BRB No. 05-0973 BLA

ERNEST E. BALSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 09/27/2006
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits, Order Denying Claimant's Motion for Reconsideration, and the Decision and Order Granting Attorney Fees of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

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

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Allen H. Feldman, Associate Solicitor, Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (02-BLA-0140), the Order Denying Claimant's Motion for Reconsideration, and the Decision and Order Granting Attorney Fees of Administrative Law Judge Thomas F. Phalen, Jr., which were issued in the above-referenced claim, which was 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). Claimant filed a duplicate claim on November 1, 2000.[1] Director's Exhibit 1. In his Decision and Order – Award of Benefits dated January 20, 2005 (Decision and Order), the administrative law judge accepted the parties' stipulation that claimant worked for twelve years in coal mine employment, and he further found that the newly submitted evidence was sufficient to establish the existence of legal pneumoconiosis, and therefore also found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309.[2] Weighing all of the record evidence, the administrative law judge further determined that claimant was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On February 18, 2005, claimant filed a Motion for Additional Findings, wherein claimant asked the administrative law judge to alter language in his decision to clarify that he had not resolved the conflict in the medical opinion solely based on either the treating or examining status of the physicians. Employer filed an Opposition to Motion for Reconsideration on March 17, 2005. The administrative law judge subsequently issued an Order Denying Claimant's Motion for Reconsideration (Administrative Law Judge Order) on Aug. 30, 2005.[3]

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[1] Claimant filed his first claim for benefits on January 23, 1991, which was denied by the district director on July 12, 1991, and then the claim was administratively closed. Claimant next filed a claim on August 9, 1994. Director's Exhibit 32. The district director issued a decision denying benefits on August 8, 1995, finding that while claimant suffered from a totally disabling respiratory or pulmonary impairment, the evidence was insufficient to establish that claimant had coal workers' pneumoconiosis or that that he was totally disabled due to the disease. *Id.*

[2] The administrative law judge found that claimant established his total respiratory or pulmonary disability based on qualifying pulmonary function studies and a preponderance of the medical opinion evidence. We affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.204(b)(2)(i) and (iv) as they are unchallenged by the parties on appeal. *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983); Decision and Order at 10-11.

[3] The administrative law judge refused to alter the language of his original Decision and Order, noting that a treating physician's opinion, that is otherwise reasoned

Thereafter, on March 30, 2005, claimant's counsel, Christopher R. McFadden, filed a request for attorney fees. An additional attorney fee petition was also filed by co-counsel, Thomas E. Johnson, on April 18, 2005. Employer filed objections to the attorney fee requests on May 18, 2005. Claimant's counsel next filed a Combined Response in Support of Fees Petitions on June 23, 2005, which prompted employer to file a Combined Opposition to Claimant's Additional Request for Fees and Reply Brief on July 7, 2005. The administrative law judge subsequently issued a Decision and Order Granting Attorney Fees on December 6, 2005, which awarded Mr. Johnson the amount of $18,080.19, and Mr. McFadden the amount of $29,703.46 in payment for services and expenses incurred while the matter was pending before the Office of Administrative Law Judges.

On appeal, employer alleges that the administrative law judge improperly relieved claimant of his burden of proof because after "finding the narrative opinion evidence in equipoise, the administrative law judge based an award of benefits on a preference for the opinions of Drs. Mumma and Cohen, because they treated or examined [claimant]." Employer's Brief in Support of Petition for Review at 1. Employer maintains that the administrative law judge's misstated the law "when [he] claimed that an [administrative law judge] may give a treating doctor controlling weight as long as the doctor's opinion is reasoned and documented." Employer's Reply Brief at 5, *citing* the Administrative Law Judge Order at 5. Employer contends that the administrative law judge erred in finding that claimant established legal pneumoconiosis, and that his reliance on the status of the doctor constitutes legal error. Employer further challenges the weight accorded its medical experts relevant to whether claimant's obstructive respiratory impairment was due in part to coal dust exposure, asserting that the administrative law judge's findings fail to comport with the Administrative Procedure Act (APA).[4]

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and documented, may be credited based on consideration of the factors set forth at 20 C.F.R. §718.104(d). Order Denying Claimant's Motion for Reconsideration (Administrative Law Judge Order). Section 718.104(d) provides that the adjudication officer shall take into consideration the following factors in weighing the opinion of a treating physician: 1) Nature of relationship; 2) Duration of relationship; 3) Frequency of treatment; 4) Extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation further requires that the administrative law judge consider the treating physician's opinion "in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

[4] The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as

Employer has also filed a brief challenging the administrative law judge's award of attorney fees. Employer argues that the administrative law judge erred because he awarded an arbitrary hourly rate for attorney fees, and because he failed to discuss the specific challenges raised by employer with regard to the reasonableness of the amount of hours of work claimed, and the reasonableness of the expenses charged by claimant's counsel.

