BRB No. 98-1142 BLA

OTTIS BENTLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KENTUCKY ELKHORN COALS, INC.	)	DATE ISSUED:
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE COMPANIES	)	
	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Benefits and the Supplemental Decision and Order Awarding Attorney Fees of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

W. William Prochot, Richard Davis and Mark E. Solomons (Arter & Hadden), Washington, D.C., for employer.

Barry H. Joyner (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, McGRANERY, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Granting Benefits and the Supplemental Decision and Order Awarding Attorney Fees (96-BLA-1477) of Administrative Law Judge Pamela Woods Lake 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). The administrative law judge accepted the parties' stipulation that claimant had at least ten years of qualifying coal mine employment and determined that this claim, filed on July 25, 1995, was subject to the duplicate claim provisions at 20 C.F.R. §725.309 because claimant took no action within one year of the final denial on August 14, 1992, of claimant's original claim filed on April 11, 1989. The administrative law judge found that new evidence submitted in support of the instant duplicate claim established a material change in conditions pursuant to Section 725.309, and that the weight of the evidence of record established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded.

Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's counsel submitted a fee petition to the administrative law judge, requesting $4,850.00 for 24.25 hours of services at $200 per hour. Thereafter, employer served interrogatories on claimant's counsel concerning the basis for the fees requested, and employer filed a Motion to Hold in Abeyance Proceedings on Fee Application Pending Responses to Discovery Requests with the administrative law judge. In a Supplemental Decision and Order Granting Attorney Fees, the administrative law judge denied employer's motion, struck the interrogatories *sua sponte* as burdensome and contrary to the specific provisions set forth in her Decision and Order Granting Benefits of April 20, 1998, and awarded claimant's counsel a fee of $4,850.00, representing 24.25 hours of services at $200 per hour.

On appeal, employer challenges the administrative law judge's findings pursuant to Sections 725.309, 718.202(a)(1), (4), 718.204(b), and her award of attorney fees. Claimant responds, urging affirmance of the award of benefits and attorney fees. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging a remand for reconsideration of the evidence at Sections 725.309 and 718.202(a)(4).[1]

[1] We affirm, as unchallenged on appeal, the administrative law judge's finding that the evidence is insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(2)-(3), and sufficient to establish total respiratory disability at Section 718.204(c). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We need not address employer's arguments challenging the administrative law judge's weighing of the x-ray evidence at

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and in accordance with law. 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).

Section 718.202(a)(1), inasmuch as she found the evidence insufficient to establish the existence of pneumoconiosis thereunder.

Employer and the Director initially contend that the administrative law judge provided an insufficient rationale for finding that the weight of the new medical opinions submitted in support of this duplicate claim established the existence of pneumoconiosis, the element of entitlement previously adjudicated against claimant, and thus established a material change in conditions at Section 725.309. Specifically, employer and the Director maintain that the administrative law judge engaged in a mechanical "nose count" of opinions rendered by examining physicians at Section 718.202(a)(4), rather than determining whether each physician's opinion was well-reasoned. The arguments of employer and the Director have merit. While the administrative law judge accurately reviewed the qualifications of the physicians and the underlying documentation for their opinions, she summarily determined that the opinions of physicians who actually examined the miner were more probative. Decision and Order at 8-12, 14-15. Notwithstanding her finding that "there is no basis on this record for me to find the Claimant's COPD, emphysema, asthma and/or chronic bronchitis attributable to coal mine dust exposure," Decision and Order at 15, the administrative law judge credited the opinions of examining physicians Drs. Fritzhand and Sundaram,[2] that claimant had pneumoconiosis, over the contrary opinions of examining physician Dr. Broudy and reviewing physicians Drs. Branscomb and Fino, solely on the basis of numerical superiority of positive examining physician opinions. Decision and Order at 15-16. The administrative law judge's analysis is inadequate, however, absent a qualitative evaluation of the evidence, particularly in view of the fact that the consultative opinions of Drs. Branscomb and Fino corroborate the opinion of Dr. Broudy, and Drs. Fritzhand and Sundaram do not possess pulmonary qualifications comparable to those of employer's experts. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993). We, therefore, vacate the administrative law judge's findings pursuant to Sections 718.202(a)(4) and 725.309 for a qualitative evaluation and weighing of the newly submitted medical opinions and a redetermination of whether claimant has established a material change in conditions pursuant to the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Sharondale Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994). If, on remand, the administrative law judge again finds a material change in conditions established, she must adjudicate the merits of the claim at Sections 718.202(a)(4) and 718.204(b) based on a consideration of all the record evidence.[3] *Id.*

[2] Employer and the Director note that the form reports of Drs. Sundaram and Fritzhand appear to offer no basis for their diagnosis of pneumoconiosis other than positive x-ray readings. Director's Exhibit 11; Claimant's Exhibits 2, 5. Employer and the Director thus argue that absent reliance on other factors to support that diagnosis, the opinions are insufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4). *See Anderson v. valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

[3] We reject employer's argument that the administrative law judge relied upon a

Lastly, employer challenges the administrative law judge's award of attorney fees. 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).

"presumption of progressivity" of simple pneumoconiosis to disregard the earlier medical opinions of record at Section 718.202(a)(4), and that due process requires a reopening of the record for the submission of rebuttal evidence on remand. Employer's Brief at 23-24. It is well settled that the relevant inquiry is claimant's pulmonary condition at the time of the hearing, thus the administrative law judge may reasonably conclude that the more recent medical opinions are more probative of claimant's current condition. *See generally Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 11 BLR 2-147 (6th Cir. 1988). We agree, however, with employer's argument that it is not employer's burden at Section 718.204(b) to establish a "cohesive theory of the etiology of the Claimant's pulmonary impairment so as to undermine the conclusions of Drs. Sundaram and Fritzhand," Decision and Order at 18. Moreover, employer correctly notes that Dr. Fritzhand diagnosed two pulmonary conditions, pneumoconiosis and COPD due to smoking, and did not indicate whether claimant's pneumoconiosis was a contributing cause of his total respiratory disability, Director's Exhibit 11, thus his opinion is insufficient to establish causation at Section 718.204(b) pursuant to *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

Employer contends that the administrative law judge abused her discretion by awarding attorney fees without affording employer an opportunity to file objections to the fee application within the time frame established by the administrative law judge. We agree. The administrative law judge issued her Supplemental Decision and Order Awarding Attorney Fees, in which she denied employer's motion to hold the proceedings in abeyance and struck employer's interrogatories, ten days prior to the deadline set by the administrative law judge in her Decision and Order for employer to file objections to the fee petition. Rather than allowing employer to assert its own objections,[4] the administrative law judge deemed employer's motion to constitute an objection to the fee petition "to the extent that it may seek an inflated fee based upon a contingency factor," Supplemental Decision and Order at 2, thereby violating employer's right to due process. Consequently, we vacate the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees. If, on remand, the administrative law judge again finds that claimant is entitled to benefits, she must provide employer with the opportunity to submit objections to counsel's fee application.

[4] Employer correctly maintains that the administrative law judge improperly approved fees for services performed in conjunction with the unsuccessful prosecution of claimant's original claim, which are not compensable. *See Broughton v. Director, OWCP*, 13 BLR 1-35 (1989). Employer additionally notes that it was not appropriate for counsel to provide merely his average hourly rate for contingent litigation; rather, in order for the administrative law judge to assess the reasonableness of the hourly rate requested, counsel should provide his customary fee for non-contingent litigation. *See generally City of Burlingame v. Dague*, 505 U.S. 557 (1992).

Accordingly, the administrative law judge's Decision and Order awarding benefits is affirmed in part, vacated in part, and this case is remanded for further consideration consistent with this opinion. The administrative law judge's Supplemental Decision and Order Granting Attorney Fees is vacated.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge