BRB Nos. 06-0495 BLA
and 06-0495 BLA-S

BARBARA DANIEL (Widow of JAMES DANIEL)	)	
Claimant-Respondent	)	
v.	)	
PRICE COAL COMPANY	)	
	)	DATE ISSUED: 05/31/2007
and	)	
AMERICAN BUSINESS & PERSONAL INSURANCE MUTUAL, INCORPORATED	)	
Employer/Carrier-Petitioners	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION AND ORDER

Appeal of the Decision and Order Awarding Benefits and Attorney Fee Order of Janice K. Bullard, Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C employer/carrier.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, 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:

Employer appeals the Decision and Order Awarding Benefits (03-BLA-6615) and Attorney Fee Order of Administrative Law Judge Janice K. Bullard on 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] At the hearing, the administrative law judge admitted medical reports, treatment records, and objective evidence designated by the parties in accordance with 20 C.F.R. §725.414 and left the record open for the submission of additional evidence. In her Decision and Order, the administrative law judge determined that because Dr. Wiot's deposition testimony regarding his CT scan interpretations constituted a medical report in excess of the evidentiary limitations, she would not address it. On the merits of entitlement, the administrative law judge credited the miner with twenty-three years of coal mine employment and considered the claim, filed on August 3, 2001, pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that claimant established that the miner had pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (a)(4), and that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). The administrative law judge also determined that the presumption, set forth in 20 C.F.R. §718.203(b), that the miner's pneumoconiosis arose out of coal mine employment, was invoked and was not rebutted. Accordingly, the administrative law judge awarded benefits.

In a subsequent Attorney Fee Order, the administrative law judge considered claimant's counsel's petition for attorney's fees. Employer objected to the number of hours of service claimed and the hourly rate of $250. The administrative law judge found merit in employer's argument that the hourly rate requested was inappropriate, as it was augmented due to the contingent nature of the fee. The administrative law judge concluded that the correct rate was $187.50 - the mean between the requested rate and the rate suggested by employer. The administrative law judge also reduced the number of hours by 15.875 and awarded a total fee of $4,429.69.

On appeal of the award of survivor's benefits, employer argues that the administrative law judge did not properly apply the evidentiary limitations set forth in Section 725.414 to the medical opinions of Drs. Johnson and Sundaram and the deposition testimony of Dr. Wiot. Regarding the administrative law

[1] Claimant is the surviving spouse of the miner, who died on July 29, 2001. Director's Exhibit 7.

judge's findings on the merits, employer alleges that the administrative law judge did not properly weigh the medical opinions and CT scan interpretations relevant to the existence of pneumoconiosis under Section 718.202(a)(4). Employer further contends that the administrative law judge erred in determining, pursuant to Section 718.205(c), that claimant established that pneumoconiosis hastened the miner's death.

Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and concurs with employer that this case must be remanded for the administrative law judge to reconsider the admissibility of Dr. Johnson's opinion. Employer has submitted a reply brief in which it essentially reiterates its arguments.[2]

With respect to the administrative law judge's Attorney Fee Order, claimant's counsel contends that the administrative law judge erred in reducing the hourly rate requested. Employer responds, urging affirmance of the fee award. The Director has not filed a response to claimant's counsel's appeal.[3]

Regarding the administrative law judge's Decision and Order on the merits of entitlement, 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, 363 (1965). With respect to the administrative law judge's Attorney Fee Order on the petition for attorney's fees, the standard of review for the Board in analyzing the arguments on appeal of an attorney fee determination is whether the determination is arbitrary, capricious, or an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980).

[2] We affirm the administrative law judge's finding that 20 C.F.R. §718.202(a)(2) and (a)(3) are not available in this case and her finding that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that the miner's pneumoconiosis arose out of coal mine employment, as they have not been challenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] We affirm the administrative law judge's reduction in the number of hours of compensable service to 23.625, as it is unchallenged on appeal. *Skrack*, 6 BLR at 1-711.

To establish entitlement to survivor's benefits, claimant must establish that the miner suffered from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the miner's death was due to pneumoconiosis. 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *see Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Haduck v. Director, OWCP*, 14 BLR 1-29 (1990); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption, relating to complicated pneumoconiosis, set forth at Section 718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co., Inc.*, 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993).[4]

Employer argues initially that the administrative law judge committed several errors in applying the evidentiary limitations set forth in Section 725.414. Employer contends that the administrative law judge acted improperly in considering the opinion in which Dr. Johnson diagnosed pneumoconiosis without addressing the fact that Dr. Johnson relied upon the reports of Drs. Mettu and Fritzhand, which the administrative law judge had excluded from the record because they exceeded claimant's limit of two medical reports. The Director concurs with employer's allegation of error.

Pursuant to Section 725.414(a)(2)(i), claimant was permitted to submit no more than two medical reports and the results of no more than two pulmonary function studies. Section 725.414(a)(2)(i) also provides that any properly admitted medical report must be based upon evidence which is admissible under the evidentiary limitations. In her Decision and Order, the administrative law judge identified the medical reports proffered by claimant that were admissible pursuant to Section 725.414(a)(2)(i), as those authored by Drs. Johnson and Musgrave. Decision and Order at 4, 7; Director's Exhibit 15; Claimant's Exhibits 3, 4. She admitted Dr. Mettu's report of a pulmonary function study dated November 15, 1994 and Dr. Fritzhand's report of a pulmonary function study obtained on February 1, 1995 pursuant to Section 725.414(a)(2)(i). *Id*. at 4; Director's Exhibits 9, 10. The administrative law judge further indicated, however, that she "excluded from consideration any portion of the reports that referred to those objective tests that could be construed as an additional medical report." *Id*.

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as the miner's coal mine employment occurred in Kentucky. Director's Exhibit 4; *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Dr. Johnson's report, dated September 1, 2002, consists of his written responses to a questionnaire submitted to him by claimant's counsel. Director's Exhibit 15. Dr. Johnson checked the "yes" box when asked if the miner had an occupational lung disease that was caused by his coal mine employment. Dr. Johnson identified the miner's forty year history of coal mine employment, chest x-rays, and pulmonary function studies as the bases for his diagnosis.[5] In response to a question asking him whether he diagnosed pneumoconiosis based solely upon x-ray interpretations or his treatment of the miner, Dr. Johnson indicated, "see report Martin Fritzhand M.D. 2/1/95…also RV Mettu M.D. 11/15/94." *Id*. The administrative law judge did not address whether Dr. Johnson's reference to the reports of Drs. Mettu and Fritzhand established that Dr. Johnson relied upon excluded evidence in violation of Section 725.414(a)(2)(i). Thus, we must vacate the administrative law judge's finding regarding the admissibility of Dr. Johnson's report and remand this case to the administrative law judge for consideration of this issue. If the administrative law judge determines on remand that Dr. Johnson relied upon inadmissible evidence, it is within her discretion to exclude Dr. Johnson's report from the record, decline to consider those parts affected by his reference to the inadmissible evidence, or accord it diminished weight depending upon the extent of the doctor's reliance upon the inadmissible evidence. *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(*en banc*)(*motion for reconsideration pending*).

Employer also contends that the administrative law judge erred in including Dr. Sundaram's opinion, that the miner had pneumoconiosis, in his consideration of the medical opinion evidence relevant to Section 718.202(a)(4). Employer maintains that because Dr. Sundaram's opinion appears in two reports that were prepared for the purpose of litigation, rather than the treatment records admitted by the administrative law judge, the administrative should have excluded it as being in excess of the evidentiary limitations set forth in Section 725.414(a)(2)(i). The Director agrees with employer, but asserts that the administrative law judge's error was harmless because she did not rely upon Dr. Sundaram's opinion in finding that the existence of pneumoconiosis was established.

Because this case is being remanded to the administrative law judge for reconsideration of the admissibility of Dr. Johnson's report, we will address the substance of employer's allegation. As indicated, the administrative law judge identified the medical reports of Drs. Johnson and Musgrave as the two medical reports that claimant was entitled to submit under Section 725.414(a)(2)(i). Dr. Sundaram's diagnosis of pneumoconiosis does not appear to be part of the

[5] Dr. Johnson cited another factor, but this reference cannot be deciphered, as his handwritten notation is not legible. Director's Exhibit 15.

treatment records admitted by the administrative law judge pursuant to Section 725.414(a)(4), but rather, was set forth in a letter dated March 25, 1996, addressed "to whom it may concern" and a form submitted in conjunction with the miner's claim for state workers' compensation benefits. Claimant's Exhibit 1. The administrative law judge relied upon Dr. Sundaram's diagnosis of pneumoconiosis, in part, to find that the medical reports of Drs. Johnson and Musgrave were adequately documented. Decision and Order at 14. If Dr. Sundaram's diagnosis is not in the records of his treatment of the miner, the administrative law judge's reference to it effectively resulted in the admission of a medical report in excess of the evidentiary limitations. 20 C.F.R. §725.414(a)(2)(i). Because the administrative law judge did not make a finding as to whether Dr. Sundaram's report was part of the treatment records, she must address this issue on remand.

Employer also contends that the administrative law judge erred in determining in her Decision and Order that Dr. Wiot's deposition testimony must be stricken from the record after admitting it at the hearing. The Director asserts that the administrative law judge rationally determined that Dr. Wiot's deposition was not admissible, as it constituted a medical report in excess of the evidentiary limitations set forth in Section 725.414(a)(3)(i). In a report dated April 13, 2005, Dr. Wiot set forth his interpretations of three CT scans. Employer's Exhibit 7. At the hearing, the administrative law judge granted employer's request to depose Dr. Wiot "to supplement his report." Hearing Transcript at 26-27. Dr. Wiot was subsequently deposed by employer and addressed questions concerning his CT scan readings and the respective merits of x-rays and CT scans. Employer's Exhibit 6.

In her Decision and Order, the administrative law judge found that Dr. Wiot's testimony "was not offered in compliance with §725.414(c), which limits deposition testimony to that from a physician who prepared a medical report or whose testimony is offered in lieu of a medical report." Decision and Order at 5. The administrative law judge determined that Dr. Wiot did not prepare a medical report, as Section 725.414(a)(1) specifically provides that a physician's written assessment of a single test shall not be considered a medical report. *Id.*; 20 C.F.R. §725.414(a)(1). She concluded, therefore, that she was required to exclude Dr. Wiot's deposition testimony. The administrative law judge also cited the Board's decision in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) and stated that the Board held that an administrative law judge may "allow the testimony of a physician to expand upon his interpretations of a CT scan, so long as the testimony was limited to that issue." Decision and Order at 5. The administrative law judge further determined, however, that the Board's ruling in *Webber* did not limit an administrative law judge's authority to exclude cumulative evidence. The

administrative law judge cited this authority as a second reason for excluding Dr. Wiot's deposition from the record. *Id*.

We hold that the administrative law judge provided a valid rationale for determining that Dr. Wiot's deposition testimony is not admissible under Section 725.414(c). The administrative law judge rationally found that because Dr. Wiot did not prepare a medical report, his deposition testimony did not satisfy the terms of Section 725.414(c). The Board's decision in *Webber* also supports the administrative law judge's treatment of Dr. Wiot's deposition. In *Webber*, the Board held that if a physician's testimony touches upon issues other than the medical acceptability or relevance of CT scan evidence pursuant to 20 C.F.R. §718.107(b), such testimony must be admissible under Section 725.414. In this case, the administrative law judge properly found that Dr. Wiot's testimony did not relate to the prerequisites of Section 718.107(b) and, therefore, if admitted, would constitute a medical report in excess of those permitted to employer at Section 725.414(a)(3)(i). *Webber*, 23 BLR at 136.

Nevertheless, we must vacate the administrative law judge's exclusion of Dr. Wiot's testimony from the record, as she did not consider whether employer established good cause for its admission pursuant to 20 C.F.R. §725.456(b). Employer did not have the opportunity to raise this issue before the administrative law judge in light of the fact that the administrative law judge specifically indicated at the hearing that Dr. Wiot's deposition would be admissible, but then reached the opposite conclusion in her Decision and Order. On remand, therefore, the administrative law judge must consider whether employer has established good cause for the admission of Dr. Wiot's deposition under Section 725.456(b)(1). If the administrative law judge decides to exclude Dr. Johnson's medical report on remand, employer may designate Dr. Wiot's deposition testimony to take its place pursuant to Section 725.414(a)(3)(i).

We will now address employer's allegations of error with respect to the administrative law judge's findings on the merits of entitlement. Pursuant to Section 718.202(a)(1) and (a)(4), the administrative law judge found that claimant established that the miner had pneumoconiosis. Decision and Order at 13-14. Employer argues that the administrative law judge did not properly weigh the medical opinions of record under Section 718.202(a)(4). Employer also asserts that the administrative law judge erred in failing to weigh the CT scans of record and in failing to weigh all of the evidence regarding the existence of pneumoconiosis together. Employer's contentions are without merit.

The United States Courts of Appeals for the Third and Fourth Circuits have held that an administrative law judge must weigh all types of relevant evidence together at 20 C.F.R. §718.202(a)(1)-(4) to determine whether the evidence is

sufficient to establish the existence of pneumoconiosis. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). Although decisions rendered by a circuit court can provide guidance in cases that do not arise within its geographical jurisdiction, we have declined to apply *Compton* and *Williams* beyond the boundaries of the Third and Fourth Circuits, as it is not apparent that the courts' holdings are mandated by the Act and the implementing regulations. Thus, because this case arises within the jurisdiction of the Sixth Circuit, *see* n. 4 *supra*, and the Sixth Circuit has not adopted the reasoning of the Third and Fourth Circuits, we decline to apply the holdings in *Williams* and *Compton* as urged by employer. *Furgerson v. Jericol Mining Inc.*, 22 BLR 1-216, 1-227 (2002). We hold, therefore, that the administrative law judge rationally found that the existence of pneumoconiosis was established based upon his accurate determination, pursuant to Section 718.202(a)(1), that the two x-rays of record were uniformly interpreted as positive for pneumoconiosis. Decision and Order at 13; Director's Exhibit 9; Claimant's Exhibit; 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345 (1985). In light of this disposition, we decline to address employer's arguments regarding the administrative law judge's weighing of the medical opinions at Section 718.202(a)(4) and the omission of the CT scan evidence from her consideration of the evidence under Section 718.202(a)(1)-(4).

With respect to the administrative law judge's consideration of the evidence regarding the cause of the miner's death under Section 718.205(c), employer argues that the administrative law judge erred in according more weight to the opinions in which Drs. Johnson and Musgrave identified pneumoconiosis as a contributing cause of the miner's demise, based upon their status as treating and examining physicians. Employer also maintains that the administrative law judge erred in crediting the death certificate, prepared by Dr. Johnson, as evidence supportive of a finding that pneumoconiosis was a cause of the miner's death. In addition, employer alleges that the administrative law judge did not accurately characterize the contrary opinions of Drs. Fino and Rosenberg. These contentions have merit.

We note as an initial matter that because the administrative law judge must reconsider the admissibility of Dr. Johnson's medical report on remand, we must vacate the administrative law judge's determination that the medical opinions of Drs. Johnson and Musgrave were sufficient to establish that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c). Nonetheless, to promote administrative efficiency and avoid the repetition of error on remand, we will address employer's specific arguments concerning the administrative law judge's treatment of Dr. Johnson's opinion under Section 718.205(c).

We hold that employer is correct in maintaining that the administrative law judge did not adequately explain her decision to give greater weight to the opinions of Drs. Johnson and Musgrave because they treated the miner and, therefore, had the opportunity to examine him. Pursuant to 20 C.F.R. §718.104(d), a treating physician's opinion can be accorded controlling weight based upon the nature and extent of the physician's relationship with the miner and the frequency and extent of treatment. The probative value of a treating physician's opinion must also be assessed, however, in light of its reasoning and documentation. 20 C.F.R. §718.104(d)(5); *see Eastover Mining Co. v. Williams*, 338 F.3d 501, 22 BLR 2-625 (6th Cir. 2003). In this case, the administrative law judge did not explain how the factors set forth in Section 718.104(d), or their examinations of the miner, actually gave Drs. Johnson and Musgrave an understanding of the miner's pulmonary condition that was superior to that gained by Drs. Fino and Rosenberg from their reviews of the medical evidence of record. Decision and Order at 15-16; Director's Exhibits 14, 16; Claimant's Exhibits 3, 4; Employer's Exhibits 3-5, 8. In addition, the administrative law judge did not identify the rationale or objective evidence supporting Dr. Johnson's and Dr. Musgrave's conclusion that pneumoconiosis hastened the miner's death, and this information is not apparent on the face of their reports. Decision and Order at 16.

Employer also argues correctly that the administrative law judge did not accurately set forth the contents of the death certificate when she accorded it weight as part of Dr. Johnson's medical report. The administrative law judge stated that "Dr. Johnson included pneumoconiosis among the causes of the miner's death." Decision and Order at 15; Director's Exhibit 7. A review of the death certificate indicates that Dr. Johnson identified metastatic lung cancer, pneumonia, "COAD," and asthma as the immediate causes of the miner's death and identified Barrett's esophagus and fractured ribs as other significant conditions contributing to death. Director's Exhibit 7. As employer asserts, it is not apparent that the administrative law judge's characterization of the death certificate is correct. "COAD" may be an acronym for chronic obstructive airways disease which, if related by Dr. Johnson to coal dust exposure, could fall within the definition of legal pneumoconiosis set forth in 20 C.F.R. §718.102(b). The administrative law judge did not address this issue, however, nor is there any clear evidence that Dr. Johnson diagnosed legal pneumoconiosis in his medical report. Thus, we vacate the administrative law judge's decision to credit the death certificate as an adjunct to Dr. Johnson's medical report. If the administrative law judge finds Dr. Johnson's report admissible on remand, he must reconsider his weighing of the death certificate.

Employer is also correct in stating that the administrative law judge did not accurately characterize the opinions of Drs. Fino and Rosenberg. Although the administrative law judge determined correctly that Dr. Fino did not diagnose

pneumoconiosis, she did not address the fact that Dr. Fino assumed that the miner had pneumoconiosis yet still opined that pneumoconiosis did not play any role in the miner's death. *Id.*; Employer's Exhibit 4 (report dated June 14, 2005). Regarding Dr. Rosenberg's opinion, the administrative law judge indicated that it was entitled to diminished weight because Dr. Rosenberg "failed to adequately address x-ray evidence that was interpreted as positive for pneumoconiosis." Decision and Order at 16. The administrative law judge did not explain, however, why Dr. Rosenberg's discussion of the relative accuracy of x-rays and CT scans in his report dated June 13, 2005 did not constitute an adequate discussion of reasons for concluding that there was convincing radiological evidence of pneumoconiosis. Employer's Exhibit 8.

In light of the foregoing, we must vacate the administrative law judge's findings with respect to the relative weight to which the medical opinions of Drs. Johnson, Musgrave, Fino, and Johnson are entitled under Section 718.205(c) and further vacate her determination that claimant established that pneumoconiosis was a contributing cause of the miner's death. *Tedesco v. Director, OWCP*, 18 BLR 1-103 (1994); *Tackett v. Cargo Mining Co.*, 12 BLR 1-11 (1988)(*en banc*); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985). On remand, the administrative law judge must reconsider these opinions in light of her determination regarding the admissibility of Dr. Johnson's report and determine whether claimant has proven that pneumoconiosis was a contributing cause of the miner's death pursuant to Section 718.205(c). *Brown*, 996 F.2d at 817, 17 BLR at 2-140.

We will now address claimant's counsel's appeal of the administrative law judge's Attorney Fee Order. The administrative law judge reduced counsel's compensable hours of service from 39.5 to 23.625 and the requested hourly rate from $250 to $187.50. In selecting the hourly rate of $187.50, the administrative law judge stated that she accepted "employer's argument that the standard used by claimant's counsel for the calculation of his hourly rate (relying in part upon contingent fees) is incorrect, and I therefore have used the mean between claimant's counsel's stated rate and that of employer ($125) as a reasonable rate." Attorney Fee Order at 2.

On appeal, counsel argues that the administrative law judge did not employ the proper analysis in calculating the proper hourly rate. This contention has merit. In determining the appropriate fee award, the administrative law judge is required to apply the regulatory criteria found at 20 C.F.R. §725.366(b), which provides that the fee award must take into account "the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of proceedings to which the claim was raised, the level at which the representative entered the proceedings, and any other information which

may be relevant to the amount of fee requested." 20 C.F.R. §725.366(b); *see Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); *see also Velasquez v. Director, OWCP*, 844 F.2d 738, 11 BLR 2-134 (10th Cir. 1988). Failure to discuss and apply the regulatory criteria requires remand. *Lenig v. Director, OWCP*, 9 BLR 1-147 (1986); *Allen v. Director, OWCP*, 7 BLR 1-330 (1984).

In this case, the administrative law judge did not perform the analysis required under Section 725.366(b), but rather split the difference between the amount requested by claimant's counsel and the hourly rate of employer's counsel. Thus, the administrative law judge did not properly exercise the discretion afforded her in assessing attorney fee petitions. *Abbott*, 13 BLR at 1-17. We vacate, therefore, the administrative law judge's Attorney Fee Order and remand the case to her for reconsideration of the appropriate hourly rate. We note that any fee awarded to claimant's counsel on remand is not enforceable until there is a final award of benefits. *See* 20 C.F.R. §725.367(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits and Attorney Fee Order are affirmed in part and vacated in part and the case is remanded to the administrative law judge for further proceedings 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