BRB Nos. 11-0323 BLA
and 11-0323 BLA-A

ROBERT L. WALKER	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
v.	)	
	)	
SAHARA COAL TRUST	)	DATE ISSUED: 05/22/2012
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits, the Supplemental Order Awarding Attorney's Fees and Costs, and the Order Denying Reconsideration of Award of Attorney's Fees and Costs of Paul C. Johnson, Jr., 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.

Jeffrey S. Goldberg (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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits, and claimant appeals the Supplemental Order Awarding Attorney's Fees and Costs and the Order Denying Reconsideration of Award of Attorney's Fees and Costs (2008-BLA-5846), of Administrative Law Judge Paul C. Johnson, Jr., rendered on a subsequent 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).

Following the hearing in this case, Congress enacted amendments to the Act, affecting claims filed after January 1, 2005 that were pending on or after March 23, 2010, the effective date of the amendments. Relevant to this claim, Section 1556 of the Patient Protection and Affordable Care Act (PPACA), Public Law No. 111-148, 124 Stat. 119 (2010), reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). Section 411(c)(4) provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that the miner is totally disabled due to pneumoconiosis.

By Order dated March 30, 2010, the administrative law judge directed the parties to submit position statements addressing the applicability of amended Section 411(c)(4) to this case, and allowing each party to submit "one supplemental medical report from any physician who had prepared an affirmative medical report, as defined at [20 C.F.R.] Section 725.414(a)(1), and/or deposition testimony as permitted by [20 C.F.R.] Section 725.457(c)." In response, all of the parties submitted supplemental briefs regarding the applicability of the amendments, and employer proffered a supplemental medical report from both Dr. Repsher, who had previously testified at deposition, and Dr. Rosenberg, who had provided a medical report and deposition testimony.

In his Decision and Order issued on January 7, 2011, the administrative law judge admitted Dr. Repsher's supplemental report into the record, but excluded Dr. Rosenberg's supplemental report on the ground that employer's submissions exceeded

[1] Claimant's initial claim was filed on October 2, 1980, and was deemed abandoned on January 31, 1983. Director's Exhibit 1. Claimant's second claim was filed on January 28, 2003, and was administratively denied on October 14, 2003, because the evidence was insufficient to establish total respiratory disability. Director's Exhibit 2. Claimant filed the current claim on March 15, 2007. Director's Exhibit 28. Claimant died on July 6, 2010, and his widow is pursuing the claim on his behalf.

the additional evidence authorized by the administrative law judge's Order. The administrative law judge credited claimant with thirty-one years of qualifying coal mine employment, and adjudicated the claim pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that the newly-submitted evidence was sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Considering the entire record, the administrative law judge found that claimant was entitled to invocation of the presumption of total disability due to pneumoconiosis under amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), and that, while employer successfully demonstrated that claimant did not have clinical pneumoconiosis, employer failed to prove that claimant did not have legal pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Accordingly, benefits were awarded.

EMPLOYER'S APPEAL OF THE AWARD OF BENEFITS

Employer challenges the administrative law judge's decision on both procedural and substantive grounds. On procedural grounds, employer asserts that the administrative law judge erred in rendering his evidentiary ruling in the Decision and Order, and in "unilaterally deciding" which of employer's proffered supplemental reports would be admitted into the record. On the merits of entitlement, employer challenges the administrative law judge's weighing of the medical opinion evidence relevant to rebuttal of the amended Section 411(c)(4) presumption. Claimant responds in support of the administrative law judge's evidentiary ruling, but challenges the administrative law judge's analysis of the evidence relevant to rebuttal in the event that the award of benefits is not affirmed.[2] The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, agreeing with employer's evidentiary argument. Employer replies in support of its position.[3]

[2] Claimant also contends that the administrative law judge erred in failing to credit claimant with an additional thirteen years of coal mine employment, representing the time claimant worked as a state mine inspector. Claimant's Brief at 2, n.1. This issue is not properly before the Board, as claimant may not seek to expand his rights by raising an issue on appeal in a response brief. *See Barnes v. Director, OWCP*, 19 BLR 1-73 (1995); 20 C.F.R. §802.212.

[3] We affirm, as unchallenged on appeal, the administrative law judge's determination that claimant established thirty-one years of underground coal mine employment, and his findings that the evidence was sufficient to establish total respiratory disability at 20 C.F.R. §718.204(b), a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and invocation of the rebuttable presumption of total

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.[4] 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).

Turning first to the evidentiary issue, employer contends that the administrative law judge erred in rendering his evidentiary ruling in his Decision and Order, thereby precluding employer from making a good cause argument for the admission into the record of both supplemental medical reports. Employer further asserts that the administrative law judge violated its due process rights by unilaterally admitting Dr. Repsher's supplemental medical report and excluding Dr. Rosenberg's supplemental report, without offering employer the opportunity to select the report it preferred for admission into the record. Employer's Brief at 13-14; Reply Brief at 2-3. Employer's argument has merit. In *L.P.* [*Preston*] *v. Amherst Coal Co.*, 24 BLR 1-57 (2008), the Board held that:

> Consistent with the principles of fairness and administrative efficiency that underlie the evidentiary limitations . . . if the administrative law judge determines that the evidentiary limitations preclude the consideration of proffered evidence, the administrative law judge should render his or her evidentiary rulings before issuing the Decision and Order. The parties should then have the opportunity to make good cause arguments under Section 725.456(b)(1), if necessary, or to otherwise resolve issues regarding the application of the evidentiary limitations that may affect the administrative law judge's consideration of the elements of entitlement in the Decision and Order.

Id. at 1-63. While the instant case involves a limitation on evidence imposed by the administrative law judge, rather than by 20 C.F.R. §725.456(b)(1) as in *Preston*, we agree with employer and the Director that, consistent with the principles of fairness and

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disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] The Board will apply the law of the United States Court of Appeals for the Seventh Circuit, as claimant was last employed in the coal mining industry in Illinois. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 5.

administrative efficiency, the administrative law judge should have rendered his evidentiary determination prior to issuing his Decision and Order. Moreover, the wording of the administrative law judge's Order could reasonably have been construed as permitting the parties to submit new opinions from each doctor who offered an affirmative medical report. Consequently, we vacate the administrative law judge's evidentiary ruling, which necessitates that we also vacate his findings on the issue of rebuttal of the amended Section 411(c)(4) presumption, and his award of benefits. On remand, prior to issuing his decision on the merits of entitlement, the administrative law judge must rule on the admissibility of the evidence submitted, advise the parties of his ruling, and provide them with an opportunity to respond appropriately.

In the interest of judicial efficiency, we will also address the parties' challenge to the administrative law judge's weighing of the evidence relevant to rebuttal of the amended Section 411(c)(4) presumption. Claimant maintains that a numerical preponderance of qualified readers interpreted the most recent x-ray as positive for pneumoconiosis, and that the administrative law judge failed to weigh all relevant evidence in finding that claimant did not have clinical pneumoconiosis. Claimant's Brief at 6-7. Employer argues that the administrative law judge applied the wrong standard of proof in finding that employer failed to establish that claimant did not have legal pneumoconiosis, or that his disabling respiratory or pulmonary impairment did not arise out of, or in connection with, coal mine employment. Employer asserts that the administrative law judge either misstated the opinions of Drs. Repsher and Rosenberg or confused the issues of legal pneumoconiosis and clinical pneumoconiosis, and that his analysis fails to comport with 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). Employer's Brief at 14-21; Reply Brief at 3-5. Some of the parties' arguments have merit.

In concluding that claimant did not have clinical pneumoconiosis, the administrative law judge relied solely upon the x-ray evidence, and accorded greatest weight to the most recent x-ray of record. Although three dually-qualified physicians interpreted the x-ray as positive for pneumoconiosis, while two dually-qualified physicians interpreted it as negative, the administrative law judge found that "this x-ray is negative for pneumoconiosis arising out of coal mine employment, based on the number of negative readings and on the equivalent and sterling credentials of the physicians who interpreted it." Decision and Order at 22. The administrative law judge then determined that, while all of the conflicting medical opinions relevant to the issue of legal pneumoconiosis were reasoned and documented, "Dr. Rosenberg's opinion is entitled to the greatest weight," as "the opinions of the other physicians were weakened by the fact that they did not review the same extent of documentation as did Dr. Rosenberg." Decision and Order at 22-23; Employer's Exhibits 1, 7, 11. The administrative law judge found, however, that the opinions of Drs. Rosenberg and Repsher, that claimant had

disabling usual interstitial pneumonitis (UIP)/idiopathic pulmonary fibrosis (IPF) unrelated to coal dust exposure, were insufficient to prove that claimant did not have legal pneumoconiosis, as "Dr. Rosenberg admitted that he could not rule out the presence of clinical coal workers' pneumoconiosis," and "Dr. Repsher testified that an individual can have co-existing coal workers' pneumoconiosis and IPF, and that claimant had sufficient exposure to coal dust to develop coal workers' pneumoconiosis." Decision and Order at 23. Because Drs. Rosenberg and Repsher did not diagnose clinical or legal pneumoconiosis, the administrative law judge concluded that their opinions were also insufficient to rebut the presumption that claimant's disabling respiratory impairment arose out of, or in connection with, coal mine employment. Decision and Order at 24.

We agree with claimant and employer that the administrative law judge's rebuttal findings are flawed. On the issue of clinical pneumoconiosis, the administrative law judge failed to weigh the digital x-rays, CT scans, and all of the medical opinions diagnosing clinical pneumoconiosis with the x-ray evidence, and provide a rationale that comports with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Moreover, in finding that the opinions of Drs. Rosenberg and Repsher were insufficient to affirmatively demonstrate that claimant did not have legal pneumoconiosis, the administrative law judge appears to have confused the issues of clinical pneumoconiosis and legal pneumoconiosis. *See* 20 C.F.R. §718.201(b), (c). We note that clinical pneumoconiosis does not necessarily result in impairment, and that a physician's failure to rule out the presence of clinical pneumoconiosis is not relevant to his determination of whether a miner has legal pneumoconiosis, or whether his disabling respiratory impairment arose out of, or in connection with, coal mine employment. Consequently, on remand, the administrative law judge is instructed to reassess all evidence of record relevant to rebuttal of the amended Section 411(c)(4) presumption, and to provide a thorough analysis and explanation for his credibility determinations. *See Wojtowicz*, 12 BLR at 1-165.

CLAIMANT'S APPEAL OF THE AWARD OF ATTORNEY'S FEES

Because we have vacated the administrative law judge's award of benefits, there has not yet been a successful prosecution of this claim. However, while claimant's counsel is not entitled to fees for services rendered until the claim has been successfully prosecuted and all appeals are exhausted, we will address counsel's challenges to the administrative law judge's award of attorney's fees, in the interest of judicial economy. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

Claimant's counsel (counsel) submitted a fee petition for work performed before the administrative law judge between August 10, 2009 and February 11, 2011. Counsel

requested a fee of $15,504.00, representing 52.35 hours of legal services performed by Sandra M. Fogel at an hourly rate of $240.00; 9.00 hours of legal services performed by Bruce Wissore at an hourly rate of $240.00; and $780.00 in expenses. Employer objected to the requested hourly rate and to specific billing entries as "block billed." After considering counsel's fee petition, and employer's objections thereto, the administrative law judge approved the expenses incurred and the hourly rate requested by the two attorneys, but disallowed 17 of the 27 hours requested by Attorney Fogel for preparation of claimant's closing brief, and awarded a total fee of $11,424.00. The administrative law judge subsequently denied counsel's motion for reconsideration.

On appeal, claimant's counsel challenges the administrative law judge's reduced award of attorney's fees, specifically his disallowance of 17 hours for preparation of claimant's closing brief. Employer responds in support of the fee award, as reduced by the administrative law judge.[5] The Director has declined to file a response brief in this appeal. Claimant's counsel replies in support of her position.

The amount of attorney's fees awarded by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law. *See Jones v. Badger Coal Co*., 21 BLR 1-102, 1-108 (1998)(en banc); *Abbott v. Director, OWCP*, 13 BLR 1-15, 1-16 (1989).

In disallowing 17 of the 27 hours requested for the preparation of claimant's closing brief, the administrative law judge determined that "a single 27-hour entry for numerous tasks simply does not provide the level of detail necessary to evaluate the claim." Supplemental Order at 4. In declining to disallow the 27-hour entry completely, the administrative law judge noted that counsel was entitled to credit for the hours she spent in March 2010 preparing a position statement regarding the PPACA in response to his Order, and was also entitled to credit for the time she spent preparing a closing argument in July 2010. The administrative law judge stated:

> Both documents reflect a close attention to detail and a successful effort at marshaling the best arguments in support of her client's position, and I find

[5] Employer also contends that the administrative law judge erred in awarding the requested hourly rate. Employer's Response Brief on Fees at 7. This issue is not properly before the Board, as employer may not seek to expand its rights by raising an issue on appeal in a response brief. *See generally Barnes v. Director, OWCP*, 19 BLR 1-73 (1995); 20 C.F.R. §802.212. Thus, we affirm, as unchallenged on appeal, the administrative law judge's allowance of $240.00 as a reasonable hourly rate for the legal services provided. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

> that she is entitled to 6 hours for preparation of the PPACA position statement and to 4 hours for preparation of written closing argument, for a total of 10 hours for those matters. The remaining 17 hours are disapproved.

Supplemental Order at 4.

Counsel requested reconsideration, attempting to clarify her billing. Counsel explained that she originally billed for work on claimant's post-hearing brief in a single entry for two different time periods during March 2010 and July 2010.[6] She explained that the briefing schedule had been interrupted due to the passage of the PPACA amendments; the submission of position statements; and the submission of additional evidence by employer. Counsel noted that the time she billed for preparation of the PPACA position statement, referenced by the administrative law judge, was separately billed at 0.25 hours and should not be confused with her amended Section 411(c)(4) position statement that was included in claimant's closing brief. Request for Reconsideration at 1-2.

In denying reconsideration, the administrative law judge determined that counsel had not shown a manifest injustice, or any other ground to justify reconsideration, as he continued to find that the time entries for March and July 2010 "lack[ed] sufficient detail to justify an award for all the time claimed." Order Denying Reconsideration at 2.

On appeal, counsel argues that the administrative law judge abused his discretion in disallowing 17 of the 27 hours billed for preparing claimant's 30-page brief. Counsel argues that the administrative law judge failed to provide a rational reason for reducing

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[6] In reponse to employer's objections, counsel's revised her single entry for drafting the post-hearing brief as follows:

> 3/28–31/10 Prepare claimant's post hearing brief: outline procedural history, miner's history, issues; review and analyze rulings on evidentiary issues and the medical evidence; draft, research, review & edit. 20 hours
>
> 7/14-16/10 Continue claimant's post hearing brief: read and revise draft; supplemental [sic] with argument re: 15 year presumption and include two additional reports from RO experts, draft final issue argument, final review, revisions and edit. 7 hours

The administrative law judge issued his Supplemental Order prior to receiving counsel's revision. Order Denying Reconsideration at 1.

her time, and should have viewed the preparation of a post-hearing brief as one task with many components, rather than multiple tasks requiring separate detailed time entries. Counsel states that she has always used this style of billing entries for briefs, and argues that the total number of hours billed was reasonable, especially in light of the administrative law judge's acknowledgement that the brief reflects a close attention to detail. Claimant's Brief at 4-6. Lastly, counsel asserts that the administrative law judge failed to consider all of the relevant factors at 20 C.F.R. §725.366(b), and did not apply any acceptable standard to justify reducing the time spent preparing claimant's post-hearing brief. Claimant's Brief at 7. Some of counsel's arguments have merit.

When a claimant wins a contested case, the Act provides that the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). The regulations provide that an approved fee shall take into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which may be relevant to the amount of the fee requested." 20 C.F.R. §725.366(b). The United States Court of Appeals for the Seventh Circuit, within whose jurisdiction this case arises, has held that the court must provide a concise but clear explanation of its reasons for any reduction. *Small v. Richard Wolf Medical Instruments Corp*., 264 F.3d 702 (7th Cir. 2001), *citing People Who Care v. Rockford Bd. of Educ*., 90 F.3d 1307 (7th Cir. 1996). We find merit in claimant's assertion that the administrative law judge failed to provide a clear explanation for disallowing portions of the 20-hour and 7-hour time entries for the task of preparing claimant's closing brief, in light of his acknowledgment that counsel "represented her client zealously and competently in this matter," and that the closing brief "reflected a close attention to detail and a successful effort at marshaling the best arguments in support of claimant's position." Supplemental Order at 1, 4. Consequently, if the administrative law judge again awards benefits on remand, he must consider whether the amount of time counsel billed was reasonable, and provide a sufficient rationale for disallowing any amount of time he deems excessive.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge