U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0398 BLA

DOUGLAS E. STONE Claimant-Respondent v. CUMBERLAND RIVER COAL COMPANY and ARCH COAL, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 09/09/2015 DECISION and ORDER and AWARD of ATTORNEY FEES

Appeal of the Decision and Order on Remand of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for claimant.

Ronald E. Gilbertson (Gilbertson Law, LLC), Columbia, Maryland, for employer/carrier.

Before: HALL, Chief Administrative Appeals Judge, BOGGS and ROLFE, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand awarding benefits (2011-BLA-5936) of Administrative Law Judge Daniel F. Solomon (the

administrative law judge) rendered on a subsequent claim[1] filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012)(the Act). This case is before the Board for the second time. In his original Decision and Order, the administrative law judge accepted the parties' stipulation that claimant worked at least twenty-eight years in surface coal mine employment, and found that at least fifteen years of claimant's surface coal mine employment occurred in conditions substantially similar to those in an underground coal mine. The administrative law judge determined that the newly submitted evidence established that claimant had a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)[2] and, therefore, claimant was entitled to invocation of the rebuttable presumption of total disability due to pneumoconiosis pursuant to amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4).[3] The administrative law judge found that employer failed to rebut the presumption. Accordingly, benefits were awarded.

On appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that the new evidence established total respiratory disability pursuant to 20 C.F.R. §718.204(b), thereby establishing a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The Board further affirmed, as supported by substantial evidence, the administrative law judge's findings that claimant established at least fifteen

[1] Claimant's first application for benefits, filed on July 29, 2008, was denied by the district director on June 16, 2009 because claimant failed to establish any element of entitlement. Director's Exhibit 1. Claimant filed the current claim for benefits on August 24, 2010. Director's Exhibit 3.

[2] The administrative law judge did not specify whether claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Because claimant did not establish total respiratory disability in his previous claim, the administrative law judge's finding that claimant established total disability with new evidence constitutes a determination of a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

[3] Congress enacted amendments to the Black Lung Benefits Act, which apply to claims filed after January 1, 2005, that were pending on or after March 23, 2010. Relevant to this case, amended Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner establishes a totally disabling respiratory or pulmonary impairment and at least fifteen years of underground coal mine employment, or coal mine employment in conditions substantially similar to those in an underground mine. 30 U.S.C. §921(c)(4), *amended by* Pub. L. No. 111-148, §1556(a), 124 Stat. 119, 260 (2010). If the presumption is invoked, the burden of proof shifts to employer to rebut the presumption. 30 U.S.C. §921(c)(4).

years of employment in dust conditions substantially similar to those found in underground mines and was entitled to invocation of the presumption of total disability due to pneumoconiosis at amended Section 411(c)(4). However, because the administrative law judge failed to address all relevant evidence and render findings that complied with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), the Board vacated his determination that employer failed to establish rebuttal of the presumed facts of legal pneumoconiosis, clinical pneumoconiosis and disability causation, and remanded the case for further consideration.

On remand, the administrative law judge found that employer failed to rebut the amended Section 411(c)(4) presumption with affirmative proof that claimant does not have either clinical or legal pneumoconiosis, or that his total respiratory disability was not caused by pneumoconiosis. Accordingly, benefits were awarded.

In the present appeal, employer argues that the administrative law judge erred in finding that employer failed to establish rebuttal of the presumption under amended Section 411(c)(4). Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation, has filed a letter indicating his intention not to participate in this appeal. Employer has filed a reply brief, reiterating its contentions on 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.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Employer contends that the administrative law judge erred in finding that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. Specifically, employer challenges the administrative law judge's crediting of Dr. Baker's opinion over those of Drs. Brooks and Jarboe on the issues of legal pneumoconiosis[5] and

[4] The record reflects that claimant's last coal mine employment was in Kentucky. Director's Exhibit 6 at 4. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (en banc).

[5] Legal pneumoconiosis refers to "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

disability causation.[6] Employer maintains that the administrative law judge did not give fair consideration to Dr. Brooks' opinion, that claimant's "physiologic abnormalities are not due to coal workers[']pneumoconiosis," Employer's Exhibit 3 at 6. Employer also asserts that Dr. Jarboe's opinion, that claimant does not have legal pneumoconiosis, was based on his review of claimant's medical records and is well-reasoned and supported by the evidence. Employer contends that the administrative law judge selectively considered Dr. Jarboe's explanations for his conclusions and failed to offer valid reasons for discrediting the opinion. Employer's Brief at 22-31.

After consideration of the administrative law judge's decision, the arguments raised on appeal, and the evidence of record, we conclude that the Decision and Order on Remand is supported by substantial evidence, consistent with applicable law, and contains no reversible error. In accordance with the Board's remand instructions, the administrative law judge provided a comprehensive discussion of the conflicting medical opinions and, after fully delineating the doctors' findings and the bases supporting their opinions, found that the opinions of Drs. Brooks and Jarboe were insufficient to affirmatively establish rebuttal of the presumed fact of legal pneumoconiosis. Decision and Order on Remand at 7-11; Director's Exhibit 12; Employer's Exhibits 2, 3, 13. While Dr. Brooks ruled out clinical pneumoconiosis as a source of claimant's disabling pulmonary impairment, the administrative law judge permissibly found that his opinion was not probative on the issue of legal pneumoconiosis because Dr. Brooks failed to assess whether the respiratory conditions he diagnosed, *i.e.*, chronic obstructive pulmonary disease (COPD) and asthma resulting in chronic hypoxemia and alveolar hypoventilation, were significantly related to, or substantially aggravated by, dust exposure in coal mine employment. *See Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990); Decision and Order on Remand at 10; Employer's Exhibit 3. Likewise, the administrative law judge acted within his discretion in finding that Dr. Jarboe's opinion was "poorly reasoned," because Dr. Jarboe failed to adequately explain how he determined that coal mine dust exposure played no role in aggravating claimant's respiratory impairment. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc); *see also Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007); Decision and Order on Remand at 10-11. As substantial evidence

[6] Employer additionally argues that the administrative law judge erred in not addressing medical evidence from the prior claim. The Board addressed and rejected this argument in the last appeal, finding no error in the administrative law judge's decision not to discuss the prior claim evidence at rebuttal. *Stone v. Cumberland River Coal Co.*, BRB No. 13-0303 BLA (Mar. 19, 2014)(unpub.), slip op. at 7 n.10, *citing Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988)(holding that it is illogical to find rebuttal established based on evidence that predates the evidence on which invocation is based); *Coffey v. Director, OWCP*, 5 BLR 1-404, 1-407 (1982).

supports the administrative law judge's credibility determinations, we affirm his finding that employer failed to establish rebuttal of the presumed fact of legal pneumoconiosis. Because employer has failed to establish rebuttal pursuant to 20 C.F.R. §718.305(d)(1)(i)(A), and because we find *infra* that, for reasons unrelated to rebuttal of the presumed fact of clinical pneumoconiosis, the administrative law judge permissibly discredited the opinions of Drs. Brooks and Jarboe with respect to rebuttal on the issue of the cause of claimant's disabling impairment, we need not address employer's arguments regarding the administrative law judge's weighing of the evidence relevant to the issue of clinical pneumoconiosis pursuant to 20 C.F.R. §718.305(d)(1)(i)(B).

We decline to address employer's allegation that the administrative law judge erred in crediting the opinion of Dr. Baker that claimant has legal pneumoconiosis. Because employer bears the burden of rebutting the amended Section 411(c)(4) presumption, error, if any, in the administrative law judge's weighing of Dr. Baker's opinion is harmless. *See Johson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); 30 U.S.C. §902(b).

Lastly, because Drs. Brooks and Jarboe did not diagnose legal pneumoconiosis, the administrative law judge acted within his discretion in finding that their opinions were entitled to little weight on the issue of disability causation. Decision and Order on Remand at 11-13; *see Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 17 BLR 2-97 (6th Cir. 1993), *vac'd sub nom., Consolidated Coal Co. v. Skukan*, 114 S. Ct. 2732 (1994), *rev'd on other grounds*, *Skukan v. Consolidated Coal Co.*, 46 F.3d 15, 19 BLR 2-44 (6th Cir. 1995); *Trujillo v. Kaiser Steel Corp.*, 8 BLR 1-472 (1986); Decision and Order on Remand at 18. As substantial evidence supports the administrative law judge's findings, we affirm his conclusion that the opinions of Drs. Brooks and Jarboe were insufficient to establish rebuttal of the presumed fact of disability causation, and that employer failed to establish rebuttal of the amended Section 411(c)(4) presumption. 30 U.S.C. §921(c)(4); 20 C.F.R. §718.305(d)(1)(i), (ii); *Morrison v. Tenn. Consol. Coal Co*., 644 F.3d 473, 25 BLR 2-1 (6th Cir. 2011). Consequently, we affirm the administrative law judge's award of benefits.

Attorney Fee Award

Claimant's counsel has filed a complete, itemized statement requesting a fee for services performed before the Board between April 15, 2013 and April 12, 2014 in BRB No. 13-0303 BLA, pursuant to 20 C.F.R. §802.203. Claimant's counsel requests a total fee of $3,543.75 for 3.0 hours of legal services by Joseph E. Wolfe at an hourly rate of $300; 3.75 hours of legal services by Ryan C. Gilligan at an hourly rate of $225; and 18.0 hours of services by legal assistants at an hourly rate of $100. Employer opposes the fee petition, arguing that claimant's counsel failed to support the hourly rates requested with market evidence, *i.e.*, what fee-paying clients pay counsel or similarly-qualified attorneys

by the hour in a comparable case. Employer further challenges the number of hours requested by claimant's counsel and the legal assistants.

The Act provides that when a claimant wins a contested case, the employer, his insurer, or the Black Lung Disability Trust Fund shall pay a "reasonable attorney's fee" to claimant's counsel. 30 U.S.C. §932(a), incorporating 33 U.S.C. §928(a).

Employer contends that claimant's counsel has failed to provide sufficient proof of the market rate necessary to support the fee petition. We disagree. In the fee petition, claimant's counsel provides a list of 41 cases from 2007 to 2012 in which counsel and the legal assistants were awarded the requested hourly rates. Evidence of fees received in the past provides some guidance as to what the market rate is, and is appropriately included within the range of sources from which to ascertain a reasonable rate. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Maggard v. Int'l Coal Group*, 24 BLR 1-172 (2010)(Order); *Bowman v. Bowman Coal Co.*, 24 BLR 1-165 (2010)(Order). In support of the requested hourly rates, claimant's counsel has also provided evidence of expertise and experience in the field of black lung litigation, the professional status, and the normal billing rate, for each person who performed services and for whose work a fee is claimed. 20 C.F.R. §802.203; *see B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008). We find, therefore, that claimant's counsel has provided sufficient evidence of the market rate in counsel's geographic area for attorneys of counsel's expertise and experience, for appellate work before the Board. Consequently, we approve the requested hourly rates of $300 for Attorney Wolfe, $225 for Attorney Gilligan, and $100 for the legal assistants.

Employer objects to the number of hours charged as unreasonable, arguing that "some of the hours requested [were] clerical in nature…. such as taking phone messages" and, as such, "are not billable and must be considered part of overhead." Employer's Objections to Claimant's Counsel's Attorney Fee Petition at 2. Employer also challenges time charged on June 11, 2013 and June 28, 2013 for tasks performed by legal assistant N. Adam Rasnick and Attorney Ryan C. Gilligan as excessive and duplicative. Lastly, employer argues that nineteen hours for time spent by legal assistant Julia B. Witt and Attorney Gilligan to draft the response brief in this appeal is excessive and unreasonable in light of the fact that counsel requested 12.5 hours to brief issues in this case when it was pending before the Office of Administrative Law Judges.

The Board has held that clerical services are considered part of overhead expenses and are figured into the hourly rate. *See Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986). Accordingly, the charges by the legal assistants of .25 hour on May 17, 2013, May 24, 2013, and April 1, 2014, for taking telephone messages are disallowed. Upon review of the fee petition, we reject employer's remaining challenges to the time charges by the attorneys and legal assistants, as we find that the services provided constituted

compensable legal work that was not excessive, duplicative, or unreasonable in this case, in light of the services performed. *See Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).[7] 33 U.S.C. §928; 20 C.F.R. §802.203.

Accordingly, claimant's counsel is awarded a fee of $3,418.75 for 3.0 hours of legal services by Joseph E. Wolfe at an hourly rate of $300; 3.75 hours of legal services by Ryan C. Gilligan at an hourly rate of $225; and 16.75 hours of services by legal assistants at an hourly rate of $100, to be paid directly to claimant's counsel by employer. 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

Accordingly, the Decision and Order on Remand awarding benefits of the administrative law judge is affirmed, and claimant's counsel is awarded a fee of $3,418.75.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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JONATHAN ROLFE
Administrative Appeals Judge

[7] An attorney's fee award does not become effective, and is thus unenforceable, until there is a successful prosecution of the claim and the award of benefits becomes final. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-17 (1995).