BRB No. 00-0430 BLA

WILLIAM B. LANE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
UNION CARBIDE CORPORATION	)	DATE ISSUED:
	)	
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 and Supplemental Decisions and Orders Awarding Attorney Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Roger D. Forman (Forman & Crane, L.C.), Charleston, West Virginia, for claimant.

Mary Rich Maloy (Jackson & Kelly, PLLC), Charleston, West Virginia, for employer.

Rita Roppolo (Judith E. Kramer, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order awarding benefits and Supplemental Decisions and Orders Awarding Attorney Fees (98-BLA-1315) 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 noted that the instant claim was a modification request and applying the proper standard, concluded that claimant established a mistake in fact. Decision and Order at 3. Considering entitlement pursuant to the provisions of 20 C.F.R. Part 718 (2000),[2] the administrative law judge found thirty-five and one-half years of coal mine employment and concluded that the evidence of record was sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), (4)(2000) and 718.203(b)(2000). Decision and Order at 10-11. The administrative law judge further determined that claimant established that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b), (c) (2000). Decision and Order at 12. Accordingly, benefits were awarded. In supplemental decisions, the administrative law judge also awarded attorney fees to both counsel who represented claimant during the litigation of this claim.

On appeal, employer contends that the administrative law judge made several errors in finding that claimant demonstrated a mistake in fact, in finding the existence of pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(1), (4)(2000), in finding that

[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.

[2]Claimant filed his initial claim for benefits on June 12, 1972, which was denied on November 30, 1980. Director's Exhibit 20. Claimant filed the present claim on March 26, 1984, which was finally denied on January 24, 1997, as claimant failed to establish that he was totally disabled. Director's Exhibits 1, 81, 93, 98. Claimant filed a modification request on January 21, 1998. Director's Exhibit 110.

total disability was established pursuant to 20 C.F.R. §718.204(c)(1), (4)(2000) and that the disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2000). Employer further challenges the award of attorney fees. Claimant responds, urging affirmance of the award of benefits and attorney fees. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter indicating that she will not participate in this appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines 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 February 21, 2001, to which claimant, employer and the Director have responded.[3] 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. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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). Additionally, an award of attorney fees 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 law. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989); *Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to

[3]The Director's brief, dated March 14, 2001, asserted that the regulations at issue in the lawsuit do not affect the outcome of this case. Claimant's brief, dated March 6, 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 March 19, 2001, employer asserted that the regulations at issue in the lawsuit "could" affect the outcome of this case. Employer's Brief at 2, 5, 9-10. Employer contends that the provisions contained at 20 C.F.R. §§718.201(c), 718.104(d) 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.

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*).

Employer initially contends that the administrative law judge violated the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), in finding a mistake of fact, the existence of pneumoconiosis pursuant to Section 718.202(a)(1) (2000) and total disability, based upon Dr. Rasmussen's exercise blood gas studies.[4] Employer's Brief at 7-20. We agree.

As the administrative law judge acknowledged, when modification is requested, the relevant standard set forth by the United States Court of Appeals for the Fourth Circuit in *Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993), requires that the administrative law judge determine whether a change in conditions or a mistake of fact has been made, even where no specific allegation has been made.[5] Furthermore, in determining whether the requesting party has established modification pursuant to Section 725.310, the administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to

[4]The Administrative Procedure Act requires each adjudicatory decision to include a statement of "findings and conclusions, and the reasons or basis therefor, on all material issues of fact, law or discretion presented on the record...." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a).

[5]This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit as the miner was employed in the coal mine industry in the State of West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 2, 3.

determine if the weight of the new evidence is sufficient to establish the element or elements of entitlement which defeated entitlement in the prior decision. *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

The administrative law judge, in the instant case, noted the relevant standard and concluded that a review of the record demonstrates that there has been a mistake in fact. Decision and Order at 3. The administrative law judge further stated that "I find that claimant has established the existence of total disability." Decision and Order at 3. The administrative law judge, however, does not explicitly state the basis for his finding that Administrative Law Judge Morin had erred in finding that claimant failed to establish total disability. Decision and Order at 3. Under the APA, the administrative law judge is required to address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. *See Wojtowicz, supra*. As the administrative law judge has failed to set forth the specific basis for his mistake of fact finding, we therefore vacate the administrative law judge's modification determination and remand this case to the administrative law judge for further consideration.

In addition, the administrative law judge's consideration of all of the evidence of record included other errors. With respect to Section 718.202(a)(1) (2000), the administrative law judge concluded that claimant established the existence of pneumoconiosis based upon the preponderance of positive interpretations by physicians with better qualifications. Decision and Order at 10. As employer correctly asserts, however, the administrative law judge failed to consider two x-ray interpretations by Drs. Shipley and Scott, who are both B-readers and board-certified radiologists, that were part of the record in the instant case. *See* Director's Exhibits 113, 121. Although the administrative law judge is empowered to weigh the evidence, inasmuch as the administrative law judge's evidentiary analysis and discussion does not coincide with the evidence of record, the basis for the administrative law judge's credibility determinations in this particular case can not be affirmed. *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *McCune v. Central Appalachian Coal Co.*, 6 BLR 1-996 (1984); *see also Witt v. Dean Jones Coal Co.*, 7 BLR 1-21 (1984). Consequently, we must vacate the administrative law judge's findings pursuant to Section 718.202(a)(1) (2000), and on remand, the administrative law judge must specifically consider all of the relevant evidence.

Employer further asserts, with respect to Section 718.202(a)(1) (2000), that the administrative law judge erred in failing to allow employer the opportunity to submit responsive readings of x-ray interpretations submitted by claimant just prior to the deadline imposed by 20 C.F.R. §725.456 (2000). Employer's Brief at 3. An administrative law judge is obligated to insure a full and fair hearing on all the issues; nonetheless, he is afforded

broad discretion in dealing with procedural matters. *See Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47 (1990); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1985) *aff'd on recon.*, 9 BLR 1-236 (1987)(*en banc*). Due process requires that employer be given some opportunity to respond to evidence submitted immediately prior to the twenty day deadline imposed by Section 725.456 (2000). *See Owens, supra*; *North American Coal Corp. v. Miller*, 870 F.2d 948, 12 BLR 2-222 (3d Cir. 1989); *Shedlock, supra*; *Lane v. Harmon Mining Co.*, 5 BLR 1-85 (1982). Consequently, on remand, the administrative law judge should reopen the record and admit into evidence the x-ray interpretations offered by employer that are responsive to the readings submitted by claimant just prior to the expiration of the twenty day deadline.

Employer also asserts that the administrative law judge erred in finding that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4) (2000) as he rejected the non-examining physician's opinions, went outside the record to discredit the opinion of Dr. Renn and failed to fully consider Dr. Crisalli's opinion. We agree. In addressing the medical opinions of record pursuant to 20 C.F.R. §718.202(a)(4) (2000), the administrative law judge gave less weight to Dr. Renn's opinion as the physician had originally concluded that the miner had pneumoconiosis but changed his mind after reviewing interpretations of more recent x-rays, the physician did not examine the miner, the physician based his opinion on the majority of x-ray readings and did not give a reason for discounting the positive readings and Dr. Renn stated that pneumoconiosis does not cause coughing or wheezing. Decision and Order at 10-11. The administrative law judge further accorded less weight to the opinion of Dr. Fino, who did not examine the miner, as he did not state why he discounted the positive x-ray readings or the miner's symptoms. Decision and Order at 11. The administrative law judge also accorded less weight to the opinion of Dr. Zaldivar as the physician did not explain why his earlier diagnosis of pneumoconiosis was incorrect. Decision and Order at 11. The administrative law judge then concluded that on balance, he found that the medical opinions established the existence of pneumoconiosis. Decision and Order at 11.

The factors to which the administrative law judge referred are relevant in determining the weight to be assigned a particular medical opinion, but the administrative law judge must first specifically determine if the opinions of record are reasoned and documented and therefore credible. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993). In the instant case, the administrative law judge stated that the opinions of Drs. Fino, Cohen, Rasmussen, Olson, Lee and Crisalli were well reasoned but only compared the physicians' findings on physical examination. Decision and Order at 11. The administrative law judge did not review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order at 10-11. In determining if a party has met its burden of proof, the United States Court of Appeals for the

Fourth Circuit has held that an administrative law judge should consider the qualifications of the physicians, the explanations of their medical opinions and the documentation underlying their opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997). Moreover, a physician's opinion based upon the review of other opinions and objective test results, may be substantial evidence in support of an administrative law judge's findings. *See Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989). In evaluating the medical opinion evidence, the administrative law judge should assess "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgements and the sophistication and bases of their diagnosis." *Akers, supra*; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997). In this case, as the administrative law judge did not specifically consider and discuss the weight he accorded the various medical opinions of record, in view of the case law from the Fourth Circuit, we vacate the administrative law judge's findings that the existence of pneumoconiosis was established by the medical opinion evidence and remand this case to the administrative law judge for a full review of the record as a whole in light of these authorities. Furthermore, the administrative law judge, in determining if claimant has met his burden of proof, must consider all factors relevant to the quality of the evidence in determining whether the opinions of record are supported by the underlying documentation and adequately explained. *See Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo, supra*; *Fields, supra*; *Lucostic, supra*. In addressing the credibility of the evidence, the administrative law judge may not go outside of the established record to attack the credibility of a medical opinion. *Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986). Thus, the administrative law judge did not act appropriately in relying on the Attorney's Textbook of Medicine and the A.D.A.M. Medical Enclyclopedia to accord less weight to Dr. Renn's opinion concerning the existence of pneumoconiosis as the physician opined that pneumoconiosis does not cause cough or wheezing. Decision and Order at 11.

Subsequent to the issuance of the administrative law judge's Decision and Order, the United States Court of Appeals for the Fourth Circuit held that although Section 718.202(a) (2000) enumerates four distinct methods of establishing pneumoconiosis, all types of relevant evidence must be weighed together to determine whether a claimant suffers from the disease. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2- (4th Cir. 2000). Consequently, if the administrative law judge finds the evidence sufficient to establish the existence of pneumoconiosis at Section 718.202(a)(1), (4) (2000), the administrative law judge, on remand, must weigh all the evidence relevant to 20 C.F.R. §718.202(a)(1)-(4) (2000) together in determining whether claimant suffers from pneumoconiosis. *Compton, supra*.

Employer further contends that the administrative law judge erred in finding total disability established. We agree. In addressing whether total disability was established based upon Dr. Rasmussen's qualifying exercise blood gas studies[6] performed in 1974 and 1984, the administrative law judge stated that there is no evidence in the record to indicate that any of these tests was invalid or performed incorrectly although he recognized that four physicians, Drs. Zaldivar, Renn, Fino and Crisalli, questioned their validity.[7] *See* Director's Exhibits 22, 29, 46, 119; Employer's Exhibits 1, 3, 4, 5, 7; Decision and Order at 12. The administrative law judge further stated that the "articles in the record supplied by Dr. Cohen" support the physician's argument that the tests are valid and therefore Dr. Cohen has provided a convincing case establishing their credibility. Decision and Order at 12. The administrative law judge has provided only a conclusory statement that Dr. Cohen demonstrated the credibility of the tests. Moreover, the administrative law judge has not specifically discussed or assessed the credibility of all of the opinions relative to the validity of the 1974 and 1984 exercise blood gas studies. The administrative law judge, under the APA, is required to specifically address all relevant evidence of record, explain the rationale employed in the case and clearly indicate the specific statutory or regulatory provision pertaining to a particular finding. *See Wojtowicz, supra*. As the administrative law judge has provided only a conclusory statement and has failed to set forth the specific basis for his finding that Dr. Rasmussen's exercise blood gas studies performed in 1974 and 1984 were valid, we vacate the administrative law judge's determination and remand this case to the administrative law judge for further consideration.

Employer also contends that the administrative law judge erred in finding that the medical opinion evidence established total disability. This contention has merit. In addressing whether the medical opinions established total disability, the administrative law judge initially determined that the 1974 and 1984 blood gas studies were valid and qualifying and then divided the physicians' opinions of record by indicating which physician had diagnosed total disability and which had not. Decision and Order at 12. The administrative law judge then accorded less weight to the opinions of Drs. Cohen, Renn, Fino and Zaldivar as the first three physicians did not examine the miner and the last did not give any reason for discounting the miner's significant coal mining history. Decision and Order at 12. The

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[6]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2).

[7]The administrative law judge also found that the exercise blood gas studies performed in 1974 and 1984 were found to be valid by Drs. Gaziano and Cohen. Decision and Order at 12; Director's Exhibit 110; Claimant's Exhibits 1. 2.

administrative law judge then accorded greater weight to the miner's treating physician, Dr. Mirza, and concluded that on balance, the miner has established that he is totally disabled from coal mine work. Decision and Order at 12.

For the same reasons previously discussed with respect to the administrative law judge's findings pursuant to Section 718.202(a)(4) (2000), we must also vacate the administrative law judge's findings that the medical opinion evidence is sufficient to establish total disability. On remand, the administrative law judge must specifically determine if the opinions of record are reasoned and documented and review the medical opinions in the context of their objective evidence which may provide a basis for determining the credibility of the opinions. *See Trumbo, supra*; *Fields, supra*; *Lucostic, supra*. Additionally, in determining if a party has met its burden of proof, the United States Court of Appeals for the Fourth Circuit has held that an administrative law judge should not automatically credit the testimony of a treating or an examining physician merely because the physician treated or personally examined the miner; rather, the administrative law judge should also consider all the relevant factors in assessing the credibility of the medical evidence. *See Hicks, supra*; *Akers, supra*. As the administrative law judge, in this case did not specifically consider and discuss the credibility of all of the record evidence, including the opinions supportive of claimant's position and in view of the case law from the Fourth Circuit, we vacate the administrative law judge's finding that total disability was established by the medical opinion evidence and remand this case to the administrative law judge for a full review of the record as a whole with specific findings as to the credibility of each medical opinion.[8] *See Hicks, supra*; *Akers, supra*; *Collins, supra*; *Trumbo, supra*; *Fields, supra*; *Lucostic, supra*. On remand, the administrative law judge is instructed to reconsider the medical opinion evidence of record with respect to these issues and to further determine, if reached, whether the

[8]In discussing the medical opinion evidence of record on remand, the administrative law judge should specifically reconsider the opinion of Dr. Zaldivar which the administrative law judge erroneously discredited for discounting claimant's significant coal mine employment history as contributing to claimant's poor physicial condition, where the doctor opined that claimant does not have a pulmonary impairment and based upon the objective evidence there was no progressive disease of the lungs. Decision and Order at 12; Employer's Exhibit 3.

medical evidence demonstrates a totally disabling respiratory impairment, when weighed against the "contrary probative evidence" pursuant to Section 718.204. *See* Black Lung Benefits Amendments, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(b); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields, supra*; *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock, supra*; *Gee, supra*.

In addition, we also address employer's challenges to the administrative law judge's finding that the miner's total disability was due to coal mine employment. Employer argues that, contrary to the APA and *Akers, supra*, the administrative law judge failed to explain his assessment or provide any rationale for finding the opinions supportive of claimant's burden to be well reasoned or supported by the evidence of record. We agree with employer that the administrative law judge did not address the medical opinion evidence in light of *Hicks, supra* and *Akers, supra* in finding total disability due to pneumoconiosis established and on remand, the administrative law judge is instructed to reconsider his findings on this issue, if reached, in accordance with the proper causation standard.[9] *See* Black Lung Benefits Amendments, 65 Fed. Reg. 80,049(2000), to be codified at 20 C.F.R. §718.204(c); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Employer lastly asserts that the administrative law judge failed to provide a proper explanation for the award of attorney's fees as he failed to specifically address employer's objections to the hourly rate in both Attorney Forman's and Attorney Ratliff's fee petitions. We agree. The administrative law judge, in the instant case, noted that employer objected to the hourly rate of both counsel, but did not discuss the specific objection concerning the enhancement of the fee for risk of loss, which is impermissible. Supplemental Decision and

[9]Although the administrative law judge set forth the standard enunciated by the United States Court of Appeals for the Fourth Circuit, he appears to have applied an incorrect standard, requiring employer to disprove that the miner's significant coal mining experience was a contributing factor to his shortness of breath and cough. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); Decision and Order at 12. The burden is on claimant to establish that pneumoconiosis is a contributing cause of his total disability. *See Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990).

Order Granting Attorney Fees to Attorney Forman at 1-2; Supplemental Decision and Order Granting Attorney Fees to Attorney Ratliff at 1-2; *Wojtowicz, supra*. The Administrative Procedure Act requires that every adjudicatory decision must be accompanied by a statement of findings of fact and conclusions of law and the basis therefore on all material issues of fact, law or discretion presented in the record. *See Wojtowicz, supra*; *Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983). As the administrative law judge's supplemental decisions do not indicate that he has addressed employer's specific objections to the fee petition with respect to the hourly rate, his decisions must be vacated and the case remanded to the administrative law judge to consider the fee petitions and to specifically address employer's objections and provide a thorough rationale for his findings of fact and conclusions of law. *See Mays v. Piney Mountain Coal Co., Inc.*, 21 BLR 1-59 (1997), *aff'd on other grounds, sub nom., Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, BLR 2- (4th Cir. 1999); *Abbott, supra*; *Wojtowicz, supra*; *Gibson v. Director, OWCP*, 9 BLR 1-149 (1986); *Barr v. Director, OWCP*, 7 BLR 1-367 (1984); *Ovies v. Director, OWCP*, 6 BLR 1-689 (1983); *Busbin v. Director, OWCP*, 3 BLR 1-374 (1981); *Marcum, supra*; *see also Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998)(*en banc*)(affirming an administrative law judge's award of an hourly rate of $200.00 in a case arising within the jurisdiction of the United States Court of Appeals for the Fourth Circuit).

Employer further contends, with respect to Attorney Forman, that the administrative law judge erred in failing to find the hours claimed for the review of medical literature and trial preparation and closing argument preparation were excessive. Contrary to employer's contention, the administrative law judge fully considered employer's contention concerning the excessive number of hours claimed by Attorney Forman in his review of the medical literature, disallowing 4.5 hours and allowing the remainder of the time requested as the action was important and necessary. Supplemental Decision and Order Awarding Attorney Fees to Attorney Forman at 2. Consequently, we affirm this finding by the administrative law judge as employer has failed to show that it is arbitrary, capricious, an abuse of discretion or not in accordance with law. *Abbott, supra*; *Marcum, supra*. However, employer correctly asserts that the administrative law judge's supplemental decision fails to indicate that the administrative law judge considered employer's contentions regarding the amount of time requested for hearing and closing argument preparation. Consequently, on remand, the administrative law judge must specifically address employer's contentions with respect to whether these entries are excessive.[10] *See Mays, supra*; *Wojtowicz, supra*; *Ridings, supra*; *Busbin, supra*.

[10]The administrative law judge's remaining findings with respect to the fee award to both Attorney Forman and Attorney Ratliff are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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.[11] *See Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991); *see 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.

Accordingly, the administrative law judge's Decision and Order awarding benefits and Supplemental Decisions and Orders Awarding Attorney Fees are affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

[11]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 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).

REGINA C. McGRANERY
Administrative Appeals Judge