BRB Nos. 11-0684 BLA
and 11-0834 BLA

HENRY L. SIMPSON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
U.S. STEEL MINING COMPANY ALABAMA	)	
	)	
and	)	
	)	
U.S. STEEL CORPORATION	)	DATE ISSUED: 09/24/2012
	)	
Employer/Carrier-Petitioners	)	
	)	
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 Order Granting Attorney Fees of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Abigail P. van Alstyne (Quinn, Connor, Weaver, Davies & Rouco, LLP), Birmingham, Alabama, for claimant.

Neil Richard Clement (RichardsonClement PC), Birmingham, Alabama, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Order Granting Attorney Fees (2009-BLA-5429) of Administrative Law Judge Theresa C. Timlin rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. 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] The administrative law judge credited claimant with thirty-five years of coal mine employment, as stipulated by the parties, and adjudicated this subsequent claim, filed on February 19, 2008, pursuant to the regulatory provisions at 20 C.F.R. Parts 718 and 725. The administrative law judge determined that the newly submitted biopsy evidence, obtained during a right upper lobe lobectomy of claimant's lung, was sufficient to establish the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). The administrative law judge further determined that the weight of the evidence was sufficient to establish the existence of complicated pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(3), 718.203(b), affording claimant the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304.[3] Consequently, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's finding of invocation of the irrebuttable presumption of total disability due to pneumoconiosis

[1] Claimant's initial claim was filed on January 31, 2005, and was denied by the district director because the evidence was insufficient to establish the existence of pneumoconiosis or total respiratory disability due to pneumoconiosis. No further action was taken on this claim. Director's Exhibit 1.

[2] Subsequent to the hearing in this case, Section 1556 of Public Law No. 111-148 amended the Act with respect to the entitlement criteria for certain claims that were filed after January 1, 2005, and were pending on or after March 23, 2010, the effective date of the amendments. Section 1556 reinstated the presumption at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), which provides, in pertinent part, that if a miner worked fifteen or more years in underground coal mine employment or comparable surface coal mine employment, and if the evidence establishes a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis. 30 U.S.C. §921(c)(4).

[3] The administrative law judge determined that because claimant was entitled to the irrebuttable presumption at 20 C.F.R. §718.304, she "did not . . . need to decide whether the 20 C.F.R. §718.305 rebuttable presumption, [as reinstated by the recent amendments to the Act], applies in this case." Decision and Order at 12 n. 5.

pursuant to Section 718.304, alleging that the administrative law judge's findings are neither supported by substantial evidence, nor in accordance with applicable law. Employer also challenges the administrative law judge's award of attorney fees, asserting that no fee award is enforceable until an award of benefits becomes final. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response.

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 (1965).

Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 718.304. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *See Pittsburg & Midway Coal Mining Co. v. Director, OWCP* [*Cornelius*], 508 F.3d 975, 24 BLR 2-72 (11th Cir. 2007); *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991).

Employer contends that the administrative law judge erred in finding the evidence of record sufficient to establish complicated pneumoconiosis at Section 718.304, arguing that the doctors' opinions and the pathology reports are inconclusive and too equivocal to support a finding that the right upper lobe mass constitutes complicated coal workers' pneumoconiosis. Employer also asserts that even if the biopsy evidence was sufficient to establish that claimant had complicated pneumoconiosis prior to his lobectomy, the lack

[4] The law of the United States Court of Appeals for the Eleventh Circuit is applicable, as claimant was employed in the coal mining industry in Alabama. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(en banc); Director's Exhibit 4.

of any post-surgery evidence of pneumoconiosis would preclude an award of benefits. Employer's Brief at 6-36. Employer's arguments lack merit.

After consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the evidence of record, we conclude that the administrative law judge's decision is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In finding the weight of the evidence sufficient to establish the existence of complicated pneumoconiosis at Section 718.304, the administrative law judge initially considered the newly submitted x-ray evidence of record,[5] and determined that it did not support a finding of pneumoconiosis, as both of the x-rays were obtained post-surgery and read as negative.[6] Decision and Order at 6. In considering the biopsy evidence pursuant to Section 718.304(b), the administrative law judge reviewed Dr. Ragland's pathology report from claimant's right upper lobe lobectomy performed by Dr. Athanasuleas on November 2, 2007, which revealed by gross description the presence of "a focal area of consolidation of the parenchyma centrally with some associated bronchiectasis . . . [measuring] approximately 4.0 x 3.0 x 2.0 cm." Decision and Order at 7; Director's Exhibit 12. The administrative law judge noted Dr. Ragland's microscopic pathology findings of "large geographic areas of well-developed fibrosis" and "a few small scattered fibrotic nodules . . . seen with associated anthracotic pigment . . . [that], given the history and the histologic appearance of the lungs, . . . likely represents coal miners' pneumoconiosis with progressive fibrosis."[7] *Id*.

[5] Dr. Ahmed read the March 26, 2008 film as negative, Director's Exhibit 13, and Dr. Goldstein read the October 27, 2009 film as negative. Employer's Exhibit 2.

[6] Employer's argument, that the administrative law judge erred in giving "no weight" to Dr. Hasson's interpretation of a February 11, 2009 film, has no merit, as Dr. Hasson's interpretation of the x-ray was not admitted into evidence. *See* 20 C.F.R. §718.102; *Kuchwara v. Director, OWCP*, 7 BLR 1-167, 1-169 (1984); Hearing Transcript at 8; Decision and Order at 10 n. 4.

[7] Dr. Ragland's microscopic description of the right upper lobe indicated:

> Sections of the lung specimens show large geographic areas of well-developed fibrosis predominantly located in the central areas and surrounding larger vessels and bronchi. These fibrotic areas demonstrate a variable amount of chronic inflammatory cells including plasma cells, eosiniphils and occasional multinucleated giant cells as well as a variable amount of anthracotic pigment. Surrounding these fibrous areas the alveoli are somewhat compressed and some alveoli are filled with foamy histiocytes and dust cells. The fibrosis appears to compress some of the larger vessels and focal areas of chronic vasculitis are seen. Outside of

The administrative law judge also noted that the specimens were sent to Dr. Katzenstein at the SUNY Upstate Medical Center for a second expert consultation. Dr. Katzenstein agreed that "the lesion in the upper lobe is an example of progressive massive fibrosis with adjacent organizing pneumonia." Director's Exhibit 12; Decision and Order at 7. Thus, the administrative law judge reasonably concluded that the biopsy evidence, describing "a well-defined mass measuring approximately 4.0 x 3.0 x 2.0 centimeters," "identified as fibrotic with associated anthracotic pigmentation," and described by the physicians as an example of progressive massive fibrosis, was sufficient to establish that claimant had a massive lesion that represented complicated pneumoconiosis pursuant to 20 C.F.R. §§718.304(b) and 718.201(a). *See Cornelius*, 508 F.3d 975, 24 BLR 2-72; *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 1359, 20 BLR 2-227, 2-229-30 (4th Cir. 1996); 20 C.F.R. §§718.106; 718.202(a); Decision and Order at 7.

Pursuant to Section 718.304(c), the administrative law judge considered the medical opinions of Drs. O'Reilly, Goldstein, and Hasson, who each examined claimant subsequent to his lobectomy. The administrative law judge noted that, although Dr. O'Reilly was aware that post-surgical x-ray findings were negative for pneumoconiosis, as determined from his May 30, 2008 examination, he nevertheless diagnosed coal workers' pneumoconiosis based on the pathologic findings from claimant's lobectomy of pneumoconiosis causing a 4 cm. x 3 cm. mass. Director's Exhibit 13; Decision and Order at 8-9. By contrast, neither Dr. Goldstein nor Dr. Hasson diagnosed coal workers' pneumoconiosis. In his report dated October 27, 2009, Dr. Goldstein acknowledged that the mass removed from claimant during the lobectomy was diagnosed as complicated pneumoconiosis, but determined that occupational pneumoconiosis was not currently present because claimant's pulmonary functions were only minimally abnormal; claimant's post-surgical x-ray did not show changes consistent with pneumoconiosis; and the doctor had not seen cases of complicated pneumoconiosis where only one nodule was found. Employer's Exhibit 2. Similarly, in a report dated February 11, 2009, Dr. Hasson agreed that the resected mass demonstrated the existence of pneumoconiosis, but found no evidence of residual pneumoconiosis on chest x-ray. Employer's Exhibit 1. The administrative law judge permissibly accorded probative weight to Dr. O'Reilly's diagnosis of pneumoconiosis, finding it well-documented and well-reasoned, and supported by the biopsy evidence, "regardless of the fact [that] the lesion had been excised." Decision and Order at 10. The administrative law judge correctly determined that claimant is not required to provide evidence that residual pneumoconiosis remains after the massive lesion had been surgically excised during the lobectomy. *See Clark v.*

> these areas, a few small scattered fibrotic nodules are seen with associated anthracotic pigment.

Director's Exhibit 12.

Karst-Robbins Coal Co., 12 BLR 1-149, 1-155 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 21 (1987); 20 C.F.R. §718.106(c); Decision and Order at 10. The administrative law judge permissibly discounted the opinion of Dr. Goldstein, as the physician failed to explain with specificity why he ruled out a diagnosis of coal workers' pneumoconiosis or why, in claimant's case, complicated pneumoconiosis could not be diagnosed with only one nodule. *See Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46, 1-47 (1985); Decision and Order at 10. With respect to Dr. Hasson's opinion, the administrative law judge acted within her discretion in finding that it merited no weight, as the diagnosis of no residual pneumoconiosis was based on an x-ray that was not submitted into the record. *See Brasher v. Pleasant View Mining Co., Inc.*, 23 BLR 1-141, 1-149 n.10 (2006); Decision and Order at 10. The administrative law judge concluded that the medical opinion of Dr. O'Reilly supported a finding of complicated pneumoconiosis, and acted within her discretion in finding that the biopsy evidence and Dr. O'Reilly's medical opinion established complicated pneumoconiosis at Section 718.304. *See Cornelius*, 508 F.3d 975, 24 BLR 2-72; Decision and Order at 10-11.

The administrative law judge, in her role as finder of fact, is charged with evaluating the relative value of conflicting medical evidence and assessing the credibility of the medical experts. *Clark*, 12 BLR at 1-155. As substantial evidence supports the administrative law judge's findings that the newly submitted evidence is sufficient to establish a change in an applicable condition of entitlement pursuant to Section 725.309(d), and that the weight of the evidence of record is sufficient to establish complicated pneumoconiosis arising out of coal mine employment pursuant to Sections 718.304 and 718.203(b), they are affirmed.[8] *See Cornelius*, 508 F.3d 975, 24 BLR 2-72. Consequently, we affirm the administrative law judge's award of benefits.

Lastly, employer challenges the administrative law judge's award of attorney fees for work performed before the Office of Administrative Law Judges. Specifically, employer maintains that, in approving attorney fees in this case before an award of benefits becomes final, the administrative law judge should have included qualifying language acknowledging that the fee award is not enforceable until the claim has been successfully prosecuted and all appeals are exhausted. Because employer does not substantively challenge the amount of the fee award, and the administrative law judge did not abuse her discretion in approving the fee request, we affirm the administrative law judge's award of attorney fees in the amount of $9,856.25, representing 38 hours of legal

[8] In light of our affirmance of the administrative law judge's finding of complicated pneumoconiosis and invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, we need not address employer's arguments regarding the issue of total respiratory disability at 20 C.F.R. §718.204(b).

services at an hourly rate of $250, and 4.75 hours of services performed by a legal assistant at an hourly rate of $75. As employer correctly notes, however, this fee award does not become effective, and is thus unenforceable, until the award of benefits becomes final. *See* 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Order Granting Attorney Fees are affirmed.

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