KENNETH P. WELLS Claimant-Respondent v. SPURLOCK MINING, COMPANY, INCORPORATED and AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	BRB No. 11-0658 BLA DATE ISSUED: 09/27/2012
KENNETH P. WELLS Claimant-Petitioner v. SPURLOCK MINING COMPANY, INCORPORATED and AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED Employer/Carrier-Respondents	)	BRB No. 11-0853 BLA

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	
KENNETH P. WELLS Claimant-Petitioner v. SPURLOCK MINING COMPANY, INCORPORATED and AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED Employer/Carrier-Respondents	)	BRB No. 12-0077 BLA
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand – Award of Benefits, Order Denying Attorney Fee Petition on Remand and Order Denying Attorney Fee Petition of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery, P.S.C.), Prestonsburg, 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/carrier (employer) appeals the Decision and Order on Second Remand – Award of Benefits and claimant appeals the Order Denying Attorney Fee Petition on Remand and Order Denying Attorney Fee Petition (2007-BLA-5196) of Administrative Law Judge Larry S. Merck (the administrative law judge) rendered on a subsequent claim[1] filed pursuant to the provisions of Title IV of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Public L. No. 111-148, §1556, 124 Stat. 119 (2010)(to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[2] This case, with respect to the merits of entitlement, is before the Board for the third time.[3]

[1] Claimant filed his first claim on July 11, 1989, which was denied by a claims examiner on December 18, 1989 because claimant failed to establish any of the elements of entitlement. Director's Exhibit 1. Claimant filed his second claim on August 12, 2002. Director's Exhibit 3. On June 30, 2005, Administrative Law Judge Joseph E. Kane issued a Decision and Order denying benefits, finding that claimant failed to establish a change in an applicable condition of entitlement. Director's Exhibit 55. The Board affirmed Judge Kane's denial of benefits. *Wells v. Spurlock Mining Co.*, BRB No. 05-0814 BLA (Feb. 14, 2006)(unpub.); Director's Exhibit 60. Claimant filed a request for modification on April 13, 2006. Director's Exhibit 61.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as claimant's subsequent claim was filed on August 12, 2002, prior to January 1, 2005. Public L. No. 111-148, §1556, 124 Stat. 119 (2010), Director's Exhibit 3.

[3] In his initial Decision and Order, Administrative Law Judge Larry S. Merck (the administrative law judge) credited claimant with at least twenty-one years of coal mine employment based on the parties' stipulation, and found that the new evidence established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). The administrative law judge, therefore, found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§725.309 and 725.310 and, therefore, granted claimant's request for modification. On the merits, the administrative law judge found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that the evidence established a totally disabling respiratory impairment due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) and (c). Accordingly, the administrative law judge awarded benefits. In a subsequent Attorney Fee Order, the administrative law judge awarded claimant's counsel a total fee of $8,025.00, representing 26.75 hours of legal

Pursuant to the most recent appeal in this case, the Board vacated the administrative law judge's findings that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The Board remanded the case for the administrative law judge to reevaluate and weigh the opinions of Drs. Dahhan and Fino on the issue of legal pneumoconiosis pursuant to Section 718.202(a)(4) and to fully explain why he credited and/or discredited the evidence thereunder. *Wells v. Spurlock Mining Co.*, BRB No. 09-0829 BLA, slip op. at 9-10 (Aug. 31, 2010)(unpub.). The Board, however, specifically rejected employer's contention that the administrative law judge erred in reviewing the opinions of Drs. Dahhan and Fino, "in light of the principles set forth in the regulatory definition of pneumoconiosis or in the preamble to the [revised] regulations defining pneumoconiosis as a latent and progressive disease." *Wells*, BRB No. 09-0829 BLA, slip op. at 6. The Board reiterated its prior holding that neither the regulatory definition of pneumoconiosis at 20 C.F.R. §718.201(c), nor the discussion in the preamble to the revised regulations, created an irrebuttable presumption that pneumoconiosis is *always* a latent and progressive disease. Instead the Board pointed out that both the regulations and the preamble state that

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services at an hourly rate of $300.00.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's finding that the new evidence established total respiratory disability pursuant to Section 718.204(b) and, thus, affirmed his finding that the new evidence established a basis for modification on the subsequent claim pursuant to Section 725.310 by showing a change in an applicable condition of entitlement pursuant to Section 725.309. *K.W.* [*Wells*] *v. Spurlock Mining Co.*, BRB Nos. 08-0506 BLA/S, slip op. at 5 (Apr. 16, 2009) (unpub.). The Board also affirmed the administrative law judge's finding that the evidence established total respiratory disability pursuant to Section 718.204(b) on the merits. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 11. However, while rejecting employer's contention that the administrative law judge could not rely on the opinions of Drs. Baker, Arnett and Sikder, the Board nonetheless vacated the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis at Section 718.202(a)(4) and remanded the case for further consideration and discussion of all the relevant medical opinion evidence on that issue. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 8, 10. In addition, the Board vacated the administrative law judge's finding that the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(c) and instructed the administrative law judge to reconsider that issue on remand. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 11. Lastly, the Board declined to address the Fee Order because the claim had not been successfully prosecuted, given that the award of benefits was vacated and the case was remanded for further consideration. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 12.

pneumoconiosis *can* be a latent and progressive disease. *Wells*, BRB No. 09-0829 BLA, slip op. at 7-8. Thus, finding that the administrative law judge failed to adequately explain his application of the principles set forth in the regulations and the preamble, in his weighing of the medical opinions of Drs. Dahhan and Fino, the Board vacated his weighing of these opinions and remanded the case for the administrative law judge to more fully set forth the bases for his conclusions. *Wells*, BRB No. 09-0829 BLA, slip op. at 8, 10. In addition, the Board held that, in light of its decision to vacate the administrative law judge's findings at Section 718.202(a)(4), the administrative law judge's findings at Section 718.204(c) were also vacated and the administrative law judge, on remand, was instructed to consider all of the relevant evidence thereunder, if reached. *Wells*, BRB No. 09-0829 BLA, slip op. at 10.

On remand, the administrative law judge reconsidered the evidence in light of the Board's instructions, and found that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[4] The administrative law judge also found that the evidence established total disability due to pneumoconiosis at Section 718.204(c). Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding that the medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), arguing that the administrative law judge erred in failing to follow the Board's instructions on remand. Employer also challenges the administrative law judge's finding that the evidence established total disability due to pneumoconiosis pursuant to Section 718.204(c). In response, claimant urges affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response to employer's 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 supported by substantial evidence, is rational,

[4] The administrative law judge noted that the Board held that if the administrative law judge found legal pneumoconiosis established on remand, it would not be necessary for him to separately determine whether claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203, as that issue would be subsumed in his legal pneumoconiosis finding. 2011 Decision and Order on Second Remand at 13 n.3.

In addition, the administrative law judge noted that the Board previously affirmed his finding that claimant established a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b). *Id*.

and is in accordance with applicable law.[5] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111 (1989).

Employer first contends that the administrative law judge erred in failing to follow the Board's remand instructions in weighing the opinions of Drs. Dahhan and Fino. Employer, therefore, contends that the administrative law judge's finding that the existence of legal pneumoconiosis was established continues to be inconsistent with the applicable law and the facts of this case. Noting its disagreement with the administrative law judge's use of the preamble in weighing the medical evidence, employer contends that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Fino because they failed to consider that pneumoconiosis *can* be a latent and progressive disease, in rendering their opinions on the issue of legal pneumoconiosis. Further, employer argues that the administrative law judge erred in discrediting the opinion of Dr. Dahhan because the doctor did not consider the additive effect of coal dust exposure when he opined that claimant's respiratory impairment was due solely to cigarette smoking. Lastly, employer contends that the administrative law judge failed to follow the Board's remand instructions in weighing the evidence pursuant to Section 718.204(c), since the administrative law judge merely reiterated his prior findings thereunder.

In finding that the opinions of Drs. Dahhan and Fino were not well-reasoned and, thus, entitled to little weight on the issue of legal pneumoconiosis pursuant to Section 718.202(a)(4), the administrative law judge reevaluated the opinions in light of their underlying documentation and their enunciated rationale, as instructed by the Board. *See* 2011 Decision and Order on Second Remand at 5-12. In particular, the administrative law judge accorded little weight to Dr. Dahhan's opinion because he found it internally inconsistent and in conflict with the regulatory definition of pneumoconiosis. The administrative law judge also found that Dr. Dahhan failed to adequately explain his conclusion. *Id*. at 5-9. Regarding Dr. Fino's opinion, the administrative law judge found that it was not entitled to probative weight because it conflicted with the regulatory

[5] The record indicates that claimant was employed in the coal mining industry in Kentucky. Director's Exhibits 1, 4, 6. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc).

definition of pneumoconiosis and because Dr. Fino failed to adequately explain his conclusion.

In weighing Dr. Dahhan's opinion that claimant has no pulmonary or respiratory impairment caused by coal dust exposure, the administrative law judge gave the opinion little weight because he found that it was not well-reasoned. The administrative law judge permissibly found that Dr. Dahhan's opinion was at odds with both the regulatory definition of pneumoconiosis and the preamble to the revised regulations. The administrative law judge noted that Dr. Dahhan opined that claimant's respiratory impairment was due to his smoking history, and that claimant had left coal mining employment twenty-six years earlier, which was sufficient time for any industrial bronchitis present to have resolved. The administrative law judge, therefore, rationally found that this opinion was inconsistent with the regulatory definition of pneumoconiosis because it foreclosed the possibility of pneumoconiosis being latent and progressive. A*&E Coal Co. v. Adams*, F.3d , No. 11-3926, 2012 WL 3932113 at *3-4 (6th Cir. Sept. 11, 2012); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 492, 22 BLR 2-612, 2-622 (6th Cir. 2003); 2011 Decision and Order on Second Remand at 7. Additionally, the administrative law judge rationally found that Dr. Dahhan's opinion was internally inconsistent, as the underlying documentation upon which it relied, *i.e.*, claimant's pulmonary function studies, did not fully support Dr. Dahhan's finding that claimant's respiratory impairment was reversible and responsive to bronchodilators. 2011 Decision and Order on Second Remand at 8-9; Employer's Exhibit 1. Further, the administrative law judge rationally found that Dr. Dahhan failed to adequately explain how the underlying documentation supported his conclusion that claimant's response to bronchodilators eliminated a finding of legal pneumoconiosis in this case. *Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713-14, 22 BLR 2-537, 2-553 (6th Cir. 2002). Consequently, we affirm the administrative law judge's finding that Dr. Dahhan's opinion is entitled to little weight because it is unreasoned.

Regarding Dr. Fino's opinion, the administrative law judge found that it was "at odds with the Sixth Circuit's holding, and the Department of Labor's finding, that legal pneumoconiosis *may* be latent and progressive." 2011 Decision and Order on Second Remand at 11. Specifically, the administrative law judge found that Dr. Fino's opinion was not well-reasoned because the sole basis of Dr. Fino's opinion, that claimant's respiratory impairment was due solely to smoking, was that claimant's respiratory impairment worsened between 2002 and 2004 and claimant had stopped working in the coal mines in 1987, but continued to smoke. *Id.*; Director's Exhibits 47, 48. The administrative law judge, therefore, found that Dr. Fino's conclusion, that the worsening of claimant's respiratory condition must have been due to smoking, was not well-reasoned since it did not account for the latency and progressivity of pneumoconiosis. *Id.* Because the administrative law judge, as instructed by the Board, has more fully

explained the rationale for his weighing of Dr. Fino's opinion and reasonably found that Dr. Fino's opinion was inconsistent with the regulatory definition of pneumoconiosis, as a latent and progressive disease, we affirm the administrative law judge's finding that Dr. Fino's opinion was entitled to little weight. *See Adams*, 2012 WL 3932113 at *3-4; *Odom*, 342 F.3d at 492, 22 BLR at 2-622; *Cornett v. Benham Coal Co*., 227 F.3d 569, 22 BLR 2-107 (6th Cir. 1998); *Gross v. Dominion Coal Corp*., 23 BLR 1-8, 1-19-20 (2004); Decision and Order on Second Remand at 12.

Turning to the opinions of Drs. Baker, Arnett and Sikder, finding the existence of legal pneumoconiosis, the administrative law judge noted that the Board previously affirmed his reliance on these opinions as well-reasoned. 2011 Decision and Order on Second Remand at 13. Accordingly, the administrative law judge properly found that the preponderance of the reasoned medical opinion evidence established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4).[6]

Employer next contends that the administrative law judge erred in finding the evidence sufficient to establish that claimant's total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c), arguing that the administrative law judge failed to follow the Board's remand instructions thereunder.

In finding disability causation established, the administrative law judge properly accorded determinative weight to the opinion of Dr. Arnett, as supported by the opinions of Drs. Baker and Sikder, as he found the existence of legal pneumoconiosis established and he was claimant's treating physician. *See* 20 C.F.R. §718.104(d); 2011 Decision and Order on Second Remand at 14-15. The administrative law judge properly found that the contrary opinions of Drs. Dahhan and Fino were entitled to little weight because they did not diagnose pneumoconiosis. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); 2011 Decision and Order on Second Remand at 14; Director's Exhibits 39, 44, 47, 49; Employer's Exhibit 1. As the administrative law judge rationally credited Dr. Arnett's opinion, based on his prior finding that the opinion was reasoned and documented, we affirm the administrative law judge's reliance on it, as supported by the opinions of Drs. Baker and Sikder, to find that claimant established total disability due to pneumoconiosis at Section 718.204(c). 20 C.F.R. §718.204(c); *see Smith*, 127 F.3d at 507, 21 BLR at 2-185-86; *Cornett*, 227 F.3d at 576-77, 22 BLR at 2-

[6] The Board also instructed the administrative law judge to consider the qualifications of the physicians on remand. *Wells*, BRB No. 08-0805 BLA/S, slip. op. at 10. In weighing the medical opinion evidence, the administrative law judge considered the fact that Drs. Dahhan, Fino and Baker were equally qualified as Board-certified physicians in Internal Medicine and Pulmonary Diseases. 2011 Decision and Order on Second Remand at 13.

121-22; *Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(en banc).

Finally, as claimant has established all the elements of entitlement pursuant to 20 C.F.R. Part 718, we affirm his award of benefits. *Anderson*, 12 BLR at 1-112.

Order Denying Attorney Fee Petition on Remand

Claimant's counsel (counsel) appeals the administrative law judge's Order Denying Attorney Fee Petition on Remand issued on September 2, 2011. This case involves counsel's initial request for attorney fees for legal services before the administrative law judge, in this case that is before the Board for the third time.[7]

On the most recent time this case was before the Board, the Board vacated the award of attorney fees,[8] holding that counsel's fee petition was incomplete because it did not contain an explicit entry as to counsel's customary hourly rate. *Wells v. Spurlock Mining Co.*, BRB No. 10-0382 BLA, slip op. at 5 n.4 (Mar. 7, 2011)(unpub.). Additionally, the Board held that the administrative law judge did not adequately explain

[7] Subsequent to the administrative law judge's Decision and Order awarding benefits, issued on March 24, 2008, claimant's counsel (counsel) filed a Motion and Affidavit for Attorney Fee, requesting a total fee of $9,362.50, representing 26.75 hours of legal services at an hourly rate of $350.00. Considering counsel's fee petition and employer's objections, the administrative law judge issued an Attorney Fee Order dated August 25, 2008, reducing counsel's requested hourly rate to $300.00 and awarding counsel a total fee of $8,025.00, representing 26.75 hours of legal services at an hourly rate of $300.00. Employer appealed the fee award to the Board. The Board declined to address the appeal of the fee award, finding that it was premature because there had not been a successful prosecution of the underlying claim for benefits. *K.W.* [*Wells*], BRB Nos. 08-0506 BLA/S, slip op. at 12.

[8] Following the administrative law judge's Decision and Order on Remand awarding benefits, claimant's counsel submitted an updated fee petition, requesting a total fee of $10,125.00, representing 33.75 hours of legal services at an hourly rate of $300.00. After considering the updated fee petition, as well as employer's objections, the administrative law judge found the hourly rate of $300.00 to be reasonable, but reduced the number of compensable hours to 27.25. Accordingly, in an Attorney Fee Award dated December 22, 2009, the administrative law judge awarded a total fee in the amount of $8,175.00, representing the awarded 27.25 hours of legal services at an hourly rate of $300.00.

how the evidence submitted by counsel supported the administrative law judge's determination that $300.00 an hour was the applicable market rate. *Wells*, BRB No. 10-0382 BLA, slip op. at 4. Consequently, the Board vacated the administrative law judge's determination that counsel was entitled to an hourly rate of $300.00 and remanded the case for the administrative law judge to reconsider the evidence regarding counsel's hourly rate. *Id*. The Board further instructed the administrative law judge to require counsel, on remand, to provide evidence of a prevailing market rate, as well as to correct the deficiencies in his fee petition. *Wells*, BRB No. 10-0382 BLA, slip op. at 3, 4, 7.

On remand, the administrative law judge provided counsel with the opportunity to amend his fee petition to address the deficiencies in his original fee petition. Counsel submitted an updated fee petition, with supporting evidence, to the administrative law judge. Employer filed an objection to counsel's fee petition, arguing that it should be denied because it was incomplete, unsupported and excessive. Following receipt of the updated documentation from counsel, the administrative law judge considered the fee petition and employer's objections to it. The administrative law judge found that counsel failed to provide his customary billing rate, as required by the regulations, and, therefore, he found that the fee petition was incomplete on its face. Order Denying Attorney Fee Petition on Remand at 7. The administrative law judge further found that the evidence submitted by counsel in support of the requested hourly rate was insufficient to establish the prevailing market rate and, thus, he found that it was insufficient to sustain counsel's burden of establishing his hourly rate. Based on his finding that counsel's fee petition was incomplete under 20 C.F.R. §725.366(a), and that counsel failed to sustain his burden of establishing the prevailing market rate, the administrative law judge denied counsel's fee petition in its entirety.

On appeal, counsel contends that the administrative law judge's decision to deny the requested fee in its entirety was an abuse of his discretion. Specifically, counsel contends that his response concerning his hourly rate was in substantial compliance with the administrative law judge's April 14, 2011 Order allowing for the submission of additional evidence. Counsel further contends that his fee petition and supporting evidence is also in substantial compliance with the requirements of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, as set forth in *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008). Employer responds, urging affirmance of the administrative law judge's denial of counsel's fee petition and arguing that the administrative law judge neither abused his discretion, nor committed legal error, in denying counsel's application for an attorney fee.

The amount of an attorney fee award by an administrative law judge is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, an abuse of discretion, or not in accordance with applicable law.

See Abbott v. Director, OWCP, 13 BLR 1-15, 1-16 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(en banc). When a claimant wins a contested case, the Act provides that the employer, its insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a). Moreover, the Board has held that the loss of an attorney fee is a harsh result that should not be imposed, except in the most extreme circumstances. *Paynter v. Director, OWCP*, 9 BLR 1-190, 1-191 (1986).

Here, the administrative law judge denied counsel's fee petition, *in toto*, finding that counsel failed to adequately set forth his customary hourly rate. The administrative law judge also found that the evidence submitted by counsel in support of a prevailing market rate was insufficient. While the amount of an attorney fee award is a discretionary matter within the purview of the administrative law judge as factfinder, based on the facts of this case, we hold that the administrative law judge's denial of counsel's entire fee request was not a reasonable exercise of his discretion and was unduly harsh, particularly, in light of the long, protracted history of this case. *Paynter*, 9 BLR at 1-191. Therefore, we vacate the administrative law judge's denial of counsel's fee petition.

In arguing that he substantially complied with the administrative law judge's Order to submit additional evidence in support of his fee petition, counsel states that, in light of the nature of his practice, it is difficult for him to set forth a customary hourly rate. Specifically, counsel states that:

> The undersigned primarily works on a contingency fee basis for the majority of his other fee producing cases. For example, the undersigned represents claimants in workers' compensation cases in the State of Kentucky (KRS 342.320). The attorney fee in those cases is based on a percentage of the recovered amount and not an hourly rate. Likewise, the unsigned[sic] represents individuals involved in personal injury litigation where the attorney fee is usually based on one[-]third of the amount of recovery. For other routine matters such as divorce litigation, the undersigned charges $100.00 per hour for out of court work and $200.00 per hour for court appearance. Routine legal matters such as divorce in no way compare to the increasingly complex field of litigation involved in federal black lung practice.

Claimant's Petition for Review and Brief at 3-4. Additionally, counsel provided evidence of several recent cases in which he was awarded an hourly rate of $300.00 for work performed before the Office of Administrative Law Judges. Claimant's Petition for Review and Brief at 4 (unpaged) and Appendix; *see, e.g., Cain v. Beech Fork Processing,*

Inc., 2008-BLA-5659 (Nov. 3, 2011); *Huff v. ICG Knott County LLC*, 2010-BLA-7596 (Aug. 18, 2011). Moreover, as the administrative law judge noted in his prior decision, the Board has previously affirmed a fee award to counsel with an hourly rate of $300.00. *See B.M.* [*Mitchell*] *v. Jones Branch Coal Co., Inc.*, BRB No. 09-0182 BLA (Aug. 20, 2009) (unpub.); 2009 Attorney Fee Order at 4. Based on this evidence, counsel has adequately set forth the basis for his requested hourly rate. Further, when this evidence is considered in conjunction with the administrative law judge's prior findings regarding counsel's expertise in the area of black lung litigation, the quality of counsel's representation as observed at the hearing, and the complexity of the legal issues involved in this case, we agree with counsel that the record supports a finding that his customary hourly rate in black lung litigation is $300.00. *See Bentley*, 522 F.3d at 663, 24 BLR at 2-121; *Pritt v. Director, OWCP*, 9 BLR 1-159, 1-160 (1986). Consequently, based on the facts of this case, we modify the administrative law judge's Order Denying Attorney Fee Petition on Remand to award counsel a total fee of $8,175.00, representing 27.25 hours of legal services at an hourly rate of $300.00.

Order Denying Attorney Fee Petition

Counsel also appeals the administrative law judge's Order Denying Attorney Fee Petition, issued on September 9, 2011, in response to counsel's Amended Motion and Affidavit for Attorney Fee. Counsel requested a total fee of $12,300.00, representing all 41 hours of legal services performed in this case at an hourly rate of $300.00. This amended fee petition included an updated list of legal services performed after the administrative law judge's first Decision and Order on Remand. Employer objected to both the hourly rate and the number of hours requested.

Initially, the administrative law judge noted that he had previously addressed counsel's request for fees for legal services performed pursuant to the initial claim and first remand. The administrative law judge, therefore, stated that he would only address the hours requested for legal services performed after August 27, 2009, the date of his first Decision and Order on Remand. *See* Order Denying Attorney Fee Petition at 3. The administrative law judge, therefore, considered counsel's fee request for an additional 7.25 hours of legal services at an hourly rate of $300.00. *Id*. In addressing the amended fee petition and employer's objections to it, the administrative law judge, applying the same analysis as he set forth in his previous Order Denying Fee Petition on Remand, also denied counsel's amended fee petition in its entirety.

On appeal, counsel contends that the administrative law judge erred in denying the amended fee request in its entirety, as an abuse of his discretion. Specifically, counsel contends that his amended fee petition and the evidence submitted in support of the fee substantially comply with the regulations and requirements of the Sixth Circuit in *Bentley*. Employer responds, urging affirmance of the administrative law judge's denial

of counsel's fee petition and arguing that the administrative law judge neither abused his discretion, nor committed legal error, in denying counsel's application for an attorney fee.

As with the administrative law judge's consideration of counsel's original fee petition, we hold that the administrative law judge's denial of counsel's amended fee petition, *in toto*, was not reasonable and was unduly harsh. *Paynter*, 9 BLR at 1-191. Consequently, we vacate the administrative law judge's denial of counsel's amended fee petition. As the record is sufficiently complete to establish that counsel's customary billing rate for black lung litigation is $300.00 per hour, *see* discussion, *supra*, we modify the administrative law judge's Order Denying Fee Petition to award counsel a total fee of $2,175.00, representing 7.25 hours of additional legal services performed at an hourly rate of $300.00.

Accordingly, the administrative law judge's Decision and Order on Second Remand – Award of Benefits is affirmed. However, the administrative law judge's Order Denying Attorney Fee Petition on Remand and Order Denying Attorney Fee Petition are reversed and modified to award counsel attorney fees in the amount of $8,175.00 and $2,175.00, respectively.

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