BRB Nos. 08-0506 BLA
and 08-0506 BLA-S

K.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SPURLOCK MINING COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED	)	DATE ISSUED: 04/16/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits and Attorney Fee Order of Larry S. Merck, Administrative Law Judge, United States Department of Labor.

Thomas W. Moak (Moak & Nunnery), Prestonburg, Kentucky, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Benefits (07-BLA-5196) of Administrative Law Judge Larry S. Merck (the administrative law judge) granting claimant's request for modification of the denial of a subsequent 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). Employer also appeals the administrative law judge's Attorney Fee Order, awarding fees to claimant's counsel. The merits of entitlement have been before the Board previously.[1] In the prior appeal, the Board affirmed Administrative Law Judge Joseph E. Kane's June 30, 2005 finding that claimant failed to establish a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d), as the new evidence did not establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), or total disability pursuant to 20 C.F.R. §718.204(b). The Board, therefore, affirmed the denial of benefits. [*K.W.*] *v. Spurlock Mining Co.*, BRB No. 05-0814 BLA (Feb. 16, 2006)(unpub.).

On April 13, 2006, claimant requested modification of the denial of benefits and submitted additional medical evidence in support of his request. Employer responded, and submitted additional medical evidence in opposition to claimant's request for modification.

In a Decision and Order dated March 24, 2008, the administrative law judge credited claimant with twenty-one years of coal mine employment,[2] as stipulated by the parties, and found that the medical evidence developed since the prior denial of benefits established the existence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge therefore found that claimant demonstrated a change in an applicable condition of entitlement as required by 20 C.F.R. §725.309(d). Reviewing the merits of entitlement, the administrative law judge relied on the medical evidence developed since the 1989 denial of claimant's first claim, as more probative of claimant's current condition. *See Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147, 2-149 (6th Cir. 1988); *Parsons v. Wolf Creel Collieries*, 23 BLR 1-29, 1-35 (2004)(*en banc*)(McGranery, J., concurring and dissenting); *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-27 (2004)(*en*

[1] The current claim, claimant's second, was filed on August 12, 2002. Director's Exhibit 3. The complete procedural history of this case, set forth in the Board's prior decision in [*K.W.*] *v. Spurlock Mining Co.*, BRB No. 05-0814 BLA (Feb. 16, 2006)(unpub.), is incorporated by reference.

[2] The record indicates that claimant's coal mine employment was in Kentucky. Director's Exhibit 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

banc). The administrative law judge found that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge further found that claimant is totally disabled and that his total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits. Subsequently, in an Attorney Fee Order dated August 25, 2008, the administrative law judge awarded claimant's counsel a fee of $8,025.00, representing 26.75 hours of attorney services at an hourly rate of $300.00.

On appeal, employer contends that the administrative law judge erred in his analysis of the medical opinion evidence relevant to the existence of total disability at 20 C.F.R. §718.204(b)(2)(iv), in finding a change in an applicable condition of entitlement established pursuant to 20 C.F.R. §§725.309(d), 725.310. On the merits of entitlement, employer further asserts that the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), and the existence of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer also challenges the administrative law judge's findings regarding the cause of claimant's totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c). Finally, employer contests the administrative law judge's award of attorney's fees, challenging both the hourly rate and the number of hours awarded. Claimant responds, urging affirmance of the administrative law judge's award of benefits, and the award of attorney's fees. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Employer filed reply briefs reiterating its contentions on appeal. [3]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In this subsequent claim filed on August 12, 2002, claimant must establish that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R.

[3] The administrative law judge's finding of twenty-one years of coal mine employment, and his determination to accord greater weight to the evidence developed since the denial of the prior claim, are affirmed as unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

§725.309(d)(2). Claimant's prior claim was denied because he failed to establish any element of entitlement. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing one element of entitlement to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2), (3). In considering a request for modification of the denial of a subsequent claim (which, as here, has been denied based upon a failure to establish a change in an applicable condition of entitlement), an administrative law judge must determine whether all of the evidence developed in the subsequent claim, including any new evidence submitted with the request for modification, establishes a change in an applicable condition of entitlement. *See* 20 C.F.R. §725.309(d); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998). If the evidence establishes a change in an applicable condition of entitlement, the administrative law judge must then consider the merits of the subsequent claim. *Hess*, 21 BLR at 1-143.

Initially, we address employer's contention that, in finding a change in an applicable condition of entitlement, the administrative law judge erred in his evaluation of the medical opinion evidence relevant to the existence of total disability at 20 C.F.R. §718.204(b)(2)(iv). Employer specifically asserts that the administrative law judge failed to consider the exertional requirements of claimant's usual coal mine employment in conjunction with the opinions of Drs. Dahhan and Arnett, before determining that claimant is totally disabled. Employer's Brief at 11. Employer also asserts that the administrative law judge's "reliance on Dr. Arnett's opinion to find total disability is precluded as a matter of law," asserting that Dr. Arnett's opinion is unreasoned and undocumented. Employer also contends that the administrative law judge credited "Dr. Arnett's opinion based solely upon his treating status." Employer's Brief at 12, 14. We disagree.

In weighing the medical opinion evidence, the administrative law judge found, correctly, that both Drs. Dahhan and Arnett opined that claimant has a totally disabling respiratory impairment. Decision and Order at 10; Employer's Exhibit 1; Claimant's Exhibit 1. Contrary to employer's arguments, in finding that claimant established the existence of a totally disabling respiratory or pulmonary impairment, the administrative law judge considered the nature of claimant's usual coal mine employment.[4] Decision

[4] On a form submitted with his claim, claimant described his last coal mine job, from April 1986 to May 1987, as follows: "Some supervisor's duties, also operated all the equipment at various times throughout daily shift. These included roof bolter, shuttle cars, scoops, continuous miner. Also maintenance duties, water pumping, conveyor belt maintenance and ventilation." Director's Exhibit 5. At the hearing, claimant testified that all of his work had been underground, and confirmed that it involved operating coal loading and cutting machines, a continuous miner, and a roof bolter. Hearing Tr. at 12-13. Claimant also testified that he worked as a part-time foreman, performed

and Order at 3; *see Hvizdzak v. North Am. Coal Co.*, 7 BLR 1-469 (1984). The administrative law judge specifically found, based on information provided by claimant, that claimant worked underground as a roof bolter, operated coal loading and cutting machines, ran a continuous miner, and performed "just about all of the jobs required in the mines." Decision and Order at 3. Further, the record reflects that Dr. Dahhan understood the demands of claimant's coal mine work. In opining that claimant has a moderate obstructive ventilatory impairment and lacks the respiratory capacity to perform his usual coal mine work, Dr. Dahhan specifically discussed the fact that claimant "worked in the mining industry for 20 years" and that "[a]ll of his mining work was underground operating a drill, roof bolter, continuous miner and cutting machine." Employer's Exhibit 1; *see Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 552 (6th Cir. 2002)*; Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 578, 22 BLR 2-107, 124 (6th Cir. 2000).

In addition, there is no merit to employer's contention that the administrative law judge mechanically credited the opinion of Dr. Arnett, as claimant's treating physician, to find total disability established. Employer's Brief at 13-14. While the administrative law judge acknowledged that Dr. Arnett treated the miner on a regular basis and is familiar with his condition, the administrative law judge did not rely primarily on Dr. Arnett's opinion. Decision and Order at 10. Rather, the administrative law judge specifically stated that he "rel[ied] on the medical report of Dr. Dahhan, as supported by the report of Dr. Arnett," to conclude that claimant established the existence of a totally disabling respiratory impairment through new evidence, pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 10-11.

Employer raises no other arguments with respect to the administrative law judge's finding that claimant established total disability, an element of entitlement previously adjudicated against him. We therefore affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §§718.204(b)(2), 725.309(d), 725.310.

Turning to the merits of entitlement, we next address employer's contention that the administrative law judge erred in finding that the medical opinion evidence established the existence of legal pneumoconiosis,[5] in the form of chronic obstructive

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maintenance, and did "just anything that could be done in the coal mines." Hearing Tr. at 13.

[5] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive disease arising out of coal mine

pulmonary disease (COPD) arising out of coal mine employment, pursuant to 20 C.F.R §718.202(a)(4). Employer contends that the administrative law judge's determination to accord greater weight to the opinions of Drs. Baker, Arnett, and Sikder, that claimant's COPD is due in part to coal dust exposure, than to the contrary opinions of Drs. Fino and Dahhan, fails to comply with 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), and the controlling precedent of the United States Court of Appeals for the Sixth Circuit. Employer's Brief at 14-23. Some of employer's contentions have merit.

The administrative law judge considered the reports of Drs. Baker, Sikder, Arnett, Fino, and Dahhan. In a report dated October 15, 2002, Dr. Baker diagnosed COPD and chronic bronchitis due to a combination of coal dust exposure and smoking. Director's Exhibit 11. In reports dated June 3, 2002 and April 11, 2007, Dr. Arnett diagnosed COPD, chronic bronchitis, and emphysema, and indicated that each of these conditions was caused, significantly contributed to, or substantially aggravated by, coal dust exposure. Claimant's Exhibit 1; Director's Exhibit 45. Similarly, in a report dated May 12, 2003, Dr. Sikder diagnosed moderate COPD, causally related to both coal dust exposure and smoking. Director's Exhibit 45. By contrast, in a report dated September 17, 2004, Dr. Fino opined that claimant does not have pneumoconiosis, but suffers from COPD with moderate obstructive bronchitis and emphysema related to cigarette smoking. Director's Exhibit 47. Finally, in a report dated October 23, 2002, Dr. Dahhan opined that claimant did not have clinical pneumoconiosis, and did not have any respiratory impairment. Director's Exhibit 39. In a report dated August 3, 2006, however, Dr. Dahhan opined that claimant still did not suffer from clinical pneumoconiosis, but had developed a moderate obstructive ventilatory impairment that was due to smoking. Employer's Exhibit 1.

Based on his review of the medical opinions, the administrative law judge found that the opinions of Drs. Baker, Arnett, and Sikder established the existence of legal pneumoconiosis because the physicians accounted for claimant's significant coal dust exposure history without ignoring his smoking history. Decision and Order at 26. The administrative law judge discredited the opinions of Drs. Fino and Dahhan, finding that they did not adequately explain why they believed that coal dust exposure did not contribute to claimant's impairment. Decision and Order at 19, 25-26.

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employment." A disease "arising out of coal mine employment" includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(2), (b).

Employer specifically contends that the administrative law judge mischaracterized the opinions of Drs. Fino and Dahhan. Employer asserts that both physicians fully explained why they believed claimant's impairment was due to smoking, and not coal dust exposure, and argues that the administrative law judge failed to set forth why he found their explanations to be inadequate. Employer's contentions have merit.

In his report dated September 17, 2004, Dr. Fino stated that the pattern of claimant's loss in lung function since 2002 pointed to smoking as the cause of claimant's impairment:

> The abnormality in lung function has also worsened between 2002 and 2004. He has gone from a mild to moderate obstructive defect. He has also developed hypoxemia. This is all consistent with cigarette smoking.
>
> . . .
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> According to the medical records I have reviewed, [claimant's] FEV1 was nearly normal in 2002. There is now a moderate reduction. He stopped working in 1987. However, he continued to smoke through 2004. It is my opinion that if he had an impairment due to coal mine dust, his lung function would not have been as well preserved in 2002. The progressive reduction in this man's lung function over two years is consistent with cigarette smoking.

Director's Exhibit 47.

Thus, contrary to the administrative law judge's finding, Dr. Fino did not "rely solely on [claimant's] smoking history, apparently without considering whether both cigarette smoking and coal dust exposure had a concurrent effect in causing chronic obstructive lung disease." Decision and Order at 19; *see Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). Rather, Dr. Fino considered claimant's coal dust exposure, and explained that because claimant's coal dust exposure ended in 1987, if coal dust exposure had caused an impairment, it would have been apparent in 2002. Instead, claimant's lung function was near normal in 2002, but by 2004 he had developed a moderate obstructive defect and hypoxemia, factors Dr. Fino stated were consistent with ongoing smoking. Although the administrative law judge is not required to accept evidence that he determines is not credible, he nonetheless must set forth his "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A); *Martin v. Ligon Preparation Co*., 400 F.3d 302, 305, 23 BLR 2-261, 2-283 (6th Cir. 2005); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). As it is not clear why the administrative law judge found Dr. Fino's

reasoning to be inadequate, we must vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at 20 C.F.R. §718.202(a)(4), and remand this case for further consideration and discussion of all the relevant medical opinion evidence. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). On remand, the administrative law judge must explain his findings as to Dr. Fino's opinion. *See Wojtowicz*, 12 BLR at 1-165.

The administrative law judge must also reconsider the opinion of Dr. Dahhan. In his report dated August 3, 2006, Dr. Dahhan explained that the nature and timing of claimant's respiratory impairment were not consistent with a coal dust-related condition:

> [Claimant's] obstructive ventilatory impairment has resulted from his lengthy smoking habit with no evidence that it was caused by, contributed to or aggravated by the inhalation of coal dust or coal workers' pneumoconiosis. He has not had any exposure to coal dust for 25 years, a duration of absence sufficient to cause cessation of any industrial bronchitis that he may have had. His obstructive ventilatory defect is being treated with multiple bronchodilator agents indicating that his physician believes it is responsive to such measures, a finding that is inconsistent with the permanent adverse effects of coal dust on the respiratory system. He has lost more than 1500 cc of his FEV1, an amount that cannot be accounted for according to the medical literature by his 20 years of coal dust exposure.

Employer's Exhibit 1.

Thus, contrary to the administrative law judge's finding, Dr. Dahhan also did not "rely solely on [claimant's] smoking history, apparently without considering whether both cigarette smoking and coal dust exposure had a concurrent effect in causing chronic obstructive lung disease." Decision and Order at 25. Rather, Dr. Dahhan specifically considered whether coal dust had contributed to claimant's impairment, and determined that it did not, based on the length of time since claimant's last exposure to coal mine dust, the sudden drop in claimant's FEV1 values since his prior examination in 2004, and the apparent reversibility of claimant's impairment. Employer's Exhibit 1. In addition, as employer contends, Dr. Dahhan did not assert that coal dust exposure does not cause obstructive lung disease. Decision and Order at 25; Employer's Brief at 21-23. Rather, Dr. Dahhan stated that, based on claimant's medical history and the results of his examination and testing, he believed that *claimant's* obstructive lung disease was not due to coal dust exposure. Employer's Exhibit 1. Thus, as the administrative law judge did not accurately characterize Dr. Dahhan's opinion, or explain why he found Dr. Dahhan's reasoning to be inadequate, we must vacate the administrative law judge's findings with respect to Dr. Dahhan. 5 U.S.C. §557(c)(3)(A); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Wojtowicz*, 12 BLR at 1-165.

Regarding the administrative law judge's evaluation of the opinions of Drs. Baker, Arnett, and Sikder, we reject employer's contention that Dr. Baker's opinion, that smoking and coal dust contributed to claimant's pulmonary impairment, is inadequately reasoned and documented to support claimant's burden of proof. Employer's Brief at 15-17. The determination of whether a physician's opinion is reasoned and documented is committed to the discretion of the administrative law judge. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). In evaluating Dr. Baker's opinion, the administrative law judge noted, correctly, that "Dr. Baker considered the objective medical data, including relevant work and smoking histories, and [c]laimant's history of symptoms, in diagnosing COPD, in part, due to coal dust exposure." Decision and Order at 18. We therefore affirm the administrative law judge's determination that Dr. Baker's opinion was "adequately reasoned" as supported by substantial evidence. *See Rowe*, 710 F.2d at 254, 5 BLR at 2-102; Decision and Order at 16.

We also reject employer's argument that the administrative law judge erred in crediting Dr. Arnett's opinion. Employer's Brief at 19. Contrary to employer's assertions, the administrative law judge did not mechanically credit the opinion of Dr. Arnett based on his status as the miner's treating physician, without examining the opinion's reasoning. Rather, the administrative law judge specifically acknowledged that Dr. Arnett's form reports provided "minimal information," and acted within his discretion in concluding that Dr. Arnett had nonetheless provided an adequate basis for consideration. *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 23.

Nor, as employer contends, was the administrative law judge required to discredit Dr. Sikder's opinion as based in part on a pulmonary function study that had been invalidated. Employer's Brief at 20. The administrative law judge properly considered that the results of Dr. Sikder's pulmonary function study were not acceptable, and acted within his discretion in concluding that, while the invalid study "detracts from the persuasiveness of Dr. Sikder's opinion regarding the level of the miner's impairment," it did not render "the physician's opinion as a whole on the issue of legal pneumoconiosis undocumented or unreasoned." Decision and Order at 18. In so finding, the administrative law judge noted, correctly, that in addition to the pulmonary function study, Dr. Sikder had relied on the miner's exposure history, medical history, and her clinical examination in determining that the miner's COPD was due in part to coal dust exposure. Decision and Order at 18-19. Therefore, the administrative law judge permissibly concluded that Dr. Sikder's diagnosis of legal pneumoconiosis was sufficiently documented and reasoned to be entitled to "some weight." *See Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; Decision and Order at 19.

We therefore reject employer's allegation that the administrative law judge could not rely on the opinions of Drs. Baker, Arnett, and Sikder as reasoned medical judgments.

In sum, on remand, the administrative law judge should reconsider all of the relevant medical opinion evidence of record pursuant to 20 C.F.R. §718.202(a)(4), address the explanations provided by the physicians, and fully set forth his reasons for crediting or discrediting their opinions as to the existence of legal pneumoconiosis. *See McCune v. Central Appalachian Coal Co.*, 6 BLR 1-966 (1984). In determining the relative weight to accord their opinions, the administrative law judge should consider the physicians' credentials, the quality of their reasoning, and whether their reports are supported by the remaining evidence of record. *See* 30 U.S.C. §923(b); *Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003)*; Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-327 (6th Cir. 2002)*; Rowe*, 710 at 255, 5 BLR at 2-103. Moreover, in reconsidering the evidence on remand, the administrative law judge should be mindful that the presumption at 20 C.F.R. §718.203(b) is not available to claimants seeking to establish the existence of legal pneumoconiosis. *See Andersen v. Director, OWCP*, 455 F.3d 1102, 1105, 23 BLR 2-332, 2-340-41 (10th Cir. 2006); Decision and Order at 26-27; Employer's Brief at 17-18. Rather, claimant must prove by a preponderance of the evidence that his respiratory impairment is due in part to coal dust exposure. *See* 20 C.F.R. §718.201(a)(2).

Should the administrative law judge again find legal pneumoconiosis established, in the interest of judicial economy, we briefly address employer's arguments regarding the issue, on the merits of the claim, of whether claimant is totally disabled by a respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Continuing to rely on the evidence developed since the denial of the prior claim, the administrative law judge found, correctly, that in a report dating from 2002, Dr. Baker opined that claimant retained the respiratory capacity to perform his usual coal mine work. In a 2004 report, Dr. Fino also concluded that claimant was not totally disabled from a respiratory standpoint. Dr. Dahhan also opined in 2002 that claimant was not totally disabled, but, in his most recent report dating from 2006, Dr. Dahhan revised his opinion to conclude that claimant's impairment had progressed and was now totally disabling. Finally, in reports dating from 2003 and 2006, Dr. Arnett opined that claimant suffers from a totally disabling respiratory impairment.

The administrative law judge initially discounted the reports of Drs. Baker and Fino, as well as the earlier report of Dr. Dahhan, because these reports were based on older evidence, while the record as a whole established that claimant's condition had worsened since 2004. Decision and Order at 28. By contrast, the administrative law judge credited the 2006 opinion of Dr. Dahhan, as well-reasoned and documented, and accorded "some weight" to the opinion of Dr. Arnett, to conclude that claimant had

established the existence of a totally disabling respiratory impairment through medical opinion evidence pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Initially, for the reasons discussed above, we again reject employer's contention that, in crediting the opinions of Drs. Dahhan and Arnett, the administrative law judge "failed to perform the required analysis" of the exertional requirements of claimant's usual coal mine work. Employer's Brief at 23. We further reject employer's assertion that the administrative law judge "improperly credited Dr. Arnett's opinion based on his treatment of [claimant]." Employer's Brief at 23-24. Rather, as discussed above, the administrative law judge permissibly accorded greatest weight to the opinion of Dr. Dahhan, as "well-reasoned and documented," and acted within his discretion in according "some weight" to the supporting opinion of Dr. Arnett, to conclude that the probative medical opinion evidence established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Decision and Order at 28-29. Weighing all of the contrary probative evidence together, the administrative law judge concluded that claimant established that he is totally disabled by a preponderance of the evidence, pursuant to 20 C.F.R. §718.204(b)(2). *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon.* 9 BLR 1-236 (1987); *see also Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989). As employer raises no challenge to the administrative law judge's finding that Dr. Dahhan's opinion is "well-reasoned and documented," or to his determination to discredit the opinions of Drs. Baker and Fino on the issue of total disability, we affirm the administrative law judge's conclusions that, on the merits, claimant established that he is totally disabled pursuant to 20 C.F.R. §718.204(b)(2).

Regarding the cause of claimant's disabling impairment, since we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we also vacate his determination that claimant's total disability is due to pneumoconiosis, and instruct the administrative law judge to reconsider this issue on remand, pursuant to 20 C.F.R. §718.204(c).

Finally, employer challenges the administrative law judge's award of an attorney's fee. Employer asserts that the administrative law judge erred in allowing an hourly rate of $300.00 for claimant's counsel without considering counsel's customary billing rate. Additionally, employer argues that counsel justified his hourly rate, in part, by impermissibly referring to the risk of loss in black lung claims. Employer further asserts that the administrative law judge abdicated his responsibility to consider the reasonableness of the hours requested for the services performed. Employer objects to claimant's counsel's practice of billing in quarter-hour increments, and asserts that claimant's counsel double-billed for the same services on two separate occasions. In addition, employer contends that claimant's counsel impermissibly requested fees for

services that were not performed before the administrative law judge, and for preparation of the fee petition itself.

Claimant's counsel is entitled to a fee only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Because we have vacated the award of benefits, there has not been a successful prosecution. Consequently, no fee is due and we decline to address the fee order at this time. Should a fee be sought on remand, the administrative law judge should address any objections raised by employer, and counsel's responses thereto, and determine the reasonableness of the fee in conjunction with 20 C.F.R. §725.366. *See B & G Mining, Inc., v. Director, OWCP* [*Bentley*], 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008); *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984). The administrative law judge must set forth his findings in detail, including the underlying rationale, as required by the APA. 5 U.S.C. §557(c); *Wojtowicz*, 12 BLR at 1-165. In so doing, the administrative law judge should be mindful that counsel, as the proponent of the fee petition, bears the burden of establishing the reasonableness of the fee request in light of the criteria set forth in 20 C.F.R. § 725.366(b). *See* 20 C.F.R. §725.366(a); 5 U.S.C. §556(d), 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 addition, the fee petition "shall indicate . . . the customary billing rate" of each person seeking a fee. 20 C.F.R. §725.366(a). However, risk of loss cannot be factored into determining a reasonable hourly rate. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

Accordingly, the administrative law judge's Decision and Order - Award of Benefits is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this opinion. We decline to address the Attorney Fee Order as it is premature.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge