BRB No. 11-0449 BLA

RALPH D. DYE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FARWEST COAL COMPANY	)	DATE ISSUED: 03/29/2012
	)	
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 Second Remand of Christine L. Kirby, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Ryan C. Gilligan (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (05-BLA-6152) of Administrative Law Judge Christine L. Kirby awarding benefits on a subsequent claim[1]

[1] Claimant, Ralph D. Dye, filed his first application for benefits on July 25, 1974, which was denied by the district director on June 10, 1982. Director's Exhibit 1. Claimant's second claim, filed on February 4, 1994, was denied by Chief Associate Administrative Law Judge James Guill in a Decision and Order dated August 26, 1997, based on claimant's failure to establish that pneumoconiosis was a substantially contributing cause or factor in his disabling respiratory impairment, and the Board

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 has a lengthy procedural history, and the current claim, filed on June 17, 2004, is on appeal before the Board for the third time. In the last appeal, the Board vacated Administrative Law Judge Linda S. Chapman's findings that the newly submitted evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), that claimant suffers from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and remanded the case for a reassessment of the evidence on those issues. If, on remand, the administrative law judge found that the newly submitted evidence was sufficient to establish disability causation pursuant to Section 718.204(c), or the existence of complicated pneumoconiosis pursuant to Section 718.304, the Board instructed the administrative law judge to conclude that claimant had established a change in an applicable condition of entitlement pursuant to Section 725.309, and to then determine whether the evidence of record considered as a whole established claimant's entitlement to benefits. The Board affirmed the administrative law judge's award of attorney's fees in the amount of $2,650 for legal services performed on behalf of claimant before the Office of the Administrative Law Judges, and $1,557.50 for expenses, and directed that the case be reassigned to a different administrative law judge on remand. *R.D. v. Farwest Coal Co.*, BRB No. 08-0827 BLA (Sept. 30, 2009) (unpub.).

On remand, the case was assigned to Administrative Law Judge Christine L. Kirby (the administrative law judge), who delineated the procedural history of this case, specified the Board's remand instructions, and summarized all the relevant medical evidence of record. The administrative law judge found that the newly submitted evidence was sufficient to establish that claimant's disability was due to pneumoconiosis pursuant to Section 718.204(c), thereby establishing a change in an applicable condition of entitlement pursuant to Section 725.309. Considering the entire record, the

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affirmed the denial of benefits. *Dye v. Farwest Coal Co.*, BRB No. 97-1828 BLA (Sept. 25, 1998) (unpub.). Claimant's third claim, filed on June 12, 2000, was ultimately denied by Administrative Law Judge Daniel F. Solomon in a Decision and Order on Remand dated May 21, 2003, for failure to establish disability causation pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 1. Claimant took no further action until he filed a fourth application for benefits on June 17, 2004, which is pending herein. Director's Exhibit 3.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply in this case, as the claim was filed prior to January 1, 2005. Director's Exhibit 2.

administrative law judge found the weight of the evidence sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a), and total disability due to pneumoconiosis pursuant to Section 718.204(b), (c). Accordingly, the administrative law judge awarded benefits without reaching the issue of complicated pneumoconiosis under Section 718.304.

In the present appeal, employer contends that the administrative law judge failed to provide valid reasons for crediting the opinion of Dr. Rasmussen and discounting the opinions of Drs. Fino and Tuteur in finding that claimant established disability causation under Section 718.204(c), and a change in an applicable condition of entitlement under Section 725.309. Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response in this appeal.

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

Employer contends that the administrative law judge erred in crediting the opinion of Dr. Rasmussen, that claimant's coal dust exposure was a substantially contributing cause of his disabling respiratory impairment, over the contrary opinions of Drs. Fino and Tuteur. Employer maintains that the administrative law judge did not consider whether Dr. Rasmussen's October 6, 2004 opinion constitutes "new" evidence sufficient to establish a change in an applicable condition of entitlement under Section 725.309 when, employer asserts, it is essentially identical to the May 21, 2001 opinion previously found insufficient to establish entitlement. Employer also argues that Dr. Rasmussen relied on the mistaken beliefs that claimant had clinical and/or complicated pneumoconiosis and twenty-one, rather than fourteen, years of coal mine employment, and that the administrative law judge failed to adequately consider the impact this reliance had on the physician's diagnosis of legal pneumoconiosis. Employer maintains that Dr. Rasmussen did not explain how coal dust exposure caused claimant's impairment, but merely identified coal dust exposure and smoking as risk factors that *could* cause the impairment. Further, employer argues that the administrative law judge did not explain why Dr. Rasmussen's reference to medical studies enhanced his opinion, when the doctor did not identify what the studies showed, or how they applied in this case. Employer contends

[3] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant's coal mine employment occurred in Virginia. Director's Exhibits 1, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

that the administrative law judge failed to provide valid reasons for discounting the contrary opinions of Drs. Fino and Tuteur, that claimant's disabling impairment is unrelated to coal dust exposure, which employer asserts are better reasoned. Finally, employer contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by relying upon consistency with "the plain language of the regulations and the Department of Labor's position in the preamble to the amended regulations," Decision and Order on Second Remand at 21, in assessing the credibility of the medical opinions. Employer's arguments lack merit.

First, we note that the administrative law judge may properly consider whether a medical opinion is based on beliefs that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science underlying the current regulations, as determined by the Department of Labor (DOL) and set forth in the preamble to the revised regulations. *See Helen Mining Co. v. Director, OWCP* [*Obush*], 650 F.3d 248, 256-57, 24 BLR 2-369, 2-383 (3d Cir. 2011); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 490, 23 BLR 2-18, 2-26 (7th Cir. 2004). Thus, we reject employer's assertion to the contrary. In evaluating the conflicting medical opinions, the administrative law judge accurately summarized the explanations and bases for the various physicians' conclusions, and acted within her discretion in finding that Dr. Rasmussen's opinion, that claimant suffers from disabling chronic obstructive pulmonary disease (COPD) and emphysema caused by coal mine dust exposure and cigarette smoking, was well-reasoned, well-documented, and entitled to full probative weight. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997); Decision and Order on Second Remand at 21. In so finding, the administrative law judge determined that Dr. Rasmussen's diagnosis was based on the following: claimant's medical history; a coal mine employment history of twenty-one years; a cigarette smoking history of one-third pack per day for thirty years, ending in 1980; a positive chest x-ray interpretation; physical examination findings; qualifying pulmonary function studies demonstrating a minimal to moderate partially reversible obstructive ventilatory impairment; and qualifying blood gas studies reflecting moderate impairment at rest and marked impairment in oxygen transfer during very light exercise. Decision and Order on Second Remand at 9-10; Director's Exhibit 12. As Dr. Rasmussen's October 6, 2004 report was based on newly administered objective tests and a physical examination, we reject employer's argument that it does not constitute "new" evidence for purposes of establishing a change in an applicable condition of entitlement under Section 725.309. The administrative law judge acknowledged that reliance on a significantly inaccurate employment history may compromise the value of a medical opinion, but permissibly declined to accord less weight to Dr. Rasmussen's opinion on that basis, finding that "the

discrepancy here is not substantial in light of the considerable years of coal mine employment (14 years) demonstrated on this record." Decision and Order on Second Remand at 21; *see Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); *Gouge v. Director, OWCP*, 8 BLR 1-307, 1-309 (1985). While Dr. Rasmussen diagnosed simple and complicated pneumoconiosis based upon Dr. Patel's positive x-ray interpretation, the administrative law judge found that this diagnosis was not well-supported because the x-ray evidence as a whole neither established the presence nor absence of clinical pneumoconiosis. However, the administrative law judge determined that Dr. Rasmussen also diagnosed legal pneumoconiosis, as evidenced by the presence of COPD and emphysema, based on claimant's chronic productive cough; airflow obstruction; reduced SBDLCO; very marked loss of lung function as reflected by his ventilatory limitation with a breathing reserve of only 22 liters at an exercise level requiring only 14.2 cc of oxygen per kg/min., "far below" the 25-30 cc/kg/min. required for claimant's usual coal mine job; marked hypoxemia during light exercise; and evidence of a progressive impairment since previous studies obtained in 2000 and 2001. Decision and Order on Second Remand at 9-10, 21; Director's Exhibit 12. The administrative law judge further determined that Dr. Rasmussen, citing medical literature which supported his position, emphasized the specific reasons that led to his diagnosis of legal pneumoconiosis, *i.e.*, "while cigarette smoking and coal mine dust exposure can cause identical forms of COPD, including bronchitis and emphysema, coal mine dust exposure causes impairment in oxygen transfer which was marked in [c]laimant's case," as demonstrated by claimant's qualifying blood gas study. Decision and Order on Second Remand at 21; Director's Exhibit 12. Finding that Dr. Rasmussen based his opinion on views that are consistent with the preamble and the regulations, the administrative law judge properly found that the opinion was sufficient to affirmatively establish the existence of legal pneumoconiosis at Section 718.202(a)(4) and disability causation at Section 718.204(c). *See* 20 C.F.R. §718.201(b); *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 622, 23 BLR 2-345, 2-372 (4th Cir. 2006).

By contrast, the administrative law judge permissibly found that the opinion of Dr. Fino was less persuasive because the physician "place[d] great emphasis on the fact that it was 'very, very important' to note that [c]laimant's lung function was normal at the time he left the mines, and he did not develop a significant pulmonary condition until several years after leaving the mines." Decision and Order on Second Remand at 25; Employer's Exhibit 1. While Dr. Fino did not state that pneumoconiosis was not a progressive disease or that airway obstruction could not result from coal mine employment, he indicated that airway obstruction that was actually due to coal dust would be expected to be present at the time claimant left the mines, and concluded that claimant's disabling impairment was unrelated to coal dust exposure. Decision and Order at 13, 24-25; Employer's Exhibits 1, 10. Noting that the preamble recognizes that a smoking or non-smoking miner "who may be asymptomatic and without significant impairment at retirement can develop a significant pulmonary impairment after a latent

period," with or without x-ray evidence of pneumoconiosis, the administrative law judge acted within her discretion in according Dr. Fino's opinion less weight. Decision and Order on Second Remand at 25, *citing* 65 Fed. Reg. 79,971 (Dec. 20, 2000); *see Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003).

Similarly, the administrative law judge determined that Dr. Tuteur's reasoning was "problematic." Dr. Tuteur attributed claimant's disabling COPD solely to smoking, explaining that, while chronic coal dust inhalation can produce a clinical picture that is indistinguishable from smoking-induced COPD:

> . . . it must be recognized in attempting to ascribe etiology in an individual case that never mining cigarette smokers develop this condition about 20% of the time. In contrast, never smoking miners develop this condition 1% of the time or less. *On this basis*, with reasonable medical certainty, the etiology of the COPD phenotype seen in [claimant] is uniquely related to and caused by the chronic inhalation of tobacco smoke, not coal mine dust.

Decision and Order on Second Remand at 26; Employer's Exhibit 8 [emphasis added]. Citing *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008), the administrative law judge permissibly concluded that the probative value of Dr. Tuteur's opinion was undermined, as it was "premised on generalities that are not in accord with the Department's position as set forth in its preamble," Decision and Order on Second Remand at 27, *i.e.*, that "nonsmoking miners develop moderate and severe obstruction at the same rate as smoking miners." 65 Fed. Reg. 79,938 (Dec. 20, 2000); *see Obush*, 650 F.3d at 256-57, 24 BLR at 2-383; *Shores*, 358 F.3d at 490, 23 BLR at 2-26.

After weighing all the medical opinions of record, the administrative law judge acted within her discretion in finding that the opinion of Dr. Rasmussen was entitled to determinative weight. Decision and Order at 28-30; *see Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275, 2-276; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28. As substantial evidence supports the administrative law judge's credibility determinations, we affirm her findings that claimant established a change in an applicable condition of entitlement under Section 725.309, and total disability due to legal pneumoconiosis pursuant to Sections 718.202(a), 718.204(b), (c). Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is affirmed.

Claimant's counsel (counsel) has filed an itemized statement requesting a fee for services performed before the Board between November 10, 2006 and February 5, 2008, pursuant to 20 C.F.R. §802.203. Counsel requests a total fee of $2,700.00, representing 5.25 hours of legal services at an hourly rate of $300.00 for Joseph E. Wolfe, 0.25 hour of

legal services at an hourly rate of $200.00 for W. Andrew Delph, 5.0 hours of legal services at an hourly rate of $175.00 for Ryan C. Gilligan, and 2.0 hours of legal services at an hourly rate of $100.00 for legal assistants. Employer objects to counsel's fee petition, arguing that counsel failed to establish the reasonableness of the requested hourly rates with market evidence. Employer also asserts that the number of hours charged was excessive, and maintains that the fee petition should be denied or reduced to no more than $1,084.00, representing 3.5 hours at an hourly rate of $150.00 for Attorney Wolfe, no fees for Attorney Delph, 5.0 hours at an hourly rate of $100.00 for Attorney Gilligan, and 0.80 hours at an hourly rate of $55.00 for legal assistants.

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*)), provides that when a claimant wins a contested case, the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The United States Court of Appeals for the Fourth Circuit has held that a market rate should be established with evidence of earnings attorneys received from paying clients for similar services in similar circumstances. *Robinson v. Equifax Info. Servs., LLC*, 560 F.3d 235, 244 (4th Cir. 2009). The fee applicant bears the burden of producing specific evidence of prevailing market rates.[4] *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 289, 24 BLR 2-269, 2-290 (4th Cir. 2010); *Plyler v. Evatt*, 902 F.2d 273 (4th Cir. 1990).

Mr. Wolfe has not provided sufficient market rate evidence in this fee petition. However, Mr. Wolfe did provide sufficient market evidence in *Maggard v. Int'l Coal Group, Knott County, LLC*, 24 BLR 1-203 (2010), and the Board may consider past fee determinations, among other factors, when deciding a reasonable hourly rate. *See Cox*, 602 F.3d at 290, 24 BLR at 2-291; *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 227-28, 43 BRBS 67, 71 (CRT) (4th Cir. 2009). Therefore, consistent with recent Board awards, we conclude that an appropriate hourly rate for Mr. Wolfe is $300.00. *See Maggard*, 24 BLR at 1-205 (2010). We similarly conclude that an appropriate hourly rate for Mr. Delph is $200.00, and an appropriate hourly rate for Mr. Gilligan is $175.00. *See Reed v. Triple S Energy, Inc.*, BRB No. 09-0819 BLA, slip op. at 2 (May 31, 2011) (unpub.).

[4] "The prevailing market rate may be established through affidavits reciting the precise fees that counsel with similar qualifications have received in comparable cases; information concerning recent fee awards by courts in comparable cases; and specific evidence of counsel's actual billing practice or other evidence of the actual rates which counsel can command in the market." *Spell v. McDaniel*, 824 F.2d 1380, 1402 (4th Cir. 1987).

Counsel, however, has not identified the training, education, and experience of his legal assistants. Because claimant's counsel has failed to provide this required information, *see* 20 C.F.R. §802.203(d)(2), we disallow the requested fee for the 2.00 hours of legal services performed by his legal assistants.

We reject employer's contention that quarter-hourly billing for routine tasks is prohibited, as the regulation at 20 C.F.R. §802.203(d)(3) states that counsel should bill in increments of one-quarter hour. Having considered employer's objections to various itemized entries, we disallow Attorney Wolfe's entry for 0.25 hour on February 23, 2007, as counsel has not established that the services related to the appeal before the Board. We find the rest of employer's objections to specific entries to be without merit, and we award a fee for the remaining time claimed, as reasonably commensurate with the necessary work performed. 20 C.F.R. §802.203(e).

Accordingly, we award claimant's counsel a total fee of $2,425.00, representing 5.00 hours of legal services at an hourly rate of $300.00 for Attorney Wolfe, 0.25 hour of legal services at an hourly rate of $200.00 for Attorney Delph, and 5.0 hours of legal services at an hourly rate of $175.00 for Attorney Gilligan, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

SO ORDERED.

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NANCY S. DOLDER
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge