BRB No. 02-0623 BLA

HERBERT G. LEWIS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CUMBERLAND RIVER COAL COMPANY	)	DATE ISSUED: _____
	)	
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 Stuart A. Levin, Administrative Law Judge, United States Department of Labor.

Johnnie L. Turner (Law Offices of Johnnie L. Turner, P.S.C.), Barbourville, Kentucky, for claimant.

Ronald E. Gilbertson (Bell, Boyd & Lloyd, PLLC), Washington, D.C., for employer.

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

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (94-BLA-0676) of Administrative Law Judge Stuart A. Levin awarding benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] Claimant filed his Black Lung claim

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the

on July 10, 1992, after working for nineteen years in the coal mines. This case is before the Board for the third time. The prior history of the case is set forth in the Board's most recent decision in *Lewis v. Cumberland River Coal Co.*, BRB No. 98-0379 BLA (May 5, 1999)(unpub.). In that decision, the Board affirmed the administrative law judge's finding that claimant established the existence of pneumoconiosis by x-ray evidence, and total disability due to pneumoconiosis by medical opinion evidence, but vacated the administrative law judge's finding regarding onset date and remanded the case to the administrative law judge for further findings on that issue. On reconsideration, however, the Board modified its decision, vacating the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and remanded the case for further consideration of the x-ray evidence. On remand, the administrative law judge concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). Benefits were awarded accordingly. The administrative law judge further found that benefits should commence from July 1, 1992, the month in which the claim was filed.

On appeal, employer contends that the administrative law judge failed to follow the Board's instructions and erred by weighing the x-ray evidence in a selective and arbitrary manner. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he will not participate in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 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).

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

Our review of the record reveals that when the administrative law judge issued his first decision on remand, November 10, 1997, he determined, *inter alia*, that the weight of the medical opinion evidence established the existence of pneumoconiosis

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amended regulations.

at 20 C.F.R. §718.202(a)(4). Decision and Order On Remand at 2-3. Employer has never challenged that finding; indeed, employer has never acknowledged it. The administrative law judge had complied with the Board's instructions remanding the case, to consider all methods contained in Section 718.202(a) to establish the existence of pneumoconiosis. Decision and Order at 2 (May 22, 1996). In its Petition for Review filed on February 2, 1998, employer stated that the Board had remanded the case for reconsideration of the existence of pneumoconiosis at Section 718.202(a)(1), total disability, including causation, at Section 718.204 and causation of pneumoconiosis at Section 718.203(b). Petition for Review at 3. Employer alleged several errors regarding the administrative law judge's analysis of the x-ray evidence but did not discuss the administrative law judge's clear finding that the weight of the medical opinion evidence established the existence of pneumoconiosis. Accordingly, that finding is affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). Any allegation of error with respect to this finding has been waived. *See Lawson v. Secretary of Health and Human Services*, 688 F.2d 436 (6th Cir. 1982); *Consolidated Coal Co. v. Director, OWCP*, 294 F.3d 885, BLR (7th Cir. 2002). Since the only issue currently raised on appeal is the administrative law judge's finding that pneumoconiosis was established by x-ray evidence and we have now affirmed the administrative law judge's finding that pneumoconiosis was established by medical opinion evidence, the administrative law judge's decision issued May 15, 2002, awarding benefits, is affirmed.

Nevertheless, in the interest of completeness, we shall discuss employer's charges of error, which have no merit. Employer first contends that the administrative law judge erred in finding that Dr. Baker consistently read x-rays as showing the existence of pneumoconiosis when, in fact, Dr. Baker interpreted some of the x-rays of record as negative for the existence of pneumoconiosis.[2] For example, employer contends that Dr. Baker's interpretations of the April 29, 1992 and November 30, 1994 x-rays were positive, but that his interpretations of the September 11, 1991 x-ray and September 4, 1992 x-ray were negative inasmuch as he noted that there were no parenchymal abnormalities consistent with pneumoconiosis on the September 11, 1991 film and while initially characterizing the September 4, 1992 film as 1/0, he subsequently found it negative for pneumoconiosis. Employer also contends that the administrative law judge failed to consider Dr. Baker's other diagnoses of bronchitis and chronic obstructive lung disease.

[2] The radiological credentials of the x-ray readers are as follows: Drs. Brandon, Barrett, and Sargent are Board-certified, B-readers; Drs. Baker, Dahhan, and Lane are B-readers; the radiological credentials of Drs. Anderson and Myers do not appear in the record. *See* Decision and Order on Remand at 2.

The administrative law judge found that Dr. Baker had consistently reported changes indicative of pneumoconiosis, with opacities of q and p, and that on two occasions he noted that the x-ray could be read as either 1/0 or 0/1. The administrative law judge noted that the credibility and the weight accorded Dr. Baker's readings were supported by the fact that he read a series of claimant's x-ray films from 1991, 1992, and 1994 and by his more complete report of the actual changes on the x-ray film. The administrative law judge noted that while Drs. Barrett and Sargent characterized the changes seen as granuloma, their opinions regarding the character of the changes present were outweighed by Dr. Baker's readings which characterized the changes as pneumoconiosis.[3] The administrative law judge further found that Dr. Baker's series of readings outweighed the single readings by Drs. Sargent and Barrett. Thus, contrary to employer's argument, the administrative law judge's consideration of Dr. Baker's opinion was rational. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192 (1989); *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20, 1-23 (1988); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985).

Employer next contends that the administrative law judge offered no valid reason for crediting Dr. Baker's findings on x-ray over the consistently negative readings of Drs. Lane, Dahhan, Barrett and Sargent, particularly those of Drs. Barrett and Sargent who were dually qualified. For the reasons discussed previously, however, the administrative law judge permissibly accorded greater weight to the x-ray findings of pneumoconiosis by Dr. Baker, a B-reader, because he had read a series of x-rays in 1991, 1992, and 1994, while Drs. Barrett and Sargent, dually qualified readers, read only a single x-ray. *See Lafferty*, *supra*; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Anderson*, *supra*; *Worley*, *supra*. The administrative law judge's crediting of Dr. Baker's x-ray findings over those of Drs. Dahhan and Lane are discussed, *infra*.

Employer also contends that the administrative law judge erred in his analysis of the September 11, 1991 x-ray. Specifically, employer contends that the administrative law judge erred in finding that the film could not establish either the presence or absence of pneumoconiosis since the quality of the film prevented adequate assessment of the film. The administrative law judge found that the x-ray did not establish the presence or absence of pneumoconiosis because the film quality prevented accurate assessment of the x-ray. In reaching this finding, the administrative law judge noted that the x-ray was read as negative by Dr. Lane and positive by Dr. Anderson, with both physicians noting a film quality of 2, while Dr. Myers noted that the film showed changes suggestive of pneumoconiosis, but that the quality of the film made it impossible to quantify. Employer contends, however,

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[3] In his Decision and Order On Remand, the administrative law judge referred to Dr. Barrett as Dr. Barnette.

citing *Preston v. Director, OWCP*, 6 BLR 1-1229 (1984), that a film does not need to be of optimal quality to be read for the presence or absence of pneumoconiosis and that the administrative law judge cannot substitute his opinion regarding the quality of the film.

Preston holds that an administrative law judge is not *required* to accord a reading less weight because it is accompanied by a notation of marginal film quality. The administrative law judge is, however, charged with assessing the credibility of the evidence. Here, in considering the September 11, 1991 x-ray the administrative law judge noted that Dr. Lane read the film as negative while Dr. Anderson read the film as positive, although both rated the quality of the film as "2." The administrative law judge further noted, however, that Dr. Myers found the film impossible to quantify because of its poor quality (3), and Dr. Baker also found the film to be of poor quality (3) and that it might or might not show pneumoconiosis characterized by his classifications of both 0/1 and 1/0. Thus, based on his consideration of all the readings of this x-ray, we conclude that the administrative law judge permissibly considered the quality of the x-ray film when assessing the reliability of the conflicting readings and permissibly found that the September 11, 1991 film established neither the presence nor absence of pneumoconiosis. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-2 (1999)(*en banc*); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *Lafferty*, *supra*; *Anderson*, *supra*; *Worley*, *supra*; *Brown*, *supra*. Employer is unable to demonstrate any undue prejudice resulting from this determination.

Turning to Dr. Dahhan's negative reading of the August 10, 1992 x-ray, employer contends that the administrative law judge erred in discounting it because Dr. Dahhan found evidence of emphysema on x-ray. The administrative law judge noted that Dr. Dahhan interpreted the August 10, 1992 as negative for pneumoconiosis, but as showing changes due to emphysema. Thus, the administrative law judge noted Dr. Dahhan did see changes on the x-ray. However, because he was the only physician to identify them as being due to emphysema, the administrative law judge rationally accorded his x-ray reading little weight. *See Lafferty*, *supra*; *Anderson*, *supra*; *Worley*, *supra*.

In addition, employer contends that the administrative law judge provided no valid reasons for according little weight to the negative readings of the April 18, 1994 x-ray by Drs. Dahhan and Lane. The administrative law judge, however, accorded little weight to Dr. Dahhan's negative reading inasmuch as Dr. Dahhan had found the presence of emphysema, but was the only physician to do so. The administrative law judge accorded little weight to Dr. Lane's reading because he was the only physician who found no changes present on x-ray, while all the other physicians, although disagreeing as to the nature of the changes present, *e.g.*,

granuloma, emphysema or pneumoconiosis, agreed that changes were seen on the x-ray films. *See Lafferty*, *supra*; *Anderson*, *supra*; *Worley*, *supra*.

Finally, employer contends that the administrative law judge erred in crediting the positive readings of the November 30, 1994 x-ray by Drs. Baker and Brandon because they were consistent with the other probative x-rays of record inasmuch as the administrative law judge's weighing of the other evidence was improper. As discussed previously, however, when considering the 1994 films, the administrative law judge found the November 1994 positive readings of Drs. Baker and Brandon outweighed the negative findings of the April 1994 x-ray since the findings of pneumoconiosis made by Drs. Baker and Brandon were consistent with other x-ray readings, while the negative findings of Drs. Dahhan and Lane on the April 1994 x-ray were worth little weight because they were contrary to other probative evidence, *i.e.*, Dr. Dahhan was the only physician to find emphysema and Dr. Lane was the only physician to find no changes at all. Accordingly, we affirm the administrative law judge's finding that the x-ray evidence established the existence of pneumoconiosis at Section 718.202(a)(1), the sole issue on appeal.[4]

Claimant's counsel has submitted a complete, itemized statement requesting a fee for services performed in this appeal pursuant to 20 C.F.R. §802.203. Counsel requests a fee of $2,875.00 for 28.75 hours of services at an hourly rate of $100.00. Employer has not objected.

The 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 Act by 30 U.S.C. §932(a) and implemented by 20 C.F.R. §725.367(a) is discretionary and will be granted if the requested fee reflects service necessary to the proper conduct

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[4] Our affirmance of the administrative law judge's finding renders moot employer's request that the case be remanded to another administrative law judge.

Further because employer has not challenged the administrative law judge's finding on onset date, that finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

In addition, we reject employer's contention that the case must be remanded for consideration under *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), Employer's Brief at 12, inasmuch as the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit which has recognized that 20 C.F.R. §718.202(a) contains four separate and distinct provisions by which claimant can establish the existence of pneumoconiosis, *e.g.*, *Wolfe Creek Collieries v. Director, OWCP*, 298 F.3d 511, BLR (6th Cir. 2002).

of the case and the time requested is reasonable to attain this result. *See Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316 (1984); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In reviewing claimant's request for an attorney fee, we note that the time spent on the services rendered and the hourly fee were reasonable, the total fee based on the hours requested and the hourly rate equals $2,750.00, not $2,875.00. We therefore grant claimant's counsel an attorney fee of $2,750.00 for services rendered in this case to be paid directly to him by employer. 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed. Claimant's counsel is awarded an attorney fee of $2,750.00 for services performed in this appeal.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

I concur in the result only.

NANCY S. DOLDER, Chief
Administrative Appeals Judge