BRB No. 10-0141 BLA

JIMMY FLANNERY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TACKETT & SPEARS COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	DATE ISSUED: 11/29/2010
	)	
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 – Award of Benefits and the Attorney Fee Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

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

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

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits and the Attorney Fee Order (05-BLA-6138) of Administrative Law Judge Larry S. Merck rendered on a

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).[2] The administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718, and credited the parties' stipulation that claimant worked in qualifying coal mine employment for at least twenty years. The administrative law judge found that claimant established the existence of clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (a)(4) and 718.203(b), and total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c). Accordingly, benefits were awarded, commencing as of March 2004, the month in which claimant filed his claim.

On appeal, employer challenges the administrative law judge's weighing of the evidence in finding that claimant established the existence of clinical and legal pneumoconiosis pursuant to Section 718.202(a)(1), (4), and disability causation pursuant to Section 718.204(c). Employer also challenges the administrative law judge's subsequent approval of attorney fees in the amount of $16,606.25. Claimant responds, urging affirmance of the award of benefits and attorney fees, to which employer replies in support of its position. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a substantive response in this appeal.[3]

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

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[1] Claimant, Jimmy Flannery, filed his application for benefits on March 9, 2004. Director's Exhibit 2. A prior claim, filed on February 27, 1990, was withdrawn upon claimant's request pursuant to the Order Approving Withdrawal of Claim issued by Administrative Law Judge Quentin P. McColgin on February 25, 1992.

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

[3] We affirm, as unchallenged on appeal, the administrative law judge's findings that claimant established at least twenty years of coal mine employment and total respiratory disability pursuant to 20 C.F.R. §718.204(b). *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 6, 31-33.

[4] The law of the United States Court of Appeals for the Sixth Circuit is applicable, as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 3.

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

Employer initially challenges the administrative law judge's determination that the x-ray evidence was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1). Employer argues that the administrative law judge improperly limited his consideration of the evidence to three x-rays, despite acknowledging that claimant's treatment records contained many more x-rays. Additionally, citing *Marra v. Consolidation Coal Co.*, 7 BLR 1-216 (1984) for the proposition that "x-ray interpretations that contain no mention of pneumoconiosis will support an inference that the miner did not, or does not, have pneumoconiosis," employer asserts that the administrative law judge mischaracterized the x-rays contained in claimant's treatment records as "inconclusive" rather than as negative for pneumoconiosis. Employer's Brief at 13-14, *citing Marra*, 7 BLR at 1-218-219. Assuming *arguendo* that the characterization of these x-rays as inconclusive was proper, employer also maintains that the administrative law judge erred in failing to weigh all the x-rays together and explain why seven inconclusive interpretations of the most recent films did not outweigh two isolated positive x-rays. Employer's arguments lack merit.

While the Board acknowledged in *Marra* that "an administrative law judge may generally assume that if the physician reading the x-ray does not mention pneumoconiosis, then pneumoconiosis is not present," there is no requirement that x-rays containing no mention of pneumoconiosis be automatically deemed negative for pneumoconiosis. *Marra*, 7 BLR at 1-218-219. Rather, the issue is a question of fact to be resolved by the administrative law judge, who may "consider, in his discretion, whether an inference that the x-rays establish the absence of pneumoconiosis is warranted." *Marra*, 7 BLR at 1-219. In the case at bar, the administrative law judge accurately determined that the x-ray interpretations developed during claimant's medical treatment did not make specific reference to pneumoconiosis, but consistently identified interstitial fibrosis. As the interpretations were not completely negative, the administrative law judge rationally concluded that these x-ray interpretations were inconclusive for the presence of pneumoconiosis. Decision and Order at 9; Director's Exhibits 67-189, 191, 193, 195, 197, 198, 200; *see Marra*, 7 BLR 1-219; *see also Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-346 (1985) (administrative law judge's function to weigh x-ray evidence and make credibility determinations based on evidence of record). Relying on the weight of the positive x-ray readings by physicians with superior radiological qualifications, the administrative law judge permissibly found that the preponderance of the x-ray evidence was positive for clinical pneumoconiosis.[5] 20

[5] The administrative law judge determined that the April 8, 2004 x-ray, interpreted by a B reader and by two dually qualified Board-certified radiologists, was inconclusive for pneumoconiosis, as the best qualified physicians disagreed as to whether the x-ray

C.F.R. §718.202(a)(1); *see Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order at 9. As the administrative law judge properly conducted a qualitative and quantitative analysis of the evidence, we affirm his finding that the weight of the x-ray evidence of record was sufficient to establish the existence of clinical pneumoconiosis pursuant to Section 718.202(a)(1).

Employer next argues that the administrative law judge erred in failing to consider the CT scan evidence of record at 20 C.F.R. §718.107, despite acknowledging that CT scans were "medically acceptable and relevant" tests, and indicating that he would accord probative weight to medical opinions that were based on the CT scans of record. Decision and Order at 23, n.16. Instead, employer asserts that the administrative law judge ignored the CT scan dated November 5, 2003, Director's Exhibit 67-200, and discounted the medical opinions of Drs. Fino and Dahhan at Section 718.202(a)(4) to the extent that they relied on the October 27, 2003 CT scan, Director's Exhibit 67-198-199, to support their conclusion that claimant did not have clinical pneumoconiosis. Employer also maintains that Dr. Forehand's diagnosis of clinical pneumoconiosis was merely a restatement of a positive x-ray, and that the administrative law judge's treatment of the conflicting medical opinions at Section 718.202(a)(4) was inconsistent. Specifically, employer asserts that the administrative law judge discredited the opinions of Drs. Fino and Dahhan for relying on negative x-rays, contrary to the administrative law judge's finding that the x-ray evidence was positive for pneumoconiosis, yet he credited Dr. Forehand's diagnosis of clinical pneumoconiosis based on the physician's positive interpretation of an x-ray that the administrative law judge deemed inconclusive for pneumoconiosis. Employer further argues that, after faulting Dr. Fino for relying on inadmissible x-ray evidence in reaching his conclusions, the administrative law judge improperly rejected Dr. Fino's opinion rather than redacting the objectionable content, asking the doctor to reconsider his opinion based solely on admissible evidence, or considering whether there was good cause to admit the additional x-ray readings by Dr.

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was positive for pneumoconiosis. Decision and Order at 8; Director's Exhibit 17; Claimant's Exhibits 3, 10; Employer's Exhibit 11. However, the administrative law judge found that the June 5, 2004 x-ray was positive for pneumoconiosis, as the positive interpretation by a dually qualified reader outweighed the negative interpretation by a B reader. Decision and Order at 8-9; Claimant's Exhibit 1; Employer's Exhibit 1. The administrative law judge also found that the April 7, 2005 x-ray was positive for pneumoconiosis, based on the uncontradicted positive interpretations by a B reader and a dually qualified physician. Decision and Order at 9; Claimant's Exhibit 2; Employer's Exhibit 4.

Fino into the record. Employer's Brief at 14-16. Employer's arguments are without merit.

When summarizing the physicians' medical opinions and their underlying documentation on the issue of clinical pneumoconiosis under Section 718.202(a)(4), the administrative law judge determined that Dr. Forehand's diagnosis of coal workers' pneumoconiosis was based on claimant's coal mine employment and cigarette smoking histories; physical examination findings; a positive x-ray reading; qualifying pulmonary function studies; arterial blood gas studies showing arterial hypoxemia; and a positive biopsy report. Decision and Order at 17-18; Director's Exhibit 17. At his deposition, Dr. Forehand explained that crackles heard on chest examination suggested that there had been a fibrotic reaction in claimant's lungs; that the mixed obstructive and restrictive ventilatory pattern revealed by claimant's pulmonary function studies indicated that there was scarring in his lungs; and that the results of claimant's arterial blood gas studies on exercise showed that he could not oxygenate normally. Decision and Order at 17-18; Claimant's Exhibit 8. The administrative law judge reasonably concluded that because Dr. Forehand "thoroughly explained how Claimant's history, physical examination, and test results supported his opinion," Dr. Forehand's diagnosis of clinical pneumoconiosis was well-reasoned, well-documented, and entitled to full probative weight. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985); Decision and Order at 18. Contrary to employer's arguments, Dr. Forehand's diagnosis was based on multiple factors and was not merely a restatement of an x-ray, and since the administrative law judge found that the weight of the x-ray evidence was positive for pneumoconiosis, he could properly credit Dr. Forehand's opinion despite the physician's reliance, in part, on his positive interpretation of an x-ray that the administrative law judge deemed inconclusive for pneumoconiosis.

By contrast, the administrative law judge determined that Dr. Dahhan based his finding that claimant did not have clinical pneumoconiosis on a negative x-ray, and biopsy and CT scan reports that Dr. Dahhan deemed negative for pneumoconiosis. Decision and Order at 21-24; Employer's Exhibits 1, 5, 6, 8, 9. However, the administrative law judge found that Dr. Dahhan's negative x-ray interpretation was outweighed by the positive interpretation of a dually qualified reader, and that the weight of the x-ray evidence as a whole was positive for pneumoconiosis. Further, as highly qualified physicians disagreed as to whether the biopsy results were positive or negative for pneumoconiosis, the administrative law judge found that the biopsy evidence was in equipoise and neither established nor ruled out pneumoconiosis. The administrative law judge also determined that the October 27, 2003 CT scan contained in claimant's treatment records identified some densities and interstitial fibrosis, but did not list the qualifications of the interpreting radiologist or state whether pneumoconiosis was present or absent, and the administrative law judge found that more recent x-rays were

interpreted by dually qualified physicians as positive for pneumoconiosis. While employer correctly maintains that Drs. Dahhan and Fino reviewed, and the administrative law judge failed to address, the November 5, 2003 CT scan contained in claimant's treatment records, that radiological report also identified fibronodular opacities and chronic pulmonary interstitial disease, but did not state whether pneumoconiosis was present or list the qualifications of the reporting physician. Director's Exhibit 67-200. Thus, based on the administrative law judge's findings regarding the October 27, 2003 CT scan, as well as his weighing of the x-ray and biopsy evidence of record, we hold that his failure to address the November 5, 2003 CT scan constitutes harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Because the objective evidence upon which Dr. Dahhan relied was either discounted or did not support his conclusions, the administrative law judge acted within his discretion in according less probative weight to Dr. Dahhan's opinion. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255 n.6, 5 BLR 2-99, 2-103 n.6 (6th Cir. 1983); *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-226 (2002) (*en banc*); Decision and Order at 24.

Similarly, the administrative law judge determined that Dr. Fino originally diagnosed clinical pneumoconiosis based on his positive interpretation of the April 7, 2005 x-ray, but changed his diagnosis upon review of the 2003 CT scan and 2004 biopsy reports, which he concluded were negative for pneumoconiosis. Decision and Order at 26; Employer's Exhibit 4. Dr. Fino explained that if changes of pneumoconiosis were not present on CT scan in 2003, the changes he observed in 2005 could not represent pneumoconiosis. *Id*. The administrative law judge found that Dr. Fino's reliance on negative CT scan and biopsy evidence was misplaced, however, as the administrative law judge determined that the CT scan evidence was interpreted during treatment, with no specific statement as to the presence or absence of pneumoconiosis, and that the biopsy evidence was in equipoise. Decision and Order at 28, 29 n.18. The administrative law judge also considered it significant that the regulations recognize that pneumoconiosis is a latent and progressive disease. Decision and Order at 29 n.18; *see* 20 C.F.R. §718.201(c). While Dr. Fino additionally opined that the rapid progression of claimant's x-ray changes, from a negative reading of 0/1 in 2004 to a positive 1/1 in 2005, was inconsistent with clinical pneumoconiosis given that claimant stopped working in 1989, the administrative law judge determined that Dr. Fino based this opinion on three of his own x-ray interpretations that were not designated as evidence in this claim. Contrary to employer's arguments, the administrative law judge reviewed the permissible options available to him for dealing with an opinion based in part on evidence not admitted into the record, and acted within his discretion in fashioning an appropriate remedy. Specifically, the administrative law judge factored in Dr. Fino's reliance upon the inadmissible evidence when deciding the weight to which his opinion was entitled. Decision and Order at 28; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229 (2007) (*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006) (*en banc*); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004) (*en banc*). As Dr. Fino admitted that he would

have diagnosed clinical pneumoconiosis based solely on his own 2005 x-ray interpretation, and as the administrative law judge found that the April 8, 2004 x-ray of record was inconclusive and that the June 5, 2004 x-ray of record was positive for pneumoconiosis, the administrative law judge rationally discounted Dr. Fino's opinion as inadequately reasoned. Decision and Order at 29; Director's Exhibit 67-639; *see Furgerson*, 22 BLR at 1-226. Because the administrative law judge's findings are supported by substantial evidence, we affirm his conclusion that claimant established the existence of clinical pneumoconiosis pursuant to Section 718.202(a).

Employer next challenges the administrative law judge's determination that the medical opinion evidence was sufficient to establish the existence of legal pneumoconiosis at Section 718.202(a)(4). Employer asserts that the administrative law judge provided invalid reasons for crediting the opinion of Dr. Koura, that claimant has legal pneumoconiosis, over the contrary opinions of Drs. Fino and Dahhan. Specifically, employer argues that the administrative law judge erred in crediting Dr. Koura's opinion, as the physician did not explain how claimant's symptoms and pulmonary function studies supported his diagnosis of legal pneumoconiosis, notwithstanding the x-rays. Employer maintains that the administrative law judge's "treatment of Dr. Fino's opinion rests for the most part on his flawed findings with respect to clinical pneumoconiosis." Employer's Brief at 18. Employer further maintains that the administrative law judge improperly discredited Dr. Dahhan's opinion based on a mischaracterization of the opinion; regulatory materials that are not part of the record; a substitution of his own opinion for that of Dr. Dahhan; and a shifting of the burden of proof to employer. Employer's Brief at 18-23. Employer's arguments lack merit.

In assessing the probative value of the conflicting medical opinions, the administrative law judge evaluated the opinion of Dr. Koura, claimant's treating physician, under the provisions at 20 C.F.R. §718.104(d)(5). The administrative law judge determined that Dr. Koura regularly treated claimant for his pulmonary condition over a five-year period, and diagnosed chronic obstructive pulmonary disease (COPD) caused by both smoking and coal dust exposure, specifically stating that coal dust exposure substantially aggravated claimant's disabling respiratory condition. Decision and Order at 18-21; Director's Exhibits 67-170, 67-182; Claimant's Exhibits 4-5. As Dr. Koura based his diagnosis of legal pneumoconiosis on claimant's symptoms, x-ray reports identifying interstitial fibrosis, and a qualifying pulmonary function test interpreted as showing a restrictive impairment and severe obstructive lung disease without improvement after bronchodilation, the administrative law judge permissibly found that the opinion was well-reasoned, albeit minimally documented, and was entitled to probative weight. Decision and Order at 21; *see Trumbo*, 17 BLR at 1-88; *Clark*, 12 BLR at 1-155.

With respect to Dr. Fino's opinion, that claimant had disabling idiopathic interstitial fibrosis unrelated to coal dust exposure, the administrative law judge determined that the physician's conclusions were based on the same reasoning that led him to reject a diagnosis of clinical pneumoconiosis. Decision and Order at 29. As we have affirmed the administrative law judge's weighing of Dr. Fino's opinion on the issue of clinical pneumoconiosis, and employer has identified no error of law or fact in the administrative law judge's weighing of the opinion on the issue of legal pneumoconiosis, we affirm his finding that Dr. Fino's opinion was inadequately reasoned and entitled to little probative weight under Section 718.202(a)(4). *Id.*, *see Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107 (1983).

With respect to the opinion of Dr. Dahhan, that claimant's COPD was exclusively attributable to cigarette smoking, the administrative law judge rationally found that the physician's reasoning was flawed on numerous grounds. Decision and Order at 21-26; Director's Exhibits 67-422, 67-447, 67-523, 67-615, 67-712. The administrative law judge observed that a diagnosis of legal pneumoconiosis may be made even in the absence of clinical pneumoconiosis, yet Dr. Dahhan opined that claimant was not a susceptible host to pneumoconiosis based on negative biopsy and x-ray results, in direct contradiction to the administrative law judge's findings that the biopsy evidence was in equipoise and that the weight of the x-ray evidence was positive for pneumoconiosis. Decision and Order at 25; *see* 65 Fed. Reg. 79939 (Dec. 20, 2000). Dr. Dahhan also found it significant that claimant's pulmonary function studies demonstrated variable reversibility and that he was prescribed bronchodilators, indicating that claimant's condition was reversible. Noting that claimant's pulmonary function studies produced qualifying values both before and after bronchodilation, however, the administrative law judge was not persuaded that the partial reversibility shown on some tests constituted credible evidence that coal dust exposure played no role in claimant's obstructive lung impairment. Decision and Order at 26; *see Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007). Additionally, the administrative law judge permissibly found Dr. Dahhan's conclusion, that claimant's COPD was unrelated to coal dust exposure due to the length of time since claimant's last exposure, to be at odds with the regulatory definition of pneumoconiosis as a "latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure," and the determination of the Department of Labor (DOL) that coal dust exposure can cause a chronic pulmonary impairment after a latent period. Decision and Order at 25, *citing* 20 C.F.R. §718.201(a)(2)(c); *see* 65 Fed. Reg. 79971 (Dec. 20, 2000). Contrary to employer's argument, the administrative law judge may properly consider whether a medical opinion is based on premises that conflict with the definition of legal pneumoconiosis and the prevailing view of medical science underlying the current regulations, as determined by DOL and set forth in the preamble to the revised regulations. *See J.O.* [*Obush*] *v. Helen Mining Co.*, 24 BLR 1-117, 1-125 (2009). The

administrative law judge also was not persuaded by Dr. Dahhan's statement that claimant's obstruction is so severe that it cannot be accounted for by claimant's twenty-one years of coal dust exposure. Because Dr. Dahhan did not explain why claimant's coal dust exposure, when combined with his smoking, could not have produced claimant's level of obstruction, the administrative law judge, within a permissible exercise of his discretion, found that Dr. Dahhan's opinion was not well-reasoned and was entitled to little weight. Contrary to employer's argument, the administrative law judge did not shift the burden of proof to employer, but merely required that Dr. Dahhan provide a well-reasoned explanation for his conclusions. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

As the administrative law judge provided valid reasons for his credibility determinations, we affirm his finding that the weight of the medical opinion evidence established legal pneumoconiosis under Section 718.202(a)(4). Based on his credibility determinations on the issues of clinical pneumoconiosis and legal pneumoconiosis, the administrative law judge also found that the weight of the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis at Section 718.204(c), and we affirm his findings thereunder, as supported by substantial evidence. Consequently, we affirm the administrative law judge's finding that claimant is entitled to benefits.

Lastly, employer challenges the administrative law judge's award of attorney fees in the amount of $16,606.25. The award of an attorney's fee 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. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger v. Coal Co.*, 21 BLR 1-102, 1-108 (1998) (*en banc*).

Upon consideration of the attorney fee petition submitted by claimant's counsel (counsel), employer's objections, counsel's response and employer's reply thereto, the administrative law judge approved the hourly rates and the number of hours requested, and awarded counsel a fee of $16.606.25, representing 10.25 hours of legal services at an hourly rate of $225.00 for work performed prior to January 1, 2008; 52 hours of legal services at a hourly rate of $275.00 for work performed in 2008 and 2009; and $685.95 for miscellaneous expenses.

On appeal, employer contends that the administrative law judge failed to apply the correct legal standard in assessing the attorney fee application. Employer asserts that counsel failed to submit market evidence of the appropriate hourly rate obtained by similarly situated attorneys, and that counsel's qualifications, experience and prior fee awards do not provide a basis for assessing the market value of his work. Employer also

contends that the administrative law judge erred in rejecting employer's challenges to the number of hours and reimbursable expenses claimed.

In determining the appropriate fee award, the administrative law judge is required to apply the regulatory criteria at 20 C.F.R. §725.366(b), which provides that the fee award must 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 fee requested." 20 C.F.R. §725.366(b); *see Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *see also Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988). Failure to discuss and apply the regulatory criteria requires remand. *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984). In this case, the administrative law judge performed the requisite analysis set forth in Section 725.366(b), and adequately explained his determination that hourly rates of $225.00 for work performed prior to 2008 and $275.00 for work performed from 2008 to 2009 were reasonable. Within a proper exercise of his discretion, the administrative law judge relied on the following considerations: the nature of the issues involved in this case; counsel's twenty-nine years of experience, including twenty years spent representing black lung claimants; his expertise in this specialized area of law demonstrated by his presentations to attorneys on black lung issues; his attendance at annual conferences; the administrative law judge's "own observation of his high-quality work at the hearing and on brief;" and the rates awarded to counsel and other eastern Kentucky attorneys in prior fee awards. *See B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 665-666, 24 BLR 2-106, 2-124 (6th Cir. 2008) (adjudicator might need to consider one or more specific factors, *i.e.*, experience, complexity of case, etc., in determining where the particular attorney's representation lies along the spectrum of the market for legal services); *see also Parks v. Eastern Assoc. Coal Corp.*, BLR , BRB No. 09-0627 BLA (May 25, 2010), *slip op*. at 5 n.5 (in determining prevailing market rate, administrative law judges may consider fees granted in black lung cases as well as fees granted in other administrative proceedings of similar complexity); Attorney Fee Order at 5. While employer submitted other fee petitions, a fee award, and affidavits asserting that experienced lawyers earned no more than $150 per hour for litigating black lung claims in counsel's geographic area, the administrative law judge acted within his discretion in finding that employer's proof was not more probative than the hourly rates awarded to counsel in prior cases and to other similarly experienced attorneys in Kentucky and Virginia, as submitted by counsel. Hence, we reject employer's arguments and affirm the hourly rates approved by the administrative law judge.

Lastly, employer avers that the administrative law judge failed to explain his determination that nineteen hours was reasonable for counsel's completion of a brief in this case. Employer also challenges the administrative law judge's reimbursement to

counsel for travel expenses and for medical records and reports. These contentions lack merit. In reviewing counsel's fee petition, the administrative law judge found that counsel had miscalculated his time entries; therefore, the administrative law judge modified counsel's request for work performed prior to 2008 from 10.5 to 10.25 hours and for work performed in 2008 to 2009 from 51.75 to 52 hours, representing a total of 62.25 hours. Attorney Fee Order at 1-2 n.1. After reviewing the billable hours and the work entries, the administrative law judge rationally found that the hours requested were "reasonable and necessary for the successful prosecution of this case on behalf of claimant." *See Bentley*, 522 F.3d at 666-667, 24 BLR 2-127 (when the record confirms that the administrative law judge, who is in a much better position than the appellate court to make these determinations, carefully reviewed the time submitted, no abuse of discretion has been shown); Attorney Fee Order at 6. Because employer has not shown, nor does a review of the record reveal, that the administrative law judge abused his discretion in finding nineteen hours reasonable to complete a brief in this case, we affirm the administrative law judge's allowance of these hours. As employer has not challenged the administrative law judge's allowance of the remaining 51.25 hours of compensable services on appeal, we affirm his approval of a total of 62.25 billable hours. *See Skrack*, 6 BLR at 1-711; Attorney Fee Order at 6. Likewise, the administrative law judge reasonably found that counsel was entitled to reimbursement in the amount of $685.95 for mileage costs incurred to attend the formal hearing and for costs associated with obtaining medical records and reports, as he concluded that these expenses were necessary in establishing claimant's case. *See Branham v. Eastern Assoc. Coal Corp.*, 19 BLR 1-1, 1-4 (1994); Attorney Fee Order at 6. We therefore affirm the administrative law judge's approval of a total attorney fee award in the amount of $16,606.25. *See Abbott*, 13 BLR at 1-17.

Accordingly, the Decision and Order – Award of Benefits and the Attorney Fee Order of the administrative law judge are affirmed.

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