BRB Nos. 08-0268 BLA, 07-0994 BLA,
07-0727 BLA and 07-0411 BLA

L.M. (Widow of and on behalf of D.M.) Claimant-Respondent v. PEABODY COAL COMPANY and OLD REPUBLIC INSURANCE COMPANY Employer/Carrier- Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 12/30/2008 DECISION and ORDER

Appeal of the Decisions and Orders – Awarding Benefits and Attorney Fee Order of Donald W. Mosser, Administrative Law Judge, United States Department of Labor, and the District Director's Proposed Orders – Supplemental Awards – Fees for Legal Services.

Paul (Rick) Rauch (Harrison Moberly), Indianapolis, Indiana, for claimant.

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

Jeffrey S. Goldberg (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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:

Employer appeals the Decisions and Orders (2005-BLA-00001 and 2005-BLA-05026) and Attorney Fee Order (2005-BLA-00001) of Administrative Law Judge Donald W. Mosser with respect to a miner's claim and a survivor's 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] Employer also appeals from the district director's Proposed Orders awarding fees for services performed in conjunction with the miner's claim and the survivor's claim.

We will first address employer's request that it be dismissed as responsible operator in both claims due to improper *ex parte* contacts involving claimant's counsel and an official with the Department of Labor (DOL). We will then consider, in turn, employer's appeals of the awards of benefits in the miner's and survivor's claim, the award of attorney fees for work performed before the Office of Administrative Law Judges (OALJ), and the district director. Lastly, we will address the petition for an award of attorney fees for services performed before the Board.

Employer's Request to Be Dismissed as Responsible Operator

Employer argues on appeal that it should be dismissed from liability for benefits and attorney fees in both the miner's claim and the survivor's claim based on improper *ex parte* communications involving claimant's counsel and a DOL official.[2] Employer has identified several instances in which it alleges that *ex parte* communications occurred that resulted in a violation of employer's right to due process. The first communication involved a letter in which claimant's counsel inquired about the status of the request for reconsideration of the Board's decision in *Webber v. Peabody Coal Co.*, 23 BLR 1-123,

[1] Claimant is the widow of the miner, who died on March 4, 2003. Living Miner's (LM) Director's Exhibit 57. Claimant filed a claim for survivor's benefits on November 24, 2003, and is pursuing the miner's claim on behalf of his estate. Survivor's Claim (SC) Director's Exhibit 1A.

[2] In the survivor's claim, employer filed a motion requesting that the administrative law judge dismiss it from the case. The administrative law judge summarily denied employer's motion and employer's request for reconsideration. *See* Order dated May 31, 2007; SC Decision and Order at 15 n.10.

1-133 (2006), *aff'd on recon.*, 24 BLR 1-1 (2007) (*en banc*), because the administrative law judge was holding the survivor's claim in abeyance until the Board issued its Decision and Order on Reconsideration. The second communication concerned the response counsel received from the official, who sent copies of counsel's letters and his response to the administrative law judge and employer. Counsel was advised that an inquiry had been made to the Benefits Review Board about the status of *Webber*, but that no specific information about the issuance of the Board's Decision and Order on Reconsideration was received. Employer notes that the Board issued its Decision and Order on Reconsideration in *Webber* "within days" of the phone call. Employer's Consolidated Brief at 13. The third alleged *ex parte* communication involved a phone conversation that was held with the administrative law judge regarding his decision to hold the survivor's claim in abeyance. Lastly, employer cites counsel's request that the official contact the district director regarding pending fee petitions and request that the petitions be ruled on before the issuance of a final decision on the merits. Employer notes that the district director subsequently issued orders concerning counsel's fee petitions in the miner's claim and the survivor's claim before final decisions were rendered.

Claimant and the Director, Office of Workers' Compensation Programs (the Director), have responded on this issue and urge the Board to reject employer's request to be dismissed. Upon review of the facts and the parties' arguments on appeal, we hold that dismissal of employer as responsible operator is not warranted in this case. Under the Administrative Procedure Act (APA), an *ex parte* communication is defined as "an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given." 5 U.S.C. §551(14), as incorporated into the Act by 5 U.S.C. §554(c), 33 U.S.C. §919(d), 30 U.S.C. §932(a). The APA further provides, however, that "requests for status reports on any matter or proceeding covered by this subchapter," do not constitute *ex parte* communications. Under the terms of Section 557(d)(1), when a claim is being adjudicated:

> (A) no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee *who is or may reasonably be expected to be involved in the decisional process of the proceeding*, an *ex parte* communication *relevant to the merits of the proceeding*;
>
> (B) no member of the body comprising the agency, administrative law judge, or other employee *who is or may reasonably be expected to be involved in the decisional process of the proceeding*, shall make or knowingly cause to be made to any interested person outside the agency an *ex parte* communication *relevant to the merits of the proceeding*[.]

5 U.S.C. §557(d)(1) (emphasis supplied).

Based upon the relevant statutory language, the communications between claimant's counsel and the DOL official regarding the Board's disposition of the request for reconsideration in *Webber*, do not fall within the APA's proscriptions against *ex parte* contacts. The communications did not concern the merits of the Board's proceedings, but rather principally concerned an inquiry regarding the status of *Webber*. *See* 5 U.S.C. §551(14); *Electric Power Supply Assoc. v. FERC*, 391 F.3d 1225, 1258 (D.C. Cir. 2004). In addition, the DOL official was not "involved in the decisional process" of the proceedings before the Board in *Webber* nor is there any evidence that he spoke to any person at the Board who could be so classified. *See* 5 U.S.C. §557(d)(1)(A), (B). Moreover, even assuming that these contacts constituted *ex parte* communications under the APA, copies of counsel's letter and the response were sent to the administrative law judge and employer's attorney, thereby providing employer with notice and an opportunity to respond. *See* 5 U.S.C. §557(d)(1)(C).

Regarding the communication with the administrative law judge, the administrative law judge merely noted that claimant had joined in the request to hold the survivor's claim in abeyance. Director's Response Brief at 6 n.4. Because the conversation did not touch upon the merits of the proceedings before the administrative law judge and principally concerned the status of the survivor's claim, it did not constitute a prohibited *ex parte* communication. *See* 5 U.S.C. §§551(14), 557(d)(1)(A), (B).

The final set of communications involves counsel's requests that the district director be contacted regarding fee petitions in the miner's claim. Because these requests concerned the status of the fee awards, and not their content, they were not impermissible *ex parte* communications under the APA. In addition, the district director's issuance of orders awarding attorney fees before the final disposition of either claim was in accordance with the regulation governing the consideration of attorney fee petitions, which provides that "[u]pon receipt of a request for approval of a fee, such request shall be reviewed and evaluated by the appropriate adjudication officer and a fee award issued." 20 C.F.R. §725.366(d). Even assuming that employer is correct and the district director changed agency policy, there was no prejudice to employer, as the fee awards are not enforceable until there is a final award of benefits on the merits. *See* 20 C.F.R. §725.367(a); *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Beasley v. Sahara Coal Co.*, 16 BLR 1-6 (1991).

Based upon the foregoing, we reject employer's request that it be dismissed from liability for any award of benefits or attorney fees in the miner's claim and the survivor's claim and we affirm the administrative law judge's denial of employer's request in the survivor's claim.

We will now turn to employer's appeal of the award of benefits in the miner's claim.

The Miner's Claim

The miner filed a claim for benefits on February 22, 1993. Living Miner (LM) Director's Exhibit 1. Administrative Law Judge Rudolf L. Jansen denied benefits, finding that the miner established that he was totally disabled, but did not prove that he had pneumoconiosis or that he was disabled by pneumoconiosis. LM Director's Exhibit 52. The miner appealed to the Board, which vacated the denial of benefits and remanded the case to Judge Jansen for reconsideration. [*D.M.*] *v. Peabody Coal Co.*, BRB No. 99-1141 BLA (Oct. 30, 2000) (unpub.). Judge Jansen awarded benefits on remand. Upon consideration of employer's appeal, the Board vacated the award of benefits and Judge Jansen's award of attorney fees and remanded the case for reconsideration.[3] [*D.M.*] *v. Peabody Coal Co.*, BRB No. 01-0731 BLA (July 26, 2002) (unpub.), *aff'd on recon.*, BRB No. 01-0731 BLA (Apr. 30, 2003) (unpub.). The miner died on March 4, 2003. Judge Jansen granted employer's subsequent motion to remand the case to the district director for additional evidentiary development. LM Director's Exhibit 58.

After additional evidence was submitted to the district director, the claim was returned to the OALJ. Due to Judge Jansen's unavailability, the case was assigned to Administrative Law Judge Donald W. Mosser (the administrative law judge), who conducted a hearing on January 20, 2006. In a Decision and Order issued on January 19, 2007, the administrative law judge accepted the parties' stipulation to eleven years and five months of coal mine employment and considered the claim under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that the existence of pneumoconiosis arising out of coal mine employment was established pursuant to 20 C.F.R. §§718.202(a)(4) and 718.203(b). The administrative law judge further found that the evidence of record was sufficient to establish that the miner was totally disabled under 20 C.F.R. §718.204(b)(2) and that pneumoconiosis was a contributing cause of his total disability under 20 C.F.R. §718.204(c). Accordingly, benefits were awarded.

Employer argues on appeal that the administrative law judge did not properly weigh the evidence relevant to Sections 718.202(a)(4) and 718.204(c). Claimant has responded, urging affirmance of the award of benefits. The Director has not responded

[3] In a subsequent Decision and Order, the Board affirmed Judge Jansen's Second Supplemental Decision and Order Granting Attorney Fees in the miner's claim, rejecting employer's allegations of error regarding the administrative law judge's approval of the hourly rates and the number of hours requested by counsel. [*D.M.*] *v. Peabody Coal Co.*, BRB No. 02-0532 BLA (Apr. 30, 2003) (unpub.).

on the issue of whether the administrative law judge properly found entitlement to benefits established in the miner's claim.[4]

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.[5] 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 order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718 in the miner's claim, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis was totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Gee v. W.G. Moore and Sons*, 9 BLR 1-4 (1986) (*en banc*); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Pursuant to Section 718.202(a)(4), the administrative law judge determined that the medical opinions of Drs. Combs, Garcia, Cohen, Dultz, Cook, Repsher, Renn and Tuteur were relevant to the issue of whether the miner had pneumoconiosis. Dr. Combs, who is Board-certified in Internal Medicine, examined the miner on April 15, 1993 and diagnosed chronic obstructive pulmonary disease (COPD) and a restrictive lung defect caused by smoking, welding fumes, and coal and rock dust. LM Director's Exhibit 10; LM Claimant's Exhibit 7. In a subsequent letter, and in his deposition testimony, Dr. Combs indicated that the miner had pneumoconiosis and was totally disabled by it. LM Claimant's Exhibit 1. Dr. Garcia, a Board-certified pulmonologist, examined the miner on June 16, 1997 and diagnosed coal workers' pneumoconiosis by x-ray and severe emphysema caused by smoking and coal dust exposure. LM Claimant's Exhibits 8, 15. Dr. Garcia indicated that the extent to which coal dust exposure contributed to the miner's pulmonary impairment was 5 percent. *Id*. Dr. Cohen, a Board-certified pulmonologist, reviewed the medical evidence and submitted reports dated August 7,

[4] We affirm the administrative law judge's findings as to the length of the miner's coal mine employment, that the existence of pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1)-(3) and that total disability was established under 20 C.F.R. §718.204(b)(2), as they are not challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit, as the miner's coal mine employment was in Indiana. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); LM Director's Exhibit 2.

1998 and December 16, 2005, and was deposed on August 5, 1998, December 18, 1998 and January 18, 2006. LM Claimant's Exhibits 13A, 20, 21, 23, 24A.[6] Dr. Cohen diagnosed coal workers' pneumoconiosis, chronic bronchitis and emphysema, and indicated that the miner's smoking contributed to his respiratory condition. *Id*. Dr. Dultz, a Board-certified pulmonologist who treated the miner beginning on November 30, 2000, diagnosed coal workers' pneumoconiosis and emphysema caused primarily by smoking. LM Claimant's Exhibit 1A.

Dr. Cook, a Board-certified pulmonologist, examined the miner on August 9, 1993 and July 1, 1997. LM Director's Exhibit 23 at 3; LM Employer's Exhibit 39. Dr. Cook indicated that the miner did not have coal workers' pneumoconiosis and that his emphysema and chronic bronchitis were caused by smoking. *Id*.; LM Employer's Exhibit 3. Dr. Repsher, a Board-certified pulmonologist, reviewed the medical evidence and submitted reports dated December 19, 1994, February 2, 1996, and December 21, 2005, and was deposed on August 31, 1998 and January 12, 2006. LM Employer's Exhibits 6, 8, 28A, 32A, 51. Dr. Repsher diagnosed COPD caused by smoking. *Id*. Dr. Renn, a Board-certified pulmonologist, also reviewed the medical evidence and prepared reports dated February 2, 1996 and August 4, 1998, and was deposed on January 25, 2006. LM Employer's Exhibits 33, 33A, 41, 49. Dr. Renn determined that the miner had emphysema and chronic bronchitis caused by smoking. *Id*. Dr. Tuteur, a Board-certified pulmonologist, reviewed the medical evidence, prepared a report dated December 15, 2005, and was deposed on January 9, 2006. LM Employer's Exhibits 30A, 31A. Dr. Tuteur stated that the miner did not have coal workers' pneumoconiosis, or any other dust-related lung disease, and indicated that the miner suffered from COPD caused by smoking. *Id*.

The administrative law judge weighed this evidence and determined that Dr. Combs's opinion did not support a finding of either legal or clinical pneumoconiosis at Section 718.202(a)(4), as Dr. Combs's diagnoses were not adequately documented or reasoned.[7] 2007 LM Decision and Order at 19. The administrative law judge also noted

[6] Exhibit numbers to which the letter "A" is appended were submitted by the parties when the miner's claim was remanded to the district director after the miner's death.

[7] Pursuant to 20 C.F.R. §718.201(a)(1):

> Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is

that "although it is undisputed that Dr. Combs may have treated the miner from 1993 to 1997," his opinion was not entitled to greater weight because "the record contains very little documentation or progress notes surrounding his treatment of [the miner]." *Id*. With respect to Dr. Garcia's opinion, the administrative law judge found that his attribution of 5 percent of the miner's pulmonary impairment to coal dust exposure did not satisfy the definition of legal pneumoconiosis. *Id*. at 19-20. The administrative law judge further determined, however, that Dr. Garcia's diagnosis of clinical pneumoconiosis by x-ray was entitled to "some probative weight," as it was supported by the x-ray Dr. Garcia obtained as part of his examination of the miner. *Id*. at 20. With respect to Dr. Cohen's opinion, the administrative law judge found that his diagnosis of clinical pneumoconiosis was well-reasoned and well-documented and assigned "great probative weight" to his opinion. *Id*. at 21. Citing the factors set forth in 20 C.F.R. §718.104(d), the administrative law judge gave "controlling weight" to Dr. Dultz's diagnosis of clinical pneumoconiosis based upon Dr. Dultz's status as the miner's treating physician. *Id*.

The administrative law judge discredited the opinions in which Drs. Repsher, Renn and Tuteur indicated that the miner did not have clinical or legal pneumoconiosis. With respect to Dr. Repsher's opinion, the administrative law judge determined that it was "internally inconsistent" as to the presence of clinical pneumoconiosis, as Dr. Repsher stated that he could not "exclude the fact that [the miner] may have had medical pneumoconiosis." 2007 LM Decision and Order at 22, citing LM Employer's Exhibit 28. The administrative law judge found that Dr. Renn's opinion was entitled to diminished weight on the ground that he relied upon the fact that the miner's pulmonary impairment showed reversibility on the PFSs of record. 2007 Decision and Order at 22. Regarding Dr. Tuteur's opinion, the administrative law judge determined that he based his conclusion, that the miner did not have clinical or legal pneumoconiosis, on the impermissible assumption that pneumoconiosis cannot appear or progress in the absence of continuing coal dust exposure. *Id*. The administrative law judge further stated that:

> not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. §718.201(a)(1). Under the terms of 20 C.F.R. §718.201(a)(2), legal pneumoconiosis is defined as "any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The term "arising out of coal mine employment" denotes "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(b).

> [A]ll three of these doctors relied principally on studies, statistics and probabilities to arrive at their conclusion that pneumoconiosis could not have been a contributing cause of [the miner's] COPD or his totally disabling pulmonary impairment, given his lengthy smoking history. In other words, their rationale was grounded on general facts and studies as applied to miners throughout the world and the United States rather than pointing to specific studies, symptoms and history of this miner. None of these physicians supplied an adequate rationale, specific to the miner, for excluding his 11 years of exposure to coal dust as a significant cause of his respiratory disability. Because these opinions all are based on "generalities," rather than the miner's specific case, I assign less probative weight to these opinions, as well as for the reasons given, above.

Id., *quoting Knizner v. Bethlehem Mines Corp.*, 8 BLR 1-5 (1985). The administrative law judge concluded, based upon his decision to give controlling weight to Dr. Dultz's opinion, as supported by the opinions of Drs. Cohen and Garcia, that "the miner had pneumoconiosis under Section 718.202(a)(4)." Decision and Order at 22. The administrative law judge also noted that a finding of pneumoconiosis was supported by references in the miner's hospital records to pneumoconiosis, "at least by history." *Id*. at 23. Lastly, the administrative law judge determined that the CT scans of record, which were interpreted as showing emphysema and COPD, were outweighed by the remaining medical evidence, "particularly the medical opinion evidence." *Id*.; LM Claimant's Exhibit 17; LM Employer's Exhibits 1, 7, 13.

Employer initially contends that the administrative law judge erred in determining that Dr. Dultz's opinion was entitled to controlling weight pursuant to Section 718.104(d). This allegation of error has merit. Section 718.104(d) provides that in weighing the medical evidence of record relevant to whether a miner suffered from pneumoconiosis, the administrative law judge "must give consideration to the relationship between the miner and any treating physician whose report is admitted into the record." 20 C.F.R. §718.104(d). In so doing, the administrative law judge must consider the nature and duration of the relationship between the doctor and the miner and the frequency and extent of treatment. 20 C.F.R. §718.104(d)(1)-(4). The regulation also provides that "the relationship between the miner and his treating physician may constitute substantial evidence in support of the adjudication officer's decision to give that physician's opinion controlling weight." 20 C.F.R. §718.104(d)(5). Notwithstanding the significance of the relationship between the miner and his treating physician, under the terms of Section 718.104(d)(5), "the weight given to the opinion of a miner's treating physician shall also be based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." *Id*.

In the present case, the administrative law judge referred to the nature and duration of relationship factors set forth in Section 718.104(d)(1), (2), and found that Dr. Dultz satisfied these criteria, as he treated the miner for his pulmonary condition from November 2000 until the miner's death in March 2003 and was "fully aware of [the miner's] smoking and occupational histories." 2007 LM Decision and Order at 20-21. With respect to the frequency and extent of treatment criteria set forth in Section 718.104(d)(3), (4), the administrative law judge noted that Dr. Dultz saw the miner "on a consistent basis, at an average of three month intervals," "often ordered tests," prescribed "a regimen of breathing medications to help the [miner] until the next follow-up visit" and "conducted blood gas tests and pulmonary function studies at least annually." *Id.*

As employer has indicated, however, Dr. Dultz did not see the miner every three months between November 2000 and March 2003. Rather, the miner had seven visits with Dr. Dultz between November 30, 2000 and November 7, 2002. LM Claimant's Exhibit 1A. The administrative law judge's finding that Dr. Dultz often ordered tests also conflicts with the record, a review of which indicates that over the course of his relationship with the miner, Dr. Dultz ordered one chest x-ray, one PFS, and one CT scan. LM Employer's Exhibit 22. In addition, contrary to the administrative law judge's statements, Dr. Dultz acknowledged that he did not order any blood gas studies and that he did not record the specific details of the miner's smoking history. LM Claimant's Exhibit 1 at 20, 87. Dr. Dultz also acknowledged that he did not see the miner between September 2002 and the miner's terminal hospitalization in March 2003. *Id*. at 17, 41. Dr. Dultz further indicated that he had no notes documenting his contacts with the miner during his hospitalization and that Dr. Bittar, the miner's cardiologist, was the attending physician. *Id*. at 41, 44.

Because the administrative law judge's findings with respect to the frequency and extent of Dr. Dultz's treatment of the miner are not supported by substantial evidence, we must vacate his decision to accord controlling weight to Dr. Dultz's opinion on the issue of the existence of pneumoconiosis pursuant to Sections 718.104(d)(5) and 718.202(a)(4). *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469, 22 BLR 2-311, 2-318 (7th Cir. 2001); *see also Zeigler Coal Co. v. Director, OWCP* [*Griskell*], 490 F.3d 609, 24 BLR 2-38 (7th Cir. 2007). Therefore, we must also vacate the administrative law judge's finding that the existence of pneumoconiosis was established under Section 718.202(a)(4), in light of the administrative law judge's reliance upon his determination that Dr. Dultz's diagnosis of pneumoconiosis was entitled to controlling weight.

Employer further contends that the administrative law judge erred in discrediting the medical opinions of Drs. Repsher, Renn and Tuteur, that the miner did not have a dust-related lung disease, on the ground that the physicians relied upon general information that conflicts with the views that the Department of Labor relied upon when promulgating the revised definition of pneumoconiosis. Employer also argues that the

administrative law judge erred in crediting Dr. Cohen's diagnoses of clinical and legal pneumoconiosis without applying the level of scrutiny that he used when weighing the opinions of Drs. Repsher, Renn and Tuteur. Lastly, employer contends that the administrative law judge failed to provide a rationale for his determination that the CT scans of record were outweighed by the other medical evidence. Employer's allegations of error have merit, in part.

In support of their opinions, Drs. Repsher, Renn and Tuteur cited studies finding that the degree of obstruction caused by coal dust exposure is not clinically significant. Employer's Exhibits 28A, 31A at 44, 32A at 8, 33, 44, 49 at 47, 51 at 38-39. In promulgating the revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201(a), DOL reviewed the medical literature on this issue and found that there was a consensus among medical experts that coal dust-induced COPD is clinically significant and that the causal relationship between coal dust and COPD is not merely rare. 65 Fed. Reg. 79,938 (Dec. 20, 2000). Accordingly, the administrative law judge acted within his discretion as fact-finder in determining that the opinions of Drs. Repsher, Renn and Tuteur were entitled to diminished weight to the extent that they relied upon studies that contradict the view accepted by DOL. *Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, 24 BLR 2-97 (7th Cir. 2008); *Midland Coal Co. v. Director, OWCP* [*Shores*], 358 F.3d 486, 23 BLR 2-18 (7th Cir. 2004).

However, as employer contends, the administrative law judge did not discuss the factors specific to the miner that Drs. Repsher, Renn and Tuteur cited in support of their opinions and, therefore, did not render a finding as to whether their opinions are reasoned and documented, despite their references to views of the medical literature rejected by DOL. Drs. Repsher, Renn and Tuteur also relied upon evidence in the record showing that the miner's severe COPD and emphysema were first diagnosed after five years of coal mine employment, and their view that the values produced on the miner's total lung capacity, PFSs, and blood gas studies were not consistent with pulmonary disease caused by coal dust exposure. Employer's Exhibits 28A, 31A at 41-44, 32A at 13-14, 33, 44, 49 at 13 and 55, 51 at 13-15 and 22. The physicians also cited the improvement in the miner's FEV1 over time and the reversibility of his obstructive impairment in individual studies. *Id*. Although the administrative law judge properly noted that the reversibility of an impairment does not rule out the presence of a fixed impairment related to coal dust exposure, the administrative law judge did not explicitly render a finding as to whether the miner had a fixed respiratory condition that could meet the definition of legal pneumoconiosis at Section 718.201(a)(2). *See Crockett Colleries, Inc. v. Barrett*, 478 F.3d 350, 23 BLR 2-472 (6th Cir. 2007).

Employer is also correct in maintaining that the administrative law judge did not accurately characterize the opinions of Drs. Repsher and Tuteur. The administrative law judge determined that Dr. Repsher's deposition testimony was "internally inconsistent"

because he did not unequivocally rule out the possibility that the miner had clinical pneumoconiosis. 2007 LM Decision and Order at 22, citing LM Employer's Exhibit 32A. In response to questions from employer's counsel, Dr. Repsher twice stated that he could not rule out the possibility that the miner had very mild clinical pneumoconiosis, primarily because no autopsy was performed on the miner. LM Employer's Exhibit 32A at 7, 24. As employer indicates, however, Dr. Repsher did not actually diagnose clinical pneumoconiosis and consistently opined that the medical record did not support such a diagnosis. LM Employer's Exhibits 6, 8, 28A, 51 at 9 and 17.

With respect to Dr. Tuteur's opinion, the administrative law judge indicated that Dr. Tuteur relied, in part, upon the impermissible premise that pneumoconiosis is not latent and progressive, as he "said that the progression of a latent disease such as pneumoconiosis would have occurred within two years after cessation of his exposure to coal dust, but not 20 years later, as in this case." 2007 Decision and Order at 22, citing LM Employer' Exhibit 31A. Employer notes correctly, however, that the deposition testimony to which the administrative law judge referred does not appear to support a determination that Dr. Tuteur assumed that pneumoconiosis is not latent or progressive. The passage cited by the administrative law judge reflects Dr. Tuteur's response to a hypothetical question in which employer's counsel asked him whether any blood gas abnormality that appeared on more recent testing could be attributed to coal dust exposure. LM Employer's Exhibit 31A at 53-54. The administrative law judge did not indicate that Dr. Tuteur's position was that the miner's blood gas studies did not consistently reflect an impairment of any kind nor did he address Dr. Tuteur's statement that "it is possible that dust-induced lung disease can progress after cessation of coal mine dust exposure." *Id.*

Because the administrative law judge did not address the opinions of Drs. Repsher, Renn and Tuteur in their entirety and did not accurately characterize aspects of the opinions of Drs. Repsher and Tuteur, we must vacate the administrative law judge's decision to discredit the findings rendered by these physicians under Section 718.202(a)(4).[8] *See Schoenecker v. Allegheny River Mining Co.*, 8 BLR 1-501 (1986); *Hunley v. Director, OWCP*, 8 BLR 1-323 (1985). Based upon this holding and our holding with respect to the administrative law judge's consideration of Dr. Dultz's status as a treating physician, we remand this case to the administrative law judge for reconsideration of the medical opinions of Drs. Dultz, Cohen, Garcia, Repsher, Renn and Tuteur pursuant to Section 718.202(a)(4). In determining whether the medical opinions of Drs. Dultz, Garcia and Cohen are sufficient to establish the existence of

[8] We affirm the administrative law judge's decision to discredit Dr. Combs's opinion, as it has not been challenged on appeal. *Skrack*, 6 BLR at 1-711; 2007 LM Decision and Order at 19.

pneumoconiosis on remand, the administrative law judge must determine whether each physician diagnosed clinical or legal pneumoconiosis, or both, and he must assess whether each diagnosis is adequately reasoned and documented.[9]

Regarding Dr. Garcia's diagnosis of clinical pneumoconiosis, although we reject employer's assertion that the administrative law judge was required to discredit Dr. Garcia's diagnosis because it was based upon a positive x-ray reading, which conflicted with the administrative law judge's finding at Section 718.202(a)(1), the administrative law judge must determine on remand whether Dr. Garcia's diagnosis was merely a restatement of an x-ray reading. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989) (restatement of an x-ray reading is not a reasoned medical opinion). In addition, when addressing Dr. Dultz's opinion, the administrative law judge must reconsider whether Dr. Dultz's opinion is entitled to controlling weight on the issue of the existence of pneumoconiosis in light of the factors set forth in Section 718.104(d)(1)-(4) and "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5).

With respect to the opinions of Drs. Repsher, Renn and Tuteur, the administrative law judge must reconsider whether their respective determinations that the miner did not suffer from either clinical or legal pneumoconiosis are reasoned and documented in light of their reliance, in part, upon a view of the medical literature that conflicts with that accepted by DOL. In determining the relative weight to which the opinions of Drs. Dultz, Cohen, Garcia, Repsher, Renn and Tuteur are entitled, the administrative law judge must identify and resolve conflicts between the physicians' opinions regarding the significance of the findings on physical examination and the objective studies of record and must apply the same level of scrutiny to each opinion. *See Peabody Coal Co. v. Lowis*, 708 F.2d 266, 5 BLR 2-84 (7th Cir. 1983). Finally, in accordance with the APA, the administrative law judge must also render a finding at Section 718.202(a)(4) regarding the CT scan evidence and set forth his rationale. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Employer further argues that the administrative law judge's finding that total disability due to pneumoconiosis was established pursuant to Section 718.204(c) cannot be affirmed, as the administrative law judge repeated the errors that he committed when

[9] A "documented" opinion is one that sets forth the clinical findings, observations, facts and other data on which the physician based his or her diagnosis. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984). A "reasoned" opinion is one in which the underlying documentation is adequate to support the physician's conclusions. *Fields*, 10 BLR at 1-22; *Fuller*, 6 BLR at 1-1294.

weighing the evidence relevant to Section 718.202(a)(4). Because the administrative law judge relied upon findings rendered under Section 718.202(a)(4) that we have vacated, we also vacate his determination that the medical opinions of Drs. Dultz and Cohen, as supported by the opinion of Dr. Garcia, are sufficient to establish total disability due to pneumoconiosis at Section 718.204(c). If reached on remand, the administrative law judge must reconsider this issue in light of his findings pursuant to Section 718.202(a)(4).

In summary, we vacate the administrative law judge's findings that claimant established the existence of pneumoconiosis at Section 718.202(a)(4) and total disability due to pneumoconiosis under Section 718.204(c). Therefore, the award of benefits is also vacated and the administrative law judge is instructed to reconsider these issues on remand.

We will now address employer's appeal of the administrative law judge's Decision and Order awarding benefits in the survivor's claim.

The Survivor's Claim

Subsequent to the miner's death on March 4, 2003, claimant filed an application for survivor's benefits on November 24, 2003. Survivor's Claim (SC) Director's Exhibit 1A. After conducting a hearing with respect to this claim, the administrative law judge issued a Decision and Order in which he credited the miner with at least eleven years of coal mine employment and considered entitlement under the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3). Upon consideration of the evidence at Section 718.202(a)(4), however, the administrative law judge determined that the medical opinions of Drs. Dultz and Cohen were sufficient to establish the existence of pneumoconiosis. Alternatively, the administrative law judge found that the doctrine of collateral estoppel applied to preclude employer from relitigating the issue of the existence of pneumoconiosis in the survivor's claim. The administrative law judge further determined that the presumption that the miner's pneumoconiosis arose out of coal mine employment, set forth in Section 718.203(b), was invoked and was not rebutted. With respect to the issue of whether pneumoconiosis caused or contributed to the miner's death pursuant to 20 C.F.R. §718.205(c), the administrative law judge found, based upon his weighing of the medical opinions under Section 718.202(a)(4), that claimant satisfied her burden of proof. Accordingly, benefits were awarded in the survivor's claim.

Employer argues on appeal that the administrative law judge did not properly weigh the medical evidence relevant to Sections 718.202(a)(4) and 718.205(c). Claimant has responded and urges affirmance of the award of benefits. The Director filed a response brief in this appeal regarding employer's request that it be dismissed as

responsible operator based upon the *ex parte* communications discussed *supra*, but took no position regarding the administrative law judge's award of benefits in the survivor's claim.[10]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order awarding benefits in the survivor's claim 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*, 380 U.S. at 363.

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, or that death was caused by complications of pneumoconiosis. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see also Peabody Coal Co. v. Director, OWCP* [*Railey*], 972 F.2d 178, 16 BLR 2-121 (7th Cir. 1992). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112**;** *Trent*, 11 BLR at 1-27.

Employer argues that the administrative law judge erred in finding, based upon his determination in the miner's claim that the existence of pneumoconiosis was established, that collateral estoppel applied to preclude employer from relitigating this issue in the survivor's claim. We agree. A prerequisite to the application of collateral estoppel, or issue preclusion, is that the issue was finally decided in the prior proceeding. *See Freeman v. United Coal Mining Co. v. Director, OWCP* [*Forsythe*], 20 F.3d 289, 18 BLR 2-189 (7th Cir. 1994); *see also Zeigler Coal Co. v. Director, OWCP* [*Villain*], 312 F.3d 332, 22 BLR 2-581 (7th Cir. 2002); *Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134 (1999) (*en banc*). In the present case, employer had timely filed an appeal of the administrative law judge's Decision and Order awarding benefits in the miner's claim prior to the issuance of the administrative law judge's Decision and Order awarding benefits in the survivor's claim. In addition, we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established under Section

[10] We affirm the administrative law judge's findings regarding the length of the miner's coal mine employment and that claimant did not establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(3), as they are not challenged on appeal. *See Skrack*, 6 BLR at 1-711.

718.202(a)(4) in the miner's claim. *See* slip op. at 12. As a consequence, the administrative law judge's finding of pneumoconiosis in the miner's claim did not become final and could not, therefore, provide the basis for the application of the doctrine of collateral estoppel in the survivor's claim. 20 C.F.R. §§725.479(a), 725.481. Accordingly, we vacate the administrative law judge's determination that employer was precluded from relitigating the issue of the existence of pneumoconiosis in the survivor's claim.

Pursuant to Section 718.202(a)(4), the administrative law judge determined that the medical opinions of Drs. Dultz, Cohen, Tuteur and Renn were relevant to the issue of the existence of pneumoconiosis. In a deposition obtained on June 30, 2004, Dr. Dultz indicated that he treated the miner from November 2000 until his death in March 2003. SC Claimant's Exhibit 7 at 16. Dr. Dultz stated that because the miner's physical examination and PFS results were not entirely consistent with a smoking-induced lung disease, he felt that the miner's lung disease was caused by smoking and coal dust exposure. *Id*. at 23, 29. In a letter to claimant dated March 13, 2003, Dr. Dultz indicated that the miner had COPD and coal workers' pneumoconiosis. SC Director's Exhibit 2A at 4. Dr. Cohen submitted a report dated December 16, 2005, based upon his review of the medical evidence, and was deposed on January 18, 2006. SC Claimant's Exhibit 10W.[11] Dr. Cohen diagnosed coal workers' pneumoconiosis, chronic bronchitis and emphysema, and indicated that the miner's smoking contributed to his respiratory condition. *Id*.

Dr. Tuteur reviewed the medical evidence, prepared a report dated December 15, 2005 and was deposed on January 9, 2006. SC Employer's Exhibits 1W, 27W. Dr. Tuteur stated that the miner did not have coal workers' pneumoconiosis or any other dust-related lung disease and indicated that the miner suffered from COPD caused by smoking. *Id*. Dr. Renn also reviewed the medical evidence, prepared a report dated September 15, 2005, and was deposed on January 25, 2006. SC Employer's Exhibits 3W, 28W. Dr. Renn determined that the miner had emphysema and chronic bronchitis caused by smoking. *Id*.

The administrative law judge considered these medical opinions and determined that the opinion in which Dr. Dultz diagnosed COPD and coal workers' pneumoconiosis was entitled to greatest weight, stating:

[11] The district director appended the letter "W" to the exhibits submitted by employer and claimant, presumably to designate this evidence as being part of the widow's claim.

> As Dr. Dultz was the miner's treating physician, I lend great weight to his opinion. His notes and statements are well-reasoned over a period of almost three years. This physician is a pulmonary specialist and had the opportunity to examine the miner and develop a well-documented opinion as to the cause of the miner's illnesses. He is the physician most familiar with the miner's pulmonary condition during the period preceding his death.

SC Decision and Order at 12. The administrative law judge determined that Dr. Cohen's opinion, that the miner had a coal dust-related lung disease, was also well-documented and well-reasoned, and supported Dr. Dultz's opinion. *Id*. at 12-13. With respect to the opinions of Drs. Tuteur and Renn, the administrative law judge indicated:

> Dr. Tuteur stated he did not find any evidence of crackling in the miner's records and therefore he opined that the miner's illness was not due in part to coal mine employment. According to Dr. Tuteur, one expects to find crack[l]ing in a patient suffering from coal workers' pneumoconiosis. Dr. Tuteur did not personally examine the miner and I lend greater credibility to Dr. Dultz's opinion that he found evidence of crackling in the miner's lungs. Dr. Renn testified that some of the miner's pulmonary function studies showed reversibility over the years, indicating that the miner did not suffer from pneumoconiosis. However, the fact that some of the pulmonary function studies showed reversibility does not necessarily preclude the presence of coal workers' pneumoconiosis. *Consolidation Coal Co. v. Swiger*, [98 Fed. Appx. 227] (4th Cir. May 11, 2004) (unpub.) As correctly noted in the claimant's brief, neither of these physicians acknowledged the possibility that the miner had a restrictive lung impairment while such evidence was clearly noted from a pulmonary function study conducted as early as 1993. (EX 26W). I therefore find that these reviewing physicians failed to provide an adequate rationale for excluding the miner's eleven years of coal dust exposure as a significant cause of his respiratory disability.

SC Decision and Order at 13. Based upon these determinations, the administrative law judge concluded that the existence of pneumoconiosis was established pursuant to Section 718.202(a)(4). The administrative law judge further found that "the medical report evidence proves the miner had simple pneumoconiosis despite the fact that the x-ray and CT scan evidence were found insufficient to establish the existence of the disease." *Id*.

Employer initially contends that the administrative law judge erred in determining that Dr. Dultz's opinion was entitled to controlling weight pursuant to Section

718.104(d). This allegation of error has merit. As employer indicates, Dr. Dultz's qualifications as a Board-certified pulmonologist do not distinguish him from Drs. Cohen, Renn and Tuteur, who are also Board-certified pulmonologists. *See* SC Claimant's Exhibit 10W; SC Employer's Exhibits 1W, 3W, 7W, 28W. In addition, absent a more detailed rationale from the administrative law judge regarding his reference to Dr. Dultz's expertise, there is an unresolved conflict between the administrative law judge's finding and the doctor's statement that he had limited experience treating coal miners. SC Claimant's Exhibit 7 at 13. The administrative law judge also did not render specific findings regarding the frequency and extent of the relationship between the miner and Dr. Dultz as required under Section 718.104(d)(3), (4). We must vacate, therefore, the administrative law judge's decision to accord controlling weight to Dr. Dultz's opinion and the administrative law judge's finding that the existence of pneumoconiosis was established under Section 718.202(a)(4), in light of the administrative law judge's reliance upon his determination that Dr. Dultz's diagnosis of pneumoconiosis was entitled to controlling weight. *See Griskell*, 490 F.3d at 616, 24 BLR at 2-51; *McCandless*, 255 F.3d at 469, 22 BLR at 2-318.

Regarding the administrative law judge's decision to discredit Dr. Tuteur's opinion, employer contends that the administrative law judge erred in relying upon Dr. Tuteur's alleged failure to acknowledge that crackling was observed on physical examination of the miner. This argument has merit. Dr. Tuteur noted that Dr. Dultz had detected rales and stated that "crackling" was an equivalent term. SC Employer's Exhibits 1W, 27W at 57-60, 65-66. Dr. Tuteur further commented that although interstitial lung disease related to coal dust exposure can cause rales, or crackling, their intermittent appearance in the miner's case was more consistent with lung disease caused by smoking. SC Employer's Exhibit 27W at 65-66. The administrative law judge did not address this aspect of Dr. Tuteur's opinion or resolve the conflict between Dr. Tuteur's view regarding the significance of the waxing and waning of the crackling and Dr. Dultz's opinion. Employer is also correct in asserting that the administrative law judge did not discuss the other factors that Dr. Tuteur relied upon in opining that the miner's lung condition was not attributable to coal dust exposure. In addition to his comments about the crackling observed in the miner's lungs, Dr. Tuteur based his conclusion upon the development of severe obstructive lung disease after five years of coal mine employment, the normal to borderline results of the miner's blood gas studies and the miner's PFSs, which produced varying results over time. SC Employer's Exhibits 1W, 27W.

Employer further contends that the administrative law judge erred in discrediting Dr. Renn's opinion because the doctor relied upon the fact that the miner's pulmonary impairment showed reversibility, as the administrative law judge did not accurately characterize the applicable law. Employer relies upon the administrative law judge's citation of *Swiger*, an unpublished case issued by the United States Court of Appeals for

the Fourth Circuit. *Swiger*, 98 Fed. Appx. 227, 237 (4th Cir. May 11, 2004) (unpub.). Although an administrative law judge may discredit a medical opinion that is premised solely upon the reversibility of a miner's impairment, he or she must first determine that the miner had a fixed respiratory impairment that could meet the definition of legal pneumoconiosis at Section 718.201(a)(2). *See Barrett*, 478 F.3d at 356, 23 BLR 2-483-84. In the present case, the administrative law judge did not explicitly render such a finding nor did he consider that Dr. Renn, like Dr. Tuteur, relied upon additional factors in opining that the miner's pulmonary condition was not related to coal dust exposure. *See* SC Employer's Exhibits 3W, 28W.

We also find merit in employer's allegation that the administrative law judge erred in discrediting the opinions of both Drs. Tuteur and Renn because they did not diagnose a restrictive impairment. As employer notes, the administrative law judge referred to a PFS obtained in 1993 that the administering physician described as showing a restrictive impairment, but did not address the most recent PFSs, obtained in 1997 and 2001, that Drs. Tuteur, Renn and Cohen characterized as showing a purely obstructive defect. SC Claimant's Exhibits 10W, 11W, 13 W; SC Employer's Exhibits 1W, 3W, 7W, 25W, 26W, 28W.

Because the administrative law judge did not address the opinions of Drs. Tuteur and Renn in their entirety and did not accurately characterize aspects of their opinions, we must vacate the administrative law judge's decision to discredit the findings rendered by these physicians under Section 718.202(a)(4). *See Schoenecker*, 8 BLR at 1-503; *Hunley*, 8 BLR at 1-326. Based upon this holding and our holding with respect to the administrative law judge's consideration of Dr. Dultz's status as a treating physician, we remand this case to the administrative law judge for reconsideration of the medical opinions of Drs. Dultz, Cohen, Tuteur and Renn pursuant to Section 718.202(a)(4).

In determining whether the medical opinions of Drs. Dultz and Cohen are sufficient to establish the existence of pneumoconiosis on remand, the administrative law judge must determine whether each physician diagnosed clinical or legal pneumoconiosis, or both, and he must assess whether each diagnosis is adequately reasoned and documented. In addition, when addressing Dr. Dultz's opinion, the administrative law judge must reconsider whether Dr. Dultz's opinion is entitled to controlling weight on the issue of the existence of pneumoconiosis in light of the factors set forth in Section 718.104(d)(1)-(4) and "based on the credibility of the physician's opinion in light of its reasoning and documentation, other relevant evidence and the record as a whole." 20 C.F.R. §718.104(d)(5); *Griskell*, 490 F.3d at 616, 24 BLR at 2-51; *McCandless*, 255 F.3d at 469, 22 BLR at 2-318.

In determining the relative weight to which the opinions of Drs. Dultz, Cohen, Tuteur and Renn are entitled, the administrative law judge must identify and resolve

conflicts among the physicians' opinions regarding the significance of the findings on physical examination and the objective studies of record and must apply the same level of scrutiny to each opinion. *See Lowis*, 708 F.2d at 276, 5 BLR at 2-98. Finally, in accordance with the APA, the administrative law judge must also render a finding at Section 718.202(a)(4) regarding the CT scan evidence and set forth his rationale.[12] *See Wojtowicz*, 12 BLR at 1-165.

Employer further argues that the administrative law judge's finding that death due to pneumoconiosis was established pursuant to Section 718.205(c) must be vacated, as the administrative law judge repeated the errors that he committed when weighing the evidence relevant to Section 718.202(a)(4). Because the administrative law judge relied upon findings rendered under Section 718.202(a)(4) that we have vacated, we also vacate his determination that the medical opinions of Drs. Dultz and Cohen are sufficient to establish death due to pneumoconiosis at Section 718.205(c). If reached on remand, the administrative law judge must reconsider this issue in light of his findings pursuant to Section 718.202(a)(4). In so doing, the administrative law judge must determine whether claimant has established, by a preponderance of the medical evidence, that pneumoconiosis caused the miner's death, or was a substantially contributing cause or factor leading to the miner's death, such that pneumoconiosis hastened the miner's death.[13] 20 C.F.R. §718.205(c); *Railey*, 972 F.2d at 183, 16 BLR at 2-128. The administrative law judge must determine whether the medical opinions regarding the cause of the miner's death are reasoned and documented and must resolve any conflicts

[12] If the administrative law judge reaches the issue of collateral estoppel in the survivor's claim on remand, he must determine whether the prerequisites for its application have been met and must address employer's argument that issue preclusion is not available because the evidentiary limitations set forth in 20 C.F.R. §725.414 are applicable to the survivor's claim, but not the miner's claim. Employer's contention is relevant to whether the "circumstances of [this] case justify an exception to general estoppel principles," *i.e.*, whether the use of collateral estoppel would be unfair. *Detroit Police Officers Ass'n v. Young*, 842 F.2d 512, 515 (6th Cir. 1987).

[13] The administrative law judge stated that the opinions in which Drs. Dultz and Cohen indicated that pneumoconiosis was a contributing cause of the miner's death were "logical, given the miner's lengthy coal mine employment history." SC Decision and Order at 14. The administrative law judge did not, however, identify the medical evidence upon which the physicians relied in rendering their opinions nor did he indicate whether Dr. Dultz described how pneumoconiosis contributed to the miner's death. *Id*. Contrary to employer's assertion, Dr. Cohen explained that pneumoconiosis contributed to the miner's poor respiratory condition, which prevented him from having surgery that could have prolonged his life. SC Claimant's Exhibit 10W.

among the opinions. If the administrative law judge finds on remand, as he did in his initial disposition of the survivor's claim, that an examining physician's opinion is entitled to more weight on the cause of the miner's death, he must apply this analysis equally and must set forth the rationale underlying his finding. *See Freeman United Coal Mining Co. v. Hunter*, 82 F.3d 764, 20 BLR 2-199 (7th Cir. 1996); *Amax Coal Co. v. Beasley*, 957 F.2d 324, 16 BLR 2-45 (7th Cir. 1992); *Wojtowicz*, 12 BLR at 1-165. Lastly, although the administrative law judge indicated correctly that he may discredit a physician's opinion ruling out pneumoconiosis as a cause of death if the physician did not diagnose pneumoconiosis, *Livermore v. Amax Coal Co*., 297 F.3d 668, 672, 22 BLR 2-399, 2-402 (7th Cir. 2002), Dr. Tuteur offered an opinion after assuming that the miner had pneumoconiosis and Dr. Renn indicated that the miner did not die a respiratory death. SC Employer's Exhibits 1W, 3W, 27W, 28W. The administrative law judge must address these aspects of the opinions of Drs. Tuteur and Renn on remand if he reaches the issue of death due to pneumoconiosis at Section 718.205(c).

In summary, we vacate the administrative law judge's findings that claimant established the existence of pneumoconiosis under Section 718.202(a)(4) and death due to pneumoconiosis pursuant to Section 718.205(c). Accordingly, we vacate the award of benefits in the survivor's claim and remand the case to the administrative law judge for reconsideration of these issues.

We will now address employer's appeals of the attorney fee awards rendered by the district director.

The District Director's Attorney Fee Awards

Employer has raised allegations of error with respect to the district director's orders dated March 1, 2007 and April 5, 2007, awarding attorney fees in the miner's claim and the district director's orders dated September 12, 2007 and November 13, 2007, awarding attorney fees in the survivor's claim. Employer argues that the district director erred in approving hourly rates of $180.00 and $190.00 for services performed by an attorney and $100.00 for services performed by a paralegal, without determining whether they are market-based. Employer also contends that the district director impermissibly referenced the risk of loss in approving the hourly rates requested. With respect to the number of hours of services and the expenses approved by the district director, employer argues that the district director did not provide valid or adequate rationales for his findings. Claimant responds, urging affirmance of the district director's orders.

The standard of review applicable to the district director's fee award is whether the award is arbitrary, capricious or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). With respect to the approved hourly rates, the district director acted

rationally in determining that the hourly rates requested were reasonable in light of the factors set forth in 20 C.F.R. §725.366(a). *See Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 22 BLR 2-483 (7th Cir. 2002). In addition, the district director did not commit reversible error in mentioning the contingent nature of counsel's fee, as the district director did not evaluate this factor separately, but rather cited it as an element incorporated into a reasonable hourly rate. *See Gibson v. Director, OWCP*, 9 BLR 1-149 (1986); *see also City of Burlington v. Dague*, 505 U.S. 557, 567 (1992). Accordingly, we affirm the district director's approval of the hourly rates requested by counsel in both the miner's claim and the survivor's claim.

With respect to the orders in the miner's claim dated March 1, 2007 and April 5, 2007, we hold that employer has not established that the district director abused his discretion in determining that the 19.60 hours claimed in connection with obtaining Dr. Tarver's deposition were reasonable and necessary and that counsel was entitled to reimbursement for the fee that Dr. Tarver charged for providing an opinion. *See Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994); *Lanning v. Director, OWCP*, 7 BLR 1-314 (1984). The district director also acted within his discretion in finding that counsel was entitled to reimbursement for time expended in defending the fee petition in the miner's claim and that the .20 hours charged for a paralegal to review a decision in the miner's claim was not unreasonable or unnecessary. *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001); *see also Kerns v. Consolidation Coal Co.*, 247 F.3d 133, 22 BLR 2-283 (4th Cir. 2001); *Gillman v. Director, OWCP*, 9 BLR 1-7 (1986). Accordingly, we affirm the district director's orders dated March 1, 2007 and April 5, 2005, requiring employer to pay counsel $6,393.00 in fees for services rendered and $521.63 in expenses incurred in the miner's claim.

With respect to the district director's September 12, 2007 and November 13, 2007 orders granting a fee petition in the survivor's claim, employer argues that the district director erred in accepting counsel's practice of equally dividing charges for time expended on services that were relevant to both the miner's claim and the survivor's claim. Employer has not established that the district director's acceptance of counsel's practice as reasonable, was arbitrary or capricious or an abuse of discretion.[14] *See Hawker v. Zeigler Coal Co.*, 22 BLR 1-168, 1-175 (2001)**;** *Gillman*, 9 BLR at 1-9.

[14] The fact that the administrative law judge rejected certain identical charges and expenses in the fee petition concerning services performed in the survivor's claim does not establish that the district director's action was impermissible. *B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008) (where different adjudicators are awarding the fees for work before them, reasonable differences in opinion can be expected).

We also reject employer's challenges to the district director's approval of the time spent in the survivor's claim preparing and obtaining medical releases from claimant and the .30 hours expended in requesting records from another attorney. The district director did not abuse his discretion in finding that the use of the services of both an attorney and a paralegal in performing these tasks, and the amount of time claimed, were reasonable and necessary. *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989).

Employer has also identified an objection to the district director's award of attorney fees in the survivor's claim that the district director did not directly address due to confusion regarding the dates on which the services were rendered. Employer challenged counsel's request for payment for 4.90 hours spent reviewing records and talking with Dr. Tarver, but misidentified the dates on which these services were rendered. In light of employer's error, the district director's rejection of its objection did not represent an abuse of discretion. *See Picinich*, 23 BRBS at 130; *Lanning*, 7 BLR at 1-317; November 13, 2007 Order at 1. In addition, employer has not demonstrated that the district director abused his discretion in rejecting employer's challenge to the .10 hours counsel charged for a telephone call related to the scheduling of a deposition. *Id*. We affirm, therefore, the district director's Reconsidered Proposed Order dated November 13, 2007.

We will now consider employer's appeal of the administrative law judge's Attorney Fee Order issued in conjunction with the award of benefits in the miner's claim.

Administrative Law Judge's Award of Attorney Fees in the Miner's Claim

In an Order issued subsequent to his Decision and Order awarding benefits in the miner's claim, the administrative law judge awarded attorney fees for work performed while the miner's claim was before the OALJ. The administrative law judge determined that the hourly rates set forth for the two attorneys and the paralegal who performed legal services were reasonable in light of the factors set forth in 20 C.F.R. §725.366. Attorney Fee Order at 3. The administrative law judge further found that counsel established the reasonableness and necessity of the expenses for which compensation was sought, including the fees paid to non-testifying expert witnesses. *Id*. at 3-6. Accordingly, the administrative law judge ordered employer to pay a total of $41,017.98 to claimant's counsel. Employer argues that the administrative law judge erred in determining that the hourly rates, hours of services, and expenses set forth by claimant's counsel in the fee

petition were appropriate. Claimant's counsel has responded and urges affirmance of the administrative law judge's Attorney Fee Order. The Director has not filed a response.

An administrative law judge's award of an attorney's fee is discretionary and will be upheld on appeal unless it is shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (*en banc*); *Abbott*, 13 BLR at 1-16. Employer first asserts that the administrative law judge's award of hourly rates of $190.00 and $150.00 for Mr. Rauch and Mr. Carroll, respectively, represents an abuse of discretion, as the administrative law judge neglected the requirement that the rates be market-based. Employer's allegation is without merit.

The United States Court of Appeals for the Seventh Circuit has held that although the rate at which an attorney is compensated must be market-based, *Peabody Coal Co. v. McCandless*, 255 F.3d at 473, 22 BLR 2-319, the calculation of an hourly rate based upon fee awards in similar cases, and counsel's representation that the rates requested reflect his firm's usual fees, is appropriate. *Goodloe*, 299 F.3d at 672, 22 BLR at 2-493. In the present case, the administrative law judge considered these factors, and the criteria set forth at Section 725.366, and acted within his discretion in finding that the requested hourly rates were reasonable. *See* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); Attorney Fee Order at 3. The administrative law judge also acted within his discretion in declining to rely upon the affidavit of a representative of Old Republic Insurance Company, in which the hourly rate that it pays attorneys in black lung cases was identified as $125.00. Attorney Fee Order at 2. By applying the factors set forth in Section 725.366(b), the administrative law judge provided a rationale for his determination that the hourly rates requested by counsel were reasonable that was independent of his finding that the affidavit was "self-serving." *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988); *Kozele v. Rochester & Pittsburg Coal Co.*, 6 BLR 1-378 (1983); Attorney Fee Order at 2.

With respect to the hours of service approved by the administrative law judge, employer specifically challenges the 1.70 hours of services that counsel performed after a request for hearing had been filed, but before the case was actually transferred to the OALJ. The standard for determining whether such charges are properly included in a petition for fees for work performed before the OALJ is whether the services rendered during that period were reasonably integral to the preparation for the hearing. *See Matthews v. Director, OWCP*, 9 BLR 1-184 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). Because the services involved matters related to the scope of the hearing and preparation for presenting the case to an administrative law judge, the administrative law judge did not abuse his discretion in approving a fee for these services. *See Matthews*, 9 BLR at 1-187**.**

We also find no merit in employer's contention that the administrative law judge

erred in finding that the expenses related to fees charged by non-testifying expert witnesses were compensable. Section 28 of the Longshore Act, as incorporated into the Act by 30 U.S.C. §932(a), does not limit expert fee-shifting to only those fees incurred by a claimant when the expert appears at the formal hearing and testifies before the administrative law judge. 33 U.S.C. §928(d). Rather, Section 28 refers to a "witness" who may provide written testimony by deposition or by medical opinion. *See e.g.*, 33 U.S.C. §928, as incorporated into the Act by 30 U.S.C. §932(a) (the testimony of any witness may be taken by deposition or interrogatories). *Hawker*, 326 F.3d at 902; *Branham*, 19 BLR at 1-4.[15] *See also DelVacchio v. Sun Shipbuilding & Dry Dock Co.*, 16 BRBS 190, 195 (1984)*; Hardrick v. Campbell Industries, Inc.*, 12 BRBS 265, 270 (1980).

Employer further argues that the administrative law judge erred in granting counsel's request for fees for 76 hours of services performed by two attorneys and a paralegal in connection with preparing a brief on remand following the Board's Decision and Order vacating Judge Jansen's award of benefits. The administrative law judge rejected employer's objection to this charge on the ground that the "this case is complex and . . . contains an incredibly large amount of evidence that needed to be addressed in the brief." Attorney Fee Order at 4. The administrative law judge also noted that counsel had reduced the total cost of preparing the remand brief by using a law clerk, whose services were billed at a lower hourly rate, and that he had "considered the contents of the brief, and . . . found them to be helpful in writing the decision." *Id*.

Employer contends that these charges are excessive and "cannot be justified by a vague reference to the complexity of the matter." Employer's Consolidated Brief at 31. Employer also maintains that the administrative law judge did not consider the fact that because counsel had already briefed the issues in this case extensively before Judge Jansen and the Board, the mere admission of additional evidence into the record after the miner died did not justify the expenditure of a large amount of time preparing a remand brief. Because the administrative law judge did not explain the finding underlying his approval of the number of hours claimed for drafting the remand brief, i.e., that this case is complex, and did not address employer's argument that 76 hours are excessive in light of counsel's familiarity with the case, we must vacate this portion of the Attorney Fee

[15] Contrary to employer's argument, the administrative law judge's finding does not conflict with the decision of the United States Supreme Court in *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 101 (1991), as the relevant statute explicitly provides for reimbursement of witness fees and the administrative law judge awarded benefits, thus triggering the provisions of 33 U.S.C. §928.

Order and remand the fee petition to the administrative law judge for reconsideration.[16] *See Lanning*, 7 BLR at 1-317. On remand, the administrative law judge must set forth his findings on this issue in detail, including the underlying rationale, as required by the APA. 5 U.S.C. §557(c), as incorporated into the Act by 5 U.S.C. §554(c), 33 U.S.C. §919(d), 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Employer also contends that the administrative law judge erred in awarding fees for 13.6 hours for consulting with outside counsel. Employer had objected to these charges, arguing that counsel had not met his burden of establishing their necessity. The administrative law judge noted that claimant's attorney stated that he sought information about attorney fee petitions, calculation of interest rates, failure to pay interim benefits, and the application of the new regulations. The administrative law judge found that it was not "unreasonable that [claimant's counsel] might have questions about these issues, and, as he stated, consulting with another attorney likely saved him several hours of research." Attorney Fee Order at 5. The administrative law judge concluded that counsel "met his burden [of] establishing the necessity of association with co-counsel." *Id*.

We agree with employer that the administrative law judge's finding on this issue is not adequately explained. The administrative law judge did not provide the rationale for his apparent determination that the discussions with outside counsel, particularly the probate attorney, were related to establishing the miner's entitlement to benefits or to counsel's defense of the fee petition in this case. *See Lanning*, 7 BLR at 1-317. In addition, the administrative law judge did not explicitly address employer's contention that awarding fees for consultations with other attorneys is inconsistent with the administrative law judge's finding regarding counsel's expertise as an attorney experienced in black lung law. We vacate, therefore, the portion of the administrative law judge's Attorney Fee Order in which he approved counsel's request for compensation for this time and remand the case to the administrative law judge for reconsideration. When considering this specific issue on remand, the administrative law judge must

[16] The administrative law judge also noted that Judge Jansen had determined that the 44 hours counsel claimed for the preparation of briefs filed in connection with the two decisions rendered by Judge Jansen were reasonable given the amount of evidence in the case. Attorney Fee Order at 4. The administrative law judge did not indicate, however, that he was aware that the Board vacated this portion of Judge Jansen's fee award. The Board held that Judge Jansen did not fully address employer's objection that the time claimed was excessive based upon the fact that the remand brief was virtually identical to the brief filed by counsel before the Board and the brief regarding the application of the new regulations was essentially copied from pleadings submitted by the Director, Office of Workers' Compensation Programs. [*D.M.*] *v. Peabody Coal Co.*, BRB No. 01-0731 BLA (July 26, 2002) (unpub.), slip op. at 7.

address the issue of whether counsel's practice of combining a number of different activities into one block of time is consistent with Section 725.366(a), which requires that the fee petition include "a complete statement of the extent and character of the necessary work done[.]" 20 C.F.R. §725.366(a); *Ball v. Director, OWCP*, 7 BLR 1-617, 1-619 (1984).

Employer also maintains that the administrative law judge erred in awarding fees for a number of services itemized by claimant's counsel without providing an adequate rationale. Employer's Consolidated Brief at 28-29. As indicated, the administrative law judge addressed employer's specific objections to the 1.70 hours for services performed while transfer of the case to the OALJ was pending, the 76 hours charged for preparing a brief on remand following the Board's Decision and Order vacating Judge Jansen's award of benefits and for the 13.60 hours spent consulting with outside counsel. *See* Attorney Fee Order at 3-5. With respect to the remaining objections, the administrative law judge stated:

> All of Mr. Rauch's other time entries appear to be reasonable. [Claimant's counsel] provided complete, itemized statements requesting fees for these services in representation of the claimant and the statements describe the extent and character of the necessary work done. I have reviewed all of the items that [employer's counsel] alleged constitute unreasonable time spent on the claim. I believe that the time claimed is entirely reasonable and necessary to the prosecution of the case. The medical evidence in this case was voluminous and some of the issues were quite complicated, which necessitated additional time to properly handle the claim. Therefore, I will not deny claimant's counsel compensation for reasonable time devoted in successfully prosecuting this claim. All of the employer's objections to the individual time items are overruled.

Attorney Fee Order at 4. Because the administrative law judge did not render findings with respect to the time entries that were the subject of specific objections by employer, his Attorney Fee Order does not accord with the APA. We must vacate, therefore, the administrative law judge's general finding with respect to the time entries that employer challenged and remand the fee petition to him for reconsideration of employer's specific objections. The administrative law judge must place the burden on counsel to establish the reasonableness and necessity of the requested charges, explicitly address employer's specific objections, and set forth his findings, including the underlying rationale, as required by the APA. 5 U.S.C. §557(c), as incorporated into the Act by 5 U.S.C. §554(c), 33 U.S.C. §919(d), 30 U.S.C. §932(a); *Wojtowicz*, 12 BLR at 1-165.

Lastly, employer challenges the administrative law judge's decision to grant counsel's request for reimbursement of miscellaneous expenses of $806.44. The administrative law judge stated:

> [Claimant's counsel] argues that all of the expenses he charged were necessary to prosecute the case successfully. Given the complex issues in this case and the necessity of the parties and their physicians to have a complete copy of the medical records, I find merit in [claimant's counsel's] argument. [Employer] has not demonstrated that these expenses are arbitrary, capricious, or an abuse of discretion.

Attorney Fee Order at 6. Employer contends that the administrative law judge erred in finding that counsel was entitled to reimbursement for these expenses, as this case did not involve multiple parties who required copies of relevant documents and claimant's counsel did not specify the reason for the charges.

The issue of whether photocopying costs or other miscellaneous expenses are reasonable and necessary, or merely part of ordinary office overhead, is committed to the discretion of the administrative law judge. *Hawker*, 22 BLR at 1-175, *aff'd on recon.*, 22 BLR 1-177; *Picinich*, 23 BRBS at 130. We affirm the administrative law judge's determination in this case, as the administrative law judge provided an adequate rationale for his finding and did not abuse his discretion in accepting counsel's representation that the expenses listed in the fee petition were incurred in this case.[17] *Hawker*, 22 BLR at 1-175.

Fees for Services Performed Before the Board

Counsel has filed a fee petition for services performed before the Board in [*D.M.*] *v. Peabody Coal Co.*, BRB No. 07-0171 BLA, between January 15, 2002 and May 6, 2003. Counsel requests compensation for 42.40 hours billed at an hourly rate of $180.00, and $498.75 in expenses, for a total of $8,130.75. Employer requests that the Board reduce counsel's hourly rate to $125.00. Employer also maintains that the following activities are not compensable: writing a memorandum to Dr. Cohen; conducting a telephone conference with Ms. Fogel regarding the miner's death; negotiating an attorney fee settlement; and speaking with claimant regarding information she needed to provide to DOL following the miner's death. In addition, employer alleges that time charges of 24.90 hours for briefing in response to employer's appeal of Judge Jansen's award of

[17] The fact that the district director denied similar charges on the ground that they were included in office overhead does not render the administrative law judge's findings impermissible. *See Bentley*, 522 F.3d at 665, 24 BLR at 2-125.

attorney fees and 3.10 hours for reviewing the Board's decisions concerning the appeal of the award of benefits in the miner's claim and the appeal of Judge Jansen's award of attorney fees were excessive. Lastly, employer asserts that the expenses for which counsel seeks reimbursement are not compensable. Based upon these objections, employer requests that the Board disallow the expenses and reduce counsel's hourly rate to $125.00 and the hours for which compensation is awarded to 8.60.

Pursuant to 20 C.F.R. §802.203(d)(4), "[t]he rate awarded by the Board shall be based on what is reasonable and customary in the area where the services were rendered for a person of that particular professional status." 20 C.F.R. §802.203(d)(4). We hereby approve the hourly rate of $180.00 requested by counsel as consistent with the "reasonable and customary" rate for work performed before the Board. 20 C.F.R. §802.203(d)(4); *see also B & G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 24 BLR 2-106 (6th Cir. 2008).

Under 20 C.F.R. §802.203(e), any fee approved for services performed before the Board "shall be reasonably commensurate with the necessary work done and shall take into account the quality of the representation, the complexity of the legal issues involved, [and] the amount of benefits awarded." 20 C.F.R. §802.203(e). Based upon these criteria, we agree with employer that the 24.90 hours counsel has claimed for drafting pleadings in response to its appeal of Judge Jansen's attorney fee award is excessive in light of the fact that the arguments raised by employer largely reiterated objections previously raised. Accordingly, we reduce this time charge to 12.50 hours. We also find that the time charge of 3.10 hours for reviewing the Board's decisions to be excessive and reduce the compensable time to 1.50 hours.

Services for which a fee is requested must also be those which the attorney could reasonably regard as necessary to establish entitlement. *Lanning*, 7 BLR at 1-317. Based upon this standard, we approve counsel's request for compensation for 1.30 hours spent talking with claimant about the ramifications of the miner's death, as this charge was related to seeking entitlement in the miner's claim and represented a reasonable amount of time. We also approve the .40 hours charged for negotiating a fee settlement, as this task was related to counsel's defense of the fee petition. *See Hawker*, 326 F.3d at 902. However, counsel has not established the necessity of the .20 hours preparing a memorandum informing Dr. Cohen of the status of the miner's claim. In addition, because the telephone conferences with Ms. Fogel regarding the miner's death do not meet the requisite standard, we disallow .50 from the time entry for September 17, 2002 and the entire .50 hour entry for March 12, 2003.

With respect to the $498.75 in expenses itemized in counsel's fee petition, counsel is entitled to be reimbursed for expenses that are reasonable and necessary to the work performed before the Board. *See Picinich*, 23 BRBS at 130. Because the photocopying

charges were related to preparing and serving pleadings in response to employer's appeals before the Board, they are approved. The charges of $43.63 and $51.93 for phone calls to Ms. Fogel on September 17, 2002 and March 12, 2003 respectively, are disallowed, however, as counsel has not established that they were either related to defending a fee petition or necessary to establishing entitlement in the miner's claim. *See Hawker*, 326 F.3d at 902; *Lanning*, 7 BLR at 1-317.

Accordingly, we hold that counsel is entitled to receive from employer a fee of $5299.19, for 27.20 hours of service performed before the Board in [*D.M.*] *v. Peabody Coal Co.*, BRB No. 01-0731 BLA, at an hourly rate of $180.00 and expenses of $403.19.

Conclusion

Based upon the foregoing, the administrative law judge's Decisions and Orders awarding benefits in the miner's claim and the survivor's claim are affirmed in part, and vacated in part, and the cases are remanded to the administrative law judge for further proceedings consistent with this opinion. In addition, the administrative law judge's Attorney Fee Order granting counsel a fee for services performed in conjunction with the miner's claim is affirmed in part, and vacated in part, and the petition is remanded to the administrative law judge for further proceedings consistent with this opinion.

We affirm the district director's Proposed Order dated March 1, 2007 and his Reconsidered Proposed Order dated April 5, 2007 requiring employer to pay counsel $6,393.00 in fees for services rendered, and $521.63 in expenses incurred, in the miner's claim. We also affirm the district director's Proposed Order dated September 12, 2007 and his Reconsidered Proposed Order dated November 13, 2007, awarding fees for services performed in conjunction with the survivor's claim in the amount of $4,749.63. These orders are not enforceable, and the fees are not payable, until an award of benefits becomes final. 20 C.F.R. §802.203.

Finally, we order employer to pay counsel a fee of $5,299.19 for 27.20 hours of service performed before the Board at an hourly rate of $180.00 and expenses of $403.19. This order is not enforceable, and the fees are not payable, until an award of benefits becomes final. 20 C.F.R. §802.203.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge