BRB No. 02-0138 BLA

KATHRYN L. CORNETT (Widow of ELMER R. CORNETT) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: DECISION and ORDER

Appeal of the Decision and Order and Supplemental Decision and Order Granting Attorney Fees of Robert J. Lesnick, Administrative Law Judge, United States Department of Labor.

Anne Megan Davis and Thomas E. Johnson (Johnson, Jones, Snelling, Gilbert & Davis), Chicago, Illinois, for claimant.

William S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Before: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

SMITH, Administrative Appeals Judge:

Employer appeals the Decision and Order (01-BLA-0334) of Administrative Law Judge Robert J. Lesnick awarding benefits on a survivor's 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] Employer also appeals the administrative law judge's

[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

Supplemental Decision and Order Granting Attorney Fees (01-BLA-0334). The instant case involves a survivor's claim filed on October 14, 1998.[2] After crediting the miner with forty years of coal mine employment, the administrative law judge found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Accordingly, the administrative law judge awarded benefits. On appeal, employer contends that the administrative law judge erred in designating it as the responsible operator. Employer also argues that the administrative law judge erred in finding that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis. Claimant[3] responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has not filed a response brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable 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).

Citing *Eastern Associated Coal Corp. v. Director, OWCP [Patrick]*, 791 F.2d 1129 (4th Cir. 1986) and *Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989), employer initially contends that because the miner's most recent coal mine employment was his twenty year employment as a federal coal mine inspector, claimant must "exhaust" her claim against the federal government under the Federal Employees Compensation Act

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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 miner filed a claim on December 14, 1979. Director's Exhibit 28. The district director denied the claim on April 22, 1980. *Id.* There is no indication that the miner took any further action in regard to his 1979 claim.

[3]Claimant is the surviving spouse of the deceased miner who died on May 16, 1998. Director's Exhibit 5.

(FECA), 5 U.S.C. §8101 *et seq.*, before seeking compensation from a private employer under the Black Lung Benefits Act. We disagree. In *Consolidation Coal Co. v. Borda*, 171 F.3d 175, 21 BLR 2-545 (4th Cir. 1999), the Fourth Circuit rejected this argument. The Fourth Circuit held that:

> [O]ur case law does not support [employer's] contention that a claimant must seek recourse against the federal government under FECA before seeking recourse against a private employer under the Black Lung Benefits Act. [Employer] has misconstrued the impact of [*Patrick*] and [*Kopp*], which mandate only that *if* a federal employee wishes to seek compensation *from the federal government* for pneumoconiosis, FECA is his exclusive remedy because Congress did not waive the federal government's sovereign immunity in enacting the Black Lung Benefits Act. *See Patrick*, 791 F.2d at 1131; *Kopp*, 877 F.2d at 309 n. 1 (interpreting and reaffirming *Patrick)*. These cases do not support the proposition that the federal government precedes a private employer in the hierarchy of a claimant's potential compensation sources.
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> It is true we noted in *Patrick*, that if an individual were entitled to benefits both from his private employer under the Black Lung Benefits Act and from the federal government under FECA, the FECA benefits would offset the amount owed by the private employer. *See Patrick*, 791 F.2d at 1130 n.1. But this does not mean that a miner must choose to seek relief from the government under FECA *instead of* or *before* seeking relief from his private employer under the Black Lung Benefits Act. On the contrary, a miner is free, consistent with the purposes of the Black Lung Benefits Act, to attempt to maximize his benefits by choosing to seek compensation first, or even exclusively, under the more generous statutory scheme.

Borda, 171 F.3d at 180, 21 BLR at 2-554-555.[4]

We, therefore, affirm the administrative law judge's designation of Consolidation Coal Company (employer) as the responsible operator.

Employer next contends that the administrative law judge erred in admitting the reports of Drs. Green, Guariglia and Cohen into the record. The regulations provide that any evidence not submitted to the district director may be received in evidence subject to the objection of any party if it is sent to all other parties at least twenty days before the hearing.

[4]In *Borda*, the miner's last fifteen years of coal mine employment were spent as a federal coal mine inspector. *Borda, supra*.

20 C.F.R. §725.456(b)(1). The reports of Drs. Green, Guariglia and Cohen, along with their respective curriculum vitaes, were exchanged on May 17, 2001, exactly twenty days prior to the hearing on June 6, 2001. Transcript at 8.

Employer, however, contends that claimant's evidence should be excluded because claimant failed to respond to its March 6, 2000 supplemental interrogatories requesting information regarding the development of additional evidence. The Board has construed Section 725.456 to favor admission of all evidence that is relevant and to allow the adjudicator to determine the weight to be assigned to the evidence. *See Cochran v. Consolidation Coal Co.*, 12 BLR 1-137 (1989). Consequently, we hold that the administrative law judge properly admitted the reports of Drs. Green, Guariglia and Cohen into the record. Because the exchange of this evidence occurred exactly twenty days prior to the hearing, employer was foreclosed from responding to this evidence prior to the expiration of the twenty-day deadline imposed by 20 C.F.R. §725.456. Under such circumstances, the administrative law judge properly provided employer forty-five days to respond to this evidence.[5] *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *see also North American Coal Corp. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989).

[5]After the hearing, employer submitted Dr. Fino's June 13, 2001 report, Dr. Branscomb's June 4, 2001 report and Dr. Oesterling's July 6, 2001 deposition testimony. The administrative law judge admitted this evidence into the record as Employer's Exhibits 9-12. Decision and Order at 2.

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis. Because the instant survivor's claim was filed after January 1, 1982, claimant must establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c).[6] *See* 20 C.F.R. §§718.1, 718.202, 718.203, 718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988). A miner's death will be considered to be due to pneumoconiosis if the evidence is sufficient to establish that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993).

In his consideration of whether the evidence was sufficient to establish that the miner's death was due to pneumoconiosis, the administrative law judge initially found that Dr. Tabatowski, the autopsy prosector, did not render an opinion as to whether the miner's pneumoconiosis contributed to his death. Decision and Order at 29. After discrediting the opinions of Drs. Tomashefski, Naeye and Fino as not sufficiently reasoned, *Id.* at 29-30, the administrative law judge found that the opinions of Drs. Oesterling and Branscomb that the miner's death was not due to pneumoconiosis were "well reasoned and well documented." *Id.* at 30. The administrative law judge, however, found that the opinions of Drs. Kahn, Green, Guariglia and Cohen that the miner's death was due to pneumoconiosis were also "well reasoned and well supported by the evidence of record." *Id.* at 31. The administrative

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[6]Section 718.205(c) provides that:

> (1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or
> (2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or
> (3) Where the presumption set forth at §718.304 is applicable.
> (4) However, survivors are not eligible for benefits where the miner's death was caused by traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.
> (5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. §718.205(c).

law judge found that the opinions of Drs. Oesterling and Branscomb were outweighed by the opinions of Drs. Kahn, Green, Guariglia and Cohen. *Id.* The administrative law judge, therefore, found that the evidence was sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). *Id.*

Employer contends that the administrative law judge committed numerous errors in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Employer initially argues that the administrative law judge erred in his consideration of Dr. Tabatowski's opinion.[7] The administrative law judge

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[7]Dr. Tabatowski performed an autopsy limited to an examination of the miner's thorax. In an autopsy report dated August 25, 1998, Dr. Tabatowski's final anatomic diagnoses included "dust macules with associated centroacinar emphysema, consistent with coal workers pneumoconiosis" and acute bronchopneumonia. Director's Exhibit 7.

The record also contains an August 25, 1998 letter from Dr. Tabatowski addressed to Dr. Ulrich. In the letter, Dr. Tabatowski stated that:

> In my opinion, [the miner's] lungs revealed evidence of coal workers pneumoconiosis in addition to the acute pneumonia which is most likely responsible for his demise. The changes associated with exposure to coal dust in this man are not dramatic; this may be related to the lack of any smoking

accorded less weight to Dr. Tabatowski's opinion because he found that the doctor did not indicate whether the miner's pneumoconiosis contributed to his death. Decision and Order at 29. Employer notes that Dr. Tabatowski, in an August 25, 1998 letter addressed to Dr. Ulrich, opined that the miner's acute pneumonia was "most likely responsible" for his death.[8] Employer's Brief at 6. Employer argues that because Dr. Tabatowski failed to "incriminate [that] pneumoconiosis played a role in causing [the miner's] death," her opinion supports a finding that the miner's death was not due to pneumoconiosis. Employer's Brief at 6. However, because Dr. Tabatowski did not directly address the contribution, if any, that the miner's pneumoconiosis played in his death, we hold that the administrative law judge did not commit any error in his consideration of Dr. Tabatowski's opinion.

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history and possibly to a period of retirement from mine work.

Director's Exhibit 7.

[8]In his decision, the administrative law judge references Dr. Tabatowski's autopsy report, but makes no mention of Dr. Tabatowski's August 25, 1998 letter to Dr. Ulrich. *See* Decision and Order at 4-5, 29.

Employer next contends that the administrative law judge erred in his consideration of Dr. Tomashefski's opinion.[9] The administrative law judge found that while Dr. Tomashefski determined that the miner's coal workers' pneumoconiosis did not contribute to his death, he offered "no explanation for the miner's multiple pulmonary conditions other than to attribute them to cigarette smoking." Decision and Order at 29. Because the administrative law judge found that the miner was a non-smoker, the administrative law judge found that Dr. Tomashefski's opinion was less well reasoned than the other medical opinions of record and entitled to less weight. *Id.* at 29-30.

The administrative law judge erred in discrediting Dr. Tomashefski's opinion because he offered "no explanation for the miner's multiple pulmonary conditions other than to attribute them to cigarette smoking."[10] Decision and Order at 29. Dr. Tomashefski attributed

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[9]In an August 13, 1999 report, Dr. Tomashefski, after acknowledging that the miner was a non-smoker, opined that the underlying cause of the miner's death was "cerebral infarction and multi infarct dementia." Director's Exhibit 21. Dr. Tomashefski explained that the miner's neurologic disorder predisposed him to repeated episodes of aspiration pneumonia. *Id.* Dr. Tomashefski opined that the miner's immediate cause of death was bronchopneumonia. *Id.* Dr. Tomashefski further opined that while the miner's coal workers' pneumoconiosis may have produced mild dyspnea on exertion, it was not a contributory cause of his death. Director's Exhibit 21. Dr. Tomashefski opined that the miner's acute pneumonia and recent pulmonary emboli were sufficient to have caused the miner's death whether or not he had coal workers' pneumoconiosis. *Id.*

During an October 9, 1999 deposition, Dr. Tomashefski opined that the immediate cause of the miner's death was bronchopneumonia which arose out of aspiration pneumonia brought about by the effects of a cerebral infarction. Employer's Exhibit 6 at 31. Dr. Tomashefski further opined that neither coal workers' pneumoconiosis nor any other disease arising out of coal dust exposure caused, contributed to, or hastened the miner's death. *Id.* at 37.

After reviewing twenty additional autopsy slides, Dr. Tomashefski prepared a supplemental report dated January 12, 2000 wherein he opined that the miner's death was due to acute bronchopneumonia. Employer's Exhibit 7. Dr. Tomashefski further opined that the miner's coal workers' pneumoconiosis neither caused nor contributed to his death. *Id.*

[10]Contrary to the administrative law judge's statement, Dr. Tomashefski, on at least

the miner's death to bronchopneumonia arising out of aspiration pneumonia brought about by the effects of a cerebral infarction. Employer's Exhibit 6 at 31. Dr. Tomashefski specifically opined that the miner's pneumonia was not caused by his coal dust exposure. *Id.* at 20-21. The administrative law judge should have focused upon Dr. Tomashefski's opinion regarding the etiology of the miner's pneumonia since it was this condition that Dr. Tomashefski found responsible for the miner's death. The administrative law judge erred in focusing upon Dr. Tomashefski's opinion regarding the etiology of the miner's "other pulmonary conditions" inasmuch as the doctor did not indicate that any of these other conditions contributed to the miner's death.

Employer next contends that the administrative law judge erred in his consideration of Dr. Naeye's opinion.[11] In his consideration of Dr. Naeye's opinion, the administrative law

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two occasions, attributed the miner's panacinar emphysema to the aging process. *See* Director's Exhibit 21; Employer's Exhibit 6 at 31.

[11]Dr. Naeye reviewed the miner's autopsy slides and other medical evidence. In a report dated September 15, 1999, Dr. Naeye opined that "[n]o chronic lesions are present in [the miner's] lungs that would have contributed in any way to his death." Director's Exhibit 22. Dr. Naeye opined that the miner would have died at the same time and in the same way if he had never mined coal. *Id.*

Dr. Naeye subsequently reviewed additional autopsy slides. In a supplemental report dated March 24, 2000, Dr. Naeye opined that pneumonia was the direct cause of the miner's death. Director's Exhibit 35.

judge stated that:

> Dr. Naeye....found that the miner suffered from mild to moderate coal workers' pneumoconiosis. However, Dr. Naeye also found that the miner possibly was a cigarette smoker in life based on the findings of centrilobular emphysema and chronic bronchitis. Dr. Naeye bases his conclusion that the miner's centrilobular emphysema was not caused by coal dust because the miner had a normal pulmonary function study in 1980. I find this not to be well reasoned. Therefore, I find Dr. Naeye's opinion entitled to less weight.

Decision and Order at 30.

Dr. Naeye opined that the miner's neurologic disease made it difficult for him to cough, which lead to pneumonia and death. *See* Director's Exhibit 36 at 48-49. The administrative law judge erred in focusing upon Dr. Naeye's opinion regarding the etiology of the miner's centrilobular emphysema inasmuch as the doctor did not attribute the miner's death to this disease. Consequently, we hold that the administrative law judge erred in his consideration of Dr. Naeye's opinion.

During an April 14, 2000 deposition, Dr. Naeye opined, *inter alia*, that the miner's death was due to pneumonia. Director's Exhibit 36 at 22-23.

Employer also contends that the administrative law judge erred in his consideration of Dr. Fino's opinion.[12] In his consideration of Dr. Fino's opinion, the administrative law judge stated that:

I accord less weight to the opinion of Dr. Fino. Dr. Fino opines that it would

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[12]Dr. Fino reviewed the medical evidence of record. In a report dated June 13, 2001, Dr. Fino initially noted that, due to the limited nature of the miner's autopsy, it was "absolute speculation" to state that coal workers' pneumoconiosis was a contributing cause to his death. Employer's Exhibit 9. Dr. Fino further stated that:

> If I assume that [the miner] had progressive respiratory failure due to aspiration pneumonia because of the stroke and blood clots to his lungs, those are condition [sic] unrelated to the inhalation of coal mine dust. He would have died as and when he did had he never stepped foot in the mines.
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> Those who have suggested that pneumoconiosis was a contributing cause have no valid, objective evidence to support that claim. The mere finding of pathologic pneumoconiosis does not imply pulmonary impairment or any pulmonary limitation. Furthermore, there is no objective evidence in the medical record of any respiratory impairment or pulmonary disability.

Employer's Exhibit 9.

> be speculative to determine a cause of death in this claim because a full autopsy was not performed. Dr. Fino concludes that even if the miner suffered a respiratory death, it was not caused or contributed to by coal dust exposure. I find Dr. Fino's report not to be well reasoned. This is so because Dr. Fino offers no explanation for his conclusion. Additionally, Dr. Fino's determination that specifying a cause of death would be speculative runs contrary to all of the other physician reports contained in the record. Therefore, I find Dr. Fino's report entitled to less weight.

Decision and Order at 30.

Contrary to the administrative law judge's characterization, Dr. Fino provided explanations for his conclusions. Because there is "no objective evidence in the medical record of any respiratory impairment or pulmonary disability," Dr. Fino concluded that there was no "valid, objective evidence" to support a finding that the miner's pneumoconiosis was a contributing cause of the miner's death. Employer's Exhibit 9. The administrative law judge also erred in discrediting Dr. Fino's opinion because Dr. Fino's determination that specifying a cause of death would be speculative "runs contrary to all of the other physician reports contained in the record." Decision and Order at 30. Other physicians recognized the limitations imposed by a limited autopsy. For example, Dr. Guariglia acknowledged that because the autopsy did not include the brain, it was impossible to definitively state whether the miner's strokes were precipitated by bronchopneumonia, or whether the strokes played a role in precipitating the bronchopneumonia. Claimant's Exhibit 2. Consequently, we hold that the administrative law judge erred in his consideration of Dr. Fino's opinion.

Employer also contends that the administrative law judge failed to provide a proper basis for crediting the opinions of Drs. Kahn, Guariglia Green and Cohen that the miner's coal workers' pneumoconiosis contributed to his death over the contrary opinions of Drs. Oesterling and Branscomb. The administrative law judge found that because "Drs. Oesterling and Branscomb both submitted well reasoned and well documented reports...." and were "well qualified," their opinions were entitled to "great weight." Decision and Order at 30. The administrative law judge, however, found that the contrary opinions of Drs. Kahn and Guariglia were also "well reasoned and based on the objective evidence" and, therefore, entitled to "more weight." *Id.* at 31. The administrative law judge concluded that:

> Weighing all of the physician opinion evidence, I find that claimant has established her burden pursuant to §718.205(c)(2). I find the opinions of Drs. Oesterling and Branscomb to be very well reasoned. However, these opinions are outweighed by the opinions of Drs. Kahn, Green, Guariglia and Cohen, all of which are also well reasoned and well supported by the evidence of record. Accordingly, I find that claimant has established that the miner's death was

> substantially contributed to by pneumoconiosis or that death was caused by the complications of pneumoconiosis.

Decision and Order at 13.

The only discernible basis for the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) is that more, credible doctors indicated that pneumoconiosis contributed to the miner's death than did not. In *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997), the Fourth Circuit held that:

> In *Adkins v. Director, OWCP*, 958 F.2d 49 (4th Cir. 1992), we pointed out that in considering expert opinions, merely "counting heads" with the underlying presumption that two expert opinions ipso facto are more probative than one is a hollow endeavor and contributes little when weighing evidence. *Id.* at 52. While we recognized that merely counting heads is not the appropriate manner for an Administrative law judge to weigh numerous and diverse opinions, we did not suggest that two or three independent, qualified opinions were necessarily of less probative value than one. In weighing opinions, the Administrative law judge is called upon to consider their quality. Thus, the Administrative law judge should consider the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudice.

Underwood, 21 BLR at 2-31-32.

In the instant case, the administrative law judge's conclusory analysis that the medical evidence is sufficient to establish that the miner's death was due to pneumoconiosis does not comply with the Administrative Procedure Act (APA), specifically 5 U.S.C. §557(c)(3)(A), which provides that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefor on all material issues of fact, law or discretion presented in the record. 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); *see Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). The administrative law judge failed to provide a sufficient basis for crediting the opinions of Drs. Kahn, Guariglia Green and Cohen that the miner's coal workers' pneumoconiosis contributed to his death over the contrary opinions of Drs. Oesterling and Branscomb. Consequently, the administrative law judge, on remand, is instructed to reconsider all of the relevant medical opinion evidence, taking into account "the qualifications of the experts, the opinions' reasoning, their reliance on objectively determinable symptoms and established science, their detail of analysis, and their freedom from irrelevant distractions and prejudice." *Underwood*, 21 BLR at 2-31-32.

We also agree with employer that the administrative law judge failed to adequately consider the reasoning underlying the opinions of Drs. Kahn, Guariglia, Green and Cohen. Instead, the administrative law judge merely set out their conclusions and summarily found that they were well reasoned. *See* Decision and Order at 30-31. On remand, the administrative law judge is instructed to specifically address the reasoning and documentation underlying the conflicting medical opinion evidence.

In light of the numerous errors committed by the administrative law judge, we vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.205(c) and remand the case for further consideration.

We now turn our attention to the administrative law judge's Supplemental Decision and Order-Granting Attorney Fees (Supplemental Decision and Order). The administrative law judge awarded claimant's counsel a total fee of $20,273.29 for 53.13 hours of legal services at an hourly rate of $205.00 and 35.38 hours of paralegal services at an hourly rate of $100.00 and $5,331.14 in expenses. The administrative law judge also awarded claimant's counsel an additional $512.50 for time spent defending the merits of the fee petition. On appeal, employer contends that the administrative law judge's attorney's fee award is excessive. Claimant responds in support of the administrative law judge's attorney's fee award. The Director has not filed a response brief regarding the administrative law judge's attorney's fee award.

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, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Employer contends that Thomas E. Johnson and Anne Megan Davis, claimant's co-counsel, failed to provide adequate proof of their respective customary billing rates. An application seeking a fee for services performed on behalf of a claimant must indicate the customary billing rate of each person performing the services. 20 C.F.R. §725.366(a).[13] 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).

[13]The Department of Labor made only technical changes to 20 C.F.R. §725.366. *See* 65 Fed. Reg. 79,925 (2000).

The administrative law judge found that the $205.00 hourly rates requested by Mr. Johnson and Ms. Davis were reasonable. Supplemental Decision and Order at 4. Contrary to employer's contention, Mr. Johnson and Ms. Davis provided adequate proof of their customary billing rates.[14] Employer, however, also argues that the fees requested by Mr. Johnson and Ms. Davis include an improper premium for the contingent nature of the requested fee. In determining the amount of attorney's fees to award under a fee-shifting statute, a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. This sum constitutes the "lodestar" amount. *See Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). The United States Supreme Court has held that fee-shifting statutes do not permit enhancement of a fee award beyond the lodestar amount to reflect the fact that a party's attorneys were retained on a contingent-fee basis.[15] *See City of Burlington*

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[14]In his fee application, Mr. Johnson stated that:

> The customary contingent billing rate for black lung work performed by Ms. Davis and myself is now $205/hour. This is based on our substantial legal experience (25 and 26 years respectively) and our other qualifications and experience, as set forth in our curriculum vitae, attached hereto as Exhibits A and B respectively. Further, we have been awarded even higher contingent rates, as long as two years ago. Many of our regular non-contingent hourly rates are also higher. Counsel's rate is substantially below the average and median rates for equity partners nationally.

Fee Application at 9-10 (case citations omitted).

In a letter dated December 14, 2001, Mr. Johnson explained that the requested $205.00 hourly rate in black lung cases was below the hourly rate that his firm charged private clients. Mr. Johnson further noted that the fee petition made clear that the requested hourly rate was below that which his firm had been awarded in "other fee-shifting cases." Mr. Johnson also noted that, on December 13, 2001, he had been retained by the parties in a commercial dispute to serve as a mediator at a rate of $200.00 per hour. Mr. Johnson characterized this work as "far less time-consuming or complicated than black lung litigation." As to Ms. Davis' hourly rate, Mr. Johnson stated that Ms. Davis was "an extraordinarily talented and experienced black lung litigator" who had prevailed in many recent black lung cases.

[15]The Supreme Court explained that the lodestar amount incorporates any compensable risk of loss as it is reflected in the increased amount of hours expended to

v. Dague, 112 S.Ct. 2638 (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).

After noting that the customary billing rate for black lung work performed by Ms. Davis and himself was $205.00 per hour, Mr. Johnson noted that they had been awarded "even higher contingent rates" and that many of their "regular non-contingent hourly rates [were] also higher." Fee Application at 9. Mr. Johnson also referenced previous hourly rates received for "black lung contingent work." *Id.* at 10. The administrative law judge did not address whether these statements establish that the requested attorney fee reflected hourly rates adjusted to account for the contingent nature of the fee. Such fees would be excessive and in violation of the principles set out in *City of Burlington* and *Broyles*. Consequently, we remand the case to the administrative law judge to address whether the $205.00 hourly rate requested by Mr. Johnson and Ms. Davis was improperly adjusted to account for the contingent nature of the fee.

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overcome the difficulty of winning or in the higher hourly fee of the more skilled attorney needed to win the case. *City of Burlington v. Dague*, 112 S.Ct. 2638, 2641 (1992).

Employer also contends that paralegal Paul Siegel failed to provide adequate proof of his customary hourly rate.[16] In his fee application, claimant's counsel stated that:

> An hourly rate of $100 is appropriate for paralegal Paul Siegel. Mr. Siegel has worked on black lung matters since 1976 and has a profound knowledge of both the medical and regulatory aspects of black lung claims. He has been Executive Director of the Chicago Area Black Lung Association and also has been actively involved in developing black lung policy, including legislation and regulations, for 23 years. He is a candidate for a Ph.D. in American labor history at the University of Illinois - Chicago.

Fee Application at 11-12 (citation omitted).

In a letter dated December 14, 2001, claimant's counsel responded to employer's argument that Mr. Siegel had not provided his customary hourly rate. Claimant's counsel noted that in addition to his black lung work for the firm, Mr. Siegel spends a considerable amount of time reviewing Chicago Police Board files relating to the suspension of police officers, receiving $100.00 per hour for this work. Claimant's counsel, therefore, contended that $100.00 per hour constituted Mr. Siegel's market rate.

In addressing employer's objection to Mr. Siegel's requested hourly rate, the administrative law judge stated that:

> Employer....objects to the hourly rate of Mr. Siegel, Claimant's counsel's paralegal. Mr. Siegel's stated hourly rate is $100.00 per hour. Employer argues that Mr. Siegel's hourly rate is not expressed in terms of customary billing rate, and that $100.00 per hour is excessive. Claimant's counsel responds that Mr. Siegel receives $100.00 per hour from the Chicago Police Board when reviewing suspension issues. Additionally, Mr. Siegel possesses an impressive resume which includes being involved in black lung claims since 1976. Mr. Siegel is also the Executive Director of the Chicago Area Black Lung Association which has given Mr. Siegel experience in developing black lung policy for approximately 23 years.
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> In light of the foregoing, I find that Mr. Siegel's experience warrants an

[16]The services of a paralegal are compensable pursuant to the Section 725.366(a). *Cox v. Director, OWCP*, 7 BLR 1-810 (1985).

hourly rate of $100.00.

Supplemental Decision and Order at 4.

Employer contends that the fact that Mr. Siegel receives $100.00 per hour from the Chicago Police Board when reviewing suspension issues "hardly translates to a customary billing rate." Employer's Brief at 5. We agree. Claimant's counsel has not provided any specific information regarding Mr. Siegel's customary billing rate for his paralegal services. Consequently, we remand the case to the administrative law judge for further consideration of Mr. Siegel's customary billing rate for his paralegal services.

Employer also argues that the amount of time expended by the paralegal (Mr. Siegel) in the performance of his services was excessive and unreasonable. The test for determining whether the paralegal's work was necessary in this case is whether claimant's counsel, at the time he had the paralegal perform the work in question, could have reasonably regarded the work as necessary to establish entitlement to benefits. *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). Once a service has been found to be compensable, the adjudicating officer must decide whether the amount of time expended by the paralegal in the performance of the service is excessive or unreasonable. *Id.*

Employer objects to the 2.50 hours spent by the paralegal on January 20, 2000. The fee petition indicates that the paralegal spent a total of 2.50 hours on January 20, 2000 reviewing the file, identifying and copying all the medical evidence, calling Dr. Cohen, and sending Dr. Cohen the documents. Fee Petition at 2. Employer argues that it should not take 2.50 hours for a paralegal to accomplish these tasks. Employer also notes that copying documents constitutes a clerical task not justifying a rate of $100.00 per hour. The administrative law judge, without elaboration, found that the time spent on January 20, 2000 was reasonable and necessary for the successful prosecution of the claim. Supplemental Decision and Order at 8. The administrative law judge also found that the time spent on these activities was not unreasonable or excessive. *Id.*

The Board has held that clerical services are considered part of overhead expenses and are figured into the hourly rate. *See Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). Consequently, the administrative law judge erred in allowing compensation for the time spent by the paralegal copying documents. On remand, the administrative law judge is instructed to reconsider what portion of the 2.50 hours spent by the paralegal on January 20, 2000 performing services is compensable.

Employer objects to the 3.00 hours spent by the paralegal on February 8, 2000. The fee petition indicates that the paralegal spent a total of 3.00 hours on February 8, 2000 performing the following services:

> Phone conf. w/Dr. Ulrich and T. Johnson; assisted w/telephone deposition of Dr. Ulrich; letter to Dr. Ulrich re: finding documentation re: O2 saturation; identified, copied and organized all medical evidence for Dr. Kahn and mailed w/ cover letter.

Fee Petition at 3.

Employer argues that the paralegal's time spent on February 8, 2000 assisting with Dr. Ulrich's deposition was duplicative and unnecessary because claimant's counsel billed for his services during the same deposition. We find it reasonable for a paralegal to assist an attorney during a deposition. *But see Simmons v. Director, OWCP*, 7 BLR 1-175 (1984) (In order for co-counsel to be compensated, counsel must demonstrate that their association was necessary). However, the fee application indicates that a part of the 3.00 hours of services performed on February 8, 2002 involved the copying of medical evidence. Such clerical work is not compensable. *See Whitaker, supra*. Consequently, the administrative law judge erred in allowing compensation for the time spent by the paralegal copying documents. On remand, the administrative law judge must reconsider what part of the 3.00 hours spent by the paralegal on February 8, 2000 performing services is compensable.

Employer also objects to the 2.00 hours spent by the paralegal on April 3, 2001. The fee petition indicates that the paralegal spent a total of 2.00 hours organizing a file, identifying and sorting medical evidence; and drafting a memorandum summarizing the medical evidence and setting out options for further development. The administrative law judge, without elaboration, found that the time spent on April 3, 2001 was reasonable and necessary for the successful prosecution of the claim. Supplemental Decision and Order at 8. The administrative law judge also found that the time spent on these activities was not unreasonable or excessive. *Id.* Employer argues that it should not take a paralegal 2.00 hours to organize a file. Time spent organizing a file is clerical in nature. *See Whitaker, supra*. Consequently, it should be considered part of overhead expenses and figured into the hourly rate. *Id.* On remand, the administrative law judge must reconsider what part of the 2.00 hours spent by the paralegal on April 3, 2001 performing services is compensable.

Employer also objects to the administrative law judge's award of compensation for the paralegal's time spent "tabbing" documents on May 14, 2001. The tabbing of documents appears to be clerical in nature. *See Whitaker, supra*. Consequently, it should be considered part of overhead expenses and figured into the hourly rate. *Id.* We, therefore, remand the case to the administrative law judge to reconsider what part of the 5.50 hours spent by the paralegal on May 14, 2001 was spent "tabbing" documents and should, therefore, be disallowed.

Employer also objects to the 4.50 hours spent by the paralegal on May 15, 2001. The

fee petition indicates that the paralegal spent a total of 4.50 hours on May 15, 2001 performing the following services:

> Correction to summary, emailed to Dr. Guariglia; called Dr. Guariglia and left voice mail; phone conf. w/Dr. Cohen; called S. Anaya at Cook County Hospital re: deadline; phone conf. w/Dr. Guariglia; made additions, changes to summary/analysis, emailed to Dr. Guariglia; met w/A. Davis re: status of Dr. Guariglia opinion; phone conf. w/Cook County Hospital re: problem with deadline; met w/T. Johnson; gathered claimant exhibits in our possession; copied exhibits, did memo to T. Johnson re: claimant exhibits in and those anticipated to come in, and procedures for submitting.

Fee Petition at 7.

The administrative law judge, without elaboration, found that the time spent on May 15, 2001 was reasonable and necessary for the successful prosecution of the claim. Supplemental Decision and Order at 8. The administrative law judge also found that the time spent on these activities was not unreasonable or excessive. *Id.* Employer contends that it should not have taken 4.50 hours for a paralegal to perform the services on May 15, 2001. The majority of the time spent by the paralegal on May 15, 2001 does not appear unreasonable or excessive. However, part of the services provided involved the copying of documents, a task properly included as overhead expenses. *See Whitaker*, *supra*. Consequently, we remand the case to the administrative law judge to reconsider what part of the 4.50 hours spent by the paralegal on May 15, 2001 was spent copying documents and is, therefore, not compensable.

Employer finally objects to the 1.00 hour spent by the paralegal on October 1, 2001. The paralegal spent 1.00 hour on October 1, 2001 reviewing the administrative law judge's Decision and Order and conducting a phone conference with claimant regarding interim benefits and appeal procedures. Fee Petition at 8. The administrative law judge found that the time spent on October 1, 2001 was reasonable and necessary for the successful prosecution of the claim. Supplemental Decision and Order at 8. The administrative law judge also found that the time spent on these activities was not unreasonable or excessive. *Id.* Employer contends that because claimant's counsel had already reviewed the administrative law judge's Decision and Order on September 28, 2001, it was not necessary for the paralegal to review the decision. An adjudication officer may not disallow all time spent by counsel advising his client as to the status of his claim. *Lanning*, *supra*. Inasmuch as it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's finding that the paralegal was entitled to compensation for 1.00 hour of services performed on October 1, 2001.

Employer next argues that the administrative law judge erred in allowing claimant's counsel to recover an "additional fee" of $418.75 for Dr. Kahn's expenses. In support of his fee petition, claimant's counsel submitted copies of three checks paid to Dr. Kahn in the amounts of $550.00, $600.00 and $418.75. The fee petition indicates that Dr. Kahn was paid $600.00 for the preparation of his initial report and $550.00 for his time spent preparing for a December 20, 2000 deposition. The fee petition also includes a request for reimbursement of $418.75 in additional fees paid to Dr. Kahn on November 13, 2000. The administrative law judge found that the additional fee of $418.75 was reasonable and that the total fee of $1,018.75 charged by Dr. Kahn for his services was reasonable and reimbursable. Supplemental Decision and Order at 3.

Employer argues that because the additional fees of $418.75 sought for Dr. Kahn's services are unexplained, they are not a reasonable expense. We agree. Claimant's counsel failed to submit any documentation, other than a copy of a check, to justify the additional payment of $415.75 to Dr. Kahn on November 13, 2000. The administrative law judge awarded claimant's counsel $600.00 in expenses for Dr. Kahn's August 7, 2000 report. The administrative law judge also awarded claimant's counsel $550.00 for expenses related to the preparation of Dr. Kahn for his deposition testimony. However, inasmuch as there is no documentation underlying claimant's counsel's request for $418.75 in additional expenses regarding Dr. Kahn's expert services, this expense is disallowed.

Employer also objects to the administrative law judge's award of $1,470.00 in expenses for Dr. Guariglia's medical opinion. Considering the issues presented and the voluminous evidence to be considered, the administrative law judge found that Dr. Guariglia's expenses of $1,470.00 were reasonable. Supplemental Decision and Order at 3. Inasmuch as it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's finding that claimant's counsel is entitled to $1,470.00 in expenses regarding Dr. Guariglia's opinion.

Employer finally argues that the administrative law judge erred in awarding claimant's counsel $512.00 for his time spent litigating the merits of his fee petition. Claimant's counsel sought $512.50 for the two and on-half hours that he spent responding to employer's objections to the fee petition. The Board has held that an attorney should not be deprived of a fee for time spent successfully defending his fee. *See Workman v. Director, OWCP*, 6 BLR 1-1281 (1984). The regulations, however, provide that "[n]o fee approved shall include payment for time spent in preparation of a fee application." 20 C.F.R. §725.366(b). The administrative law judge approved the additional 2.50 hours sought by claimant's counsel in the defense of his fee petition, noting that there was no indication that claimant's counsel had improperly included any time spent preparing the fee application. Supplemental Decision and Order at 8. Inasmuch as it is not arbitrary, capricious, or an abuse of discretion, we affirm the administrative law judge's finding that claimant's counsel is entitled to

compensation for the 2.50 hours that he spent defending the merits of his fee application.[17]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring in part and dissenting in part:

I concur in Administrative Appeals Judge Roy P. Smith's opinion regarding the attorney fee petition and I concur in the majority opinion regarding the merits of the case except insofar as the majority holds that the administrative law judge did not adequately analyze the opinions of Drs. Kahn, Guariglia, Green and Cohen, citing pages 30-31 of his decision. I dissent from the majority's determination to vacate the administrative law judge's discussion of these opinions.

The majority overlooks the administrative law judge's exhaustive discussion of each doctor's opinion earlier in his decision: Dr. Kahn, pages 5-8; Dr. Guariglia, page 19; Dr. Green, pages 17-19; and Dr. Cohen, pages 23-24. The administrative law judge set forth their credentials, the various medical records they reviewed, their knowledge of the miner's employment and smoking histories, the stated bases of their opinions, their analyses of the miner's condition in light of their knowledge of current medical research, and in each case, how the doctor reasonably concluded that the miner's pneumoconiosis hastened his death.

[17]We note that an attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim. *Coleman v. Ramey Coal Co*., 18 BLR 1-9, 1-17 (1995).

Having fully discussed each doctor's conclusion once, the administrative law judge was not required to repeat himself. Accordingly, I would affirm the administrative law judge's consideration of these opinions.

REGINA C. McGRANERY
Administrative Appeals Judge

HALL, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to remand the case to the administrative law judge to address whether the hourly rates requested by Thomas E. Johnson and Anne Megan Davis were improperly adjusted to account for the contingent nature of the fee. Inasmuch as it is not arbitrary, capricious, or an abuse of discretion, I would affirm the administrative law judge's finding that claimant's co-counsel, Mr. Johnson and Ms. Davis, are entitled to an hourly rate of $205.00.

I concur in all other respects in the majority opinion.

BETTY JEAN HALL
Administrative Appeals Judge