Claimant responds, urging the Board to affirm the administrative law judge's award of benefits and his award of attorney fees. The Director, Office of Workers' Compensation Programs (the Director), has also filed a brief. The Director agrees with employer that the administrative law judge erred in arbitrarily setting the hourly rate for attorney fees in this case. The Director, however, does not address the merits of claimant's entitlement to benefits. Employer has filed briefs in reply to the arguments advanced by both claimant and the Director in this appeal.

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

After consideration of the administrative law judge's Decision and Order, and the issues and arguments raised by the parties on appeal, we affirm, as supported by substantial evidence, the administrative law judge's award of benefits. However, the administrative law judge's attorney fee award with regard to the amount of the hourly rate is vacated and remanded for further consideration.

Merits of Entitlement:

In order to establish entitlement to benefits under Part 718 in a living miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that he or she is totally disabled due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to prove any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

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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 Caudill v. Arch of Kentucky, Inc.*, 22 BLR 1-97, 1-101 (2000) (*en banc*).

In this case, there were seven medical opinions considered by the administrative law judge with respect to the issues of legal pneumoconiosis and causation of disability. Of these seven physicians, Drs. Parker, Cohen, and Mumma agreed that claimant suffered from disabling, obstructive respiratory impairment due to a combination of smoking and coal dust exposure, while Drs. Altmeyer, Tuteur, Fino, and Renn attributed claimant's respiratory impairment either solely to smoking or a combination of factors unrelated to claimant's coal mine employment. In weighing the evidence, the administrative law judge first determined that, with the exception of Dr. Tuteur, all of the physicians' opinions were documented and reasoned.[5]

In weighing the six reasoned and conflicting opinions, the administrative law judge distinguished employer's expert, Dr. Altmeyer, and claimant's expert, Dr. Cohen, because they had personally examined claimant. The administrative law judge also acknowledged that Dr. Mumma was claimant's most recent treating physician. The administrative law judge determined that Dr. Cohen's opinion was entitled to greater weight than Dr. Altmeyer because, in addition to his examination, he reviewed more objective evidence than Dr. Altmeyer, and thus Dr. Cohen's opinion represented "a more comprehensive grasp on the totality of [c]laimant's condition at the time of the hearing." Decision and Order at 27. Although the administrative law judge recognized that Dr. Mumma was the only physician of record who was not Board-certified in pulmonary medicine, he nonetheless found that Dr. Mumma's opinion deserved deference since he had treated claimant for eighteen months for severe chronic obstructive pulmonary disease (COPD) and "his notes, in addition to his report, are replete with consistent, uncontested, notations concerning his pulmonary observations and comparisons that support a worsening condition caused by pneumoconiosis as well as other conditions." Decision and Order at 27. The administrative law judge also noted that Dr. Mumma's opinion was corroborated by the opinions of Dr. Cohen and Dr. Parker, both of whom were Board-certified in internal medical and pulmonary disease. *Id*. The administrative law judge further found Dr. Cohen's opinion to be more credible as to whether claimant suffered from asthma, and thus assigned less probative weight to Drs. Altmeyer, Renn and Fino, who had attributed claimant's objective respiratory impairment, in part, to that condition as opposed to coal dust exposure. The administrative law judge thus concluded

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[5] The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, s*ee Shupe v. Director*, 12 BLR 1-200 (1989) (*en banc*), has consistently held that the administrative law judge, as fact-finder, must examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the opinion is based, in determining whether the opinion is documented and reasoned. *See Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

that claimant established by a preponderance of the medical opinion evidence that he suffered from legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).

Employer challenges the administrative law judge's finding that claimant has legal pneumoconiosis, asserting that the administrative law judge's credibility determinations improperly favored examining and treating physicians, contrary to the law of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. Employer's arguments are rejected as without merit. In finding that claimant established the existence of legal pneumoconiosis, the administrative law judge permissibly assigned controlling weight to the opinions of Drs. Parker and Cohen based on their expertise in pulmonary medicine and because they provided convincing objective medical support for their conclusion that claimant's COPD was due in part to coal dust exposure, a medical diagnosis sufficient to support a finding of pneumoconiosis at Section 718.202(a)(4). *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000). Contrary to employer's assertion, the administrative law judge properly explained why he favored the opinion of Dr. Cohen over the opinions of Drs. Tuteur, Fino and Renn aside from the fact that Dr. Cohen had examined claimant. Although employer's experts attributed claimant's obstructive respiratory impairment in part to asthma, the administrative law judge permissibly found this diagnosis undermined by the explanation provided by both Drs. Cohen and Parker, that claimant's pulmonary function testing did not show a significant response to bronchodilator medication, and thus, the administrative law judge credited Dr. Cohen's opinion that asthma was not a plausible risk factor in the development of claimant's respiratory obstruction:

> I find Dr[s]. Parker and Cohen's conclusions concerning the absence of any evidence of asthma to be extremely convincing. They base their opinions, in part, on the fact that while [c]laimant's COPD progressed in severity over time, and while there were signs of bronchoreversibilty, there was only one occasion where this reversibility showed to be significant; and even in that instance, it never reversed to a level greater than severe. Thus, Drs. Cohen and Parker's opinions are supported by the objective test results, and I find them to be highly convincing.

Decision and Order at 28.

With respect to Dr. Mumma, we reject employer's interpretation of the administrative law judge's decision as assigning exclusive weight to Dr. Mumma's opinion based solely on his status as a treating physician. In this case, the administrative law judge noted that Dr. Mumma offered a reasoned and documented opinion as to the etiology of claimant's COPD, which was based on accurate smoking and employment histories, symptomology, objective test results, his observation of claimant's deteriorating respiratory health, and his active participation in claimant's medical treatment over

eighteen months. The administrative law judge further assessed the probative value of Dr. Mumma's status as a treating physician in light of the factors set forth at Section 718.104(d), noting that Dr. Mumma had treated claimant on fifteen occasions between March 13, 2002 and December 3, 2003 and finding that "his notes, in addition to his report, are replete with consistent, uncontested notations concerning his pulmonary observation and comparisons that support a worsening condition caused by pneumoconiosis as well as other conditions." Decision and Order at 24. Because he found Dr. Mumma's opinion to be documented and reasoned, and since he found that Dr. Mumma's opinion, along with his treatment notes, served as corroborating support for the opinions of Drs. Parker and Cohen, the administrative law judge had discretion to accord Dr. Mumma's opinion determinative weight along side claimant's other medical experts. *See Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003) (the opinions of treating physicians get the deference they deserve based on their power to persuade); *Peabody Coal Co. v. Groves*, 277 F.3d 834, 22 BLR 2-320 (6th Cir. 2002); *Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995); *Director, OWCP v. Rowe*, 710 F.2d 251, 5 BLR 2-99 (6th Cir. 1983).

Contrary to employer's assertion, the administrative law judge did not err in rejecting Dr. Tuteur's opinion. The administrative law judge determined that Dr. Tuteur cited to "tentative" factors for claimant's obstruction such as childhood pneumonia, aspiration pneumonia, and hay fever, which were not well established in the record. Decision and Order at 26. As noted by the administrative law judge, Dr. Tuteur admitted in his deposition that "there is '[l]ittle' evidence in the record concerning childhood pneumonia, and that the data does not say anything about the severity of this occurrence." Decision and Order at 26. The administrative law judge further noted that the medical records documented only one brief incident of aspiratory pneumonia in January 1991, which quickly resolved and "none of claimant's subsequent records mention any further complications from this episode." *Id.* This episode occurred subsequent to the documented onset of claimant's respiratory problems in 1983. Because the administrative law judge found that there was inadequate underlying documentation in the record to support Dr. Tuteur's opinion,[6] the administrative law judge permissible found that Dr. Tuteur's opinion was not reasoned with respect to etiology of claimant's COPD. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

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[6] Although the administrative law judge suggested that Dr. Tuteur's analysis may have been goal oriented since he "seized on a general reference to childhood pneumonia in a 10 year old report, which was never mentioned or expounded upon anywhere else in the enormous evidentiary record. [He] then proceeded to use this evidence as a thrust of his 'risk factor' theory as to why [c]laimant did not suffer from pneumoconiosis." Administrative Law Judge Order at 7; Employer's Reply Brief at 11. We eject employer's assertion that this amounted to an improper finding of bias.

We further reject employer's assertion that the administrative law judge impermissibly substituted his opinion for the medical experts when he stated: "I find it less convincing that [c]laimant's smoking history, which ended more than 20 years ago, and five to seven years prior to [c]laimant's retirement from the coal mines, is the sole cause of his continually worsening condition, as Drs. Renn, Tuteur, Fino, and Altmeyer would have me believe, and that coal dust exposure had absolutely no effect on [c]laimant's condition." Decision and Order at 28; Employer's Reply Brief at 7. It is the duty of the administrative law judge to resolve the conflicts in the medical evidence by examining the validity of the reasoning behind the various medical opinions. *See Rowe*, 710 F.2d 251, 5 BLR 2-99. The administrative law judge's statement reflects his permissible determination that Drs. Renn, Tuteur, Fino and Altmeyer failed to adequately explain, to the satisfaction of the administrative law judge, why claimant's impairment was due to his more remote smoking history than to his more recent coal dust exposure. *Id*.

The administrative law judge, as the trier-of-fact, has broad discretion to assess the evidence of record and draw his own conclusions and inferences therefrom, *see Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986), and to determine whether an opinion is documented and reasoned, *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). It is within the purview of the administrative law judge's function is to resolve the conflicts in the medical evidence, *see Lafferty*, 12 BLR at 1-190; *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988), *aff'd*, 865 F.2d 916 (7th Cir. 1989), and the Board is not empowered to reweigh the evidence nor substitute its inferences for those of the administrative law judge. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988).

To the extent that the administrative law judge weighed all of the evidence and rendered credibility determinations based on the power of the physicians' opinions to persuade, *see Williams*, 338 F.3d at 501, 22 BLR at 2-625; *Groves*, 277 F.3d at 834, 22 BLR at 2-320 (6th Cir. 2002), we affirm his decision to credit the weight of claimant's medical experts over employer's experts in finding that claimant established legal pneumoconiosis. Consequently, as we affirm the administrative law judge's findings at 20 C.F.R. §718.202(a)(4) and 20 C.F.R. §718.204(c), s*ee Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180, 185; Decision and Order at 32,[7] we affirm, as supported by substantial evidence, the administrative law judge's award of benefits.

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[7] The administrative law judge applied his factual findings concerning the weight of the medical opinions as discussed at 20 C.F.R. §718.202(a)(4) to his causation analysis at 20 C.F.R. §718.204(c). The administrative law judge specifically found that the

Attorney Fees:

When the amount of an attorney's fee is appealed to the Board as excessive, the burden is on the challenging party to show that the assessment of the fee is arbitrary, capricious or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Jones v. Kaiser Steel Corp*., 8 BLR 1-339 (1985). Where specific objections to a fee petition are raised, the administrative law judge's failure to address them is a violation of the APA, which requires remand for reconsideration. *Busbin v. Director, OWCP*, 3 BLR 1-374 (1981). The administrative law judge must provide some explanation supporting his determination, and his explanation will be deemed sufficient if it addresses in a reasoned manner the opposing party's specific objections. *Id.*

In this case, contrary to employer's contention, the administrative law judge's decision reflects his consideration of employer's objection to reimbursement of all of the time spent by the paralegal, Mr. Seigel, and we find no reversible error in his decision to find Mr. Seigel's services to be reasonable. The administrative law judge noted that employer objected to 79.35 out of 98.35 hours spent by Mr. Seigel in this case, but the administrative law judge also noted that claimant had documented that Mr. Seigel spent 13.5 hours (working at an average speed of 122 pages/hour) receiving and organizing the voluminous record in this case, which included 1650 pages of medical records. Decision and Order (Attorney Fee Award) at 7. Although employer challenged the necessity of Mr. Seigel's recorded meetings with co-counsel, the administrative law judge further noted that claimant had itemized each of the days spent by Mr. Seigel in meetings with counsel, explaining exactly what Mr. Seigel did on those days, and that his total time in meeting each day did not exceed .33 hours. *Id.* Contrary to employer's assertion, the administrative law judge had discretion to accept Mr. Seigel's explanation that the meetings were crucial to development of case strategy and were therefore reasonably necessary to secure claimant's entitlement to benefits. *See generally Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

Notwithstanding, we agree that the administrative law judge erred with regard to his determination of the hourly rate applicable for attorney fees in this case. Claimant's counsel, Mr. McFadden, requested attorney fees based on an hourly rate of $285.00, which was reduced by the administrative law judge to $250.00 per hour with the following explanation: "The maximum rate this office is now allowing for black lung counsel is $250.00/hour…." Decision and Order (Attorney Fee Award) at 9. We agree with employer that the administrative law judge erred when he awarded claimant's

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opinions of Drs. Parker and Cohen established that claimant's total disability was due to both smoking and coal dust exposure. Decision and Order at 32.

counsel an arbitrary rate of $250.00 per hour without basing his decision on market-based factors, taking into consideration the location of counsel, his years of experience, the level of expertise, and the complexity of the case. We also note the Director's position that "to the extent the administrative law judge's decision may be interpreted as setting a maximum hourly rate that may be awarded to a claimant's representative, the administrative law judge's finding is wrong." Director's Brief at 1; Decision and Order (Attorney Fee Award) at 9. Because the administrative law judge's hourly rate determination is arbitrary, capricious and contrary to law, we vacate his attorney fee decision and remand the case for further consideration of this aspect of the attorney fee award.

Employer has also detailed specific time and expense challenges that were not addressed by the administrative law judge and which require his attention on remand. Employer correctly asserts that the administrative law judge's decision fails to discuss employer's challenge to 11.18 hours of Mr. Johnson's time which was spent in conference with co-counsel and which employer contends was not reimbursable because the time was spent by Mr. Johnson in educating Mr. McFadden about claimant's case.[8] Employer maintains that the administrative law judge improperly awarded the total of $18,008.19, as requested by Mr. Johnson, without specifically addressing employer's objection to 11.18 hours of Mr. Johnson's time which was billed as time spent educating Mr. McFadden about the case. Employer's Petition for Review and Brief (Attorney Fee Award) at 8; Reply Brief at 6; Combined Opposition to Shifted Fee Petitions at 8. We direct the administrative law judge to determine whether the time billed by Mr. Johnson was necessary to the case or whether his time was spent discussing matters with co-counsel and familiarizing co-counsel with the case, and therefore was not reimbursable. *See Simmons v. Director, OWCP*, 7 BLR 1-178 (1984); *Kovaly v. Director, OWCP*, 7 BLR 1-383 (1984).

We also agree with employer that the administrative law judge failed to specifically address employer's challenge to the charges incurred for Mr. McFadden to prepare and perform depositions in this matter. Employer's Petition for Review and Brief (Attorney Fee Award) at 9. Employer contends that Mr. McFadden's charges are excessive in comparison to his co-counsel who was apparently more efficient with his time charges. Because the administrative law judge's decision only sets forth the positions of employer and claimant, and then summarily concludes that the charges by claimant's counsel were reasonable, we agree that the administrative law judge has failed

[8] Mr. Johnson's requested $18,080.19 for his law firm (this amount includes Mr. Johnson's 21.12 hours of time billed at a rate of $215 per hour, $3,704.39 for expenses, and 98.35 hours of time billed by a paralegal, Mr. Seigel, at the rate of $100 per hour, or $9,835.00).

to explain the basis for his findings of fact and conclusions of law as required under the APA.

Lastly, employer argues that the administrative law judge has improperly allowed claimant's counsel to be awarded compensation for preparing a response to employer's challenge of the fee petition, noting that all claimant's counsel really did was supply the information that that should have been apart of their initial fee petition. Employer notes that time spent by counsel in preparing their fee applications is not compensable. *See Calhoun v. Director, OWCP*, 3 BLR 1-812 (1981). The administrative law judge, however, addressed employer's arguments below and permissibly found that the work performed by claimant's counsel was necessary to defend his fee petition. Because counsel may be compensated for time spent litigating the fee award, we affirm the administrative law judge's ruling on this charge. Decision and Order (Attorney Fee Award) at 11.

Accordingly, the Decision and Order – Award of Benefits and the Order Denying Claimant's Motion for Reconsideration of the administrative law judge are hereby affirmed, while his 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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge