the probative value of the opinions of Drs. Repsher and Renn, that the miner did not suffer from legal pneumoconiosis, is still at issue. The Board previously held that the administrative law judge rationally assigned these opinions less weight at 20 C.F.R. §718.202(a)(4). *Singer*, BRB No. 08-0707 BLA, slip op. at 5 n.7. Specifically, the Board held that the administrative law judge acted within his discretion in discounting, as insufficiently reasoned, the opinions of Drs. Repsher and Renn, because both physicians "fail[ed] to illustrate how they rationally eliminated the miner's seventeen years of coal mine employment as a contributor" to his COPD. *Id*., *quoting* June 12, 2008 Decision and Order at 14. As employer has not shown that the Board's holding was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination. *See Brinkley v. Peabody Coal Co*., 14 BLR 1-147, 1-151 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989) (Brown, J., dissenting).

Employer also argues that Dr. Cohen's opinion, as a matter of law, is generalized and fails to satisfy claimant's burden of proving that the miner's disabling COPD was due to coal dust exposure. Employer's Brief in Support of Petition for Review at 13-19. We disagree. Dr. Cohen provided a consultative report dated November 15, 2005. Claimant's Exhibit 5. He opined that the miner had severe obstructive lung disease with a disabling pulmonary impairment, combined with a diffusion and gas exchange impairment. *Id*. He also opined that the miner's seventeen years of coal mine dust exposure and heavy exposure to tobacco smoke both significantly contributed to the development of this condition. *Id*. Dr. Cohen reiterated his opinion in two supplemental reports dated May 11, 2007 and December 10, 2009. Claimant's Exhibits 6, 7.

On remand, the administrative law judge reviewed Dr. Cohen's opinion, "in its entirety," and found that his diagnosis of legal pneumoconiosis was "consistent with the regulations," and that his opinion was well-documented and well-reasoned and entitled to "great weight." Decision and Order on Remand at 6-7. We reject employer's argument

that Dr. Cohen's attribution of the miner's impairment to multiple factors, including coal dust exposure, renders his opinion legally insufficient, as a physician's opinion that a miner's impairment is due to a combination of cigarette smoking and coal dust exposure can constitute substantial evidence sufficient to support a claimant's burden of proving the existence of legal pneumoconiosis. *See Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 726, 24 BLR 2-97, 2-103 (7th Cir. 2008); *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Cornett v. Benham Coal, Inc*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *Gross v. Dominion Coal Corp*., 23 BLR 1-8 (2003).

Furthermore, contrary to employer's argument, the administrative law judge also rationally determined that Dr. Cohen's opinion is well-documented and well-reasoned and that Dr. Cohen "provide[d] a sufficient causal link between the miner's coal dust exposure [and] obstructive disease." Decision and Order on Remand at 7; s*ee Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 482-83; 22 BLR 2-265, 2-280 (7th Cir. 2001); *Clark v. Karst-Robbins Coal Co*., 12 BLR 1-149, 1-155 (1989). The administrative law judge noted that Dr. Cohen "considered the miner's symptoms and medical, employment and smoking histories, as well as numerous x-rays, pulmonary function studies, and the medical records and reports prepared by Drs. Harris, Repsher and Renn." Decision and Order on Remand at 6. The administrative law judge explained that Dr. Cohen had the "best picture of the miner's complete medical condition" because he "reviewed the miner's voluminous medical and hospitalization records[,] which document symptoms of [COPD], coronary artery disease, cor pulmonale and respiratory difficulties." *Id*. In addition, the administrative law judge found that "Dr. Cohen thoroughly discussed several scientific studies upon which he based his opinions and rebutted the comments made by Dr. Repsher . . . [and] further cited to several studies which demonstrated a relationship between coal dust exposure and declines in lung function . . . ." *Id*.

The administrative law judge also properly explained why he found Dr. Cohen's reasoning, as to the etiology of the miner's respiratory condition, to be persuasive:

> Dr. Cohen acknowledged that smoking was a significant component to the miner's pulmonary impairment, but explained that coal mine dust exposure was also a significant contributing factor based, in part, on the epidemiologic studies. Dr. Cohen also addressed the other factors that may have contributed to the miner's impairment, namely obesity and sleep apnea, and explained how he was able to rule out these other factors. He found the miner was a very sensitive host as to both smoking and coal dust related toxins based on his medical history, examination, and test results. The physician acknowledged the miner's smoking history of forty-five to fifty-two pack years was significant. He also determined the miner had

> significant exposure to coal mine dust while working underground for seventeen years. These two factors considered in conjunction with the miner's demonstrated significant decline in pulmonary function and the medical and scientific literature, as well as the sum of the other medical evidence, led Dr. Cohen to his conclusions.

Decision and Order on Remand at 7.

Employer's arguments on appeal amount to little more than a request that the Board reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co*., 12 BLR 1-20 (1988). Because the administrative law judge permissibly relied on Dr. Cohen's opinion to find that the miner had legal pneumoconiosis, we affirm his finding pursuant 20 C.F.R. §718.202(a)(4). *Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Amax Coal Co. v. Burns*, 855 F.2d 499, 501 (7th Cir. 1988); *Tackett v. Cargo Mining Co*., 12 BLR 1-11 (1988) (*en banc*).

II. Disability Causation

Lastly, we reject employer's assertion that the administrative law judge erred in finding that claimant established that the miner's total disability was due to pneumoconiosis at 20 C.F.R. §718.204(c). The administrative law judge weighed the medical opinion evidence, as discussed *supra*, and rationally found that Dr. Cohen's opinion, that the miner's legal pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment, was entitled to controlling weight. Decision and Order on Remand at 8-9; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997). The administrative law judge properly noted that Dr. Cohen "consistently reported that the miner's totally disabling lung disease was due to both his coal dust inhalation and tobacco smoke, even though he could not assign a precise 'percentage' of lung function to either factor." *Id*. He then permissibly credited Dr. Cohen's disability causation opinion as well-reasoned and well-documented for the same reasons that he credited Dr. Cohen's diagnosis of legal pneumoconiosis. Decision and Order on Remand at 8. Moreover, the administrative law judge rationally assigned controlling weight to Dr. Cohen's opinion because he considered Dr. Cohen to be a "highly qualified pulmonary specialist." *Id.; see Clark*, 12 BLR at 1-151.

Furthermore, the administrative law judge properly accorded "little weight" to the disability causation opinions of Drs. Repsher, Renn, Theertham and Harris, as these physicians did not diagnose legal pneumoconiosis. Decision and Order on Remand at 9; *see Beeler*, 521 F.3d at 726, 24 BLR at 2-103; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 512 (6th Cir. 2002); *Toler v. Eastern*

Associated Coal Co., 43 F.2d 109, 19 BLR 2-70 (4th Cir. 1995). We, therefore, affirm, as supported by substantial evidence, the administrative law judge's finding at 20 C.F.R. §718.204(c), that the miner was totally disabled due to pneumoconiosis. Thus, we affirm the award of benefits in this claim.

III. Attorney Fees

Claimant's counsel has filed a fee petition in connection with the services she performed before the Board in *Singer*, BRB No. 08-0707 BLA. She requests a fee of $2,079.00 for 9.45 hours of service, performed at an hourly rate of $220.00, for the period of June 30, 2008 through July 10, 2009. No objections to the fee petition have been received.

An award of attorney fees pursuant to Section 28 of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Black Lung Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a), will be ordered if the requested fee reflects services necessary to the proper conduct of the case and the time requested for such work is reasonable. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). Claimant's counsel is entitled to an attorney fee payable by employer for successfully prosecuting the claim. *See* 33 U.S.C. §928; *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *see generally Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (*en banc*); *see also Smith v. Alter Barge Line, Inc.*, 30 BRBS 87 (1996).

After reviewing counsel's fee petition, we approve the hourly rate and services performed as they as reasonable in this case. Accordingly, we hold that counsel is entitled to receive a fee, payable directly to counsel by employer, of $2,079.00 for legal services performed before the Board in BRB No. 08-0707 BLA. *See* 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge