BRB No. 00-0831 BLA

GLENNA FLOYD (Widow of DAVID L. FLOYD) Claimant-Respondent	)	
v.	)	DATE ISSUED:_____
BETHENERGY MINES, 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-Awarding Benefits and Supplemental Decision and Order Granting Attorney's Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

James M. Phemister (Washington & Lee University School of Law), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson & Kelly), Morgantown, West Virginia, for employer.

Before: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order-Awarding Benefits and Supplemental Decision and Order Granting Attorney's Fees (98-BLA-1098) of Administrative Law Judge Gerald M. Tierney on a claim filed pursuant to the provisions of Title IV of the Federal Coal

Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] The administrative law judge accepted the parties' stipulation that the miner had been employed in the coal mines for at least twenty-two years and then determined that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4) and 718.204(c)(2), (4) (2000). Accordingly, benefits were awarded, commencing September 1997, the month in which the miner's claim was filed, and ceasing in November 1999, the month prior to the month in which the miner died. In a Supplemental Decision and Order Granting Attorney's Fees, the administrative law judge approved the Petition for Fees and Costs in the amount of $8983.00, filed by claimant's counsel.

On appeal, employer challenges the administrative law judge's findings pursuant to 20 C.F.R. 718.202(a), 718.204(b) (2000), as well as the attorney fee award. Claimant responds, urging affirmance of the award of benefits and attorney fees. The Director, Office of Workers' Compensation Programs (the Director) has indicated that he will not participate in this appeal.

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80, 045-80, 107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all Black Lung claims pending on appeal before the Board, except for those cases where the Board determines after briefing by the parties, that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on March 9, 2001, to which claimant, employer and the Director have responded.[2] Based on the briefs submitted by the parties, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of this 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, and is in accordance with applicable law. 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 the existence of 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 (2000); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

In challenging the administrative law judge's finding that claimant established the existence of pneumoconiosis, employer contends that the administrative law judge erred by

[2]The Director's brief, dated March 26, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant's brief, dated April 2, 2001, asserted that the changes contained in the new regulations will not affect the outcome of this case and therefore a decision on the merits should not be stayed. In a brief dated April 2, 2001, employer asserted that the regulations at issue in the lawsuit "could" affect the outcome of this case. Employer's Brief at 4 - 9. Employer contends that the provisions contained at 20 C.F.R. §§718.201(c) and 718.204(a) may affect the disposition of this case, but has not specifically indicated how the application of the new regulations to the facts of the case herein could affect the outcome of the instant appeal.

crediting the medical report by the West Virginia Occupational Pneumoconiosis Board[3] (WVOPB) pursuant to Section 718.202(a)(4) (2000). The administrative law judge acknowledged that the findings of the WVOPB are not binding because of the differences in state and federal law, Decision and Order at 5, but nevertheless, after noting that the WVOPB's finding was based upon a physical examination, chest x-ray findings, pulmonary function results and a medical report, permissibly credited the report. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

[3]On September 22, 1992, the West Virginia Occupational Pneumoconiosis Board diagnosed occupational pneumoconiosis with thirty percent pulmonary functional impairment attributable to the disease. The report indicated that these findings were based upon twenty-three years of coal mine employment, physical examination, pulmonary function studies and chest x-ray. Director's Exhibit 3.

Employer next contends that the administrative law judge erred in crediting Dr. Durham's opinion.[4] The administrative law judge properly noted the conflicting nature of the physician's deposition testimony,[5] but contrary to employer's assertion, was not required to discredit the opinion on the basis that it is equivocal. *See Salisbury v. Island Creek Coal Co.*, 7 BLR 1-501 (1984); Decision and Order at 5. However, prior to determining that Dr. Durham's opinion is sufficient to establish the existence of pneumoconiosis at Sections 718.201 and 718.202(a)(4) (2000), the administrative law judge is required to make a determination whether the opinion is well-reasoned and well-documented. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). Thus, we vacate the administrative law judge's weighing of Dr. Durham's opinion and remand the case for him to consider the physician's opinion further.

[4]Dr. Durham, who is board-certified in internal medicine and pulmonary disease, examined the miner on October 20, 1997 and diagnosed mild chronic obstructive pulmonary disease related to coal dust exposure and tobacco abuse. Director's Exhibit 8. Dr. Durham also opined that the miner's rheumatoid arthritis significantly limits his ability to perform work. Dr. Durham stated that the miner's mild obstructive pulmonary disease contributes five percent to his impairment.

[5] At deposition, Dr. Durham stated that his assessment of five percent was relatively arbitrary and that it was possible that the miner's lung disease was related to his smoking history as opposed to coal dust exposure, but stated that although rheumatoid arthritis and/or tobacco abuse probably contributed more to the miner's disabling condition, coal dust exposure and coal workers' pneumoconiosis were also contributing factors. Employer's Exhibit 5.

Employer further contends that the administrative law judge erred in crediting the opinions of Drs. Durham and Rasmussen and the WVOPB over contrary opinions without providing an adequate rationale for his weighing of these opinions.[6] These contentions have merit. In weighing the medical opinion evidence pursuant to Section 718.202(a)(4) (2000), the administrative law judge accorded determinative weight to the opinions by the WVOPB, and Drs. Durham and Rasmussen, finding that these opinions were the most consistent with claimant's complaints of worsening shortness of breath, his history of coal mine employment, the significant abnormalities shown on arterial blood gases and the cited medical literature. Decision and Order at 10. In assessing the relative weight to be accorded to the medical opinions of record, however, the administrative law judge did not sufficiently address the conflicts between the diagnoses rendered by Drs. Durham, Rasmussen, the WVOPB and those rendered by Drs. Bellote and Morgan.[7]

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[6]Dr. Rasmussen, who is board-certified in internal medicine and forensic medicine, issued a report on April 12, 1999. Claimant's Exhibit 2. Based on a review of the medical data and citations to medical literature, the physician concluded that the miner suffers from occupational pneumoconiosis which arose from coal mine employment. The physician further opined that the miner is totally disabled as a consequence of his probable rheumatoid lung disease as well as coal mine dust exposure. Dr. Rasmussen stated that the miner's coal mine dust exposure and resultant pneumoconiosis is a significant contributing factor in the miner's total disability. The physician additionally noted that the miner suffered from rheumatoid arthritis, which is known to be able to produce diffuse interstitial fibrosis, and also noted that silicosis is associated with an increased incidence of rheumatoid arthritis. In a supplemental report on July 9, 1999, Dr. Rasmussen responded to Dr. Bellotte's deposition testimony and reiterated his previous findings regarding the miner. Claimant's Exhibit 3.

[7]Dr. Bellotte, a B-reader who is board-certified in internal medicine and pulmonary diseases, examined the miner on April 14, 1998, and on the basis of a summary of the available medical data, the miner's history, complaints and the results of clinical tests, concluded that there was insufficient objective evidence to justify a diagnosis of coal workers' pneumoconiosis. The physician further opined that the miner suffered from some moderately severe pulmonary and respiratory impairment, attributed to pulmonary fibrosis secondary to his collagen vascular disease, namely rheumatoid arthritis. The physician noted the miner's smoking history of thirty-nine pack years and found that the miner's chest x-rays, pulmonary function and blood gas tests are compatible with a diagnosis of chronic obstructive pulmonary disease with bullous emphysema and chronic bronchitis. Dr. Bellotte stated that the type of findings on the miner's x-rays were inconsistent with coal workers' pneumoconiosis as they are localized in the lower zones and are linear, whereas one would expect to see nodular rounded densities in the upper lung zones. Director's Exhibit 23. Dr.

In *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit indicated that in

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Bellotte was deposed on June 18, 1999, at which time he reiterated his previous findings. Employer's Exhibit 12.

Dr. Morgan, a B-reader and British certified pulmonologist issued a report on March 20, 1999, and based upon his interpretation of several chest x-rays, CT scans, and a review of the medical data, concluded that there was insufficient evidence to justify a diagnosis of coal workers' pneumoconiosis because the miner had worked for a relatively limited time in the coal mines and the fact that expert B-readers have interpreted his chest x-ray as negative for pneumoconiosis. The physician further opined that the miner has mild to moderate respiratory impairment due to emphysema which was induced by his former habit of cigarette smoking. Dr. Morgan additionally found that it "may well be" that the miner is totally and permanently disabled by his rheumatoid arthritis which would impair the miner's ability to carry out regular mining work. Dr. Morgan also found that the miner "may have" mild interstitial pulmonary fibrosis, but was not impaired by his prior exposure to coal mine dust. Employer's Exhibit 10.

assessing the relative probative weight of the medical opinions of record, an administrative law judge must address the qualifications of the respective physicians, the explanation of their conclusions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses. *See Akers*, *supra*; *see also U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). However, in the instant case, Drs. Rasmussen, Durham, Bellote and Morgan discuss claimant's shortness of breath, years of coal mine employment, and abnormal blood gas study. In light of the administrative law judge's failure to provide an adequate rationale for finding the opinions of Drs. Rasmussen, Durham and the WVOPB persuasive, when evaluated with the opinions by Drs. Bellote and Morgan, we must vacate the administrative law judge's findings hereunder and remand the case to the administrative law judge for further consideration of all of the relevant evidence of record.[8] *See Hicks*, *supra*; *Akers*, *supra*; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

[8]Employer also contends that the absence of a diagnosis of pneumoconiosis from the treating physician, Dr. Shamma-Othman, supports the findings of Drs. Bellotte and Morgan. Petition for Review at 21. However, the administrative law judge properly found that Dr. Shamma-Othman's treatment notes and medical reports did not directly address the issue of the existence of pneumoconiosis and therefore did not consider them at Section 718.202(a)(4) (2000). Decision and Order at 10; Employer's Exhibits 6, 11.

Furthermore, we note that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000), that although Section 718.202(a)(1)-(4) (2000) provides alternative methods for establishing the existence of pneumoconiosis, in determining whether the evidence is sufficient to support a finding of the disease, an administrative law judge must weigh all relevant evidence together.[9] Thus, on remand, if the administrative law judge determines that the medical opinion evidence establishes the existence of pneumoconiosis at Section 718.202(a)(4) (2000), he must then address all of the pertinent evidence in conjunction with each other to determine whether claimant has established the existence of pneumoconiosis pursuant to Section 718.202(a) (2000). *See Compton*, *supra*.

Employer next contends that the administrative law judge erred in his analysis of the evidence regarding disability causation at Section 718.204(b) (2000).[10] We agree. After considering the evidence, the administrative law judge accorded determinative weight to Dr. Rasmussen's opinion, finding that it is clear, unequivocal, well-reasoned and documented and most consistent with the miner's complaints of shortness of breath, his significant coal mine employment history, the qualifying arterial blood gases, and the cited medical literature. Decision and Order at 12. The administrative law judge additionally found that Dr. Rasmussen's finding that the miner's totally disabling respiratory impairment is related, at least in part, to pneumoconiosis is partially buttressed by the opinions of Dr. Durham and the WVOPB. *Id*. The administrative law judge, while acknowledging that the opinions by Drs. Bellotte and Morgan are probative regarding disability causation, Decision and Order at 11, fn. 4, 5, nevertheless failed to address these opinions when weighing the evidence on the issue of causation at Section 718.204(b) (2000). The United States Court of Appeals for the Fourth Circuit has stated that a medical opinion that acknowledges the miner's respiratory impairment but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability. *See Hicks, supra*; *Dehue Coal Co. v.*

[9]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's last full year of coal mine employment occurred in West Virginia. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[10]The administrative law judge's finding that claimant established total disability pursuant to Section 718.204(c) (2000) is unchallenged on appeal, and is therefore affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Ballard,65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). In the instant case, because the administrative law judge did not address evidence which is pertinent to the issue of disability causation at Section 718.204(b) (2000), we vacate his determination that the miner established total disability due to pneumoconiosis, and remand the case for further consideration of the evidence.

Additionally, on the issue of attorney's fees, counsel requested a fee of $5,500.00 for twenty-seven and one-half hours of services performed at an hourly rate of $200.00 and reimbursement for expenses totaling $3,483.00. Employer objected to the hourly rate and contested the inclusion of fees paid to two physicians who provided claimant with reports. In his Supplemental Decision and Order Granting Attorney's Fees, the administrative law judge found the hourly rate to be reasonable. The administrative law judge also found that $2,937.50 for a medical report by Dr. Koenig[11] and $200.00 for a medical report by Dr. Shamma-Othman were reasonable expenses for reimbursement and therefore granted counsel's request and instructed employer to pay counsel a total of $8,983.00. Supplemental Decision and Order at 2. Employer argues on appeal that the administrative law judge did not comply with the Administrative Procedure Act in determining the reasonableness of the hourly rate and failed to explain why the costs incurred in obtaining Dr. Koenig's and Dr. Shamma-Othman's opinions were reasonable or necessary.

In determining whether the $200.00 hourly rate was reasonable, the administrative law judge set forth the standard contained in 20 C.F.R. 725.366(b), which provides in pertinent part that:

> Any fee approved...shall be reasonably commensurate with the necessary work done and 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).[12] The administrative law judge then stated that "[t]aking into

[11]The administrative law judge mistakenly refers to Dr. Koenig as Dr. Downig. *See* Supplemental Decision and Order Granting Attorney's Fees at 2.

[12]No substantive changes were made to 20 C.F.R. §725.366(b) in the amended regulations. *See* 65 Fed. Reg. 80,071 (2000)(to be codified at 20 C.F.R. §725.366(b).

consideration these factors, I do not find that the proposed hourly rate of $200.00 [is] excessive." Supplemental Decision and Order at 2. We reject employer's assertion that the administrative law judge was required to compare the hourly rate requested by counsel to the typical hourly rate charged in the geographic area in which counsel practices when determining the appropriate hourly rate. The administrative law judge may consider this factor, but is not required to do so. 20 C.F.R. §725.366(b); *c.f.* 20 C.F.R. §802.203(d)(4). Therefore, as employer raises no other specific objection to the hourly rate, we affirm his determination that $200.00 per hour constitutes a reasonable hourly rate.

Employer also objects to the reimbursement of Dr. Koenig's fee of $2,937.50, arguing that the fee is excessive because Dr. Rasmussen submitted a similar report and charged $200.00. Employer also contends that since Dr. Koenig's opinion was not credited by the administrative law judge, it was unnecessary to secure an award of benefits and the charge should not be compensable. With respect to the opinion by Dr. Shamma-Othman, employer argues that although claimant requested the report, it was employer that offered the report, and since the physician did not diagnose pneumoconiosis or indicate that the miner was totally disabled, the report was unnecessary to claimant's case and should not be compensated. We disagree that the administrative law judge committed any error in awarding these costs. The administrative law judge's Supplemental Decision indicates that with respect to Dr. Koenig's opinion, he was persuaded by claimant's counsel's argument that the report was thorough, and given the amount of medical records, the evidence submitted by employer and the complex issues regarding obstruction, the fee is reasonable. Regarding the $200.00 charge for Dr. Shamma-Othman, the administrative law judge found that it is not unreasonable to request reimbursement for a report that was requested but ultimately not used.[13] As the administrative law judge acted within his discretion and employer has failed to demonstrate that the reimbursement of these costs was arbitrary, capricious, or an abuse of discretion, we affirm his determination that costs incurred by claimant's counsel for obtaining the reports by Drs. Koenig and Shamma-Othman are reimbursable. 20 C.F.R. §725.366(c); *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

We note, however, that in order to be entitled to an award of attorney's fees under Section 28(a) of the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a), claimant's counsel must engage in the successful prosecution of a claim.[14] *See Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *see*

[13]The record indicates that Dr. Shamma-Othman was the miner's treating physician. Employer's Exhibits 6, 11.

[14]A prosecution of a claim is successful when claimant receives an economic benefit resulting from an adversarial proceeding. *See* 33 U.S.C. §928(a), as implemented by 20

generally Director, OWCP v. Baca, 927 F.2d 1122, 15 BLR 2-42 (10th Cir.1991); *Yates v. Harman Mining Co.*, 12 BLR 1-175 (1989), *aff'd on recon.*, 13 BLR 1-56 (1989) (*en banc*). As we have vacated the award of benefits, neither counsel is entitled to a fee until claimant has succeeded in obtaining benefits.

C.F.R. §725.367(a); *see also Bethenergy Mines Inc. v. Director, OWCP* [*Markovich*], 854 F.2d 632 (3d Cir. 1988), *aff'g sub nom. Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987).

Accordingly, the administrative law judge's Decision and Order - Awarding Benefits and Supplemental Decision and Order Granting Attorney's Fees is affirmed in part and vacated in part and this case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge