BRB No. 99-1203 BLA

JOHN S. MacMUNN	)	
	)	
Claimant-	)	
Respondent	)	
	)	DATE ISSUED:
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF	)	
WORKERS'	)	
COMPENSATION PROGRAMS,	)	
UNITED STATES DEPARTMENT	)	
OF LABOR	)	DECISION AND ORDER

Party-in-Interest

Appeal of the Supplemental Decision and Order Granting Attorney Fees and Decision and Order - Awarding Benefits of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Raleigh, Illinois, for claimant.

Richard A. Dean (Arter & Hadden LLP), Washington, D.C., for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Supplemental Decision and Order Granting Attorney Fees and Decision and Order - Awarding Benefits (97-BLA-1888) of Administrative Law Judge Rudolf L. Jansen with respect to 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). In his Decision and Order,

the administrative law judge accepted the parties' stipulation to nineteen years of coal mine employment and considered the claim, filed on May 14, 1996, pursuant to the regulations set forth in 20 C.F.R. Part 718.[1] Director's Exhibit 1. The administrative law judge determined that claimant established the existence of pneumoconiosis arising out of coal mine employment under 20 C.F.R. §§718.202(a)(1) and 718.203(b). The administrative law judge also found that claimant proved that he is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, benefits were awarded. In a Supplemental Decision and Order, the administrative law judge instructed employer to pay claimant's counsel $13,756.80 in attorney fees and expenses.

With respect to the award of benefits, employer argues on appeal that the administrative law judge erred in determining that the x-ray evidence of record was sufficient to establish the existence of pneumoconiosis under Section 718.202(a)(1). Employer also asserts that the administrative law judge did not properly weigh the evidence relevant to Section 718.204(b) and (c). Regarding the award of attorney fees, employer contends that the administrative law judge erred in requiring employer to compensate claimant's counsel for charges that were not described with sufficient specificity and for expenses related to procuring the testimony of non-testifying witnesses. Claimant has responded and urges affirmance of the award of benefits and the fee award. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal.[2]

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 is in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In weighing the x-ray evidence under Section 718.202(a)(1), the administrative law judge noted that the overall preponderance of the x-ray evidence is negative for pneumoconiosis. The administrative law judge determined, however, that the majority of the readings of the films dated September 15, 1997 and May 4, 1998 performed by physicians who are both B readers and Board-certified radiologists are positive for pneumoconiosis.

---

[1]Claimant is the miner, John S. MacMunn.

[2]We affirm the administrative law judge's findings with respect to the length of claimant's coal mine employment and 20 C.F.R. §§718.202(a)(2)-(4) and 718.204(c)(1) and (3), as they are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Decision and Order at 13. The administrative law judge found that the interpretations of these films were entitled to greater weight based upon their recency and the administrative law judge concluded, therefore, that the existence of pneumoconiosis was established under Section 718.202(a)(1). *Id*. Employer argues that the administrative law judge ignored the written comments and deposition testimony indicating that the opacities viewed on the films are not consistent with pneumoconiosis. Employer also maintains that the administrative law judge placed too much emphasis on the recency of these x-rays.

Subsequent to the issuance of the administrative law judge's Decision and Order awarding benefits and the filing of employer's brief regarding the merits of this case, the Board held in *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999), that a physician's comments addressing the source of pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis under Section 718.202(a)(1), but should be addressed at Section 718.203. We affirm, therefore, that the Board affirm the administrative law judge's finding that claimant demonstrated the existence of pneumoconiosis pursuant to Section 718.202(a)(1) on the ground that the preponderance of interpretations by highly qualified reader was positive for pneumoconiosis. *See McMath v. Director, OWCP*, 12 BLR 1-6 (1988). We must, however, vacate the administrative law judge's finding that the record does not contain any evidence rebutting the Section 718.203(b) presumption that claimant's pneumoconiosis arose out of coal mine employment and remand the case to the administrative law judge for reconsideration of this issue.

As employer alleges, although Drs. Selby and Binns provided an ILO/UICC classification of the x-ray dated September 15, 1997 that constitutes a positive interpretation for pneumoconiosis, 20 C.F.R. §718.102, both physicians indicated that the opacities observed were not necessarily consistent with occupational pneumoconiosis.[3] Employer's Exhibits 31, 45. In addition, in his report of his examination of claimant, Dr. Selby stated that the changes observed on claimant's x-ray are due to his well documented cardiac disease. Employer's Exhibit 31. Furthermore, Drs. Wiot and Hippensteel indicated, in general, that the

[3]Contrary to employer's contention, Drs. Abramowitz and Baek did not exclude coal workers' pneumoconiosis as the source of the opacities they observed on the September 15, 1997 film. Dr. Abramowitz stated that he "could not exclude borderline changes of occupational pneumoconiosis" and Dr. Baek indicated that the "non-specific markings" were "consistent with occupational pneumoconiosis." Employer's Exhibit s 44, 47.

irregular opacities viewed by several of the physicians who submitted readings that are positive for pneumoconiosis under the ILO/UICC classification system are consistent with heart disease, rather than occupational pneumoconiosis. Employer's Exhibits 29, 57 at 11, 59 at 21. On remand, the administrative law judge should consider whether this evidence is sufficient to rebut, pursuant to Section 718.203(b), the presumption that claimant's pneumoconiosis arose out of coal mine employment. *See Cranor*, *supra*.

With respect to the administrative law judge's decision to accord greater weight to the interpretations of the most recent x-rays of record, we affirm the administrative law judge's finding as being within his discretion as trier-of-fact. An administrative law judge may give additional weight to more recent x-ray evidence particularly when that evidence reflects a shift from a preponderance of negative readings to a preponderance of positive readings. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). This principle accords with the recognition by the courts that pneumoconiosis as defined in the Act and the implementing regulations is a progressive disease. *See*, *e.g.*, 20 C.F.R. §§725.309, 725.310; *see also Mullins Coal Co. of Va., Inc. v. Director, OWCP*, 484 U.S. 135, 151, 11 BLR 2-1, 2-9 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Peabody Coal Co. v. Spese [Spese II]*, 117 F.3d 1001, 21 BLR 2-115 (7th Cir. 1997); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); *Adkins*, *supra*. In the present case, the administrative law judge determined correctly that the majority of the readings of the x-rays dated from January 29, 1992 to June 3,1996, are negative for pneumoconiosis. Decision and Order at 13. The administrative law judge also rationally found that the gap between the film dated June 3, 1996 and the films dated September 15, 1997 and May 4, 1998 is significant and that the preponderance of readings of these films is positive. *Id*; *see Burns v. Director, OWCP*, 7 BLR 1-597 (1984). Thus, the administrative law judge acted within his discretion in giving more weight to the readings of the most recent x-rays of record and did not mechanically rely upon mere recency. *See Adkins*, *supra*; *c.f. Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Thorn v. Itmann Coal Co.,* 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993).

Turning to the administrative law judge's findings under Section 718.204(c), the administrative law judge found that total disability was established based upon the more recent, qualifying blood gas study and an earlier, corroborating study and the medical opinions of Dr. Cohen and Houser due to their superior knowledge of the exertional requirements of claimant's usual coal mine employment. Decision and Order at 15-16; Director's Exhibit10; Claimant's Exhibits 1, 17. Employer alleges that the administrative law judge

erred in giving greater weight to the opinions of Drs. Cohen and Houser on this basis and in neglecting to determine that claimant's totally disabling impairment was respiratory or pulmonary in nature as is required under Section 718.204(c).

The administrative law judge's finding that total disability was established under Section 718.204(c)(2) is affirmed, as the administrative law judge acted within his discretion in according greatest weight to the most recent blood gas study of record which produced qualifying values. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986); *Pate v. Alabama By-Products Corp.*, 6 BLR 1-636 (1983); *see also Adkins*, *supra*. As employer asserts, however, Drs. Dahhan, Hippensteel, Repsher, and Selby either independently set forth a detailed description of claimant's usual coal mine work or indicated that they had reviewed the description contained in Dr. Houser's report dated June 15, 1998.[4] Employer's Exhibits 31, 55, 57 at 9, 58 at 6. Inasmuch as the administrative law judge relied upon an inaccurate characterization of the respective merits of the medical opinions relevant to the issue of total disability, we vacate the administrative law judge's finding under Section 718.204(c). *See Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). If this issue is reached on remand, the administrative law judge must specifically address whether the evidence is sufficient to establish that claimant is suffering from a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(c); *see Beatty v. Danri Corp.*,16 BLR 1-11 (1991), *aff'd* 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995); *Lollar v. Alabama By-Products Corp.*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

[4]Dr. Selby included a lengthy description of claimant's usual coal mine work in the report of his physical examination of claimant on September 15, 1997, but at his deposition, indicated that he did not inquire extensively as to the nature of claimant's job duties. Employer's Exhibits 31, 60 at 33-34.

Regarding Section 718.204(b), employer contends that the administrative law judge erred in determining that the opinions of Drs. Hippensteel, Dahhan, Selby, and Repsher were not probative, as none of these physicians diagnosed a totally disabling respiratory or pulmonary impairment.[5] Employer also asserts that the administrative law judge did not properly address the evidence of record regarding the extensive treatment that claimant has received for heart disease. In light the administrative law judge's reliance upon his Section 718.204(c) findings in rendering his finding under Section 718.204(b), we also vacate the administrative law judge's determination under Section 718.204(b). If the administrative law judge finds total respiratory or pulmonary disability established pursuant to Section 718.204(c) on remand, he must consider all evidence relevant to the source of claimant's disability, including the medical records and reports pertaining to claimant's cardiac disease, to determine whether claimant has established that pneumoconiosis is at least a contributing cause of his total disability. *See Shelton v. Director, OWCP,* 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990); *Hawkins v. Director, OWCP,* 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990); *see also Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994); *Peabody Coal Co. v. Vigna,* 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).[6] The administrative law judge should also treat as probative those medical opinions in which the physician acknowledges that claimant is totally disabled but attributes the total disability to a source other than pneumoconiosis. *See generally Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986).

Turning to employer's appeal of the administrative law judge's Supplemental Decision and Order awarding attorney fees, employer maintains that the administrative law judge erred in awarding fees for services which counsel did not describe in adequate detail. Employer also asserts that under 33 U.S.C. §928, which was incorporated into the Act, the administrative law judge erred in holding that claimant's counsel was entitled to compensation for expenses related to obtaining the opinions of physicians who did not testify at the hearing.

---

[5]We affirm as unchallenged on appeal the administrative law judge's determination that Dr. Goodman's opinion is entitled to little weight under 20 C.F.R. §718.204(b) on the ground that it is vague. Decision and Order at 17; Employer's Exhibit 32; *see Skrack*, *supra*.

[6]This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as claimant's coal mine employment occurred in Indiana. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

An administrative law judge's determination with respect to an attorney fee petition will be affirmed unless it is arbitrary, capricious, or represents an abuse of discretion. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). In the present case, the administrative law judge rationally determined that the brevity of counsel's billing entries, *i.e.*, "letter to client," "letter to Dr. Mathur," was "reasonable considering the nature of the services performed." Supplemental Decision and Order at 2. With respect to the single entry which employer identified as incomplete, claimant's counsel set forth the full description of the service provided in her Reply to Employer's Objections to Fee Application; a document submitted to the administrative law judge prior to issuance of the Supplemental Decision and Order awarding attorney fees.[7]

Moreover, the administrative law judge acted within his discretion in finding, pursuant to 20 C.F.R. §725.366(c), that the funds counsel spent to obtain x-ray readings, reports of physical examinations of claimant, and reports from consulting physicians are reimbursable. Supplemental Decision and Order at 2-3. Section 725.366(c) specifically mandates paying to counsel the "reasonable and unreimbursed expenses incurred in establishing the claimant's case." 20 C.F.R. §725.366(c). Employer's reliance upon a literal interpretation of 33 U.S.C. §928 is flawed, as the Board has explicitly held that the Act does not require that a physician testify at the hearing in order for claimant's counsel to be reimbursed for the costs of obtaining his or her opinion whether in the form of deposition testimony or a report that is admitted into the record. *See Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1, 1-3-1-4 (1994); *DelVacchio v. Sun Shipbuilding & Dry Dock Co*., 16 BRBS 190, 195 (1984); *Hardrick v. Campbell Industries, Inc.*, 12 BRBS 265, 270 (1980). The administrative law judge rationally determined, therefore, that the items for which counsel sought payment constituted medical evidence developed in support of claimant's application for benefits. Finally, the administrative law judge also acted within his discretion in finding that in the absence of specific objections to the contrary, the expenses claimed for procuring medical evidence were reasonable. *See Abbott*, *supra*. Thus, we affirm the administrative law judge's award of attorney fees in the

[7]The entry read "sorting through client's." Counsel stated that the complete description of the service provided is "sorting through client's claim papers (organize, collate, and analyze)."

amount of $13,756.80. The an award of attorney fees does not become enforceable, however, until there is successful prosecution of the claim. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993).

Accordingly, the administrative law judge's Supplemental Decision and Order Granting Attorney Fees is affirmed, but the administrative law judge's Decision and Order - Awarding Benefits is affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge