BRB Nos. 97-1192
and 97-1192A

NAN PARKS (Widow of HERMAN W. PARKS)	)	
Claimant-Respondent Cross-Petitioner	)	DATE ISSUED:
v.	)	
NEWPORT NEWS SHIPBUILDING AND DRY DOCK COMPANY	)	
Self-Insured Employer-Petitioner Cross-Respondent	)	DECISION and ORDER

Appeals of the Decision and Order on Motion for Reconsideration - Granting Death Benefits, Order Denying Employer's Motion for Reconsideration, and Supplemental Decision and Order Awarding Attorney Fees of Richard K. Malamphy, Administrative Law Judge, United States Department of Labor.

Gary R. West (Patten, Wornom & Watkins, L.C.), Newport News, Virginia, for claimant.

James M. Mesnard (Seyfarth, Shaw, Fairweather & Geraldson), Washington, D.C., for self-insured employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Motion for Reconsideration - Granting Death Benefits and the Order Denying Employer's Motion for Reconsideration (90-LHC-2556) of Administrative Law Judge Richard K. Malamphy awarding death benefits on a claim filed pursuant to the provisions of the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. §901 *et seq*. (the Act). In addition, employer appeals and claimant cross-appeals the Supplemental Decision and Order Awarding Attorney Fees. We must affirm the findings of fact and

conclusions of law of the administrative law judge if they are rational, supported by substantial evidence, and in accordance with law. *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965); 33 U.S.C. §921(b)(3). The amount of an attorney's fee award is discretionary and may be set aside only if the challenging party shows it to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See, e.g., Muscella v. Sun Shipbuilding & Dry Dock Co.*, 12 BRBS 272 (1980).

Claimant's husband (decedent) worked for employer from 1942-1945 as a handyman and joiner, and from 1961-1979 as a joiner. Throughout the course of his employment, decedent was exposed to asbestos. He also had a 60 pack year history of cigarette smoking. Decedent was diagnosed with emphysema in 1965, chronic bronchitis in 1975, and moderately severe chronic obstructive pulmonary disease in 1979. He retired in 1979 due to chronic lung disease. In March 1988, decedent was diagnosed with lung cancer, which ultimately proved fatal on December 5, 1989. Claimant filed a claim for death benefits under the Act on April 20, 1990.

The parties disputed the cause of death; employer attributed it solely to cigarette smoking, while claimant averred that death was due, at least in part, to occupational exposure to asbestos. In his initial Decision and Order dated September 13, 1991, the administrative law judge found that claimant invoked and employer rebutted the Section 20(a), 33 U.S.C. §920(a), presumption. Upon consideration of the record as a whole, the administrative law judge determined that the evidence regarding the cause of death was in equipoise, and thus, applied the "true doubt" rule in claimant's favor and awarded benefits. The administrative law judge also determined that employer is entitled to Section 8(f), 33 U.S.C. §908(f), relief. Employer appealed the award of benefits, first to the Board, which by Decision and Order dated December 30, 1993, affirmed the administrative law judge's award of benefits, *see Parks v. Newport News Shipbuilding & Dry Dock Co.,* BRB No. 91-2177A (Dec. 30, 1993)(unpub.), and then to the United States Court of Appeals for the Fourth Circuit, which remanded the case for reconsideration in light of the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries,* 512 U.S. 267, 28 BRBS 43 (CRT)(1994).[1] *Newport News Shipbuilding &*

[1]The United States Supreme Court held that the true doubt rule violates Section 7 of the Administrative Procedure Act. Thus, the Court held that the proponent of a rule or order

Dry Dock Co. v. Parks, No. 94-1183 (4th Cir. Oct. 4, 1994)(unpub.).

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bears the burden of proving his case by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 28 BRBS 43 (CRT)(1994); *see also Santoro v. Maher Terminals, Inc.*, 30 BRBS 171 (1996).

On remand, the administrative law judge allowed both parties to further develop the record with regard to the causation issue. In his Decision and Order on Remand dated January 16, 1997, the administrative law judge, after discussing at length the relevant medical evidence of record, denied benefits as he was "unable to ascertain the correct standard for a diagnosis of asbestosis," and did not find within the record "support for the proposition that [decedent's] exposure to asbestos led to the fatal lung cancer." Decision and Order - Upon Remand Denying Benefits at 34. Claimant moved for reconsideration of this decision.

On reconsideration, the administrative law judge determined, based on the medical opinions of Drs. Roggli and Maddox, that decedent had asbestosis which contributed to his ultimately fatal lung cancer. Accordingly, death benefits were awarded. 33 U.S.C. §909. The administrative law judge also reiterated his prior determination that employer is entitled to Section 8(f) relief. Employer's request for reconsideration was denied by Order dated May 14, 1997. Employer now appeals the administrative law judge's Decision and Order on Motion for Reconsideration - Granting Death Benefits and Order Denying Employer's Motion for Reconsideration, and the case is assigned BRB No. 97-1192. Claimant responds, urging affirmance.

Meanwhile, claimant's counsel submitted a consolidated fee petition to the administrative law judge for work performed before the administrative law judge, the Board, and the United States Court of Appeals for the Fourth Circuit, seeking fees for the entirety of the work performed in this case totaling $79,040.75, plus $13,131.43 in costs.[2] Included in counsel's fee petition was a request that the hourly rate for services performed during the 1991 hearing (42.45 hours of services performed by Mr. West) be augmented to compensate for the delay in payment. Employer filed objections to counsel's fee petition.

[2]Counsel's petition includes requests for the following hours: 58.25 hours of work performed by Mr. Hatten at $375 per hour; 62.5 hours of work by Mr. Smith-George at $200 per hour; a total of 20.25 hours of work performed by Mr. McCormick at $100 per hour through May 31, 1996, and $125 per hour from June 1, 1996; and a total of 255.55 hours of work performed by Mr. West at $100 per hour through May 31, 1994, $125 per hour from June 1, 1994, and $165 per hour from June 1, 1996.

In his Supplemental Decision and Order - Awarding Attorney Fees, the administrative law judge initially determined that an hourly rate of $155 for work performed by Mr. Hatten, Mr. Smith-George and Mr. West and an hourly rate of $125 for the work performed by Mr. McCormick is reasonable given the complexity of issues and the fees normally charged in the Hampton Roads, Virginia area. The administrative law judge next found that counsel is entitled to augmentation of the fee, and therefore applied the hourly rate of $155 to the 42.45 hours of work performed by Mr. West in conjunction with the 1991 hearing. In response to employer's objections, the administrative law judge reduced the total number of hours requested by 57. Accordingly, the administrative law judge awarded an attorney's fee of $58,602.50, reflecting 20.25 hours of services performed by Mr. McCormick at $125 per hour, and 361.75 hours of services rendered by Mr. Hatten, Mr. Smith-George, and Mr. West at $155 per hour, plus $13,131.43 in costs.

Employer appeals, and claimant cross-appeals, the administrative law judge's Supplemental Decision and Order Awarding Attorney Fees, and these appeals are assigned respectively BRB No. 97-1192 and 97-1192A.

APPEAL OF THE AWARD OF BENEFITS

Initially, employer argues that the administrative law judge erred in allowing claimant to enter additional evidence after her case in chief was over, and that his rulings had the effect of denying employer's procedural due process right to a fair hearing. Specifically, employer avers that despite having concluded her case on October 13, 1995, claimant was allowed to submit additional affirmative evidence, *i.e.*, the affidavits of Drs. Pratt, Abraham and Kleinerman, the letter of Dr. Selikoff and the narrative reports of Drs. Fechner and Frable, at the March 4, 1996, hearing.[3]

[3]The testimony of Drs. Roggli and Maddox was taken at the hearing on October 13, 1995, and the administrative law judge at that time admitted into evidence employer's exhibits numbered 1-33. During the hearing on March 4, 1996, employer elicited the testimony of its

The administrative law judge has considerable discretion regarding the admission of evidence and his rulings may be disturbed only if they are arbitrary, capricious or an abuse of discretion. *See, e.g., Raimer v. Willamette Iron & Steel Co.,* 21 BRBS 98 (1988). Contrary to employer's contentions, the administrative law judge's actions regarding the admission of evidence in this case have not denied its right to due process of law. In his Decision and Order on Motion for Reconsideration - Granting Death Benefits, the administrative law judge acknowledged the potential flaws in the written statements of Drs. Pratt, Kleinerman and Abraham since they are identical affidavits composed by claimant's counsel and signed under oath by the three physicians. The administrative law judge noted that the statements of these doctors were introduced only as evidence to rebut employer's case, *see* Order Denying Employer's Motion for Reconsideration at 2, and therefore, were accorded little dispositive weight. In addition, at the March 4, 1996, hearing, employer requested and the administrative law judge agreed to allow employer the opportunity to depose Drs. Pratt, Kleinerman and Abraham. Hearing Transcript (HT) dated March 4, 1996, at 93-94, 102. The administrative law judge reiterated, in both his Post-Hearing Order #1 dated April 18, 1996, and Order Denying Employer's Motion for Reconsideration, that he allowed employer the opportunity to depose these witnesses in a timely fashion, and further that he allowed into evidence in support of employer's case the additional medical reports of Drs. Seemayer and Green. Similarly, the opinions of Drs. Frable and Fechner were admitted into evidence with an allowance for rebuttal by employer. Employer however made no effort at supplementing the record with regard to the evidence submitted by claimant.

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experts, Drs. Craighead and Egilman, and the administrative law judge admitted employer's exhibits numbered 34-40, and claimant's exhibits numbered 13-33. In particular, during this second hearing, claimant was allowed to admit the affidavits of Drs. Pratt, Kleinerman, and Abraham, a letter by Dr. Selikoff and the statements of Drs. Fechner and Frable. Employer was allowed to admit into evidence the reports of Drs. Seemayer and Green. The administrative law judge expressly provided both parties, at that time, the opportunity to submit additional exhibits.

Moreover, in his Order Denying Employer's Motion for Reconsideration, the administrative law judge explicitly noted that the evidence submitted by claimant, and admitted at the March 4, 1996, hearing, addressed two separate issues: 1) the proper interpretation of the Committee of the College of American Pathologists and the National Institute for Occupational Safety and Health (CAP/NIOSH) criteria; and 2) the validity of asbestos fiber counting methods. In light of this, the administrative law judge found that the evidence submitted by claimant was material and relevant to the issue in dispute, namely whether decedent had asbestosis. Again, the administrative law judge noted that employer had not availed itself of the opportunity to respond to the evidence submitted by claimant in rebuttal to employer's expert witnesses. Contrary to employer's contention, the administrative law judge found that the statements of Drs. Pratt, Kleinerman, and Abraham, and the medical opinions of Drs. Frable and Fechner, cast serious doubt on Dr. Craighead's interpretation of the CAP/NIOSH criteria and thus, did in fact use this evidence for purposes of rebutting employer's evidence rather than as affirmative evidence establishing the cause of decedent's death.[4] In this regard, the administrative law judge principally relied on the opinions of Drs. Roggli and Maddox in finding that the decedent had asbestosis that contributed to his death. Thus, as the administrative law judge's admission of this relevant and material evidence is rational and within his discretion as fact-finder, it is affirmed. *See* 20 C.F.R. §702.338; *Wayland v. Moore Dry Dock,* 21 BRBS 177 (1988). Furthermore, as the administrative law judge has directly addressed employer's objections to the admission of claimant's evidence and provided employer every opportunity to submit additional evidence in rebuttal to the evidence submitted by claimant, employer has not been denied its right to procedural due process. *See generally Universal Maritime Corp. v. Moore,* 126 F.3d 256, 31 BRBS 119 (CRT) (4th Cir. 1997); *Olsen v. Triple A Machine Shops, Inc.,* 25 BRBS 40 (1991), *aff'd mem. sub nom. Olsen v. Director, OWCP,* 996 F.2d 1226 (9th Cir. 1993).

[4]With regard to the opinion of Dr. Selikoff, employer is correct in noting that due to his death, employer was not given any opportunity for cross-examination. In his Post-Hearing Order #1, the administrative law judge acknowledged employer's objection and noted that Dr. Selikoff's opinion would be given appropriate weight. Dr. Selikoff's letter, dated June 22, 1988, generally discusses "a number of studies [which] are now coming to fruition with regard to the predictive significance of various levels of parenchymal infiltration of asbestosis, in relation to subsequent development of asbestos-related neoplasms." CX 23. It does not include any discussion of the CAP/NIOSH criteria and/or decedent's case in particular, nor does it provide any insight into the pertinent issues presented in this case, *e.g.*, what is required for a diagnosis of asbestosis, and thus, is not relevant to the instant case. As such, the administrative law judge, in his discussion of the relevant evidence, did not specifically mention, let alone rely on, the medical opinion of Dr. Selikoff, thus rendering moot employer's inability to cross-examine Dr. Selikoff.

Employer next argues that the administrative law judge never resolved the most basic question of fact in this case, *i.e.*, whether decedent's pathology samples revealed diffuse interstitial fibrosis indicative of asbestosis. Employer maintains that all of the physicians who testified regarding whether the decedent had asbestosis purported to apply the CAP/NIOSH criteria, and that those criteria state that without diffuse interstitial fibrosis, there can be no asbestosis, regardless of whether or where asbestos bodies are present. Employer alternatively argues that even if the decedent did have diffuse interstitial fibrosis, the administrative law judge erred in crediting the opinions of Drs. Maddox, Roggli, Frable, and Fechner over the contrary opinions of Drs. Craighead, Seemeyer and Green. In addition, employer avers that the administrative law judge's decision does not comply with the Administrative Procedure Act (APA) in that he failed to provide any explanation as to why he credited statements, regarding the intent of the CAP/NIOSH committee, of physicians who were not members of that committee, over the statements of physicians who were members.

In reviewing the medical evidence of record, the administrative law judge initially observed that all three of the pathologists who examined lung tissue samples in this case - Drs. Craighead, Roggli and Maddox - stated that they relied on the CAP/NIOSH committee report in arriving at a conclusion as to whether the decedent had asbestosis. The administrative law judge then set out the pertinent part of the CAP/NIOSH report which states:

> the minimal features that permit the diagnosis [of asbestosis] are the demonstration of discrete foci of fibrosis in the walls of the respiratory bronchioles *associated with* the accumulations of asbestos bodies.

EX 16 at 559 (emphasis added). Thus, the administrative law judge concluded that a pathologist must find *asbestos bodies in association with fibrosis* when examining the lung tissue samples in order to conclude that the decedent suffered from asbestosis. The administrative law judge further noted that while Drs. Craighead, Roggli and Maddox all agreed that decedent exhibited evidence of exposure to asbestos, they offered contrasting opinions as to the issue of whether decedent had asbestosis based upon their differing interpretations of the phrase "associated with" contained in the CAP/NIOSH report. Specifically, the administrative law judge found that Drs. Roggli and Maddox stated that the asbestos bodies need only be present on the same tissue slide, or in the same histologic section as the fibrosis, in order to be considered "associated with" the fibrosis, and thus arrive at a diagnosis of asbestosis, while Dr. Craighead required that the asbestos bodies be imbedded in the fibrous tissue, or immediately adjacent to the fibrous tissue in order for the asbestos bodies to be "associated with" the fibrosis.

The administrative law judge first determined that Drs. Roggli and Maddox diagnosed decedent with asbestosis based on their interpretation of the CAP/NIOSH

criteria. The administrative law judge then noted that Drs. Roggli and Maddox confirmed their diagnosis of asbestosis with fiber counting, which although, as the administrative law judge recognized, is not a substitute for pathological diagnosis, nevertheless served a useful function in confirming a diagnosis based upon the pathological criteria. In contrast, the administrative law judge observed that Dr. Craighead concluded that decedent did not have asbestosis based on his interpretation of the CAP/NIOSH criteria. The administrative law judge, however, determined that significant doubt has been cast upon Dr. Craighead's interpretation of the CAP/NIOSH criteria by Drs. Churg, Frable, Fechner, Roggli, Maddox, Pratt, Kleinerman and Abraham, and that no physician, other than Dr. Craighead, directly disputed the diagnostic criteria under CAP/NIOSH employed by Drs. Roggli and Maddox.[5] The administrative law judge thus concluded, based upon the opinions of Drs. Roggli and Maddox, that decedent did have asbestosis. In addition, the opinions of Drs. Roggli and Maddox sufficiently establish the causal nexus between decedent's asbestos exposure and his ultimate death. Specifically, Dr. Roggli stated that asbestos was a substantial contributing factor to decedent's lung cancer which ultimately caused his death, HT dated October 13, 1995, at 34, and Dr. Maddox opined that, with reasonable medical certainty, asbestos exposure contributed to decedent's lethal malignant tumor. CX 12.

As the administrative law judge considered, independently analyzed and discussed all of the relevant medical evidence of record, and articulated the rationale for his findings of fact and conclusions of law, his decision comports with the

[5]Specifically, the administrative law judge noted that Drs. Roggli and Frable stated that Dr. Craighead relied on an interpretation of the language in the CAP/NIOSH that is not itself contained in the CAP/NIOSH report. He found that Dr. Frable, a pathologist and professor of medicine at the Medical College of Virginia, stated that asbestos bodies need not be embedded in the fibrous tissue to arrive at a diagnosis of asbestosis. Similarly, Dr. Fechner, a pathologist and professor of medicine at the University of Virginia Medical School, also stated that the location of the asbestos bodies is not critical in making a diagnosis of asbestosis under the CAP/NIOSH criteria. The administrative law judge also recited an excerpt of an article by Dr. Churg, who served on the CAP/NIOSH committee, in which Dr. Churg referred to the notion that asbestos bodies must be found in proximity to areas of fibrosis in order to make a diagnosis of asbestosis as "mystical" and "simplistic." The administrative law judge further found that Drs. Pratt, Kleinerman, and Abraham, who all served on the CAP/NIOSH committee, agreed that asbestosis bodies need not be embedded within the fibrous tissue in order to arrive at a diagnosis of asbestosis. Finally, the administrative law judge determined that, upon cross-examination, Dr. Craighead conceded that in previous testimony he has characterized his own diagnostic criteria as more restrictive than that of CAP/NIOSH.

requirements of the APA. *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), and 33 U.S.C. §919(d). In addition, since the administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence, *Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962), and as his credibility determinations in the instant case are rational, his conclusions that the decedent did have asbestosis which contributed to his ultimately fatal lung cancer, and thus that claimant is entitled to death benefits, are affirmed as supported by substantial evidence. Consequently, the administrative law judge's Decision and Order on Motion for Reconsideration - Granting Death Benefits and Order Denying Employer's Motion for Reconsideration are affirmed.

APPEALS OF THE ATTORNEYS' FEE AWARD

As an initial matter, we note that the fee awarded by the administrative law judge includes time spent on work performed before the Board and the United States Court of Appeals for the Fourth Circuit. Although not specifically raised on appeal, we must address this in order to properly resolve the parties' contentions in light of the fact that both the Board and the Fourth Circuit have issued fee awards in this case for services included in the administrative law judge's award. Specifically, the Board, by Order dated June 19, 1997, awarded claimant's counsel a fee of $3,270, for work performed before the Board in the first appeal of this case. *Parks v. Newport News Shipbuilding & Dry Dock Co.,* BRB No. 91-2177A (June 19, 1997). Moreover, claimant's counsel admits that the United States Court of Appeals for the Fourth Circuit also has entered a fee award in this case for work performed between the dates of February 10, 1994, and December 20, 1994, time for which the administrative law judge has now awarded a fee. We therefore modify the administrative law judge's award of attorney's fees to reduce the time spent on this case when it was before the Board and when it was before the Fourth Circuit. Specifically, we reduce the number of hours awarded to Mr. West, first by the number of hours awarded by the Board, 21.8 hours, and then by the 10.25 hours of work Mr. West performed before the Fourth Circuit, at the administrative law judge's awarded hourly rate of $155, and the 20.25 hours of work performed before the Fourth Circuit by Mr. McCormick at the administrative law judge's hourly awarded rate of $125. Consequently, the administrative law judge's award of attorney fees is reduced by $7,344 (31.05 hours at $155 per hour and 20.25 hours at $125 per hour).

Employer first argues that counsel's fee petition should be denied in its entirety because it is grossly excessive. For example, employer notes that Mr. Hatten requested a fee for 42.75 hours preparing for his cross-examination of Dr.

Craighead, a cross-examination which lasted but two hours. Similarly, Mr. Smith-George requested a fee for 53 hours to prepare for the direct testimony of Dr. Egilman, which also lasted about only two hours.

In his decision, the administrative law judge explicitly considered and rejected employer's contention that counsel's fee petition, in its entirety, is excessive because the time charges are excessive. The administrative law judge recognized that while the fee request is unusually large, it is not outrageously excessive given the lengthy process of litigation and the complexity of issues that were to be resolved.[6] Inasmuch as the administrative law judge considered employer's specific objections, and employer has not demonstrated that the administrative law judge's finding on this matter is arbitrary, capricious or an abuse of discretion, its contention is rejected.

Employer next argues that the administrative law judge erred in granting counsel's request for augmentation of the hourly rate charged for work performed in this case in 1991. First, employer maintains that augmentation of an attorney's fee is not authorized under the Act. Employer also asserts that augmentation is inappropriate based on the facts of the instant case, particularly since employer's appeal of the administrative law judge's initial decision proved to be meritorious, as the administrative law judge's application of the "true doubt" rule was invalidated by the Supreme Court's decision in *Greenwich Collieries*.

Employer's contentions lack merit. The Board has previously held that in light of the United States Supreme Court's decisions in *Missouri v. Jenkins,* 491 U.S. 274 (1989), and *City of Burlington v. Dague*, 505 U.S. 557 (1992), it is clear that consideration of enhancement for delay is appropriate for fee awards under Section 28 of the Act, 33 U.S.C. §928. *Nelson v. Stevedoring Services of America*, 29 BRBS 90 (1995); *see also Anderson v. Director, OWCP*, 91 F.3d 1322, 30 BRBS 67 (CRT) (9th Cir. 1996). Accordingly, when the question of delay is timely raised, the body awarding the fee must consider this factor. *Allen v. Bludworth Bond Shipyard,* 31 BRBS 95 (1997). The fact-finder may adjust the fee based on historical rates to reflect its present value, apply current market rates or employ any other reasonable means to compensate claimant's counsel for the delay. *Id.* The relevant inquiry in determining whether a fee should be augmented to account for delay is the amount of time that has passed between the performance of counsel's services and the

[6]Moreover, as we have noted, the large number of hours is due in part to the fact the fee petition contains services performed before the Board and the Court of Appeals.

payment of his fee. *Id.*

In the present case, the administrative law judge initially observed that the six year delay between the date of the initial hearing and the date of the ultimate award of death benefits was caused by employer's successful appeal to the Fourth Circuit of his initial Decision and Order Awarding Benefits. The administrative law judge, however, rejected employer's contention that augmentation of the attorney fee is, in essence, punishing employer for its successful appeal. First, the administrative law judge noted that augmentation of attorney fees seemingly has been approved without regard to who was responsible for the protracted nature of the litigation. *See, e.g., Nelson*, 29 BBS at 99; *Cox v. Brady-Hamilton Stevedore Co.*, 25 BRBS 203 (1988). In addition, the administrative law judge properly stated that augmented fees are not punitive in nature, but rather merely reflect economic realities. The administrative law judge observed that the money that counsel is paid for work done in 1991 at a 1991 hourly rate does not take into account inflation. As the administrative law judge rationally concluded that the rate of $155 per hour, awarded Mr. West for his present work in this appeal, is reasonable for application to the 42.45 hours of services performed by Mr. West in pursuing claimant's claim in 1991, his award in this respect is affirmed.[7]

Employer further contends that the administrative law judge improperly awarded an attorney's fee for more than one attorney in this case. Employer specifically avers that it was improper for the administrative law judge to award 70 hours of preparation time plus a full eight hours of time on March 4, 1996, for both Mr. Hatten and Mr. Smith-George even though each attorney only handled half of the hearing. Employer asserts that it is claimant's burden to establish the necessity of and thus, entitlement to, the hours requested and that in the instant case, employer was erroneously required to prove that claimant did not need more than one attorney. Similarly, employer asserts that the administrative law judge incorrectly placed the burden of proof on employer to establish that the requested fees were unreasonable.

As the administrative law judge correctly noted, there is nothing objectionable to several attorneys participating in the litigation of a single claim, especially considering the complexity of the underlying issues. In considering the fee petition, the administrative law judge took specific notice of employer's concern regarding the necessity for more than one attorney and in fact, made several reductions in the hours requested by the attorneys on the grounds that their efforts were duplicative

[7]In addition, we note that the Board and the Fourth Circuit awarded enhanced hourly rates to account for the delay in payment of the attorney's fees in the instant case.

and/or unnecessary. We therefore reject employer's assertion that the administrative law judge erred in awarding a fee to more than one attorney in this case.

Pursuant to Section 702.132(a), 20 C.F.R. §702.132(a), any counsel seeking an attorney's fee has the burden to produce a fee petition which "is supported by a complete statement of the extent and character of the necessary work done." Claimant's counsel have, in the instant case, submitted a fee petition which, at least with regard to number of hours claimed, falls within the criteria set out in Section 702.132(a), and thus, they have met their burden. Thereafter, the administrative law judge is required to determine the reasonableness of the fee requested. Here, the administrative law judge properly applied this standard in considering counsel's fee petition and fully considered employer's objections. Consequently, we reject employer's contention that the administrative law judge erroneously placed the burden on employer in the instant case.

Employer further avers that the administrative law judge erred by not ordering a hearing on the fee petition and/or not having counsel produce records sufficient to justify their fees. Employer maintains that a hearing is necessary to determine the reasonableness of the fee petition. Employer asserts that, at the very least, it should be entitled to find out what record keeping mechanism was used for attorney time, and to review the time charges of all attorneys involved in the instant case and compare those fees to the fee petitions submitted in other similar cases. Such a requirement, argues employer, would protect its right to substantive due process.

The Board has held that a hearing is not required where the fee request is before the administrative officer before whom the work was performed. *See generally Carroll v. Hullinghorst Industries, Inc.*, 12 BRBS 401 (1980), *aff'd*, 650 F. 2d 750, 14 BRBS 373 (5th Cir. 1981), *cert. denied*, 454 U.S. 1163 (1982). In the instant case, the administrative law judge, who has presided over this case at the Office of Administrative Law Judge level from its inception, determined that a hearing on the issue of the fee petition would not be fruitful, as it would merely be an added expenditure in time and effort to an "already worn out case." Supplemental Decision and Order Awarding Attorney Fees at 3. In addition, the administrative law judge denied employer's requests for time sheets, billing records, tax records, and past attorney's fee petitions, as the records already presented by claimant's counsel are sufficient for reaching a decision and employer has not offered any compelling reason for the disclosure of the requested records. In accordance with the pertinent regulation, counsel, in the case at hand, submitted a fee petition which is supported "by a complete statement of the work done, described with particularity as to the professional status of each person performing such work, the normal billing

rate for each such person, and the hours devoted by each such person to each category of work." 20 C.F.R. §702.132(a). The regulations do not require counsel to submit additional records of the kind which employer seeks to have entered into the record in this case. In addition, due process requires that employer be given a reasonable time to respond. *See generally Dupre v. Cape Romain Contractors, Inc.*, 23 BRBS 86 (1989). In the instant case, employer was given, and in fact, did respond to counsel's fee petition and the administrative law judge has addressed each of employer's objections. Consequently, all procedural due process requirements have been met.

Employer lastly avers that the administrative law judge's award of costs is not in accordance with the law, as the costs claimed are vague and non-specific. For instance, on three separate occasions counsel requested reimbursement for costs associated with expert witnesses, but in each case the fee petition fails to identify the individual. As a further example, counsel requested reimbursement in the amount of $650 for a medical report on April 21, 1997, after claimant had been awarded benefits.

Employer's contention on this issue has merit. The fee petition submitted by claimant's counsel lacks specificity with regard to costs pertaining to expert fees and a medical report paid in connection with this litigation. As employer notes, the fee petition includes entries on March 5, 1996, for "Expert Fees for consultation fees," at $900, and for "Expert Fees - review of letter & preparation of document," at $200, and an entry on April 30, 1996, for "Expert fee including preparation and testimony, researcher, search line, hotel, and air fare" totaling $6,594.59. In addition, the fee petition includes an entry dated April 21, 1997, for a "medical report" which cost $650. In addressing employer's contentions, the administrative law judge merely found that these expenses are all reasonable and, thus, are allowed. In light of the lack of specificity exhibited by the fee petition concerning these costs, we vacate the administrative law judge's award of costs and remand the instant case for reconsideration of this issue. On remand, the administrative law judge may allow claimant's counsel the opportunity to amend the fee petition with evidence regarding the details of these requested costs. In turn, employer should also be provided with the opportunity to respond to any submission by claimant.

In his appeal of the administrative law judge's fee award, claimant first avers that the administrative law judge erred by awarding Mr. West only an hourly rate of $155, since both the Board and the Fourth Circuit have approved an hourly rate of $165 for Mr. West.[8] Similarly, claimant argues that the administrative law judge

[8]Contrary to claimant's contention, the Board's Order awards a fee at $150 per hour.

erred by reducing the hourly rates of Mr. Hatten and Mr. Smith-George to $155, claiming the credentials and expertise in asbestos litigation of Mr. Hatten and Mr. Smith-George warrant an award of the hourly requested rates of $375 and $200 respectively.

In considering the hourly rate to be awarded counsel in the instant case, the administrative law judge first determined that the fees normally applied in Longshore cases in the Hampton Roads, Virginia area, tend to be around $150 per hour. The administrative law judge also considered evidence put forth by employer giving a range from $100 up to $165 per hour for Longshore cases in various locations across the nation, including the Hampton Roads area, and noted that the Board had recently, in an unpublished decision, awarded an hourly rate of $155 in a Longshore claim in the Hampton Roads area. In light of this precedent, the administrative law judge reduced counsel's requested fee for work performed by Mr. Hatten, Mr. Smith-George and Mr. West to $155 per hour. Inasmuch as the amount of an attorney's fee as well as the hourly rate allowed is within the discretion of the body awarding the fee, 20 C.F.R. §702.132, and claimant has not met its burden of showing that the $155 hourly rate awarded for work performed by Mr. Hatten, Mr. Smith-George and Mr. West is unreasonable, it is affirmed. *Ferguson v. Southern States Cooperative*, 27 BRBS 16 (1993).

Claimant next contends that the administrative law judge's reduction of the time Mr. West spent preparing for and attending the March 4, 1996, hearing, specifically a total of 26.75 hours (18.75 hours in preparation and 8 hours at the hearing), was erroneous as Mr. West's presence and participation was integral to the proper presentation of claimant's case. The administrative law judge found that although Mr. West handled a majority of the case, and was present for the March 4, 1996, hearing, he did not conduct that hearing. Rather, his colleagues, Mr. Hatten and Mr. Smith-George performed this task. Consequently, the administrative law judge concluded that as Mr. West did not participate in the March 4, 1996, hearing, and since the two attorneys who did actually participate in the hearing charged a more than sufficient total of 95.75 hours in preparation time,[9] Mr. West is not entitled

[9]In addition, the administrative law judge reduced the preparation times requested by Mr. Hatten from 42.75 hours to 30 hours and by Mr. Smith-George from 53 hours to 40 hours, as the requested hours were excessive and inconsistent with the preparation time charged by Mr. West for the 1995 hearing in the same claim.

to any fee directly associated with that hearing. As the administrative law judge's findings are rational, they are affirmed.

Accordingly, the administrative law judge's Decision and Order on Motion for Reconsideration - Granting Death Benefits and Denying Employer's Motion for Reconsideration are affirmed. The administrative law judge's award of attorney's fees is modified to reflect a reduction of $7,344, representing hours awarded for work which was performed before the Board and United States Court of Appeals for the Fourth Circuit. In addition, the administrative law judge's award of costs in his Supplemental Decision and Order Awarding Attorney Fees is vacated, and the case is remanded for further consideration consistent with this opinion. In all other regards, the Supplemental Decision and Order Awarding Attorney Fees is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge