BRB No. 10-0140 BLA

JOHN PENNINGTON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 10/29/2010
	)	
LICK FORK MINING COMPANY, INCORPORATED	)	
	)	
	)	
Employer-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 in Initial Claim of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts (William Lawrence Roberts, P.S.C.), Pikeville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits in Initial Claim (2008-BLA-5060) and the Attorney Fee Order of Administrative Law Judge Larry S. Merck, with respect to a claim filed on September 25, 2006, 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). After crediting claimant with eleven years of coal mine employment, based on the stipulation of the parties, the administrative law judge adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that claimant established that he has clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2), (4) and legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). In addition, the administrative law judge found that claimant established that he suffers from a totally disabling respiratory impairment due to coal workers' pneumoconiosis at 20 C.F.R. §718.204(b)(2)(ii), (iv), (c). 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's fees. Employer objected to the number of hours of service claimed and the hourly rate of $300.00. The administrative law judge found that the hourly rate requested was appropriate, but reduced the number of hours from twenty-seven to twenty and one-half, and awarded a total fee of $6,150.00.

Employer appeals, arguing that the administrative law judge erred in finding clinical pneumoconiosis established at 20 C.F.R. §718.202(a)(2), (4). In addition, employer asserts that the administrative law judge did not properly weigh the medical opinion evidence in finding legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4) and disability causation established at 20 C.F.R. §718.204(c). Further, employer indicates that the administrative law judge impermissibly granted the attorney fee request without requiring counsel to provide market evidence supporting the rate requested. Claimant responds, urging affirmance of the award of benefits and the award of attorney's fees. The Director, Office of Workers' Compensation Programs (the Director), has declined to file a response brief in this appeal.[1]

By Order dated June 30, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148,

[1] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and his finding that claimant established the existence of a totally disabling respiratory impairment at 20 C.F.R. §718.204(b)(2)(ii), (iv). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

which amended the Act with respect to the entitlement criteria for certain claims.[2] *Pennington v. Lick Fork Mining Co.*, BRB No. 10-0140 BLA (June 30, 2010)(unpub. Order). Only the Director has responded.

The Director states that there is no need to address the impact of Section 1556 on this case if the Board affirms the administrative law judge's award of benefits. The Director further asserts that, if the Board does not affirm the administrative law judge's findings, remand for consideration under Section 411(c)(4), 30 U.S.C. §921(c)(4), would not be required, since neither claimant nor employer have challenged the administrative law judge's acceptance of their stipulation to eleven years of coal mine employment. We agree with Director that Section 1556 has no impact on the resolution of the claim in this case because claimant does not have the fifteen years of coal mine employment necessary to invoke the statutory presumption.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

In order to establish entitlement to benefits in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

[2] Section 1556 of Pub. L. No. 111-148, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4)), reinstated the "15-year presumption" of Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), for claims filed after January 1, 2005, that were pending on or after March 23, 2010. Under Section 411(c)(4), if a miner establishes at least fifteen years of qualifying coal mine employment, and that he or she has a totally disabling respiratory impairment, there is a rebuttable presumption that he or she is totally disabled due to pneumoconiosis.

[3] The record reflects that the miner's coal mine employment was in Kentucky. Director's Exhibits 3, 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 (1989)(*en banc*).

I. Merits of Entitlement

A. The Administrative Law Judge's Findings

In considering whether legal pneumoconiosis was established at 20 C.F.R. §718.202(a)(4) and total disability causation was established at 20 C.F.R. §718.204(c), the administrative law judge considered the medical opinions of Drs. Agarwal, Jarboe, and Forehand. The administrative law judge found that although Dr. Agarwal diagnosed clinical pneumoconiosis, he did not diagnose legal pneumoconiosis. Decision and Order at 12-13; Director's Exhibit 11. With respect to the issue of legal pneumoconiosis, the administrative law judge gave little weight to Dr. Agarwal's opinion, that claimant's chronic obstructive pulmonary disease (COPD) was due entirely to his cigarette smoking history, because he found that Dr. Agarwal did not consider whether coal dust exposure contributed to, or aggravated, claimant's COPD.[4] Decision and Order at 12-13; Director's Exhibit 11.

The administrative law judge also gave little weight to Dr. Jarboe's opinion, that claimant's respiratory impairment was due to cigarette smoking, because he found it was not well-reasoned. Decision and Order at 17; Director's Exhibit 31. The administrative law judge determined that Dr. Jarboe did not adequately explain why he excluded coal dust exposure as a cause of claimant's impairment, but instead apparently relied on claimant's smoking history, without considering whether coal dust exposure could have had a concurrent effect. Decision and Order at 16. In addition, the administrative law judge found that Dr. Jarboe's opinion, that miners can get emphysema, but only in proportion to the amount of dust retained in the lungs, was contrary to the determination by the Department of Labor (DOL) that emphysema can occur independently of clinical pneumoconiosis. *Id*. at 17.

Regarding Dr. Forehand's opinion, the administrative law judge noted that he discounted coal mine employment as a cause of claimant's "cigarette lung disease" without considering or explaining why cigarette smoking and coal dust exposure could

[4] On Form CM-988, Dr. Agarwal stated that claimant's "[chronic obstructive pulmonary disease (COPD)] is due to 37.5 pack years of smoking." Director's Exhibit 11. In addition, Dr. Agarwal indicated that claimant's "reduced exercise capacity and pulmonary impairment is mainly due to COPD. In my judgment contribution from coal workers' pneumoconiosis is small but it is still substantial in view of limited lung capacity." *Id*. In a narrative report accompanying Form CM-988, Dr. Agarwal stated: "The contribution from coal workers' pneumoconiosis is small. In view of his limited lung capacity, even this small contribution from coal workers' pneumoconiosis is probably substantial." *Id*.

not have had a concurrent effect. Decision and Order at 23; Claimant's Exhibits 2, 4. Therefore, the administrative law judge accorded this portion of Dr. Forehand's opinion little weight. Decision and Order at 23. The administrative law judge then stated that Dr. Forehand diagnosed claimant with a permanent pulmonary impairment, based on his examination of claimant and the blood gas study results, which he attributed to coal dust exposure and cigarette smoking. *Id*. at 24; Claimant's Exhibits 2, 4. The administrative law judge found that this portion of Dr. Forehand's opinion was well-documented and well-reasoned so he accorded it full probative weight. Decision and Order at 24. Based on Dr. Forehand's diagnosis, the administrative law judge determined that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. at 25.

At 20 C.F.R. §718.204(c), the administrative law judge gave little weight to Dr. Agarwal's opinion, as he found that Dr. Agarwal's conclusion, that the contribution from coal workers' pneumoconiosis to claimant's impairment was "probably substantial," was equivocal. Decision and Order at 30; Director's Exhibit 11. The administrative law judge also accorded little weight to Dr. Jarboe's opinion because, contrary to the administrative law judge's findings, he did not diagnose clinical or legal pneumoconiosis or any other condition aggravated by coal dust exposure. Decision and Order at 28; Director's Exhibit 31. In contrast, the administrative law found Dr. Forehand's opinion, that claimant's impairment was due to cigarette smoking and coal dust exposure, to be well-reasoned, well-documented, and sufficient to meet the contributing cause standard at 20 C.F.R. §718.204(c). Decision and Order at 29-30; Claimant's Exhibits 2, 4.

B. Arguments on Appeal

With respect to both 20 C.F.R. §§718.202(a)(4) and 718.204(c), employer asserts that the administrative law judge improperly discounted the opinions of Drs. Agarwal and Jarboe by requiring them to rule out coal dust exposure as a contributing factor of claimant's impairment. Employer contends that, in so doing, the administrative law judge shifted the burden of proof to employer. In addition, employer argues that the administrative law judge erred in giving less weight to Dr. Jarboe's opinion because he relied, in part, on the reversibility of claimant's impairment. Employer states that in making this determination, the administrative law judge erred in relying on *Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007), because, in that case, the judge applied the presumption at 20 C.F.R. §718.203 to find legal pneumoconiosis established at 20 C.F.R. §718.202(a)(4). Employer also indicates that the administrative law judge's reliance on *Mountain Clay, Inc. v. Spivey*, 172 Fed. Appx. 641 (6th Cir. 2006) and *Consolidation Coal Co. v. Swiger*, Case No. 03-1971 (4th Cir. May 11, 2004), was in error. Further, employer contends that the administrative law judge mischaracterized Dr. Jarboe's opinion when he found that Dr. Jarboe would not attribute claimant's emphysema to coal dust, absent a finding of clinical pneumoconiosis. In addition, employer argues that the administrative law judge's determination, that Dr.

Forehand's opinion was sufficient to establish the existence of legal pneumoconiosis and total disability due to legal pneumoconiosis, is contradictory, as he both credited and discredited the opinion.

There is no merit to employer's assertion that, in weighing the opinions of Drs. Agarwal and Jarboe, the administrative law judge improperly shifted the burden of proof to employer to rule out coal dust exposure as a cause of claimant's respiratory impairment.[5] Rather, the administrative law judge permissibly discredited Dr. Agarwal's opinion because he found that it did not contain any rational explanation as to why claimant's respiratory condition was due only to smoking, and could not be related, at least in part, to coal dust exposure. Decision and Order at 12-13; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). Similarly, the administrative law judge acted within his discretion in discounting Dr. Jarboe's opinion because Dr. Jarboe attributed claimant's impairment solely to cigarette smoking without explaining why coal dust exposure could not have had a concurrent effect.[6] Decision and Order at 16-17; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513; *Clark*, 12 BLR at 1-155.

Regarding the administrative law judge's crediting of Dr. Forehand's opinion, employer states that Dr. Forehand never actually diagnosed an impairment related to coal dust exposure, because he attributed claimant's mild obstructive impairment solely to cigarette smoking. Employer also asserts that the administrative law judge did not address Dr. Jarboe's criticisms of Dr. Forehand's explanation for his view that the blood gas studies established that coal dust played a role in claimant's impairment. Employer further contends that the administrative law judge did not consider that Dr. Forehand failed to identify the extent of claimant's cigarette smoking history in reaching his conclusions.

Contrary to employer's contention, the administrative law judge's treatment of Dr. Forehand's opinion is not contradictory, as Dr. Forehand diagnosed both cigarette

[5] The administrative law judge recognized that Dr. Agarwal had stated that clinical pneumoconiosis contributed to claimant's respiratory impairment, but discredited his opinion on the basis that it was equivocal. Decision and Order at 30.

[6] Because the administrative law judge gave a valid reason for giving little weight to Dr. Jarboe's opinion, we decline to address employer's additional allegations of error regarding the administrative law judge's discounting of this opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

smoker's lung disease and a "permanently disabling respiratory impairment of an oxygen-transfer nature." Claimant's Exhibit 2. Dr. Forehand opined that claimant's "smoking history has contributed to but does not appear to be the principal cause" of the obstructive impairment revealed on claimant's pulmonary function tests. *Id*. Instead, Dr. Forehand diagnosed a separate, totally disabling gas-exchange impairment, as revealed by claimant's blood gas study results, attributable to both cigarette smoking and coal dust exposure. Claimant's Exhibits 2, 4. In addition, contrary to employer's assertions, the administrative law judge considered Dr. Jarboe's criticisms of Dr. Forehand's opinion regarding the cause of claimant's impairment, but permissibly determined that Dr. Forehand's opinion was supported by the objective evidence. Decision and Order at 19-22; *see Napier*, 301 F.3d at 713-14, 22 BLR at 2-553; *Stephens*, 298 F.3d at 522, 22 BLR at 2-513. Further, contrary to employer's contention, Dr. Forehand was aware of claimant's cigarette smoking history, as he noted that claimant "has been smoking up to a pack of cigarettes daily for [forty] years." Claimant's Exhibit 2. This is consistent with the smoking histories considered by the other physicians and claimant's testimony on the subject.[7] Therefore, we affirm the administrative law judge's treatment of the medical opinion evidence and his finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4) and total disability due to legal pneumoconiosis at 20 C.F.R. §718.204(c). Accordingly, we affirm the award of benefits.[8]

[7] In a medical note, dated February 3, 1999, Dr. King stated that claimant had a smoking history of greater than thirty-three pack years. Employer's Exhibit 1. Dr. Agarwal, in his report dated January 10, 2007, indicated that claimant smoked for approximately forty-two years at a rate of three-quarters of a pack of cigarettes a day. Director's Exhibit 11. In his report, dated April 15, 2007, Dr. Jarboe stated that claimant started smoking when he was sixteen and averaged a little over one-half pack of cigarettes daily. Director's Exhibit 31. Dr. Jarboe also stated, in a questionnaire, that either claimant or his spouse reported that claimant smoked one pack of cigarettes daily for forty-two years. *Id*. Claimant testified that he currently smokes about one-half pack of cigarettes a day and has smoked off and on for approximately thirty-eight years. Hearing Transcript at 24, 28. In an answer to employer's interrogatories, claimant indicated that he smoked a pack of cigarettes daily for forty-two years. *Id*. at 24-25.

[8] Because we have affirmed the administrative law judge's Decision and Order on these grounds, it is not necessary to address employer's additional arguments regarding the administrative law judge's finding that claimant established clinical pneumoconiosis at 20 C.F.R. §718.202(a)(2), (4).

II. Attorney Fee Appeal

On November 20, 2009, claimant's counsel submitted an attorney's fee petition to the administrative law judge, in the amount of $8,100, for twenty-seven hours of work performed from March 14, 2008 to November 11, 2009, at an hourly rate of $300.00. After considering employer's objections, counsel's response, and the evidence presented, the administrative law judge reduced the hours of compensable services to twenty and one-half hours. Accordingly, the administrative law judge awarded claimant's counsel $6,150.00 in attorney's fees.

On appeal, employer argues that the administrative law judge's fee award should be vacated and remanded because claimant's counsel failed to support his fee petition with "market evidence" of his hourly rate. Employer's Brief Regarding Attorney Fee at 1. In addition, employer asserts that the administrative law judge did not properly apply the lodestar approach in awarding claimant's counsel $300.00 an hour because he did not state how much weight he gave the factors he considered or explain how these factors resulted in the rate awarded. Further, employer states that the administrative law judge did not explain why he rejected employer's evidence regarding lower rates awarded by the district director and other administrative law judges. Claimant responds, arguing that his application complies with 20 C.F.R. §725.366(a) and asserting that his requested hourly rate is reasonable.

The amount of an attorney's 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 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980); *see also Jones v. Badger Coal Co*., 21 BLR 1-102 (1998)(*en banc*). The regulations provide that an approved fee shall take 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 the fee requested." 20 C.F.R. §725.366(b).

In determining the amount of attorney's fees to award under a fee-shifting statute, the United States Supreme Court has held that a court must determine the number of hours reasonably expended in preparing and litigating the case and then multiply those hours by a reasonable hourly rate. *Pa. v. Del. Valley Citizens' Council for Clean Air*, 478 U.S. 546 (1986). This sum constitutes the "lodestar" amount, which is the appropriate starting point for calculating fee awards under the Act. *B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 663, 24 BLR 2-106, 2-121 (6th Cir. 2008). An attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community." *Blum v. Stenson*, 465 U.S. 886, 895 (1984). The

prevailing market rate is "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004). The fee applicant has the burden to produce satisfactory evidence "that the requested rates are in line with those prevailing in the community for similar services by lawyers of comparable skill, experience, and reputation." *Blum*, 465 U.S. at 896 n.11; *Gonter v. Hunt Valve Co.*, 510 F.3d 610, 617 (6th Cir. 2007).

Employer argues that the administrative law judge erred in awarding claimant's counsel an hourly rate of $300.00 because "he relieved [claimant's counsel] of his burden of producing market evidence supporting his requested rate of $300/hour." Employer's Brief Regarding Attorney Fee at 5. We disagree. In determining counsel's hourly rate, the administrative law judge relied upon an "attorney fee statement" justifying counsel's hourly rate and copies of several decisions that claimant's counsel attached to his petition. The administrative law judge found that these decisions document that attorneys practicing black lung litigation in eastern Kentucky and Virginia were awarded hourly rates of $300.00 in past federal black lung cases. *See* Attorney Fee Order at 2. As a general proposition, rates awarded in other black lung cases do not set the prevailing market rate. *See Bentley*, 522 F.3d at 664, 24 BLR at 2-122-23. However, where there is only a small number of comparable attorneys, a tribunal may look to prior awards for guidance in determining a prevailing market rate. *Id.*

The administrative law judge also considered documentation from employer regarding three attorneys practicing in Kentucky, who requested an hourly rate of $150.00 for representation of black lung claimants; a fee petition by a Kentucky attorney requesting an hourly rate of $137.50; and a fee award from the district director's office awarding an attorney an hourly rate of $100.00, based on the routine nature of the work and because most of the evidence was in the file prior to his representation.[9] Attorney Fee Order at 3. In addition, the administrative law judge noted that the Benefits Review Board recently affirmed fee awards for attorneys in Kentucky, where claimant's counsel practices, based on hourly rates from $200 to $300. *Id*. at 4-5.

[9] While employer argues that the administrative law judge rejected its evidence of lower hourly rates awarded by the district director and administrative law judges, this is not the case. Instead, the administrative law judge determined that the fee petitions submitted by employer were "no more probative" than those submitted by claimant's counsel and only established that "[a]lthough some attorneys in Kentucky have requested hourly rates of $150, other attorneys practicing in the same area have requested and been awarded $300 for their representation of claimants." Attorney Fee Order at 4.

In awarding claimant's counsel an hourly rate of $300.00 in this case, the administrative law judge relied upon counsel's extensive experience and expertise in litigating federal black lung cases. Attorney Fee Order at 5. This is a relevant factor that an administrative law judge may consider in determining a reasonable hourly rate for claimant's counsel. *Newport News Shipbuilding & Dry Dock Co. v. Holiday*, 591 F.3d 219, 228 (4th Cir. 2009); *Bentley*, 522 F.3d at 664-65, 24 BLR at 2-124.

Based upon the facts of the case, employer has not established that the administrative law judge abused his discretion in determining that claimant's counsel established that $300.00 represents "a reasonable hourly rate." Attorney Fee Order at 5; *see Bentley*, 522 F.3d at 663-64, 24 BLR at 2-126; *Bowman v. Bowman Coal Co.*, BLR , BRB No. 07-0320 BLA, slip op. at 5 n.8 (Apr. 15, 2010); *Maggard v. Int'l Coal Group, Knott County, LLC*, BLR , BRB No. 09-0271 BLA, slip op. at 9 n.5 (Apr. 15, 2010).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits in Initial Claim and Attorney Fee Order 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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REGINA C. McGRANERY
Administrative Appeals Judge