BRB Nos. 08-0779 BLA
and 08-0779 BLA-A

B.D. (Surviving Spouse of J.D.) Claimant-Respondent Cross-Petitioner v. PRICE COAL COMPANY and AMERICAN BUSINESS & PERSONAL INSURANCE MUTUAL, INCORPORATED Employer/Carrier- Petitioners Cross-Respondents DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/17/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

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

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Remand (2003-BLA-06615) of Administrative Law Judge Janice K. Bullard awarding benefits and attorney fees 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] This case is before the Board for the second time. In her initial Decision and Order, the administrative law judge credited the miner with twenty-three years of coal mine employment and considered the claim, filed on August 3, 2001, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that claimant established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1) and (4), and that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). The administrative law judge also determined that the presumption set forth in 20 C.F.R. §718.203(b), that the miner's pneumoconiosis arose out of coal mine employment, was invoked and was not rebutted. Accordingly, the administrative law judge awarded benefits.

In a subsequent Attorney Fee Order, the administrative law judge considered claimant's counsel's petition for attorney fees. Finding merit in employer's objections to the hourly rate requested by claimant's counsel because it was augmented due to the contingent nature of the fee, the administrative law judge concluded that the correct rate was $187.50 per hour, the mean between the requested rate and the rate suggested by employer. The administrative law judge also reduced the number of hours allowed by 15.875 and awarded a total fee of $4,429.69.

Employer appealed the administrative law judge's award of benefits and claimant cross-appealed the administrative law judge's supplemental award of attorney fees. Pursuant to the arguments raised in employer's appeal, the Board vacated the administrative law judge's award of benefits and remanded the case for further proceedings regarding the admissibility of the medical evidence, and the weighing of the medical evidence pursuant to Section 718.205(c).[2] [*B.D.*] *v. Price Coal Co.*, BRB No.

[1] Claimant is the surviving spouse of the miner, who died on July 29, 2001. Director's Exhibit 7.

[2] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that 20 C.F.R. §718.202(a)(2) and (3) are not available in this case, and her finding that claimant is entitled to the presumption that the miner's pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b), as well as her reduction in the number of hours of compensable legal services to 23.625. [*B.D.*] *v. Price Coal Co.*, BRB No. 06-0495 BLA/S, slip op. at 3 n.2 and n.3 (May 31, 2007)(unpub.).

06-0495 BLA/S (May 31, 2007)(unpub.). Initially, the Board vacated the administrative law judge's award of benefits and remanded the case for the administrative law judge to reconsider the admissibility of the medical opinions of Drs. Johnson, Sundaram and Wiot pursuant to the evidentiary limitations set forth at 20 C.F.R. §725.414. [*B.D.*], slip op. at 5-7. With regard to the administrative law judge's findings on the merits, the Board affirmed the administrative law judge's finding that the x-ray evidence of record is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1). [*B.D.*], slip op. at 8. In addition, because this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the Board declined to address employer's contentions at Section 718.202(a)(4). [*B.D.*], slip op. at 8. However, in light of the instructions to reconsider the admissibility of the medical opinion of Dr. Johnson, the Board vacated the administrative law judge's finding that the medical opinion evidence is sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c) and remanded the case for the administrative law judge to reconsider the relevant evidence thereunder, in light of her findings on the admissibility of the medical opinions. [*B.D.*], slip op. at 10. Lastly, pursuant to claimant's appeal of the administrative law judge's supplemental award of attorney fees, the Board vacated the administrative law judge's fee award and remanded the case for the administrative law judge to properly apply the regulatory criteria set forth at 20 C.F.R. §725.366(b) in determining the hourly rate to be awarded claimant's counsel. [*B.D.*], slip op. at 11.

On remand, the administrative law judge addressed the procedural issues regarding the admissibility of medical reports. She admitted the report of Dr. Johnson, but noted that no weight will be given to Dr. Johnson's reliance on the inadmissible evidence. She excluded Dr. Sundaram's opinion, finding that it exceeded the evidentiary limitations at Section 725.414. With regard to Dr. Wiot's deposition, the administrative law judge found that employer did not establish good cause for the admission of this report as a medical report because it exceeded the evidentiary limitations. However, the administrative law judge admitted the portion of Dr. Wiot's deposition that discussed whether CT scans are a medically acceptable method of diagnosing pneumoconiosis. With regard to her findings on the merits, the administrative law judge found the medical evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(4), based on the positive x-ray readings and medical opinion evidence. In addition, the administrative law judge found the medical evidence sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, the administrative law judge awarded benefits in this survivor's claim.

With regard to claimant's counsel's attorney fee petition, the administrative law judge again found that counsel did not establish that the requested hourly rate of $250.00 was reasonable pursuant to 20 C.F.R. §725.366(b) and reduced the hourly rate to $180.00, based on hourly rates she awarded in other cases. Consequently, the

administrative law judge awarded a total fee of $4,252.50, representing 23.625 hours of legal services at the awarded rate of $180.00 per hour.

On appeal, employer again alleges that the administrative law judge did not properly weigh the medical opinions and CT scan interpretations relevant to the existence of pneumoconiosis under Section 718.202(a)(4), or weigh all of the relevant evidence, like and unlike, in determining that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(1) and (4). Employer further contends that the administrative law judge erred in weighing the medical opinion evidence in determining, pursuant to Section 718.205(c), that claimant established that the miner's death was due to pneumoconiosis. In response, claimant urges affirmance of the administrative law judge's award of benefits. In a reply brief, employer reiterates its previous allegations of error. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter stating that he will not submit a substantive response unless requested to do so by the Board.[3]

In a cross-appeal, claimant's counsel generally contends that the administrative law judge erred in reducing the requested hourly rate, arguing that the administrative law judge again failed to apply the proper analysis in calculating the hourly rate. Employer responds, urging affirmance of the administrative law judge's reduction of the hourly rate. Employer, however, contends that the administrative law judge erred in awarding an hourly rate of $180.00 and not reducing the hourly rate to $125.00, the rate employer states is the comparable market rate in the relevant geographical area. The Director has not responded to claimant's cross-appeal.

Regarding the administrative law judge's Decision and Order on the merits of entitlement, the Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359, 363 (1965). With respect to the administrative law judge's Attorney Fee Order on

[3] The parties do not challenge the administrative law judge's procedural rulings regarding the admission of Dr. Johnson's medical opinion, the exclusion of Dr. Sundaram's opinion and the admission, in part, of Dr. Wiot's deposition testimony. These findings are therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 4.

the petition for attorney fees, the standard of review for the Board in analyzing the arguments on appeal of an attorney fee determination is whether the determination is arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).

Employer contends initially that the administrative law judge erred in finding that the medical evidence is sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a). In particular, employer contends that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(4), arguing that the administrative law judge failed to render separate findings regarding the existence of clinical pneumoconiosis and legal pneumoconiosis. Employer also contends that there are numerous errors in the administrative law judge's weighing of the medical opinions of record, specifically, that the administrative law judge erred in failing to adequately discuss the bases for her findings with regard to the opinions of Drs. Johnson and Musgrave.

In addition, employer again argues that the administrative law judge's finding of clinical pneumoconiosis cannot be affirmed, notwithstanding the Board's prior holding, because the administrative law judge found the x-ray readings positive for pneumoconiosis without considering the contrary evidence, including the CT scan and medical opinion evidence. Employer contends that the rationale provided by the Board in the prior decision is not valid, and argues that the Board should revisit the issue and remand the case for the administrative law judge to weigh all evidence of clinical pneumoconiosis together. There is merit, in part, with employer's contentions.

Initially, we note that the Board, in its prior decision, affirmed the administrative law judge's finding that claimant established the existence of clinical pneumoconiosis at

Section 718.202(a)(1) and further held that, because this case arises within the jurisdiction of the Sixth Circuit, in light of the affirmance at Section 718.202(a)(1), the Board declined to address employer's arguments regarding the administrative law judge's weighing of the medical evidence at Section 718.202(a)(4). [*B.D.*], slip op. at 8. Although employer again challenges the administrative law judge's findings that claimant has clinical pneumoconiosis pursuant to Section 718.202(a)(1) without consideration of all of the like and unlike evidence, it fails to raise any new arguments thereunder and, thus, we decline to revisit our prior holding. Because the Board's previous disposition of the issue of the existence of clinical pneumoconiosis constitutes the law of the case, and we are not persuaded that an exception to it has been demonstrated, we decline to address employer's arguments with respect to Section 718.202(a)(1). *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

As previously noted by the Board, ordinarily, the administrative law judge's finding that the existence of pneumoconiosis was established by x-ray evidence at Section 718.202(a)(1) would obviate the need for her to render a separate finding regarding whether the medical opinion evidence establishes the existence of pneumoconiosis pursuant to Section 718.202(a)(4).[5] *See Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). However, in this case, the administrative law judge credited the medical opinion evidence attributing the cause of the miner's death to "legal" pneumoconiosis, *i.e.*, chronic obstructive pulmonary disease, chronic bronchitis or asthma, due, at least in part, to coal dust exposure, pursuant to Section 718.205(c). Before addressing whether the evidence establishes that the miner's death was due to or hastened by "legal" pneumoconiosis, the administrative law judge therefore should have first determined whether the medical evidence specifically establishes the existence of "legal" pneumoconiosis and not merely a general finding of pneumoconiosis at Section 718.202(a)(4). *See* 20 C.F.R. §§718.201(a)(2), 718.205(c). Consequently, we vacate the administrative law judge's Section 718.202(a)(4) findings and remand the case to the administrative law judge for consideration of whether the medical opinion evidence is sufficient to establish the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).

In addition, the administrative law judge must provide a more specific discussion of her findings with respect to the medical opinions of Drs. Johnson and Musgrave. She

[5] A finding of either clinical pneumoconiosis, 20 C.F.R. §718.201(a)(1), or legal pneumoconiosis, 20 C.F.R. §718.201(a)(2), is sufficient to support a finding of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). "Legal pneumoconiosis" includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment. 20 C.F.R. §718.201(a)(2).

must determine whether these opinions are well-reasoned on the issue of legal pneumoconiosis, *i.e.*, whether they provide adequate support and explanation for their conclusions. *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). In addition, the administrative law judge must discuss the effect, if any, that the inadmissible evidence contained in Dr. Johnson's opinion has on the credibility of his ultimate conclusions. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*). Further, the administrative law judge must more fully discuss the specifics of Dr. Fino's opinion, whether the physician actually diagnosed the presence of pneumoconiosis and whether it is supportive of a finding of legal pneumoconiosis at Section 718.202(a)(4).

Moreover, because the administrative law judge's Section 718.205(c) finding was based on a finding of legal pneumoconiosis, we also vacate her Section 718.205(c) finding and remand the case for the administrative law judge to reweigh the evidence thereunder in light of her legal pneumoconiosis findings. On remand, the administrative law judge must more fully explain her weighing of the relevant evidence, particularly whether she finds that the evidence establishes that the miner's death was due to pneumoconiosis or whether pneumoconiosis hastened the miner's death "through a specifically defined process that reduces the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-635. Moreover, the administrative law judge must more fully explain her weighing of the opinions of the treating physicians, including whether they are entitled to additional weight and whether the opinions are well-reasoned.

With regard to claimant's counsel's appeal of the administrative law judge's Attorney Fee Order, the administrative law judge reduced the hourly rate from the requested rate of $250.00 to $180.00. In selecting the hourly rate of $180.00, the administrative law judge stated that she accepted "employer's argument that the standard used by claimant's counsel for the calculation of his hourly rate (relying in part upon contingent fees) is incorrect." Decision and Order on Remand at 11. Further, in finding that the criteria set forth at Section 725.366(b) do not support the requested hourly rate, the administrative law judge reduced the hourly rate and awarded claimant's counsel $180.00 per hour, based on fees she has awarded in prior cases arising in the same geographic area. *Id*.

On appeal, claimant's counsel generally contends that the administrative law judge erred in reducing counsel's hourly rate to $180.00 per hour. Counsel generally states that he "feels that the Administrative Law Judge failed to apply the proper analysis in calculating a properly [sic] hourly fee and that the [undersigned's attorney fees] should be increased." Claimant's Cross-Petition for Review and Brief at 2. In response, employer contends that the administrative law judge properly reduced counsel's hourly rate, but that the $180.00 hourly rate awarded by the administrative law judge was still excessive. In particular, employer contends that the administrative law judge failed to

adequately explain her rejection of employer's uncontested evidence showing the market rate for black lung attorneys. Employer also contends that the administrative law judge's reliance on the hourly rate she awarded in prior claims, without identifying the awards, violates the basic principles of judicial notice.

In awarding claimant's counsel an hourly rate of $180.00, the administrative law judge applied the appropriate regulatory criteria, taking 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); Decision and Order on Remand at 11; *see Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *see also Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988). In applying these criteria, the administrative law judge rationally found that the issues in this case were not complex and counsel did not exhibit a superior level of expertise. She therefore found that the $250.00 hourly rate requested by counsel was not reasonable. 20 C.F.R. §725.366(b); *B & G Mining, Inc., v. Director, OWCP* [*Bentley*], 522 F.3d 657, 664, 24 BLR 2-106, 2-121 (6th Cir. 2008); *Pritt*, 9 BLR at 1-161; Decision and Order on Remand at 11-12. However, as employer correctly contends, the administrative law judge did not provide adequate judicial notice of the prior cases she used in determining that $180.00 is a reasonable hourly rate in this case. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990); Decision and Order on Remand at 12. Consequently, we vacate the administrative law judge's reduction in the hourly rate and remand the case for reconsideration of the appropriate hourly rate. Further, we note that any fee awarded to claimant's counsel on remand is not enforceable until there is a final award of benefits. *See* 20 C.F.R. §725.367(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge