BRB No. 03-0564 BLA

REXFORD STAPLETON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
HADDIX MINING AND DEVELOPMENT CORPORATION	)	
	)	
and	)	DATE ISSUED: 05/28/2004
	)	
AMERICAN BUSINESS AND MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order On Remand – Award of Benefits and Supplemental Decision and Order Awarding Attorney's Fees of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonsburg, Kentucky, for claimant.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer/carrier.

Sarah M. Hurley (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits and Supplemental Decision and Order Awarding Attorney's Fees (00-BLA-0103) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) 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] This case is before the Board for the second time. Previously, the Board affirmed, in *Stapleton v. Haddix Mining and Development Corp.*, BRB No. 01-0785 BLA (July 31, 2002)(unpublished), the administrative law judge's findings that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2) and total respiratory disability at 20 C.F.R. §718.204(b).[2] Addressing employer's contention that the administrative law judge erred in finding the evidence of record sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), the Board agreed with employer that the administrative law judge had not provided a rationale for discrediting Dr. Fino's opinion that claimant's pneumoconiosis was not a causative factor in his total disability. *Stapleton*, slip op. at 6. The Board thus vacated the administrative law judge's finding at 20 C.F.R. §718.204(b), and remanded the case for the administrative law judge to provide specific findings regarding the weight and credibility of Dr. Fino's opinion. The Board also instructed the administrative law judge, on remand, to provide a more specific explanation for his conclusion that the opinions of Drs. Younes and Koenig were entitled to greater weight based on their qualifications.

The Board next affirmed the administrative law judge's determination that Dr. Branscomb's opinion was not well reasoned. In a footnote, the Board noted that

---

[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, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The Board affirmed, as unchallenged on appeal, the administrative law judge's decision to credit claimant with sixteen years of coal mine employment and his findings pursuant to 20 C.F.R. §§718.202(a)(1), 718.203(b), and 718.204(b)(2)(i), (ii) and (iii). *Stapleton v. Haddix Mining and Development Corp.*, BRB No. 01-0785 BLA (July 31, 2002)(unpublished), slip op. at 4 n.4.

employer did not challenge the administrative law judge's decision to accord little probative weight to the opinions of Drs. Naeye, Kleinerman, and Hutchins to the effect that pneumoconiosis was not a contributing cause of claimant's total respiratory disability. *Id.* at 7 n.7. The Board also noted that the reports of Drs. Green, Khalil, and Ortiz did not include any opinion regarding total disability or disability causation. *Id.* The Board likewise affirmed the administrative law judge's decision to accord little probative weight to Dr. Broudy's opinion that claimant's pneumoconiosis was not a causative factor in his total respiratory disability. *Id.* at 7-8. Accordingly, the Board remanded the case for further consideration of the evidence relevant to disability causation at 20 C.F.R. §718.204(c).

Administrative Law Judge's Decision and Order on Remand

On remand, the administrative law judge indicated that he was again persuaded by the well-reasoned and well-documented report of Dr. Koenig. He addressed the medical opinions of Dr. Fino rendered in 1992, 1995, 1999 and 2000 and found them to be "flawed in several respects and entitled to less weight." Decision and Order on Remand at 5. Specifically, the administrative law judge found that although Dr. Fino, in 1992, concluded that asthma was a significant cause of claimant's disability, he failed to explain adequately his diagnosis of asthma. The administrative law judge also found that Dr. Fino, in his later opinions, did not discuss the findings by Drs. Hutchins and Perper that there is no pathological evidence of asthma. *Id.* at 4. The administrative law judge found that Dr. Koenig's opinion, that claimant's chronic obstructive lung disease, rather than asthma, is the most likely cause of claimant's obstructive impairment, was well explained and thus persuasive, and was supported by the objective findings of record. *Id.* The administrative law judge further noted that Dr. Fino's 1992 opinion, that claimant had not smoked for twenty-five years and was essentially a non-smoker and that claimant's smoking history did not cause his pulmonary condition, differed from his 1999 opinion that, based on the degree of obstruction, the abnormalities in the arterial blood gas values, and the variable smoking histories reported, there was a possibility that claimant's disability is due to lung cancer or smoking-induced emphysema. *Id.* The administrative law judge further found that Dr. Koenig provided a well-reasoned and well-documented explanation for his disagreement with Dr. Fino's diagnosis of smoking-induced emphysema. *Id.* at 5. The administrative law judge stated, "Specifically, Dr. Koenig relies on the pulmonary function studies and fully explains how the deterioration of FEV1 values could not be attributed to smoking." *Id.* The administrative law judge also noted that Dr. Fino's 2000 opinion, that coal mine dust does not cause emphysema, was disputed by Drs. Green, Perper, and Koenig. *Id.* at 4-5.

The administrative law judge continued to find probative Dr. Younes' 1999 opinion that claimant is totally disabled and "has severe obstructive impairment to which

his work history in the mines is a significant contributing factor." *Id.* at 6. The administrative law judge explained that Dr. Younes' opinion was well reasoned and well documented as it was based on a physical examination and objective tests and contains the basis for his conclusions. The administrative law judge also found that Dr. Younes is a highly qualified expert, and his opinion supports that of Dr. Koenig.

In response to the Board's instruction that the administrative law judge provide a more specific explanation for his conclusion that the opinions of Drs. Younes and Koenig were entitled to greater weight based on their qualifications, the administrative law judge stated that although credentials are relevant, he did not base his findings regarding the weight of the evidence on the physicians' credentials alone. *Id.* The administrative law judge reiterated his findings that the opinions rendered by Drs. Younes and Koenig are well-reasoned and well-documented and that he continued to find the opinion of Dr. Koenig to be most persuasive. Specifically, the administrative law judge indicated that he was persuaded by Dr. Koenig's explanation of how the objective data discredits the conclusions presented by Drs. Fino, Branscomb, Kleinerman, and Broudy. *Id.*

The administrative law judge thus concluded that claimant established total disability due to pneumoconiosis at 20 C.F.R. §718.204(c) and awarded benefits.

Employer's Appeal

On appeal, employer contends that the administrative law judge erred by failing to determine whether claimant established the existence of legal pneumoconiosis.[3] Employer argues that the administrative law judge thereby failed to weigh the opinions of Drs. Branscomb, Broudy, Kleinerman, Hutchins, and Fino, that claimant's chronic obstructive pulmonary disease is not related to his coal mine employment, against the contrary opinions of Drs. Green, Perper, Younes, and Koenig. Employer also contends that the administrative law judge erroneously relied on the opinions of Drs. Younes and Koenig on disability causation without recognizing that these opinions establish that claimant's pneumoconiosis played only a *de minimus* part in his disabling respiratory impairment. Employer further challenges the administrative law judge's discrediting of Dr. Fino's opinion. Claimant responds, and urges affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), responds, and

[3] Employer preserves for appeal, its objection to the administrative law judge's finding of clinical pneumoconiosis based on the biopsy evidence at 20 C.F.R. §718.202(a)(2) and its disagreement with the Board's holding that the filing of multiple requests for modification is not an abuse of the modification process at 20 C.F.R. §725.310 (2000).

indicates that he takes no position on the issue of claimant's entitlement to benefits. The Director urges the Board to reject employer's arguments that (1) the administrative law judge improperly assumed that pneumoconiosis is a progressive disease and incorrectly relied on the "supposed" progressive nature of pneumoconiosis to attribute claimant's total disability to his coal mine employment, and that (2) legal pneumoconiosis can never be latent and progressive. Employer has filed a combined reply brief.

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).

Administrative Law Judge's Findings on the Existence of Pneumoconiosis

Employer contends that the administrative law judge erred in failing to determine "the threshold question whether all the proof establishes the presence of 'legal pneumoconiosis.'" Employer's Brief at 14. Employer also argues that, even if the administrative law judge tangentially considered the issue of legal pneumoconiosis in the context of the disability causation issue, he ignored the diagnoses of Drs. Branscomb, Broudy, Kleinerman, Hutchins, and Fino, who found that claimant's chronic obstructive pulmonary disease was unrelated to his coal mine employment. Employer asserts that the administrative law judge erred in failing to weigh this evidence against the contrary evidence, including the medical opinions of Drs. Green, Perper, Younes, and Koenig. Employer further asserts that the opinions of Drs. Younes and Koenig are not credible and do not establish the existence of legal pneumoconiosis.

Employer's contentions lack merit. The Board previously affirmed the administrative law judge's finding that the preponderance of the opinions interpreting the biopsy evidence, including the opinions of Drs. Kleinerman, Perper, Broudy, Fino, Branscomb, and Koenig, establishes the existence of simple coal workers' pneumoconiosis at 20 C.F.R. §718.202(a)(2). *Stapleton*, slip op. at 5-6. The Board further affirmed the administrative law judge's finding that claimant established that his pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203(b). *Stapleton*, slip op. at 4 n.4. The regulation at 20 C.F.R. §718.201(a) provides: "For purposes of the Act, 'pneumoconiosis' means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical, or 'clinical,' pneumoconiosis and statutory, or 'legal,' pneumoconiosis." 20 C.F.R. §718.201(a). In the instant case, claimant established the existence of clinical pneumoconiosis based on the biopsy evidence. Claimant has, therefore, established the existence of "pneumoconiosis" as

defined in the Act at 20 C.F.R. §718.201(a), and has thus met his burden to establish this essential element of entitlement. *Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993). Consequently, we reject employer's assertion that the administrative law judge erred by failing to determine whether claimant established legal pneumoconiosis and we need not discuss further employer's alternative argument that the administrative law judge tangentially addressed the issue of the existence of legal pneumoconiosis at 20 C.F.R. §718.204(c).

Administrative Law Judge's Findings on Disability Causation

With regard to the administrative law judge's findings on remand at 20 C.F.R §718.204(c), employer contends that the administrative law judge's reliance on the fact that claimant's FEV1 values declined between 1992 and 1998, after he ceased smoking in 1989, does not establish that pneumoconiosis is the cause of his impairment. Citing *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass=n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001), employer asserts that there is no presumption that pneumoconiosis is a progressive disease and to the extent the administrative law judge and Dr. Koenig found otherwise, they erred. Dr. Koenig opined that coal dust exposure alone, "independent of smoking and without the presence of radiographic coal workers' pneumoconiosis, is a significant, if not the primary cause of Mr. Stapleton's [chronic obstructive pulmonary disease] and consequent respiratory impairment and total and permanent disability," Claimant's Exhibit 1. Dr. Koenig also found, "Because coal-dust induced lung disease can progress even after further exposure ceases, it can account for [claimant's] accelerated decline in lung function after leaving the coal mines." *Id.* The administrative law judge found that Dr. Koenig's opinion was persuasive as it was supported by its underlying findings and the objective findings of record. Decision and Order on Remand at 4-6. Employer asserts that Dr. Koenig did not explain how claimant could leave the mines with no evidence of legal pneumoconiosis and then develop a disabling form of the disease years after his last exposure. Employer argues, "The supposed 'progressive nature' of the disease is not, therefore, a reason to blindly attribute [claimant's] declining pulmonary condition to coal dust." Employer's Brief at 20. Employer asserts that the administrative law judge's decision to credit Dr. Koenig's opinion cannot stand.

Employer's contentions lack merit. The United States Court of Appeals for the District of Columbia Circuit did not hold in *National Mining Ass'n* that pneumoconiosis may not be latent and progressive. The District of Columbia Circuit adopted, in *National Mining Ass'n*, their reading of the regulation at 20 C.F.R. §718.201(c) to the effect that pneumoconiosis *may* be latent and progressive. *National Mining Ass'n*, 292 F.3d at 869. In the instant case, the administrative law judge properly found that Dr. Koenig provided

a well-reasoned and well-documented explanation disputing Dr. Fino's diagnosis of smoking-induced asthma in favor of Dr. Koenig's diagnosis of chronic obstructive pulmonary disease related to claimant's coal mine employment. *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983). The administrative law judge found, within his discretion, "Specifically, Dr. Koenig relies on the pulmonary function studies and fully explains how the deterioration of FEV1 values could not be attributed to smoking. I also rely on the opinion of Dr. Koenig that the Claimant's lung cancer did not significantly contribute to his pulmonary condition." Decision and Order on Remand at 5. Further, the administrative law judge's decision to credit Dr. Koenig's opinion, that coal-dust induced lung disease can progress after exposure ceases and accounts for claimant's decline in lung function after leaving his coal mine employment, Claimant's Exhibit 1, is consistent with the decision of the United States Court of Appeals for the Sixth Circuit in *Peabody Coal Co. v. Odom*, 342 F.3d 486, 22 BLR 2-612 (6th Cir. 2003). The Sixth Circuit in *Odom* recognized that pneumoconiosis may be a progressive disease that can arise or progress in the absence of continued exposure to coal dust. *Odom*, 342 F.3d at 491, 22 BLR at 2-621.

Employer next contends that the administrative law judge failed to apply fully the disability causation standard at 20 C.F.R. §718.204(c), as expressed by the Sixth Circuit in *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). Citing *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997)(evidence that pneumoconiosis played an infinitesimal or *de minimus* part in a miner's totally disabling respiratory impairment is insufficient to establish total disability due to pneumoconiosis), employer argues that the opinions by Drs. Younes and Koenig, relied on by the administrative law judge, show a *de minimus* contribution of pneumoconiosis to claimant's disability and are thus insufficient to meet claimant's burden. Employer further presents several arguments in support of its contention that the opinions by Drs. Younes and Koenig are not credible. Employer also asserts that by relying on this evidence, the administrative law judge effectively shifted to employer the burden to prove that pneumoconiosis did not cause claimant's disability.

Employer's contentions lack merit. The regulation at 20 C.F.R. §718.204(c) requires that a miner establish that his pneumoconiosis is a substantially contributing cause of his totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c)(1). Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:

> i. Has an material adverse effect on the miner's respiratory or pulmonary condition; or

ii. Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). In the instant case, Dr. Koenig opined that coal dust exposure alone, "independent of smoking and without the presence of radiographic coal workers' pneumoconiosis, is a significant, if not the primary cause of Mr. Stapleton's [chronic obstructive pulmonary disease] and consequent respiratory impairment and total and permanent disability," Claimant's Exhibit 1. Dr. Younes opined that claimant's "work history in the mines is [a] significant contributing factor" to his totally disabling obstructive impairment. Director's Exhibit 133. Given these physicians' findings, we reject employer's assertion that the opinions by Drs. Koenig and Younes are legally insufficient to establish disability causation.

Lastly, employer contends that the administrative law judge did not provide a valid reason for crediting Dr. Koenig's opinion and selectively analyzed the evidence by discrediting Dr. Fino's opinion, while summarily crediting the opinions of Drs. Koenig and Younes. Employer's contentions lack merit. A review of the administrative law judge's findings on remand reveals that he thoroughly considered the relevant opinions of Drs. Fino, Koenig, and Younes. The administrative law judge discussed each of Dr. Fino's opinions individually. Decision and Order on Remand at 3-5. The administrative law judge concluded:

> Upon review of the medical evidence, I am again persuaded by the well-reasoned and well-documented report of Dr. Koenig. Additionally, I find the opinions of Dr. Fino to be flawed in several respects and entitled to less weight. Dr. Fino provides inadequate explanation of his diagnosis of asthma, specifically in light of the Drs. Hutchins and Perper finding of no pathological evidence consistent with asthma. Additionally, Dr. Koenig lists multiple findings favoring [chronic obstructive pulmonary disease] over asthma which are not adequately addressed by Dr. Fino. Dr. Koenig provides a well-reasoned and well-documented explanation discrediting Dr. Fino's diagnosis of smoking-induced emphysema. Specifically, Dr. Koenig relies on the pulmonary function studies and fully explains how the deterioration of FEV1 values could not be attributed to smoking. I also rely on the opinion of Dr. Koenig that the Claimant's lung cancer did not significantly contribute to his pulmonary condition.

Decision and Order on Remand at 5. The administrative law judge further found that Dr. Younes' opinion was probative, and was well-documented and well-reasoned as it was based on a physical examination and objective testing. Decision and Order at 5-6. The

administrative law judge also noted that Dr. Younes' opinion supports Dr. Koenig's opinion. *Id.* at 6. The administrative law judge thus properly weighed Dr. Fino's opinion and found it outweighed by other competing evidence, namely the opinions of Drs. Koenig and Younes. *Riley v. National Mines Corp.*, 852 F.2d 197, 11 BLR 2-182 (6th Cir. 1988).

As the administrative law judge's opinion is supported by substantial evidence in the record, we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c) and the award of benefits.

Administrative Law Judge's Award of Attorney's Fees

Employer also appeals from the administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees. Claimant responds in support of the administrative law judge's award of attorney's fees. The Director responds, and urges the Board to reject employer's argument that it is not liable for expenses incurred by claimant in hiring medical experts.

Claimant's counsel filed a fee petition for $11,900.00, seeking compensation for 59.5 hours of work before the Office of Administrative Law Judges at the hourly rate of $200. Counsel also sought reimbursement for $1,729.83 in expenses, including the costs associated with the development of expert medical evidence. Employer objected to the fee petition. The administrative law judge approved the $200 hourly rate over employer's objection. Specifically, the administrative law judge found that claimant's counsel provided excellent representation and was diligent, that claimant's counsel was experienced in black lung law, and that the legal issues involved were complex factors that justified a fee "on the high end of the reasonable range." Supplemental Decision and Order at 2. In approving the hourly rate, the administrative law judge further found that "risk of loss is a constant factor in Black Lung litigation which is deemed incorporated into the hourly rate…" *Id.* at 3. The administrative law judge also determined that the amount of hours for which counsel sought compensation was reasonable, and rejected employer's challenge to counsel's use of quarter-hour billing. Relying on *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894, BLR (7th Cir. 2003), the administrative law judge approved counsel's request for reimbursement of $1,729.83 in expenses associated with non-testifying witnesses. The administrative law judge also approved the one-hour charge for counsel's defense of the fee petition. The administrative law judge thus awarded a fee of $12,100.00 for sixty and one-half hours at $200.00 per hour, plus $1,729.83 in expenses, for a total of $13,829.83.

The award of an attorney fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion.

Abbott v. Director, OWCP, 13 BLR 1-15 (1989), citing *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

Employer argues that counsel for claimant, Stephen A. Sanders, of the Appalachian Citizens Law Center, Inc., failed to prove the reasonableness of his hourly rate. Employer argues that counsel has no fee-paying clients and "simply pulled an hourly rate out of the air, and then sought to justify it based on what other attorneys in other areas have claimed as their hourly rates…" Employer's Brief at 4-5. Employer asserts that the market rate in claimant's counsel's community is between $90 and $125 an hour. Employer further argues that the administrative law judge erroneously took into account the fact that counsel is a public interest lawyer, in approving the requested hourly rate.

The administrative law judge explained, by reference to the factors set forth at 20 C.F.R. §725.366(b), why he approved the requested hourly rate of $200. Although the administrative law judge considered many appropriate factors in determining whether claimant's requested hourly rate was reasonable, *see* 20 C.F.R. §725.366, he also considered claimant's counsel's risk of loss. The administrative law judge stated:

> In this regard, risk of loss is a constant factor in Black Lung litigation which is deemed incorporated into the hourly rate, and a fee so low it would preclude an attorney from recouping his risk of loss would be manifestly inadequate. *See Gibson v. Director, OWCP*, 9 BLR 1-149 (1986). The Employer correctly asserts that a contingency enhancement is contrary to law. However, I find no indication that Mr. Sanders' hourly rate is improperly enhanced with a contingency multiplier. To say that the usual fee claimed included risk of loss and delay of payment is not the same as saying that there has been either a contingency multiplier to compensation for risk of loss. Such multiplier is not being sought here.
>
> Nevertheless, it has been my observation that it has become increasingly difficult for claimants to obtain not only competent, but any legal representation, in black lung claims. That is so apparently due to the relatively low award rates at the District Director and Administrative Law Judge levels. Understandably, the relatively poor chances of success no doubt dissuades (sic) many practitioners from accepting such litigation. Therefore, I think it important to adequately compensate those few attorneys who are still willing to accept black lung claims. Moreover, I have, in the past given attorneys who practice in the same geographical areas as Mr. Sanders awards in the neighborhood of $150.00 to $175.00 per hour. However, given the number of cases accepted by Mr. Sanders, his

> tenacious representation of his clients and the aforementioned high risk of loss, I find that $200.00 per hour in today's litigation arena is neither inappropriate nor unjustified. Accordingly, I award Mr. Sanders an hourly rate of $200.00 per hour for his services.

Supplemental Decision and Order at 3.

Despite the fact that the administrative law judge recognized that to enhance the hourly rate for risk of loss would be error, *see City of Burlington v. Dague*, 505 U.S. 557 (1992) (no contingency enhancement whatever is compatible with the fee-shifting statutes at issue); *see also Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992), he ultimately enhanced the hourly rate based upon this very factor. As the above-quoted findings by the administrative law judge demonstrate, the administrative law judge enhanced the hourly rate from between $150 and $175 to $200 based in part on counsel's "high risk of loss." Such an enhancement of the hourly rate is impermissible under *Dague.* Consequently, we remand the case to the administrative law judge to reconsider the reasonableness of the requested $200.00 hourly rate without an improper adjustment for claimant's risk of loss. *See* 20 C.F.R. §725.366.

Employer also argues that the administrative law judge summarily approved the total hours requested, namely fifty-nine and one-half hours, and thus his ruling does not meet the requirements of the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a). The administrative law judge rejected employer's contention that the use of the quarter-hour billing method was *per se* unreasonable. The administrative law judge indicated that he was, however, still required to address employer's objections and determine whether the amount of time expended for the services was excessive or unreasonable. The administrative law judge found:

> Upon reviewing the fee petition, I find the time expended to be reasonable. Additionally, I find the work performed to be reasonable and necessary to establish entitlement. As such, the Employer's objection to the use of the quarter-hour billing for the work performed is overruled.

Supplemental Decision and Order at 4.

We hold that the administrative law judge's relevant findings are sufficient under the APA, given their context. The administrative law judge specifically indicated that employer's objection was a general objection to counsel's use of the quarter-hour billing method. The administrative law judge found:

> The Employer next argues that Mr. Sanders' use of the quarter-hour billing increments is *per se* unreasonable. The Employer maintains that by charging fifteen minutes for numerous routine tasks, such as drafting letters and receiving and reviewing correspondence, the total number of hours charged is unreasonable. Specifically, the Employer asks that the amount of time requested be reduced by at least ten hours.

Supplemental Decision and Order at 3. Accordingly, once the administrative law judge properly overruled employer's objection to claimant's counsel's use of the quarter-hour billing method, *Jarrell v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 883 (1982), the administrative law judge then properly considered the reasonableness of those charges and further rejected employer's request that the amount of time be reduced by "at least ten hours." Supplemental Decision and Order at 3-4.

Employer next urges the Board to vacate the administrative law judge's award of one hour's time for claimant's counsel to reply to employer's objections to the fee petition. Employer argues that counsel's reply constituted his attempt "to bring his fee petition into compliance with the case law and regulations," Employer's Brief at 13, and states that the preparation of an attorney fee petition is not compensable under 20 C.F.R. §725.366(b).

Employer's contention that the administrative law judge improperly ruled compensable the one hour counsel charged to defend his fee petition lacks merit. The administrative law judge correctly noted that the United States Courts of Appeals for the Seventh and Fourth Circuits have both determined that work performed by counsel in defense of a fee petition is compensable. *See Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d at 903; *Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 134, 22 BLR 2-283, 2-286 (4th Cir. 2001).

Lastly, employer contends that the administrative law judge erred in approving compensation for costs incurred by claimant for expert medical opinions. Employer reiterates the argument it made before the administrative law judge that Section 28(d) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928(d), allows for the reimbursement of expenses of witnesses who testify, physically, at the hearing. The administrative law judge rejected this argument and reasoned that the Board, and the Seventh Circuit, *see Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d at 900-902, have held that claimants are entitled to fees for their expert medical evidence even when the physicians do not appear at the formal hearing. Employer argues that the administrative law judge's ruling is contrary to both the plain language of Section 28(d) of the Longshore Act and the general rule that each party bears its own costs. Claimant and the Director respond in favor of the administrative law judge's ruling.

Employer's contention lacks merit. Section 28 of the Longshore Act, as incorporated by 30 U.S.C. §932(a), does not limit expert fee-shifting to those fees incurred by a claimant when the expert appears at the formal hearing and testifies before the administrative law judge. 33 U.S.C. §928(d). Rather, Section 28 refers to a "witness" who may provide written testimony by deposition or by medical opinion. *See e.g.*, 33 U.S.C. §924, as incorporated into the Act by 30 U.S.C. §932(a),(the testimony of any witness may be taken by deposition or interrogatories). Furthermore, the Board held in *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994) that an expert need not testify at a hearing in order for claimant's counsel to be reimbursed the costs of obtaining a physician's opinion. Finally, employer's reliance on *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass=n v. Chao*, 160 F. Supp.2d 47, --- BLR --- (D.D.C. 2001), in arguing that the District of Columbia Circuit "addressed this very issue," Employer's Brief at 15, is misplaced, as that case is distinguishable on its facts. In *Nat'l Mining Ass'n*, the District of Columbia Circuit held, *inter alia*, that 20 C.F.R. §725.459(b), which would have empowered an administrative law judge to shift to the employer the costs incurred by the claimant's production of witnesses, regardless of whether the claimant ultimately prevailed in the litigation, lacked the "specific statutory authorization" for fee shifting required by the decision of the United States Supreme Court in *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 97-1000 (1991). *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d at 875. In the instant case, however, the administrative law judge awarded benefits, thus triggering the fee-shifting provisions of 33 U.S.C. §928. Based on the foregoing, we reject employer's argument that the administrative law judge erred by approving compensation for costs incurred by claimant for expert medical opinions.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed. The administrative law judge's Supplemental Decision and Order Awarding Attorney's Fees is affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

_____

NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge