BRB No. 10-0180 BLA

BURTON BENTLEY, JR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
RATLIFF & CHILDERS COAL CORPORATION	)	
	)	
	)	
and	)	
	)	DATE ISSUED: 10/13/2010
LIBERTY MUTUAL INSURANCE GROUP	)	
	)	
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 on Remand – Award of Benefits of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

W. Barry Lewis (Lewis and Lewis Law Offices), Hazard, Kentucky, for employer.

Michelle S. Gerdano (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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits (05-BLA-5756) of Administrative Law Judge Larry S. Merck (the administrative law judge), rendered on a claim 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). This case involves a subsequent claim filed on March 15, 2004,[1] and is before the Board for the second time.

In the initial decision, the administrative law judge determined that the newly submitted evidence established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, and that claimant therefore established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Reviewing the entire record, the administrative law judge found that claimant established total disability pursuant to 20 C.F.R. §718.204(b)(2), and that his total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c)(1). Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board vacated the administrative law judge's finding that the new evidence established the existence of legal pneumoconiosis[2] pursuant to 20 C.F.R. §718.202(a)(4), holding, *inter alia*, that the administrative law judge erred in failing to adequately explain his credibility determinations and explain how he resolved the inconsistencies in the miner's smoking history. The Board therefore vacated the administrative law judge's finding that claimant established a change in the applicable condition of entitlement pursuant to 20 C.F.R. §725.309, and his findings on

[1] Claimant's initial claim for benefits, filed on May 22, 1987, was finally denied on November 30, 1995, because claimant failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Claimant died on April 19, 2007, while the instant claim was still pending before the administrative law judge. By Order dated September 26, 2007, the Board denied his widow's motion to be substituted as the claimant, but has updated its records to reflect that claimant is deceased and his widow is pursuing his claim.

[2] Legal pneumoconiosis "includes any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). This definition encompasses any chronic respiratory or pulmonary disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

the merits of entitlement under 20 C.F.R. §718.202(a), 718.204(c).[3] *B.B.* [*Bentley*] *v. Ratliff & Childers Coal Corp.*, BRB No. 07-0762 BLA, slip op. at 7 (Jun. 20, 2008)(unpub.). Consequently, the Board remanded the case to the administrative law judge for further consideration. *Id.* at 7-8.

On remand, the administrative law judge determined that claimant had a twenty-six pack year smoking history, and that the new evidence established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby establishing a change in the applicable condition of entitlement under 20 C.F.R. §725.309. Considering all of the evidence on the merits, the administrative law judge found that the new evidence was entitled to greater weight than the old evidence, and that therefore, claimant established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). The administrative law judge further found that the medical opinion evidence established that claimant's totally disabling respiratory impairment was due to legal pneumoconiosis pursuant to 20 C.F.R. §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 legal pneumoconiosis and total disability due to pneumoconiosis under 20 C.F.R. §§718.202(a)(4), 718.204(c). Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), did not file a response brief.[4]

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.[5] 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).

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[3] The Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established thirty-three and one-half years of coal mine employment, and the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2). *B.B.* [*Bentley*] *v. Ratliff & Childers Coal Corp.*, BRB No. 07-0762 BLA, slip op. at 3 (Jun. 20, 2008)(unpub.).

[4] We affirm as unchallenged on appeal, the administrative law judge's finding that the record establishes that claimant had a twenty-six pack-year smoking history. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was last employed in the coal mine industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

By Order dated September 13, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556, Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §921(c)(4)), which amended the Act with respect to the entitlement criteria for certain claims. Claimant and the Director have responded.

Claimant and the Director correctly state that the recent amendments to the Act, which became effective on March 23, 2010, and which apply to claims filed after January 1, 2005, do not apply to this claim because it was filed before January 1, 2005.[6]

To establish entitlement to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 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, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish the existence of pneumoconiosis. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3).

Employer raises several challenges to the administrative law judge's finding that claimant had legal pneumoconiosis.[7] Initially, employer asserts that the administrative

[6] Because the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to this case, employer's motion for an extension of time to file a supplemental brief concerning the impact of the amendments, is moot.

[7] Relevant to 20 C.F.R. §718.202(a)(4), the record contains the new medical opinions of Drs. Stamper, Forehand, Baker, Dahhan, and Fino. Director's Exhibits 13, 15, 17, 28; Claimant's Exhibit 1; Employer's Exhibits 1, 3. Drs. Stamper, Forehand, and Baker opined that claimant's chronic lung disease was caused by both smoking and coal dust exposure, while Drs. Fino and Dahhan opined that claimant's lung disease was caused solely by smoking. *Id*. The administrative law judge found that Dr. Stamper's opinion was entitled to little probative weight because Dr. Stamper failed to provide any

law judge selectively analyzed the medical opinion evidence and erred in crediting Dr. Baker's opinion, given that Dr. Baker understated claimant's smoking history. We disagree.

Employer correctly points out that the administrative law judge discredited Dr. Forehand's opinion because it was based on an inaccurate smoking history, and credited Dr. Baker's opinion, despite the fact that it was also based on an inaccurate smoking history. The administrative law judge, however, distinguished the physicians' opinions with respect to this issue. Specifically, the administrative law judge explained that it was "unclear" whether Dr. Forehand would have altered his opinion, that 75-80% of claimant's impairment was due to smoking and 20-25% was due to coal dust exposure, if he had considered a greater smoking history than the fifteen-pack-year history on which he relied. By contrast, the administrative law judge found that Dr. Baker based his opinion, that claimant's respiratory condition was primarily related to coal dust exposure, on the fact that claimant's length of coal mine employment exceeded his smoking history. Decision and Order on Remand at 9, 11 n.2. Therefore, although Dr. Baker considered a maximum smoking history of twenty pack-years, the administrative law judge found his opinion to be well-reasoned, because Dr. Baker considered objective medical tests and the possibility of a significant smoking history,[8] and because claimant's thirty-three and one-half years of coal mine employment still exceeded the twenty-six pack-year smoking history that the administrative law judge found established by the record. *Id*. at 11. Substantial evidence supports these findings. Contrary to employer's assertions, therefore, the administrative law judge rationally found that Dr. Baker's opinion was well-reasoned, despite his reliance on a smoking history that differed from the smoking history found established by the administrative law judge. *See Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

We additionally reject employer's assertion that the administrative law judge failed to state a valid reason for discounting the opinions of Drs. Dahhan and Fino. With respect to Dr. Dahhan, the administrative law judge found his opinion, that claimant's chronic obstructive pulmonary disease was due entirely to smoking because claimant had

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reasoning or objective medical evidence to support his opinion. The administrative law judge discounted Dr. Forehand's opinion, finding that it was based on a fifteen pack-year smoking history, and it was "unclear" whether Dr. Forehand would have altered his opinion given a greater smoking history. Decision and Order at 9.

[8] The administrative law judge accurately observed that Dr. Baker explained that smoking would have contributed to claimant's condition, if his smoking history exceeded fifteen years. Decision and Order on Remand at 10; Claimant's Exhibit 1.

not been exposed to coal mine dust since 1985, to be at odds with the notion that a pulmonary impairment from coal mine dust can develop after a latent period, and because Dr. Dahhan did not explain why claimant's response to bronchodilators necessarily eliminated coal mine dust exposure as a cause of claimant's obstructive lung disease. *See Crockett Colleries, Inc. v. Director, OWCP* [*Barrett*], 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); Decision and Order on Remand at 12-13; Director's Exhibit 28. As it is supported by substantial evidence, we affirm the administrative law judge's permissible credibility determination. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

Further, the administrative law judge discounted Dr. Fino's opinion, finding that Dr. Fino focused on the obstructive nature of claimant's impairment as a reason that his lung disease was due entirely to cigarette smoking, when the regulations state that legal pneumoconiosis can involve an obstructive impairment or a restrictive impairment. *See* 20 C.F.R. §718.201(a)(2). The administrative law judge further found that Dr. Fino based his opinion on the partial reversibility of claimant's pulmonary impairment, but failed to explain why partial reversibility in claimant's pulmonary function test indicated that his impairment was caused by cigarette smoking alone, given that the post-bronchodilator results still produced qualifying results. Decision and Order on Remand at 14; Employer's Exhibits 1, 3. Substantial evidence supports these findings. Contrary to employer's assertion, therefore, the administrative law judge acted within his discretion in discounting Dr. Fino's opinion. *See Barrett*, 478 F.3d at 356, 23 BLR at 2-483; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. As employer raises no additional challenges to the administrative law judge's finding of legal pneumoconiosis, we affirm his finding that the new evidence establishes the existence legal pneumoconiosis under 20 C.F.R. §718.202(a)(4), thereby establishing a change in the applicable condition of entitlement under 20 C.F.R. §725.309(d). Further, employer does not challenge the administrative law judge's finding, on the merits, that the new evidence is entitled to greater weight than the old evidence. We therefore affirm the finding of legal pneumoconiosis, on the merits, under 20 C.F.R. §718.202(a)(4).

Employer additionally asserts that the administrative law judge erred in finding that claimant's totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Specifically, employer asserts that the administrative law judge erred in discrediting the opinions of Drs. Dahhan and Fino, in assigning some weight to Dr. Forehand's opinion, and in assigning full-probative weight to Dr. Baker's opinion.[9] Employer asserts that the Board should vacate the administrative law judge's

[9] Drs. Baker and Forehand opined that claimant was totally disabled, in part, due to pneumoconiosis, while Drs. Dahhan and Fino opined that claimant's totally disabling respiratory impairment was due to smoking, and possibly contributed to by asthma. Director's Exhibits 15, 28; Claimant's Exhibit 1; Employer's Exhibits 1, 2.

finding that claimant's totally disabling respiratory impairment is due to legal pneumoconiosis under 20 C.F.R. §718.204(c) "for the same reasons that the Board must vacate the [a]dministrative [l]aw [j]udge's finding that the evidence established legal pneumoconiosis at 20 C.F.R. [§]718.202(a)(4)." Employer's Brief at 21. We disagree.

Contrary to employer's assertion, the administrative law judge acted within his discretion in discounting the opinions of Drs. Dahhan and Fino as to the etiology of claimant's totally disabling respiratory impairment, because the physicians did not diagnose legal pneumoconiosis. *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vac'd sub nom., Consolidation Coal Co. v. Skukan*, 512 U.S. 1231 (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 16; Director's Exhibit 28; Employer's Exhibits 1, 3. Further, contrary to employer's assertion, the administrative law judge rationally credited Dr. Baker's opinion as to disability causation for the same reasons he credited Dr. Baker's opinion as to legal pneumoconiosis at 20 C.F.R. §718.202(a)(4). Decision and Order on Remand at 17; Employer's Brief at 20. As stated above, substantial evidence supports the administrative law judge's findings that Dr. Baker considered the possibility of a significant smoking history and based his opinion, that coal mine dust exposure contributed to claimant's respiratory impairment, on the fact that claimant's coal mine employment history exceeded his smoking history. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Finally, because the administrative law judge gave "the most weight" to Dr. Baker's opinion, that claimant was totally disabled due to legal pneumoconiosis, any error the administrative law judge may have made in also assigning some weight to Dr. Forehand's opinion as to disability causation, despite his reliance on a fifteen pack-year smoking history, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984). We, therefore, affirm the administrative law judge's finding at 20 C.F.R. §718.204(c). As claimant has established each element of entitlement, we affirm the award of benefits.

Attorney Fee Request

Claimant's counsel has submitted a fee petition for services performed during the prior appeal to the Board in BRB No. 07-0762 BLA. Claimant's counsel submitted a fee petition requesting a total of $3,150.00 for 14.00 hours of legal services performed at an hourly rate of $225.00. In response to this fee petition, employer challenges both the number of hours requested by claimant's counsel and the hourly rate.

Employer asserts that claimant's counsel requests excessive amounts of time for preparing and revising claimant's brief. A review of the fee petition indicates that much of the requested time was spent drafting claimant's brief. We hereby allow all of the requested hours, as reasonably commensurate with the necessary work done, given the

nature and complexity of the instant case. *See* 20 C.F.R. §725.366(b); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984).

Employer also contends that the hourly rate requested by claimant's counsel is "excessive." The Supreme Court has held that an attorney's reasonable hourly rate is "to be calculated according to the prevailing market rates in the relevant community."[10] *Blum v. Stenson*, 465 U.S. 886, 895 (1984). In support of his requested hourly rate, claimant's counsel has set forth his qualifications and experience, as well as the current hourly rate of other attorneys representing claimants in federal black lung benefits claims in the general community where he practices (Eastern Kentucky and Southwestern Virginia). Because it is supported by substantial evidence, we hold that the requested hourly rate of $225.00 is reasonable. *See* 20 C.F.R. §725.366; *Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004).

We, therefore, award claimant's counsel a fee of $3,150.00 for 14.00 hours of legal services at a rate of $225.00 per hour to be paid directly to claimant's counsel by employer.[11] 33 U.S.C. §928, as incorporated by 30 U.S.C. §932(a); 20 C.F.R. §802.203.

[10] The Sixth Circuit has defined the prevailing market rate as "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *See Geier v. Sundquist*, 372 F.3d 784, 791 (6th Cir. 2004).

[11] 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).

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits is affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge