BRB Nos. 04-0323 BLA
and 04-0323 BLA-A

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| JOAN WALLACE<br>(on behalf of the estate of<br>ETHEL EVERSOLE) | ) | |
| Claimant-Petitioner<br>Cross-Respondent | ) | |
| v. | ) | |
| PEABODY COAL CO. | ) | DATE ISSUED: 12/28/2004 |
| Employer-Respondent<br>Cross-Petitioner | ) | |
| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| Party-in-Interest | | DECISION and ORDER |

Appeal of the Decision and Order Second Remand - Awarding Living Miner Benefits and Awarding Survivor Benefits, and Appeal of the Attorney Fee Order, of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

Joseph Kelley (Monhollon & Kelley, P.S.C.), Madisonville, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Claimant appeals and employer cross-appeals the Decision and Order Second Remand - Awarding Living Miner Benefits and Awarding Survivor Benefits (02-BLA-0086) of Administrative Law Judge Thomas F. Phalen, Jr. rendered 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] In addition, employer appeals the administrative law judge's Attorney Fee Order awarding fees to claimant's counsel. This case is before the Board for the third time.[2] Most recently, the Board, in *Eversole v. Peabody Coal Co.* [*Eversole 2*], BRB No. 00-0284 BLA (Dec. 18, 2000)(unpub.), considered employer's appeal of the administrative law judge's award of benefits in both the miner's and survivor's claims. The Board initially declined to revisit its prior holding at 20 C.F.R. §725.309(d), on the grounds that employer had full opportunity to challenge the Board's prior finding but failed to do so. With respect to the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the Board affirmed the administrative law judge's credibility determinations with respect to the opinions of Drs. O'Bryan, Norsworthy, Penman and Mercer, but held that the administrative law judge failed to provide a proper reason for finding the opinions of Drs. Branscomb and Caffrey outweighed. Therefore, the Board vacated the administrative law judge's finding at Section 718.202(a)(4). The Board also vacated the administrative law judge's disability causation and death due to pneumoconiosis findings at 20 C.F.R. §§718.204(b) and 718.205(c), respectively. However, in conflict with its previously stated disposition vacating the administrative law judge's determination at Section 718.202(a)(4), the Board erroneously stated that it had *affirmed* the administrative law judge's Section 718.204(a)(4) finding and only directed the administrative law judge to reconsider, on remand, the issues of disability causation, death due to pneumoconiosis, and onset.

While this case was pending before the administrative law judge on remand from the Board, Joseph Kelley, the widow's counsel, informed the administrative law judge by letter dated July 27, 2001 that the widow, Ethel Eversole, passed away on April 14, 2001. Counsel included a copy of the death certificate, which listed Joan Wallace as the informant. Director's Exhibit 31. On August 10, 2001, the administrative law judge remanded the case to the district director to allow the Estate of Ethel Eversole to be

[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 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The complete procedural history of this claim is set forth in the Board's July 22, 1999 and December 18, 2000 decisions.

substituted for the widow and to pursue the claim on her behalf.[3] Subsequently, in a letter dated November 5, 2001, Senior Claims Examiner Bobby Chaffins informed Joan Wallace that in accordance with the administrative law judge's Order, "Joan Wallace, for the Estate of Mrs. Eversole" had been substituted as a party to the record. Director's Exhibit 31.

On November 30, 2001, the claim was referred back to the Office of Administrative Law Judges for a formal hearing.[4] On August 22, 2003, Judge Phalen ordered Wallace to show cause why the claims should not be denied by reason of

[3] By letter dated August 24, 2001, a Department of Labor claims examiner wrote to the Estate of Ethel Eversole and requested the name and address of the individual to contact regarding the estate and a copy of the appointment of the administrator or executor of the estate. There is no response to this letter contained in the record. The record does contain a copy of the widow's will, appointing Joan Wallace as executrix of Ethel Eversole's estate, as well as a Petition for Probate, a Petition to Dispense with Administration of the estate, signed by Joan Wallace, a surviving adult daughter of both the miner and the widow, and an Order by the state of Kentucky granting the Petition to Dispense with Administration of the widow's estate. Director's Exhibit 31. These documents indicate that Wallace paid funeral expenses for her mother in the amount of $7,536.25, that the estate had no assets for administration, and that the widow was survived by five adult daughters, including Wallace, and a son. Director's Exhibit 31.

[4] Upon the return of the case to the Office of Administrative Law Judges, the claim was inadvertently assigned to Administrative Law Judge Roketenetz. Director's Exhibit 32. On July 1, 2002, while the claim was before Judge Roketenetz, Wallace moved for a decision on the record. On July 1, 2002 employer submitted a Motion to Dismiss and, in the alternative, for a decision on the record. Employer asserted that Wallace was not a proper party to this claim because she was never formally appointed executrix of the widow's estate and, therefore, had no standing to pursue this claim on behalf of the estate. Employer further asserted that because the widow did not leave anything in her will to Wallace, Wallace had no financial interest permitting her to pursue the claim on her own behalf. Finally, employer asserted that even if Wallace was a proper party, she had failed to prosecute the claim with reasonable diligence. Employer's July 1, 2002 Motion to Dismiss. By Order dated July 22, 2002, Judge Roketenetz granted the motions for a decision on the record, denied Employer's Motion to Dismiss, holding that Wallace was a proper party in interest and that she had not abandoned the claim, and allowed for additional briefing as requested by employer. However, on October 1, 2002, Judge Roketenetz issued an Order of Clarification noting that this case had been assigned to him in error and reassigning the claim back to Administrative Law Judge Thomas F. Phalen, Jr. for the purpose of deciding it in accordance with the Board's December 18, 2000 decision.

abandonment, including a showing of whether the estate of Ethel Eversole submitted a written notice to the district director in order to be substituted as a party for Ethel Eversole, as well as a showing of the actions taken on behalf of the estate to pursue the miner's and survivor's claims with due diligence.[5] In a Decision and Order on Second Remand [Second Remand Decision and Order] dated December 9, 2003 (currently before the Board), the administrative law judge, after considering the responses by the parties to his Show Cause Order, dismissed Wallace as a party to the proceedings pursuant to Rule 25 of the Federal Rules of Civil Procedure, as authorized by 29 C.F.R. §18.1(a), and in accordance with 20 C.F.R. §725.465(b), and stated that Wallace is not eligible for benefits in an individual capacity or in a capacity as a representative of the estate of Ethel Eversole. Second Remand Decision and Order at 6. Considering the merits of the claims, the administrative law judge awarded benefits on both the miner's and survivor's claims, pursuant to 20 C.F.R. §§718.202(a), 718.204(b), (c) and 718.205(c). The administrative law judge thus ordered employer to reimburse the Black Lung Disability

[5] The administrative law judge further ordered both parties to address the issue of whether the representative of the estate of Ethel Eversole may or may not, if it has not already done so, submit a written notice that the estate's rights may be prejudiced by a decision of an adjudication officer so that it may be added as a party, which is to be documented by a signed affidavit from the representative of the estate of Ethel Eversole.

In response to the administrative law judge's Order, claimant's counsel asserted that claimant is a proper party as an adult child of the miner and widow and as representative of the estate, that both the miner's and widow's claims had been diligently pursued from the beginning, and that claimant's rights and the rights of the other surviving children would be prejudiced if she was dismissed. Counsel explained that an underpayment of benefits existed in these claims which would be payable in equal shares to the surviving children. Counsel also submitted an August 27, 2003 affidavit from claimant, in which she stated that while she had not personally submitted a written notice requesting substitution, she could not say that notice was not sent, because the claim was subsequently recaptioned in her name. In addition, claimant asserted that at no time had the claims been abandoned; they had been pursued from the date of filing. Finally, claimant asserted that the rights of the surviving children of the miner and Ethel Eversole and/or her estate would be prejudiced as benefits were owing should the claims be approved, and that claimant had a personal financial interest because she paid medical expenses for her mother before her death.

Employer asserted that under Kentucky state law, the widow's estate had been closed and it was too late to reopen it to substitute Wallace as the party in interest. The Director, Office of Workers' Compensation Programs (the Director) also responded, objecting to any dismissal of these claims on the grounds of abandonment, because the Black Lung Disability Trust Fund had paid benefits in both claims.

Trust Fund (the Trust Fund) for benefits previously paid, but further stated that "no other person is entitled to receive any benefits." Second Remand Decision and Order at 19. Following the award of benefits, in an Order dated February 23, 2004, the administrative law judge granted claimant's counsel's petition for attorney's fees in full. Attorney Fee Order, issued February 23, 2004.

On appeal, claimant contends that the administrative law judge erred in dismissing her as a party, and further appeals from the administrative law judge's order that any underpayment of benefits would not be payable to the adult children of the miner and his widow. Employer responds, urging affirmance of the administrative law judge's decision. Employer also cross-appeals, asserting that the administrative law judge erred in failing to consider whether the miner's January 22, 1993 duplicate claim was timely filed pursuant to the holding of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001). Employer further asserts that the administrative law judge erred in failing to follow the Board's instructions on remand regarding the existence of pneumoconiosis pursuant to Section 718.202(a)(4). Employer also challenges the administrative law judge's findings that both the miner's totally disabling respiratory impairment and his death were due to pneumoconiosis pursuant to Sections 718.204(c), 718.205(c). Finally, employer asserts that the administrative law judge erred in awarding attorney fees to claimant's counsel. The Director, Office of Workers' Compensation Programs (the Director), responds to both appeals, agreeing with claimant, that she is a proper party and is entitled to share in any underpayment of benefits together with her siblings. The Director disagrees with employer's assertion that *Kirk* is controlling in the instant claim, and instead asserts that the unpublished case of *Peabody Coal Co. v. Director, OWCP* [*Dukes*], No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002) controls the outcome of this case. The Director agrees, however, with employer's argument that the Board's prior holding pursuant to Section 718.202(a)(4) was contradictory, requests that the Board clarify its holding, and asks that the case be remanded for the administrative law judge to reconsider the medical opinions at Section 718.202(a)(4). The Director further requests that the Board's holdings regarding the credibility of the medical opinions not be revisited, but declines to address the issues of disability causation and death due to pneumoconiosis, as the existence of pneumoconiosis at Section 718.202(a)(4) is not yet finally determined. Finally, both claimant and the Director urge affirmance of the administrative law judge's award of attorney's fees.

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).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Claimant initially asserts that the administrative law judge erred in dismissing her as a party to this claim. In determining that claimant is not a proper party to this claim, the administrative law judge initially noted that 20 C.F.R. Parts 718 and 725 do not expressly authorize the substitution of estates on behalf of miners or survivors who die before a final determination on their claim has been reached. Second Remand Decision and Order at 5. The administrative law judge therefore applied Rule 25 of the Federal Rules of Civil Procedure, as authorized by 29 C.F.R. §18.1(a), which sets forth, in relevant part, that upon a motion for substitution made by any party or by the successors or representatives of the deceased party, a court may issue an order allowing the substitution of the proper party if a party dies and the claim is not thereby extinguished. Fed.R.Civ.P. 25(a)(1); Second Remand Decision and Order at 5. The administrative law judge found that the record does not show that any successor or any representative of the estate of Ethel Eversole ever filed a motion to be substituted on her behalf, as required by Rule 25. The administrative law judge further found that in her affidavit, claimant did not describe one single action taken to pursue the miner's or survivor's claims. Second Remand Decision and Order at 5. The administrative law judge stated that while there were actions taken by the widow's counsel, Joseph Kelley, to pursue the claims, there is no documentation in the record that anyone had retained Kelley to represent the estate of Ethel Eversole in pursuing the miner's or survivor's claims. Second Remand Decision and Order at 6. As the record contained no motion for substitution, and as the administrative law judge found claimant's affidavit insufficient to establish that she had actively pursued the claims, the administrative law judge dismissed Wallace as a party to the proceedings in accordance with Section 725.465(b) and stated that she is not eligible for benefits in an individual capacity or in a capacity as a representative of the estate of Ethel Eversole.[6] Second Remand Decision and Order at 6. After adjudicating the claims on the merits, and awarding benefits on both claims, the administrative law judge ordered employer to reimburse the Trust Fund for benefits paid but further ordered that "no other person is entitled to receive any benefits." Second Remand Decision and Order at 19.

We agree with claimant's argument that she is a proper party to this claim and was improperly dismissed by the administrative law judge. While the administrative law

[6] While the administrative law judge emphasized what he found to be claimant's lack of involvement, he did not actually dismiss her claim by reason of abandonment pursuant to 20 C.F.R. §725.409.

judge correctly stated that 29 C.F.R. §18.1(a) authorizes the use of the Federal Rules of Civil Procedure in any situation not provided for or controlled by another regulation, we hold that he incorrectly concluded that the regulations implementing the Act do not authorize the substitution of estates on behalf of miners or survivors who die before a final determination on their claim for benefits has been reached. Second Remand Decision and Order at 5. The Board has held that the regulations which implement the Act, namely 20 C.F.R. §§725.360(b), 725.545(c)-(e) and 802.402(b), "expressly allow for the substitution of parties upon the death of a party." *Clarke v. Director, OWCP*, 11 BLR 1-169, 1-170 (1988). In addition, the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, has held that the Black Lung Act "both contemplates and authorizes certain non-dependent heirs to pursue the deceased miner's claim for benefits." *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 247, 19 BLR 2-123, 2-128 (6th Cir. 1995).

Further, Section 725.360(b) provides that "[a] widow, child, parent, brother, or sister, or the representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to benefits may be prejudiced by a decision of an adjudication officer, may be made a party." 20 C.F.R. §725.360(b). In addition, as claimant points out, Section 725.360(d) provides, without requiring a written statement from the individual, that "any other individual may be made a party if that individual's rights with respect to benefits may be prejudiced by a decision to be made." 20 C.F.R. §725.360(d) does not include a time limit for adding a party to an action. In this case, it is undisputed, and supported by the record, that claimant is the daughter of the deceased miner, J.C. Eversole, and the deceased widow, Ethel Eversole. August 27, 2003 Affidavit of Joan Wallace at 1. In addition, claimant, in her sworn affidavit submitted in response to the administrative law judge's Show Cause Order, specifically stated, as required by Section 725.360(b), that her rights with respect to benefits may be prejudiced by a decision in these claims because she personally paid $500 in medical expenses incurred by her mother prior to death, which her mother's estate could not cover. August 27, 2003 Affidavit of Joan Wallace at 2. Therefore, it appears that claimant has satisfied the requirements of Section 725.360(b) for being named a party to this claim as a surviving child. As claimant's written statement was received by the administrative law judge prior to the issuance of his December 9, 2003 decision, the administrative law judge erred in dismissing Wallace as a party to this claim.

Further, contrary to employer's arguments, these appeals cannot be dismissed on the grounds of abandonment as both the Director and claimant have objected to any such dismissal. 20 C.F.R. §802.402(b) specifically provides that an appeal may be dismissed on the death of a party only if the record affirmatively shows that there is no person who wishes to continue the action and whose rights may be prejudiced by dismissal. In addition, while claimant did not seek to be substituted as a party prior to August 27, 2003, she had no reason to do so because the district director had notified her, in his letter

dated November 5, 2001, that she in fact had been substituted as a party. Furthermore, employer's reliance on *Jordan v. Director, OWCP*, 892 F.2d 482, 13 BLR 2-184 (6th Cir. 1989) is misplaced, as *Jordan* is distinguishable on its facts. In *Jordan*, the Sixth Circuit affirmed the Board's denial of a survivor's claim as abandoned. The party in that case failed to respond for over a year to a notice that her case would be closed if she took no further action. That is not the situation here. Rather, in the instant case, as both claimant and the Director contend, claimant, through counsel, responded to all requests for information and participated in all necessary aspects of the proceedings.

In addition, as both claimant and the Director assert, if this claim is ultimately successful, there will have been an underpayment of benefits in the amount of $1501.50 in the widow's claim. Section 725.545(c)(5) provides that in cases where there is no surviving spouse or dependent children, the non-dependent children of the deceased individual are entitled, in equal shares, to receive the underpaid benefits. 20 C.F.R. §725.545(c), (d); *Webb*, 49 F.3d at 248, 19 BLR at 2-130. Thus, despite the fact that claimant was never formally appointed executrix of the widow's estate, she is, in her own right, eligible to receive a share of any underpaid benefits. Therefore, the administrative law judge erred in stating that claimant is not eligible for benefits even in an individual capacity. Furthermore, as claimant's siblings are also eligible to receive a share of any underpaid benefits, the administrative law judge further erred in finding that besides the Trust Fund, "no other person" is entitled to receive any benefits." 20 C.F.R. §725.545(c), (d); *Webb*, 49 F.3d at 248, 19 BLR at 2-130; Second Remand Decision and Order at 19. Therefore, we reverse the administrative law judge's dismissal of Joan Wallace as a party to this claim.

We next address employer's assertion on cross-appeal, that the administrative law judge erred in failing to consider whether the decision of the United States Court of Appeals for the Sixth Circuit in *Tennessee Consolidation Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001) barred as untimely filed the miner's January 22, 1993 duplicate claim. Employer specifically asserts that subsequent to the Board's December 18, 2000 decision remanding this case to the administrative law judge for further consideration of both the miner's and widow's claims, the Sixth Circuit issued *Kirk*, holding therein that the three-year statute of limitations "clock" imposed by 20 C.F.R. §725.308 on the filing of a claim, "begins to tick the first time that a miner is told by a physician that he is totally disabled due to pneumoconiosis. This clock is not stopped by the resolution of the miner's claim or claims, and, pursuant to *Sharondale* [*Corp. v. Ross*, 42 F.3d 993, 19 BLR 2-10 (6th Cir. 1994)], the clock may only be turned back if the miner returns to the mines after a denial of benefits." *Kirk*, 264 F.3d at 608, 22 BLR at 2-298. Employer asserts that because the miner never returned to the mines after the denial of his prior claim, the three year statute of limitations started running in September 1986

when Dr. Simpao diagnosed total disability due to pneumoconiosis.[7] Employer's Brief at 18; Director's Exhibit 27, pp. 84-88. Employer asserts that the miner's 1993 claim, filed more than three years after Dr. Simpao's 1986 report, was, therefore, untimely filed. Employer's Brief at 18. Employer further asserts that pursuant to the Board's holdings in *Abshire v. D & L Coal Co.*, 22 BLR 1-203, 1-206-207 (2002)(*en banc*) and *Furgerson v. Jericol Min. Inc.*, 22 BLR 1-217, 1-220 (2002)(*en banc*), employer did not waive a challenge to the issue of timeliness by not raising the issue prior to the issuance of *Kirk*. Employer's Brief at 18. In addition, employer asserts that despite having raised the issue of timeliness at the first available opportunity, namely in a Remand Brief to the administrative law judge dated August 21, 2002, the administrative law judge failed to address the issue in his Decision and Order on Second Remand dated December 9, 2003. Therefore, employer asserts that a remand of the case is required to allow the administrative law judge to consider whether the miner's 1993 duplicate claim was timely filed.

Employer's argument has merit. Initially, we note that while the Board generally will not address an issue which was not presented below, the Board has made an exception in cases, such as in the instant case, where there has been intervening authority, when raising the issue would have been futile. *Furgerson,* 22 BLR at 220. In this case, at the time the miner filed his 1993 duplicate claim, the claim was timely pursuant to Board precedent and, therefore, it would have been futile for employer to raise the issue of timeliness then. In addition, contrary to the Director's arguments, *Kirk* constitutes the controlling authority on this issue and *Dukes*,[8] which is an unpublished case, has no

[7] Dr. Simpao examined claimant on September 30, 1986. In his form report of the same date, Dr. Simpao diagnosed coal workers' pneumoconiosis category 1/1, and indicated by check marks that the miner had a moderate pulmonary impairment due to pneumoconiosis and did not have the respiratory capacity to perform the work of a coal miner or to perform comparable work in a dust-free environment. Dr. Simpao also indicated that he based his diagnosis and conclusions on the miner's abnormal chest x-ray, blood gas studies and pulmonary function studies. Director's Exhibit 27, p. 84-88.

[8] In *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002), an unreported case, the United States Court of Appeals for the Sixth Circuit agreed with the holding of the United States Court of Appeals for the Tenth Circuit in *Wyoming Fuel Co. v. Director, OWCP [Brandolino]*, 90 F.3d 1502, 20 BLR 2-302 (10th Cir. 1996), that when a doctor determines that a miner is totally disabled due to pneumoconiosis, the miner must bring a claim within three years of when he becomes aware or should have become aware of the determination. The Tenth Circuit also held, however, that a final finding by an Office of Workers' Compensation Programs adjudicator that the claimant is not totally disabled due to pneumoconiosis, repudiates

precedential value. 6 Cir.R. 206(c);[9] *Lopez v. Wilson*, 355 F.3d 931 (6th Cir. 2004); *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554 (6th Cir. 2003); *see Cross Mountain Coal, Inc. v. Ward*, 93 F.3d 211, 20 BLR 2-360 (6th Cir. 1996); *Furgerson*, 22 BLR at 222. Therefore, employer raised the timeliness issue at the first opportunity following the issuance of *Kirk*, namely when the case was pending before the administrative law judge on remand. Based on these facts, and as the record contains a medical report diagnosing total disability due to pneumoconiosis, we vacate the administrative law judge's award of benefits and remand the case for the administrative law judge to consider whether the miner's duplicate claim, filed on January 22, 1993, Director's Exhibit 2, was timely filed pursuant to *Kirk*. In doing so, the administrative law judge must also determine, pursuant to 20 C.F.R. §725.308(a), whether the September 30, 1986 opinion of Dr. Simpao, Director's Exhibit 27, pp. 84-88, constitutes a "medical determination of total disability due to pneumoconiosis which has been communicated to the miner…" 20 C.F.R. §725.308(a).

Turning to the merits of the miner's claim, employer and the Director both contend that the Board's December 18, 2000 decision contains an inconsistency which requires that the administrative law judge re-evaluate the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4).

Employer and the Director correctly assert that the Board's December 18, 2000 decision contained an inconsistency which requires that the administrative law judge re-evaluate the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4). In considering the administrative law judge's weighing of the medical opinions at Section 718.202(a)(4), the Board, in its December 18, 2000 Decision and Order, affirmed the administrative law judge's credibility determinations with respect to Drs. O'Bryan,

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any earlier medical determination to the contrary and renders prior medical advice to the contrary ineffective to trigger the running of the statute of limitations.

[9] Rule 206(c) of the United States Court of Appeals for the Sixth Circuit regarding Publication of Decisions indicates:

> Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court en banc consideration is required to overrule a published opinion of the court.

Of particular note is the fact that the Sixth Circuit denied the motion filed by the Director to publish the decision in *Peabody Coal Co. v. Director, OWCP [Dukes]*, No. 01-3043, 2002 WL 31205502 (6th Cir. Oct. 2, 2002).

Norsworthy, Penman and Mercer, but held with respect to the administrative law judge's weighing of Dr. Branscomb's and Dr. Caffrey's opinions, that:

> Although the administrative law judge found that the opinions of Drs. Caffrey and Branscomb were outweighed by those of Drs. O'Bryan, Norsworthy, and Mercer, he provided an improper basis for rejecting the opinions of Dr. Caffrey and Branscomb, and we, therefore, vacate the administrative law judge's weighing of these opinions under Section 718.202(a)(4).

*Eversole 2*, slip op. at 9. Later in the decision, however, the Board stated:

> Accordingly, we affirm the administrative law judge's determination that claimant affirmatively established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) inasmuch as this finding is rational, contains no reversible error, and is supported by substantial evidence.

*Eversole 2*, slip op. at 12. It is this paragraph upon which the administrative law judge relied in finding that the issue of the existence of pneumoconiosis need not be readdressed. Second Remand Decision and Order at 8. We note that this paragraph was erroneous, as we actually vacated the administrative law judge's findings pursuant to Section 718.202(a)(4) on the grounds that the administrative law judge gave improper reasons for rejecting the opinions of Drs. Caffrey and Branscomb. Therefore, we again remand this case to the administrative law judge for reevaluation of the medical opinion evidence relevant to the existence of pneumoconiosis pursuant to Section 718.202(a)(4).

Employer next challenges the administrative law judges determinations pursuant to Sections 718.204(c) and 718.205(c), that the medical evidence of record is sufficient to establish that the miner's totally disabling respiratory impairment and death were both due to pneumoconiosis. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was previously established, we also vacate his findings regarding disability causation and death due to pneumoconiosis at Sections 718.204(c) and 718.205(c), respectively. We instruct the administrative law judge to reweigh the relevant evidence thereunder, if, on remand, he finds established the existence of pneumoconiosis.

Finally, with respect to the issue of attorney's fees, we note that an attorney's fee award does not become effective, and is not enforceable, until counsel is successful in prosecuting the claim and all appeals are exhausted. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *see Wells v. International Great Lakes Shipping Co.*, 693 F.2d 663, 15 BRBS 47 (CRT) (7th Cir. 1982). In light of our remand of this case for application of *Kirk*, and for further findings on the merits of the claim at Sections 718.202(a)(4),

718.204(c) and 718.205(c), we need not address employer's arguments regarding the administrative law judge's award of attorney's fees at this juncture. Employer's November 1, 2004 Motion to Strike is moot.

Accordingly, the administrative law judge's Decision and Order Second Remand – Awarding Living Miner Benefits and Awarding Survivor's Benefits is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

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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BETTY JEAN HALL
Administrative Appeals Judge