BRB Nos. 07-0696 BLA
and 08-0184 BLA

B.C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LITTLE DAVID COAL COMPANY	)	
	)	DATE ISSUED: 11/26/2008
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Granting Modification and Awarding Benefits and the Supplemental Decision and Order of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe, Williams and Rutherford), Norton, Virginia, for claimant.

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

Helen H. Cox (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 Decision and Order Granting Modification and Awarding Benefits and the Supplemental Decision and Order (2006-BLA-05277) of Administrative

Law Judge Daniel F. Solomon on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act).[1] The relevant procedural history of the case is as follows. Claimant filed a claim for benefits on February 15, 1991, which was denied by the district director on the grounds that claimant failed to establish any of the requisite elements of entitlement. Director's Exhibit 1. Claimant requested modification, and the case went to hearing before Administrative Law Judge Stuart A. Levin, who issued a Decision and Order denying benefits on September 19, 1994. *Id.* Judge Levin found that claimant was totally disabled, but that he failed to establish the existence of pneumoconiosis or that he was totally disabled by pneumoconiosis. *Id.* Claimant filed another modification request on August 3, 1995, which was denied by Judge Levin on May 13, 1996. *Id.* Claimant filed a third request for modification on March 26, 1997, which was denied by Administrative Law Judge Richard A. Morgan on the grounds that the evidence was insufficient to establish the existence of pneumoconiosis and disability causation. *Id.* On May 13, 1999, claimant submitted additional medical evidence to the district director and that submission was construed to be a fourth request for modification. *Id.* Following a hearing, Administrative Law Judge Edward Terhune Miller denied benefits on October 16, 2001, because the evidence failed to establish the existence of pneumoconiosis. *Id.* A fifth request for modification was filed by claimant on October 9, 2002, which was denied by the district director in a Proposed Decision and Order dated June 24, 2003. *Id.* Thereafter, claimant filed an application for benefits on July 26, 2004, which was processed by the district director as a subsequent claim, and is the subject of this appeal. Director's Exhibit 2.

In his Decision and Order dated April 12, 2007, the administrative law judge determined that claimant's July 26, 2004 application was not a subsequent claim but a timely request for modification. Pursuant to 20 C.F.R. §725.310 (2000), the administrative law judge found no mistake in a prior determination of fact, but he determined that the new evidence was sufficient to establish a change in conditions, as it established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4) and that claimant was totally disabled by pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits, commencing

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). The amendments to the regulation pertaining to requests for modification, set forth in 20 C.F.R. §725.310, do not apply to requests for modification of claims filed before January 19, 2001. 20 C.F.R. §725.2. Unless otherwise indicated, all citations to the regulations refer to the revised regulations.

October 1, 2004. On October 3, 2007 the administrative law judge awarded attorney fees to claimant's counsel in the amount of $4,750.00.

Employer appeals, asserting that the administrative law judge erred in determining that claimant's July 26, 2004 application was not a subsequent claim but a request for modification[2] of the denial of his 1991 claim. In the alternative, employer argues that even if the July 26, 2004 application is a proper modification request, the administrative law judge erred by failing to consider whether claimant acted in good faith in pursuing his modification request and whether allowing him to pursue a fifth modification request renders justice under the Act. Employer also argues that the administrative law judge erred in awarding benefits because he improperly shifted the burden to employer to prove that claimant does not suffer from legal pneumoconiosis and that he is not totally disabled due to pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a letter brief, asserting that the administrative law judge properly determined that claimant's July 26, 2004 application was a timely modification request. The Director also asserts that it is "implicit" in the administrative law judge's award that allowing claimant to pursue another modification petition renders justice under the Act.[3] Director's Brief at 4. The Director takes no position on the merits of claimant's entitlement to benefits. Employer has also filed a reply to the Director's brief.

Employer also appeals the administrative law judge's award of attorney fees. Employer contends that the administrative law judge erred in determining the appropriate hourly rate and the number of hours that are compensable for legal work performed by claimant's counsel. Claimant's counsel responds, urging affirmance of the administrative

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[2] The regulation at 20 C.F.R. §725.309(c) provides that "if a claimant files a claim under this part within one year after the effective date of a final order denying a claim previously filed by the claimant . . . the later claim shall be considered a request for modification of the prior denial and shall be processed and adjudicated under [20 C.F.R.] §725.310." 20 C.F.R. §725.309(c). However, "if a claimant files a claim . . . more than one year after the effective date of a final order denying a claim previously filed by the claimant . . . the later claim shall be considered a subsequent claim for benefits" and will be "denied unless the claimant demonstrates that one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d).

[3] The Director, Office of Workers' Compensation Programs, asserts that, contrary to employer's contention, "bad intent should [not] be inferred [merely] from the number of times [claimant] has requested modification." Director's Brief at 5.

law judge's award of attorney fees. The Director has declined to file a brief on the propriety of the attorney fee award.

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.[4] 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).

A. Timeliness of the Modification Request

We first address employer's contention that this case involves a subsequent claim and not a modification request. The record reflects that the district director issued a Proposed Decision and Order Denying Modification on June 24, 2003, which notified the parties that "[if] no request for formal hearing is received within 30 days from the date of the Proposed Order Denying Modification, the proposed order will be deemed to have been accepted by all parties and the finding set forth herein shall become final." Director's Exhibit 1. Claimant did not request a hearing within the thirty day period and took no further action on the denial of his modification request until he filed an application for benefits on July 26, 2004. Director's Exhibit 3. The administrative law judge determined that claimant's July 26, 2004 application constituted a timely request for modification and not a subsequent claim. *See* 20 C.F.R. §725.309(c), (d). The administrative law judge reasoned that because claimant did not request a hearing or a revision of the district director's June 24, 2003 Proposed Decision and Order, that decision became final at the end of the thirty day appeal period, or July 24, 2003, after which claimant had one-year to request modification. Decision and Order at 11. Because the one year period for requesting modification ended on Saturday, July 24, 2004, the administrative law judge applied 20 C.F.R. §725.311 and found that the deadline for requesting modification automatically extended to Monday, July 26, 2004. *Id*. Thus, the administrative law judge adjudicated the claim as a modification request pursuant to Section 725.310 (2000).

Employer contends that the administrative law judge erred in extending the period for requesting modification in this case based upon "the effective date" of the district director's June 24, 2003 proposed decision and order denying modification, or July 24, 2003. We disagree. The regulation at 20 C.F.R. §725.419(a) states that "[w]ithin 30 days after the date of issuance of a proposed decision and order, any party may, in

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[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit as claimant's last coal mine employment was in Tennessee. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 12; Decision and Order at 3.

writing, request a revision of the proposed decision and order or a hearing." 20 C.F.R. §725.419(a). If no party requests a hearing or a revision of the proposed decision and order, the regulation of 20 C.F.R. §725.419(d) provides that "the proposed decision and order shall become a final decision and order, which *is effective upon the expiration of the applicable 30-day period*." 20 C.F.R. §725.419(d) (emphasis added).

As the Director correctly points out, the certificate of service for the June 24, 2003 proposed decision and order advised the parties that if claimant did not request a hearing, the decision and order would become effective upon the expiration of the 30 day period. Director's Exhibit 1. Thus, "by operation of the regulation" at Section 725.419(d), the administrative law judge properly determined that the proposed decision and order became effective on July 24, 2003, and relied on July 24, 2003 as the starting date for the one-year period for requesting modification. Director's Brief at 3; *see also Wooten v. Eastern Associated Coal Corp.*, 20 BLR 1-20 (1996).

Furthermore, Section 725.311(d) provides that in computing any period of time described in 20 C.F.R. Part 725, "[t]he last day of the period shall be included unless it is a Saturday, Sunday, or legal holiday, in which event the period extends until the next day which is not a Saturday, Sunday, or legal holiday." 20 C.F.R. §725.311(d). In this case, because the one-year period for requesting modification ended on Saturday, July 24, 2006, we conclude that the administrative law judge correctly applied Section 725.311 and found that claimant had until Monday, July 26, 2004, to request modification of the district director's decision. *Gross v. Dominion Coal Corp.*, 23 BLR 1-8 (2003). We, therefore, affirm the administrative law judge's finding that claimant's July 26, 2004 application was a timely request for modification pursuant to Section 725.310.

B. Merits of the Modification Request

Pursuant to Section 725.310 (2000), modification may be granted in a miner's claim on the grounds of a change in conditions or a mistake in a determination of fact with regard to the prior denial of benefits. *See* 20 C.F.R. §725.310(a) (2000). When a request for modification is filed, the administrative law judge has the authority "to reconsider all the evidence for any mistake of fact," including whether "the ultimate fact" of entitlement was wrongly decided. *Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 230, 18 BLR 2-290, 2-296 (6th Cir. 1994); *see Betty B. Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993).

In order to establish entitlement to benefits in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that he is totally disabled by pneumoconiosis.

30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

In this case, although the administrative law judge found that there was no mistake in a prior determination of fact, he determined that the medical evidence was sufficient to establish the existence of legal pneumoconiosis[5] and that claimant was totally disabled by pneumoconiosis. Thus, the administrative law judge found that claimant satisfied his burden of establishing a change in conditions pursuant to Section 725.310 (2000). Employer argues that the administrative law judge erred in finding that claimant established legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[6] Specifically, employer maintains that the administrative law judge applied an incorrect legal standard in assessing the medical evidence, and that he erred in discrediting the opinions of Drs. Hippensteel and Fino that claimant has no respiratory disease caused or aggravated by his coal dust exposure. Employer's assertions of error have merit.

Under Section 718.202(a)(4), the administrative law judge noted that there was a consensus among the physicians of record that claimant has a respiratory disease. Decision and Order at 15. Drs. Rasmussen, Agarwal and Nida, opined that claimant has chronic obstructive pulmonary disease (COPD) or emphysema due, in part, to coal dust exposure, while Drs. Hippensteel and Fino opined that claimant's COPD or emphysema is totally unrelated to coal dust exposure. Director's Exhibits 10, 16; Claimant's Exhibits 1, 4; Employer's Exhibit 1. The administrative law judge determined that the opinions of Drs. Nida and Agarwal were insufficiently reasoned because they fail to fully explain the basis for their medical conclusions in light of the objective evidence and claimant's work

[5] Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). For the purposes of the regulation, a disease "arising out of coal mine employment" means a disease that is "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b).

[6] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that there was no mistake in a prior determination of fact pursuant to 20 C.F.R. §725.310 (2000), that the evidence was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1)-(3), and that claimant suffers from a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

and smoking histories.[7] Decision and Order at 16. The administrative law judge accorded little weight to the opinions of Drs. Fino and Hippensteel and gave controlling weight to Dr. Rasmussen's opinion at Section 718.202(a)(4). Decision and Order at 16-17.

Employer contends that the administrative law judge erred in his treatment of Dr. Hippensteel's opinion. We agree. As one of the grounds for assigning Dr. Hippensteel's opinion less weight, in comparison to Dr. Rasmussen's opinion, the administrative law judge noted that "the [r]ecord shows that Dr. Rasmussen's most recent examination of [c]laimant occurred in October 2004[, while] Dr. Hippensteel last examined [claimant] in September 1997." Decision and Order at 16. Contrary to the administrative law judge's finding, however, Dr. Hippensteel last examined claimant on March 1, 2006, subsequent to Dr. Rasmussen's examination. Employer's Exhibit 1.

Furthermore, the administrative law judge found that Dr. Hippensteel's opinion is hostile to the Act because Dr. Hippensteel "foreclose[d] all possibility that [claimant's] emphysema can be related to or aggravated by coal mine dust exposure, unless there is a presence of complicated pneumoconiosis." Decision and Order at 16. An administrative law judge may discount a medical opinion predicated on a tenet that is inimical to the Act, *e.g.,* that pneumoconiosis does not progress after cessation of a miner's coal mine employment, or that obstructive disorders cannot be caused by coal mine employment, because such an opinion is hostile to the Act, and therefore, is not entitled to much, if any, weight. *See Adams v. Peabody Coal Co*., 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987); *Mountain Clay, Inc. v. Collins*, 256 Fed.Appx. 757 (6th Cir. 2007); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Penn Allegheny Coal Co. v. Mercatell*, 878 F.2d 106, 12 BLR 2-305 (3d Cir. 1989).

The administrative law judge is correct that Dr. Hippensteel stated that bullous emphysema is "only associated with complicated pneumoconiosis on occasion and not with simple pneumoconiosis." Employer's Exhibit 1. However, when asked at deposition whether coal dust exposure can cause the type of severe obstruction demonstrated in this case, Dr. Hippensteel replied: "Yes. It is usually associated with some restrict[ive] component in addition, but it can cause severe obstruction." Employer's Exhibit 3 at 22. Because the administrative law judge's Decision and Order does not reflect whether he fully considered Dr. Hippensteel's deposition testimony prior to finding that Dr. Hippensteel's opinion is hostile to the Act, we are unable to affirm his

[7] Since the parties do not challenge the weight accorded the opinion of Drs. Nida and Agarwal at 20 C.F.R. §718.202(a)(4), the administrative law judge's credibility determinations with respect to these physicians are affirmed. *Skrack,* 6 BLR at 7-111.

credibility determination with respect to Dr. Hippensteel's opinion at Section 718.202(a)(4).

Additionally, we agree with employer that the administrative law judge applied an inconsistent standard in evaluating the conflicting opinions of Drs. Rasmussen and Hippensteel. The administrative law judge noted that in criticizing Dr. Rasmussen's opinion, "[Dr. Hippensteel] did not explain in detail why Dr. Rasmussen's use of the medical literature could not support his proposition" that the miner's bullous emphysema was due, in part, to coal dust exposure. Decision and Order at 16; Employer's Brief in Support of Petition for Review (BRB No. 07-0696 BLA) at 20-21. The administrative law judge's analysis, however, makes an impermissible assumption that Dr. Rasmussen's opinion is correct, and does not require Dr. Rasmussen to explain why he disagrees with Dr. Hippensteel's opinion. We conclude that the administrative law judge erred in finding Dr. Hippensteel's opinion to be unexplained in light of the medical literature cited by Dr. Rasmussen without first addressing whether Dr. Rasmussen adequately explained how the medical literature supported his opinion. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-135, 1-139 (1999) (*en banc*). Thus, we vacate the administrative law judge's finding that claimant established the existence of legal pneumoconiosis at Section 718.202(a)(4).[8]

To the extent that the administrative law judge relied upon his findings at Section 718.202(a)(4) to find that claimant satisfied his burden of proving that he is totally disabled by pneumoconiosis, we vacate the administrative law judge's finding at Section 718.204(c). Because we vacate the administrative law judge's findings at Sections 718.202(a)(4) and 718.204(c), we also vacate the administrative law judge's finding that

[8] We reject employer's assertion that the administrative law judge erred in assigning less weight to Dr. Fino's opinion. Dr. Fino opined that claimant's emphysema was unrelated to coal dust exposure, citing medical literature for the propositions that "in the absence of clinical pneumoconiosis there was no increased incidence of emphysema" and "the amount of clinical pneumoconiosis in the lungs determines the amount of clinical emphysema." Director's Exhibit 16. We conclude that the administrative law judge acted within his discretion in giving less weight to Dr. Fino's opinion at Section 718.202(a)(4) because he found that "Dr. Fino fails to account for the presence of legal pneumoconiosis (emphysema due to coal dust exposure), which does not require a clinical diagnosis" of pneumoconiosis. Decision and Order at 16; *see* 20 C.F.R. §718.201; *Wolf Creek Collieries v. Director, OWCP [Stephens]*, 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*).

claimant established modification based on a change in conditions pursuant to Section 725.310 (2000).[9]

On remand, the administrative law judge must reconsider whether claimant has established the existence of legal pneumoconiosis based on reasoned and documented medical opinion evidence at Section 718.202(a)(4), taking into consideration the comparative credentials of the respective physicians, the explanations for their conclusions, the documentation underlying their medical judgments, and the sophistication of, and bases for, their diagnoses. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). If necessary, the administrative law judge must also determine whether claimant has satisfied his burden to establish that he is totally disabled by pneumoconiosis pursuant to Section 718.204(c).[10] *See* 20 C.F.R. §718.204(c); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Abshire v. D & L Coal Co.,* 22 BLR 1-202, 214 (2002) (*en banc*). In addressing each of these elements of entitlement, the administrative law judge must explain the basis for his findings of fact and the rationale underlying his credibility

[9] Because we vacate the administrative law judge's award of benefits and remand this case for further consideration, we direct the administrative law judge to consider employer's assertion that granting modification does not render justice under the Act as "claimant has offered no good faith basis for modification [other than] a persistent disagreement with the result reached" in the prior determinations in this case. Employer's Brief in Support of Petition for Review at 15-16; *see Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007); *D.S. v. Ramey Coal Co.*, --- BLR ---, BRB No. 07-0789 BLA (June 25, 2008).

[10] With regard to disability causation, a miner is totally disabled due to pneumoconiosis if pneumoconiosis :

> Is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1); *Gross v. Dominion Coal Corp.*, 23 BLR 1-8, 1-17 (2003).

determinations.[11] *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984); *see generally Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1, 1-2 (1986) (*en banc*).

C. Attorney Fees

In the interest of judicial economy, we address employer's challenge of the attorney fee award. The standard of review for the Board in analyzing petitioner's arguments on appeal of an attorney fee determination is whether the determination is arbitrary, capricious, or an abuse of discretion. *See Abbott v. Director, OWCP*, 13 BLR 1-15 (1989), *citing Marcum v. Director, OWCP*, 2 BLR 1-894 (1980). All fee petitions must be filed with, and approved by, the adjudicating officer or tribunal before whom the services were performed. 20 C.F.R. §§725.365, 725.366(a); *Helmick v. Director, OWCP*, 9 BLR 1-161 (1986); *Vigil v. Director, OWCP*, 8 BLR 1-99 (1985). The adjudicating officer must discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the fee award due, if any. *See Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

Claimant's counsel submitted a fee petition to the administrative law judge, seeking approval of $7,275.00 in attorney fees, representing 14.5 hours of legal work performed by Mr. Wolfe at the rate of $400.00 per hour ($5,800.00), 3.5 hours of legal work by co-counsel at the rate of $200.00 per hour ($700.00), and 8.75 hours of work performed by a legal assistant at the rate of $100.00 per hour ($875.00). Employer objected to the fee petition, alleging that the hourly rates claimed were excessive. Employer also objected to certain specific time entries on the grounds that they were either duplicative, unnecessary or clerical in nature and, therefore non-compensable. After considering employer's objections, the administrative law judge reduced Mr. Wolfe's hourly rate to $300.00, but approved hourly rates claimed for co-counsel and the legal assistant. The administrative law judge also disallowed four hours of work by the legal assistant. Therefore, the administrative law judge awarded attorney fees in the amount of $4,750.00.

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[11] The administrative law judge must comply with the Administrative Procedure Act (APA), which requires that every adjudicatory decision be accompanied by a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2),

Employer contends that an award of $300.00 per hour for Mr. Wolfe's services in this case is excessive. Employer's Brief in Support of Petition for Review at 3. Contrary to employer's contention, the administrative law judge specifically addressed employer's objection to the requested hourly rate of $400.00 by Mr. Wolfe and reduced that amount in keeping with what he determined to be reasonable for the geographic practice area, and Mr. Wolfe's level of experience in federal black lung litigation. The administrative law judge specifically noted that, in support of his request for an hourly rate of $400.00, Mr. Wolfe attached an attorney fee survey as of January 1, 2002 for the South Atlantic Region. Based on this survey, the administrative law judge determined that Mr. Wolfe's "request of $400.00 per hour is high in the range set forth by the Survey as the average for someone of like experience is $334.00 per hour." Supplemental Decision and Order at 2. Taking into consideration Mr. Wolfe's experience in black lung and the fact that his office was one of the few in the area that accepted these types of cases, the administrative law judge determined an hourly rate of $300.00 was appropriate for his level of expertise and years of experience. Supplemental Decision at 2-3; s*ee* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). Because employer has failed to demonstrate why the administrative law judge's ruling should be considered arbitrary, capricious or an abuse of discretion, *see Whitaker v. Director, OWCP*, 9 BLR 1-216 (1986); *Abbott,* 13 BLR at 1-16, and since his determination to reduce Mr. Wolfe's hourly rate to $300.00 in this case appears reasonable, it is affirmed.

Employer next argues that the number of hours claimed in this case is excessive based on counsel's use of the quarter-hour billing method. Employer's Brief in Support of Petition for Review (Attorney Fees) at 8. Contrary to employer's contention, the administrative law judge did not err in finding that counsel's practice of billing in quarter-hour increments was reasonable. *See B&G Mining, Inc. v. Director, OWCP [Bentley]* , 522 F.3d 666, 24 BLR 2-106; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); 20 C.F.R. §802.203(d)(3). We therefore affirm the administrative law judge's award of attorney fees in the amount of $4,750.00, which is contingent on the successful prosecution of claimant's case.

Accordingly, the Decision and Order Granting Modification and Awarding Benefits and the Supplemental Decision and Order of the administrative law judge are affirmed in part and vacated in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge