

BRB No. 03-0164 BLA

MARTHA G. HERRON	)	
(Widow of RAYMOND HERRON)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/31/2003
	)	
ELM GROVE COAL COMPANY	)	
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Mary Zanolli Natkin (Washington & Lee University Legal Clinic), Lexington, Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (01-BLA-0733) of Administrative Law Judge Robert J. Lesnick 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).<sup>1</sup> Employer also appeals the administrative law judge's Supplemental Decision and Order Granting Attorney's Fees. The administrative law judge credited the miner with at least nineteen years of coal mine employment and adjudicated this survivor's claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). He further found the evidence 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 challenges the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer also challenges the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant<sup>2</sup> responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

With regard to attorney's fees, the administrative law judge awarded claimant's counsel a fee of \$16,188.95 for 42.2 hours of legal services at an hourly rate of \$200.00, and

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<sup>1</sup>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 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.

<sup>2</sup>Claimant is the widow of the miner, Raymond Herron, who died on February 1, 2000. Director's Exhibits 1, 10. The miner filed a claim on March 29, 1977. Director's Exhibit 26. This claim was denied by the Department of Labor on September 27, 1982. *Id.* The miner filed another claim on August 22, 1983. *Id.* On August 8, 1991, Administrative Law Judge George P. Morin issued a Decision and Order awarding benefits, *id.*, which the Board affirmed, *Herron v. Elm Grove Coal Co.*, BRB No. 91-2073 BLA (Mar. 22, 1993)(unpub.). The Board subsequently granted employer's request for reconsideration, but denied the relief requested. *Herron v. Elm Grove Coal Co.*, BRB No. 91-2073 BLA (July 15, 1993)(Order on Motion for Reconsideration)(unpub.). Claimant filed a survivor's claim on February 24, 2000. Director's Exhibit 1.

for \$7,748.95 incurred in costs.<sup>3</sup> On appeal, employer contends that the administrative law judge erred in finding that claimant's counsel are entitled to an hourly rate of \$200.00 for legal services performed before the administrative law judge. Employer also contends that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Lastly, employer contends that the administrative law judge erred in finding that the costs for Dr. Koenig's opinion and a copy of Dr. Perper's deposition transcript are reasonable. Claimant's counsel respond, urging affirmance of the administrative law judge's award of attorney's fees.<sup>4</sup>

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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).

First, employer challenges the administrative law judge's award of benefits under 20 C.F.R. Part 718. Benefits are payable on a survivor's claim filed on or after January 1, 1982 only when the miner's death was due to pneumoconiosis.<sup>5</sup> See 20 C.F.R. §§718.1,

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<sup>3</sup>Claimant's counsel filed a Petition for Fees and Costs on November 21, 2002 for work performed before the administrative law judge from June 20, 2001 to November 21, 2002 at an hourly rate of \$200.00, and for costs incurred from November 19, 2001 to July 18, 2002.

<sup>4</sup>Employer filed a brief in reply to claimant's counsel's response brief that reiterates employer's assertions regarding the hourly rate, the number of hours that claimant's counsel claimed for legal services, and the costs for Dr. Koenig's opinion and a copy of Dr. Perper's deposition transcript.

<sup>5</sup>Section 718.205(c) provides, in pertinent part, that death will be considered to be due to pneumoconiosis if any of the following criteria is met:

- (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.

718.205(c); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). However, before any finding of entitlement can be made in a survivor's claim, a claimant must establish the existence of pneumoconiosis. See 20 C.F.R. §718.202(a)(1)-(4); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). A claimant must also establish that the miner's pneumoconiosis arose out of coal mine employment.<sup>6</sup> See 20 C.F.R. §718.203; *Boyd*, 11 BLR at 1-40-41.

Employer initially contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer's contention has merit. The record consists of reports by Drs. Altmeyer, Branscomb, DelVecchio, Fino, Garson, Hersey, Koenig, Levine, Perper, Reddy, Saludes and Templeton.<sup>7</sup> Whereas Drs. Altmeyer, Branscomb and Fino opined that the miner did not suffer from pneumoconiosis, Director's Exhibit 26; Employer's Exhibits 1, 4-6, 9, 12-14, 22, 23, 28-30, Drs. DelVecchio, Hersey, Koenig, Levine, Perper and Templeton opined that the miner suffered from pneumoconiosis, Director's Exhibit 26; Claimant's Exhibits 10, 11; Employer's Exhibits 8 at 15, 33, 31 at 93. Dr. Saludes opined that the miner suffered from black lung disease. Director's Exhibits 8, 10. Similarly, Dr. Garson opined that the miner

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(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).

<sup>6</sup>After noting employer's objection to application of the amended regulations, the administrative law judge stated that "it is noted that the application of certain regulations would be impermissibly retroactive pursuant to *National Mining Association v. Dep't of Labor*, 292 F.3d 849 (D.C. Cir. 2002)." Decision and Order at 4 n.2. However, the administrative law judge also stated, "where appropriate, I have reviewed this claim under both the pre-amendment regulations and the 2000 amendments." *Id.* The administrative law judge further stated, "I have determined that the resolution of this case, stated below, would be identical under either standard." *Id.* In light of our disposition of this case, we hold that any error by the administrative law judge in failing to apply the amended regulations at 20 C.F.R. §§718.202(a) and 718.205(c) is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

<sup>7</sup>In a report dated August 10, 1977, Dr. Paal opined that the miner's severe disabling chronic obstructive lung disease was not related to coal dust exposure. Director's Exhibit 26. However, the administrative law judge did not consider Dr. Paal's opinion in weighing the conflicting medical opinion evidence at 20 C.F.R. §718.202(a)(4).

suffered from a chronic obstructive pulmonary disease that was industrially related. Director's Exhibits 26, 49. Based on his reliance on the opinions of Drs. Hersey, Koenig Perper and Templeton, the administrative law judge found the existence of pneumoconiosis established at 20 C.F.R. §718.202(a)(4).<sup>8</sup>

Employer specifically asserts that the administrative law judge erred in according greater weight to the opinions of Drs. Hersey and Templeton based on their status as treating physicians. In finding that Drs. Hersey and Templeton had superior knowledge of the miner's condition based on their treatment of him, the administrative law judge indicated that he considered the length of time of the relationships between the physicians and the miner and the number of examinations performed by the physicians on the miner.<sup>9</sup> Decision and Order at 30. The administrative law judge therefore stated:

Based on their years of treatment and consistency in their reports, I believe the treating physicians are entitled to greater weight. In addition, I accord greater weight to Dr. Hersey because of the length of his physician-patient relationship, the numerous office visits with [the miner], and his background and education in medicine and physiological biochemistry, especially his knowledge of the effect of lung diseases on the body and the connection between the structure and function of the body's organs.

*Id.* at 28.

The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recognized that the opinions of treating and examining physicians deserve special consideration. *Grizzle v. Pickands Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993). However, the court has held that there is no rule that a treating or examining physician must be accorded greater weight than the opinions of other physicians. *Id.*; *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997).

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<sup>8</sup>Employer asserts that Dr. Perper's opinion that coal workers' pneumoconiosis is always a progressive disease is hostile to the Act. Contrary to employer's assertion, Dr. Perper's opinion does not contravene the statutory and regulatory definition of pneumoconiosis. Section 718.201(c) provides that "'pneumoconiosis' is recognized as a latent and progressive disease." 20 C.F.R. §718.201(c).

<sup>9</sup>The administrative law judge stated that Dr. Templeton became the miner's treating physician in 1981 and that Dr. Hersey became the miner's treating physician in 1993. Decision and Order at 27. The administrative law judge also stated that "[s]ince 1993, Dr. Hersey had approximately 40 office visits with [the miner]." *Id.*

In *Akers*, the administrative law judge concluded that claimant established that pneumoconiosis contributed to the miner's death based on the testimony of Drs. Bembalkar and Hamdan, who had examined or treated the miner for only a month. The administrative law judge credited the testimony of Drs. Bembalkar and Hamdan over the testimony of all other doctors for no reason except that Drs. Bembalkar and Hamdan treated the miner. The Fourth Circuit observed that in reaching his conclusion, the administrative law judge ignored entirely the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. Hence, the court held that contrary to the Fourth Circuit's precedent, the administrative law judge's invocation of a rule of absolute deference to treating and examining physicians relieved the administrative law judge of his statutory obligation to consider all of the relevant evidence of record. *Akers*, 131 F.3d at 441, 21 BLR at 2-275-2-276.

As previously noted, in the instant case, the administrative law judge indicated that he considered the duration of the relationships between the physicians and the miner and the number of examinations performed by the physicians on the miner. Decision and Order at 30. However, the administrative law judge did not specifically note the nature of the relationship between Dr. Templeton and the miner. The administrative law judge merely noted that "Dr. ... Templeton became [the miner's] treating physician in 1981."<sup>10</sup> *Id.* at 27. Further, although the administrative law judge considered the nature of Dr. Hersey's relationship with the miner, he did not adequately explain why he found that the opinion of Dr. Hersey outweighed the contrary opinions based on Dr. Hersey's relationship with the miner. The record does not indicate that Dr. Hersey treated the miner's pulmonary condition.<sup>11</sup> In his consideration of Dr. Hersey's opinion, the administrative law judge noted:

Dr. Hersey stated that his initial goal was to control [the miner's] diabetes. He further stated that he accepted [the miner's] statement that he suffered from black lung, without initially making his own determination. Dr. Hersey noted that he deferred to qualified pulmonologists to make such determinations. Moreover, Dr. Hersey also noted that he found evidence of lung disease during his years of examinations of [the miner].

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<sup>10</sup>Dr. Templeton's credentials are not in the record.

<sup>11</sup>The administrative law judge noted that "Dr. Hersey was Board-certified in family practice, until he let his certification lapse in 1998, for his anticipated retirement." Decision and Order at 27. The administrative law judge additionally noted that "Dr. Hersey also has a Master's Degree and Ph.D. in physiological biochemistry." *Id.*

Dr. Hersey, however, did show some confusion during his deposition about whether inhaling coal mine dust caused a restrictive or obstructive impairment. He further admitted that he was not a Board-certified pulmonologist. Dr. Hersey stated that he felt capable of disagreeing with a pulmonologist's findings, such as those of Dr. Altmeyer, because Dr. Altmeyer based his opinion largely on numbers. While Dr. Hersey relied on those same numbers, he also relied on his years of examinations with [the miner], as well as his knowledge of the structure and function of the body.

*Id.* at 27-28. Unlike Dr. Hersey, Drs. Altmeyer and Fino are Board-certified in internal medicine, with a subspecialty in pulmonary disease. Employer's Exhibits 2, 5. Similarly, Dr. Branscomb is Board-certified in internal medicine. Employer's Exhibits 5, 7. The administrative law judge did not explain why he found that Dr. Hersey's examinations of the miner and his knowledge of the structure and function of the body entitled his opinion to greater weight than the contrary opinions of record by qualified pulmonologists. *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). Therefore, we vacate the administrative law judge's finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand the case for further consideration.

Citing *Hicks*, employer also argues that the administrative law judge erred in according less weight to consulting physicians at 20 C.F.R. §718.202(a)(4). The administrative law judge stated that "[t]here were four non-examining consulting physicians who reviewed the records in this case." Decision and Order at 30. In considering the non-examining physicians' opinions, the administrative law judge also stated:

Generally, an administrative law judge may accord less weight to a consulting physician's opinion because he does not have first-hand knowledge of the miner's condition. *Bogan v. Consolidation Coal Co.*, 6 B.L.R. 1-1000 (1984). However, a non-examining physician's opinion may constitute substantial evidence if it is corroborated by the opinion of an examining physician or by the evidence considered as a whole. *Newland v. Consolidation Coal Co.*, 6 B.L.R. 1-1286 (1984).

*Id.*

In *Hicks*, the Fourth Circuit noted that the administrative law judge completely disregarded the opinions of Drs. Fino and Sobieski, despite the fact that he found their opinions to be "of high quality," simply because they did not examine Hicks. The court also noted that the administrative law judge relied exclusively on the reports of two examining physicians, Drs. Rasmussen and Zaldivar. Citing *Akers*, the court noted its prior declaration that an administrative law judge should not mechanistically credit, to the exclusion of all other testimony, the testimony of an examining or treating physician solely because the

doctor personally examined the claimant. Thus, the court held that the administrative law judge erred in considering the opinions of Drs. Rasmussen and Zaldivar to the exclusion of all the other competent medical opinion evidence.

In the instant case, however, the administrative law judge did not accord absolute deference to the opinions of the examining physicians to the exclusion of the opinions of the non-examining physicians. To the contrary, the administrative law judge accorded greater weight to the opinions of Drs. Koenig and Perper, non-examining physicians, than to the contrary opinion of Dr. Altmeyer, an examining physician. Thus, we reject employer's specific assertion that the administrative law judge erred in according less weight to claimant's consulting physicians.

Employer additionally asserts that the administrative law judge erred in failing to explain why he accorded greater weight to the opinions of Drs. Perper and Koenig than to the contrary opinions of Drs. Branscomb and Fino. Dr. Koenig opined that "[c]oal dust exposure, without the presence of radiographically evident simple or complicated coal workers' pneumoconiosis, caused [the miner's] COPD." Claimant's Exhibit 11. Similarly, Dr. Perper opined that "[the miner] had evidence [of] chronic pulmonary disease with centrilobular emphysema, and mixed restrictive and obstructive pulmonary impairment, as [a] result of exposure to coal mine dust." Claimant's Exhibit 10. In contrast, Dr. Branscomb opined that the miner did not suffer from pneumoconiosis and that "there is no impairment caused or aggravated by coal dust exposure." Employer's Exhibits 5, 6. Dr. Fino also opined that the miner did not suffer from pneumoconiosis and that there is no objective evidence to make a diagnosis of a lung disease induced by coal mine dust. Employer's Exhibit 9 at 39. The administrative law judge properly accorded greater weight to the opinions of Drs. Koenig and Perper than to the contrary opinions of Drs. Branscomb and Fino because he found that the former are better documented and reasoned. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). In considering the opinions of Drs. Koenig and Perper, the administrative law judge stated that "[t]heir reports better documented the factors they considered, were based on and supported by the objective medical tests, and cited to a substantial amount of medical literature." Decision and Order at 30. The administrative law judge noted that "Dr. Perper, in his reports and deposition, discussed the effects of coal mine dust exposure, the progression of pneumoconiosis, and the impact of COPD on a person." *Id.* at 29. Further, the administrative law judge noted that "Dr. Perper also cited to medical literature and studies to support his assertions." *Id.* In addition, the administrative law judge noted that "[a]fter reviewing the objective medical data and other physician's findings, Dr. Koenig concluded that [the miner] had an obstructive lung disease." *Id.* Moreover, the administrative law judge noted that "[Dr. Koenig] attributed the cause of this disease to COPD and asthma" and "[h]e then concluded that COPD was the more likely cause, in light of results from [the miner's] medical tests and medical literature." *Id.* Thus, we reject

employer's specific assertion that the administrative law judge erred in failing to explain why he accorded greater weight to the opinions of Drs. Perper and Koenig than to the contrary opinions of Drs. Branscomb and Fino.

On remand, in light of the foregoing, the administrative law judge must consider all of the relevant medical opinions at 20 C.F.R. §718.202(a)(4) and explain the bases for his findings and conclusions. *Wojtowicz*, 12 BLR at 1-165.

Employer additionally asserts that the administrative law judge erred in failing to weigh the conflicting evidence at 20 C.F.R. §718.202(a) in accordance with *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). After considering the evidence separately at 20 C.F.R. §718.202(a)(1)-(4), the administrative law judge indicated that he weighed together the conflicting evidence.<sup>12</sup> The administrative law judge stated:

Therefore, after considering all of the medical evidence together, I find that the [c]laimant has established the existence of pneumoconiosis.

Decision and Order at 31. In light of the aforementioned, we reject employer's specific assertion that the administrative law judge erred in failing to weigh the conflicting evidence at 20 C.F.R. §718.202(a) in accordance with *Compton*.

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer's contention has merit. The record consists of a death certificate<sup>13</sup> and reports by Drs. Altmeyer, Branscomb, Fino, Hersey, Koenig and Perper. In the death certificate dated March 8, 2000, the cause of the miner's death was noted as an acute myocardial infarction. Director's Exhibit 10. Whereas Drs. Altmeyer, Branscomb and Fino opined that pneumoconiosis did not contribute to the miner's death, Employer's Exhibits 1, 4-6, 9, 12-14, 22, 23, 28-30, Drs. Hersey, Koenig and Perper opined that pneumoconiosis contributed to the miner's death, Claimant's Exhibits 10-12; Employer's Exhibits 8, 31.

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<sup>12</sup>Although the administrative law judge found the evidence insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1)-(3), he found the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4).

<sup>13</sup>Although the death certificate indicates that Dr. Hersey was the physician who provided the cause of death, Dr. Hersey did not sign the death certificate. Director's Exhibit 10.

Consistent with 20 C.F.R. §718.205(c), the Fourth Circuit has adopted the standard whereby pneumoconiosis will be considered a substantially contributing cause of the miner's death if it actually hastened the miner's death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993).

In his consideration of the conflicting medical evidence in the instant case, the administrative law judge stated:

As noted above, I attribute more weight to the documented and well-reasoned opinions of Drs. Perper and Koenig. Moreover, while I may accord less weight to the death certificate, I find the opinion of Dr. Hersey enlightening, especially because of his knowledge and experience with [the miner]. Therefore, after weighing the evidence presented, I find that the competent medical evidence fails to establish that death was due to pneumoconiosis. However, based on the foregoing, I find that pneumoconiosis hastened [the miner's] death, and thus, was a substantially contributing factor.

Decision and Order at 33.

As employer argues, although the administrative law judge considered the opinions of Drs. Altmeyer, Fino, Hersey, Koenig and Perper at 20 C.F.R. §718.205(c), he failed to consider Drs. Branscomb's opinion thereunder. Dr. Branscomb opined that coal mine dust exposure did not contribute to the miner's death. Employer's Exhibits 5, 6, 12, 22, 29. While an administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must address and discuss all of the relevant evidence of record. *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966, 1-988 (1984). Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), and remand the case for further consideration. On remand, the administrative law judge must explain how he weighed the conflicting medical opinions. *Wojtowicz*, 12 BLR at 1-165.

With regard to the administrative law judge's award of attorney's fees, employer contends that the administrative law judge erred in finding that claimant's counsel are entitled to an hourly rate of \$200.00 for legal services that they performed before the administrative law judge. Specifically, employer asserts that claimant's counsel failed to provide any relevant documentation to indicate that the \$200.00 hourly rate requested by them is commensurate with either of their customary billing rates. Claimant's counsel are

Mary Zanolli Natkin and James M. Phemister,<sup>14</sup> professors at the Washington and Lee University School of Law Legal Practice Clinic.<sup>15</sup>

The United States Supreme Court has held that in determining the amount of attorney=s fees to award under a fee-shifting statute, a fact-finder must determine the lodestar amount, which is the number of hours reasonably expended in preparing and litigating the case times a reasonable hourly rate. *Pennsylvania v. Delaware Valley Citizens=Council for Clean Air*, 478 U.S. 546 (1986). The Court has also 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. *City of Burlington v. Dague*, 112 S.Ct. 2638 (1992); *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91 (1995).

The pertinent regulations provide that “[a]ny fee approved under...this section shall be reasonably commensurate with the necessary work done and 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 fee requested.” 20 C.F.R. §725.366(b). In considering the reasonableness of the requested hourly rate, the administrative law judge stated:

I take judicial notice of *The 2001 and 2002 Survey of Law Firm Economics*, published by Altman & Weil. The 2001 Executive Summary indicates an average national standard hourly billing rate for partners of \$246. The 2002 survey average is \$265. I also take judicial notice of signed affidavits from Washington and Lee University faculty members who perform outside legal work. The faculty members note non-contingent hourly rates that range from \$225 to \$335. Moreover, Ms. Natkin explained that the hourly rate presented here has been in effect since January 1, 2000. Accordingly, I consider counsel’s requested hourly rate of \$200.00 reasonable, considering the nature

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<sup>14</sup>Mary Zanolli Natkin has been the Director of the Washington and Lee University School of Law Legal Practice Clinic since 1990, and James M. Phemister has been a supervising attorney there since 1999.

<sup>15</sup>We reject employer’s assertion that the administrative law judge erred in failing to render an explicit finding that claimant’s counsel met her burden of demonstrating the necessity of association with co-counsel. Ms. Natkin and Mr. Phemister worked in the same legal clinic. *See generally Bates v. Director, OWCP*, 3 BLR 1-746.11 (1981).

of the issues involved and the degree of skill with which the [c]laimant was represented.

Supplemental Decision and Order at 2.<sup>16</sup> In support of her assertion that the hourly rate of \$200.00 has been in effect since January 2000,<sup>17</sup> claimant's counsel, Ms. Natkin, submitted copies of several decisions dated from April 2000 to October 2002, wherein claimant's counsel received an hourly rate of \$200.00 for legal services they performed.<sup>18</sup> In light of the aforementioned evidence, we reject employer's assertion that claimant's counsel failed to provide any relevant documentation to indicate that the \$200.00 hourly rate requested by them is commensurate with either of their customary billing rates. Therefore, we decline to disturb the administrative law judge's award of an hourly rate of \$200.00 for their legal services.

Employer also contends that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Specifically, employer asserts that the administrative law judge erred in allowing compensation to claimant's counsel for duplicative and unnecessary work. Employer's assertion is based on the premise that the request for a copy of Dr. Perper's deposition transcript from Everman & Associates by claimant's counsel, Mr. Phemister, on July 18, 2002 was duplicative and

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<sup>16</sup>Claimant's counsel stated that "[t]he customary rate range charged by faculty colleagues, \$230 to \$335 per hour, appeared to be higher than what the black lung bar was charging." Counsel's Statement Regarding Customary Hourly Rate at 2-3. Claimant's counsel also stated, "[w]e set our rate to be more in line with the black lung bar, rather than set it at the market rate for our services." *Id.* at 3.

<sup>17</sup>Claimant's counsel stated that "[n]o other attorneys in this locality represent claimants in black lung cases, which is why the Clinic began accepting these cases in August 1996." Counsel's Statement Regarding Customary Hourly Rate at 1. Claimant's counsel further stated that "[a]ttorneys will not accept black lung cases because they do not want to take the time to develop the necessary expertise and because black lung cases do not generate enough in fees to justify accepting them." *Id.* at 1-2.

<sup>18</sup>The decisions submitted by claimant's counsel are as follows: *Hunter v. Royal Coal Co.*, Case No. 1999-BLA-0566 (Apr. 19, 2000); *Floyd v. Bethenergy Mines*, Case No. 1998-BLA-1098 (July 13, 2000); *Ellison v. Lady H Coal Co.*, Case No. 1999-BLA-0911 (Oct. 20, 2000); *Warren v. Director, OWCP*, Case No. 1999-BLA-0700 (Nov. 29, 2000); *Meredith v. Director, OWCP*, Case No. 2001-BLA-0036 (Oct. 9, 2001); *Goscinski v. Terry Eagle Coal Co.*, Case No. 2000-BLA-1100 (Nov. 6, 2001); *Ray v. Midland Coal Co.*, Case No. 1999-BLA-1204 (Oct. 16, 2002).

unnecessary since employer sent him the same document the following business day.<sup>19</sup> The administrative law judge stated:

Regarding the claim of a duplicative entry, Ms. Natkin contends that co-counsel took the lead on this case for approximately one month. During that time, he reviewed the deposition transcript in order to determine whether or not to develop additional responsive evidence.

Supplemental Decision and Order at 2. After considering the basis for claimant's counsel's decision to read Dr. Perper's deposition transcript twice, the administrative law judge stated:

During Ms. Natkin's leave, ...[Mr.] Phemister completed several tasks for this case, including two reviews of Dr. Perper's deposition. First, because this transcript came from two separate sources, it is not unreasonable for Mr. Phemister to review both documents for accuracy. Secondly, I find Ms. Natkin's explanation reasonable; in order to make a decision regarding the case (*i.e.*, whether or not to obtain further responsive evidence), Mr. Phemister reviewed the document twice. I find such action appropriate, especially considering the size of the case file and the amount of technical medical evidence.

*Id.* at 3. Since the administrative law judge implicitly found that claimant's counsel's review of Dr. Perper's deposition transcripts was reasonably necessary to establish entitlement to benefits by allowing it, we decline to hold that the administrative law judge abused his discretion in allowing compensation to claimant's counsel for this work. *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

Employer additionally asserts that the administrative law judge erred in allowing compensation to claimant's counsel for reviewing the work of students.<sup>20</sup> With regard to

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<sup>19</sup>The Petition for Fees and Costs indicates that claimant's counsel spent 0.1 hours ordering a copy of Dr. Perper's deposition transcript from Everman & Associates on July 18, 2002 and 0.6 hours receiving and reviewing it on July 19, 2002. Petition for Fees and Costs at 18. The Petition for Fees and Costs also indicates that claimant's counsel spent 0.7 hours receiving and reviewing a copy of Dr. Perper's deposition transcript from employer on July 24, 2002. *Id.* at 19.

<sup>20</sup>The administrative law judge noted:

claimant's counsel's review of work prepared by students, the administrative law judge stated:

The 1.5 hours to review student work is reasonable considering the quantity of work generated and the amount of time spent researching and drafting memoranda, activities that were essential to representing the client. According to Ms. Natkin, these memoranda were used to discuss legal theories and strategy, or detail evidentiary development. Such uses are necessary and proper for representation of clients.

Supplemental Decision and Order at 3.<sup>21</sup> With regard to claimant's counsel's review of correspondence prepared by students, the administrative law judge stated:

Employer's counsel...challenges Ms. Natkin's time reviewing student correspondence. Ms. Natkin, however, correctly asserts that an attorney must review and edit a document before placing her signature on it.

*Id.* Since the administrative law judge implicitly found that claimant's counsel's review of the work and correspondence prepared by the students was reasonably necessary to establish entitlement to benefits by allowing it, we decline to hold that the administrative law judge abused his discretion in allowing compensation to claimant's counsel for this work. *Lanning*, 7 BLR at 1-316.

Further, employer asserts that the administrative law judge failed to provide an adequate explanation for compensating claimant's counsel for performing clerical tasks. Specifically, employer asserts that the administrative law judge erred in compensating claimant's counsel for time spent requesting and receiving copies of medical evidence and documents on October 22, 2001, October 30, 2001, and November 5, 2001, as well as time

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In prosecuting this claim, the clinic's students completed 49.40 hours of work. Students worked on this case nearly seven hours more than the attorneys; however, neither the [c]laimant nor the [e]mployer are charged for this work. If they were charged, the requested amount in fees requested would more than double.

Supplemental Decision and Order at 3; *see* Petition for Fees and Costs at 1-16.

<sup>21</sup>The administrative law judge noted that "Ms. Natkin states that clients are not billed for time spent teaching students; rather, only the time spent reviewing, revising and finalizing the student's draft into a finished document is billed." Supplemental Decision and Order at 2.

spent making calls to obtain x-ray readings. The Petition for Fees and Costs indicates that claimant's counsel spent 0.3 hours requesting medical records from Wheeling Hospital on October 22, 2001. Petition for Fees and Costs at 6. The Petition for Fees and Costs also indicates that claimant's counsel spent 0.1 hours receiving and reviewing a faxed copy of an administratrix certificate on October 30, 2001 and 0.1 hours receiving and reviewing a certified copy of an administratrix appointment and medical release from claimant's daughter on November 5, 2001. *Id.* at 19. With regard to claimant's counsel's request for x-ray readings, the administrative law judge stated:

Claimant's counsel made three telephone calls, all relating to X-ray readings or interpretations. The fourth challenged telephone call was one received from the Department of Labor regarding X-ray films. I find these telephone calls were made/received, and expenses incurred, while obtaining medical evidence, and thus, compensable.

Supplemental Decision and Order at 3. Since the administrative law judge implicitly found that the time spent by claimant's counsel requesting and reviewing this evidence was reasonably necessary to establish entitlement to benefits by allowing it, we decline to hold that the administrative law judge abused his discretion in allowing compensation to claimant's counsel for this work. *Lanning*, 7 BLR at 1-316.

Finally, employer contends that the administrative law judge erred in finding that the costs for Dr. Koenig's opinion and a copy of Dr. Perper's deposition transcript are reasonable. The Petition for Fees and Costs lists the cost of Dr. Perper's deposition transcript as \$319.45 and the cost of Dr. Koenig's opinion as \$3,475.00. Petition for Fees and Costs at 21. The administrative law judge stated:

Claimant's counsel argues that she ordered a copy of the deposition transcript while the record was still open in order to prepare post-deposition discovery, if necessary. Ms. Natkin further asserts that she did not have control over either Dr. Koenig's hourly rate, or the time he spent reviewing the data and writing his report.

Supplemental Decision and Order at 4. Based on his consideration of these expenses, the administrative law judge stated:

Ms. Natkin has provided sound legal reasoning for requesting and paying for a deposition transcript, even though the [e]mployer eventually provided one for the [c]laimant. Moreover, in representing her client, Ms. Natkin obtained medical experts who devoted time to this case and completed thorough reports. Employer's counsel is now asking this Court to limit the [c]laimant's ability to seek specific experts, based on their rates. It is not

proper for this Court to tell [c]laimants or [e]mployers which experts they can or cannot use. Each party has an opportunity to seek its experts and present its case. In this case, both sides did so, resulting in a verdict favorable to the [c]laimant. Based on the nature of the issues involved and the degree of skill with which the [c]laimant was represented, I find that the costs involved in obtaining a deposition transcript and Dr. Koenig's fee were reasonable.

Supplemental Decision and Order at 4. Since the administrative law judge implicitly found that the costs incurred by claimant's counsel were reasonably necessary to establish entitlement to benefits by allowing them, we decline to hold that the administrative law judge abused his discretion in allowing reimbursement to claimant's counsel for these costs. *Picinich v. Lockheed Shipbuilding*, 22 BRBS 128 (1989).

In light of the foregoing, we affirm the administrative law judge's award of attorney's fees.<sup>22</sup> *Abbott*, 13 BLR at 1-16; *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

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

SO ORDERED.

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NANCY S. DOLDER, Chief  
Administrative Appeals Judge

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<sup>22</sup>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).

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge