BRB Nos. 08-0678 BLA
and 08-0678 BLA-S

I.B. (Widow of R.B.) Claimant-Respondent v. GUM BRANCH 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:_____ DECISION and ORDER

Appeal of the Decision and Order – Award of Benefits and the Supplemental Decision and Order Granting Attorney's Fees of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor.

William Lawrence Roberts, Pikeville, Kentucky, for claimant.

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

Emily Goldberg-Kraft (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, 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 BOGGS, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Employer/carrier (employer) appeals the Decision and Order – Award of Benefits and the Supplemental Decision and Order Granting Attorney's Fees (06-BLA-5483) of Administrative Law Judge Thomas F. Phalen, Jr., (the administrative law judge), rendered on a survivor's claim[1] filed pursuant to 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).[2] The administrative law judge credited the miner with nineteen years of coal mine employment[3] based on the parties' stipulation, and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that employer was properly designated as the responsible operator under 20 C.F.R. §725.493(b). Further the administrative law judge found that, under 20 C.F.R. §718.102(d), (e), Dr. Martin's interpretation of an April 11, 1980 x-ray could be considered, despite the fact that the x-ray film had been destroyed and was unavailable for employer to have re-read. The administrative law judge found that Dr. Martin's x-ray interpretation established the existence of both simple and complicated pneumoconiosis at 20 C.F.R. §718.202(a)(1), that the preponderance of the evidence established that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant was therefore entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.304. Additionally, the administrative law judge

[1] Claimant is the surviving spouse of the miner, R.B. The miner filed an application for lifetime benefits on April 23, 1980. No medical evidence was filed in connection with that claim, and the claim was denied as abandoned on November 12, 1981. Director's Exhibit 1 at 2. The miner died on January 6, 2001, Director's Exhibit 14, and claimant filed the instant claim for survivor's benefits on April 25, 2005. Director's Exhibit 2 at 2.

[2] 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 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable as the miner was employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibit 3.

found that the miner's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Accordingly, the administrative law judge awarded benefits. In a Supplemental Decision and Order issued on September 25, 2008, the administrative law judge directed employer to pay claimant's counsel a fee of $7,050.00 for legal services rendered to claimant while the case was pending before the administrative law judge.

On appeal, employer asserts that the administrative law judge erred in finding that employer is the responsible operator, and in finding that Dr. Martin's interpretation of the April 11, 1980 x-ray was legally sufficient to support a finding of pneumoconiosis under 20 C.F.R. §718.102(d), (e), where Dr. Martin is not a Board-certified radiologist, Board-eligible radiologist, or B reader. Employer additionally asserts that, even if Dr. Martin's x-ray interpretation is legally sufficient under 20 C.F.R. §718.102, the administrative law judge erred in failing to consider the miner's treatment record x-rays in conjunction with Dr. Martin's x-ray reading, at 20 C.F.R. §718.304. Employer additionally asserts that, because it was unable to have the April 11, 1980 x-ray re-read, its due process rights were violated by an award of benefits based solely on Dr. Martin's interpretation of that x-ray. Claimant responds in support of the administrative law judge's award. The Director, Office of Workers' Compensation Programs (the Director), filed a limited response, arguing that employer was properly designated as the responsible operator in this case. Employer filed a reply brief reiterating its contentions.

Based upon employer's specific challenge to the administrative law judge's finding at 20 C.F.R. §718.102, and its due process argument, the Board issued a July 22, 2009 Order, requesting that the parties address the following questions:

1. Was the administrative law judge's application of Section 718.102(d), (e), correct?

2. In the case of a deceased miner, where the original x-ray film is unavailable, does Section 718.102(e), as revised, require any such x-ray to have been read by a Board-certified or Board-eligible radiologist or B reader for the x-ray to establish the presence or absence of pneumoconiosis?

3. Assuming that the administrative law judge properly applied Section 718.102(d), (e), were employer's due process rights violated by an award of benefits that was based solely on the positive reading of an x-ray that employer was unable to rebut because the x-ray was unavailable?

I.B. v. Gum Branch Coal Co., BRB Nos. 08-0678 BLA and 08-0678 BLA-S (July 22, 2009)(Order)(unpub.). In his supplemental brief, the Director asserts that the administrative law judge erred in applying revised 20 C.F.R. §718.102, rather than the

former version of 20 C.F.R. §718.102 (2000), to assess the quality of Dr. Martin's 1980 x-ray. The Director responds further that Section 718.102(d), (e)(2000) provides that if an x-ray of a deceased miner substantially complies with the quality standards, but the film is lost, a physician's interpretation of the film may establish the existence of pneumoconiosis, regardless of the physician's qualifications. However, the Director argues that the administrative law judge in this case erred in failing to properly address whether the April 11, 1980 x-ray substantially complies with the quality standards. Finally, the Director contends that employer's due process rights would not be violated by an award of benefits based on Dr. Martin's x-ray interpretation, because employer had the opportunity to mount a meaningful defense, notwithstanding its inability to have Dr. Martin's x-ray re-read. Claimant and employer filed supplemental briefs, reiterating the assertions contained in their prior briefs. Further, both claimant and employer filed responses to the Director's supplemental brief.

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

20 C.F.R. §725.494: Responsible Operator

We first address employer's challenge to the administrative law judge's responsible operator finding. To be a properly designated responsible operator, the employer must be the last coal mine operator to have employed the miner for a cumulative period of at least one year. 20 C.F.R. §725.494. Dates and length of coal mine employment may be established by any credible evidence including, but not limited to, company records, pension records, earnings statements, coworkers' affidavits and sworn testimony. 20 C.F.R. §725.101(a)(32)(ii).

In the instant case, the administrative law judge considered the miner's Social Security records[4] and employment history form. Although the Social Security records

[4] The Social Security record reflects that employer paid the miner the following amounts:

	Jan-Mar	**April-June**	**July-Sept**	**Oct - Dec**		**Total**
1973			$235.40	$2,896.48		$3,131.88
1974	$2,974.64	$3,066.88	$1,909.63			$7,950.35
1980						$2,100.44

specified only the total amount the miner earned in 1980, rather than his monthly or quarterly earnings, because the miner stated on his application for lifetime benefits that he worked for employer between November 1979 and February 15, 1980, and because the miner filed his application "only six weeks after he quit work with Gum Branch Coal," the administrative law judge found the miner's statement concerning the dates of employment to be credible. Decision and Order at 4 n.6. Without further explaining his method of calculation, the administrative law judge determined that the miner worked for employer for full months from October 1973 to July 1974, in December 1979, in January 1980, and for half a month in February 1980, for a total of 12.5 months. Decision and Order at 5. Further finding that employer was the most recent operator to have employed the miner, the administrative law judge determined that employer was the properly designated responsible operator.

Employer contends that the administrative law judge's method of calculation is not apparent and that he did not explain the basis for his decision. The Director asserts that the administrative law judge permissibly inferred that the miner worked for employer for the required calendar year based on the Social Security records.

We agree with employer. Although the administrative law judge may have inferred from the miner's Social Security records that the miner worked for employer for a cumulative period of at least one year, as employer states, the administrative law judge did not explain his method of calculation. Because it is unclear how the administrative law judge determined that the miner worked for full months from October 1973 to July 1974, and in December 1979, and January 1980, we vacate the administrative law judge's findings at 20 C.F.R. §§725.492(c), 725.493(a). On remand, the administrative law judge must explain the basis for his findings. *See* 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). If, on remand, the administrative law judge determines that claimant did not work for employer for at least one year, employer is not the responsible operator. *See* 20 C.F.R. §725.495(c).

20 C.F.R. §718.102: Quality Standards

Employer next contends that the administrative law judge erred in finding that Dr. Martin's April 11, 1980 x-ray interpretation is legally sufficient to support a finding of pneumoconiosis under 20 C.F.R. §718.102(d) and (e). Specifically, employer asserts that Dr. Martin's x-ray interpretation cannot be considered, because Dr. Martin is not a Board-certified radiologist, Board-eligible radiologist, or, B reader. The Director asserts that the administrative law judge erred in applying revised 20 C.F.R. §718.102(d), (e), to

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Director's Exhibit 9 at 6-7.

assess the quality of Dr. Martin's x-ray interpretation, because Dr. Martin's x-ray interpretation was developed prior to January 19, 2001. The Director further asserts that under 20 C.F.R. §718.102(d), (e)(2000),[5] the applicable regulation, Dr. Martin's lack of credentials as a Board-certified or Board-eligible radiologist, or B reader, would preclude consideration of his x-ray interpretation only if the x-ray does not substantially comply with the quality standards set forth in 20 C.F.R. §718.102 (2000). The Director further asserts, however, that the administrative law judge erred in failing to address whether the x-ray was in substantial compliance with the quality standards.

We agree with the Director. Because Dr. Martin's x-ray interpretation was developed before January 19, 2001, the revised quality standards at 20 C.F.R. §718.102 (2001) do not apply. 20 C.F.R. §718.101(b). Rather, the quality standards found at 20 C.F.R. §718.102 (2000)[6] are applicable. As the Director further asserts, the plain text and

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[5] Section 718.102(d) and (e)(2000) provide:

> (d) The original film on which the X-ray report is based shall be supplied to the Office, unless prohibited by law, in which event the report shall be considered as evidence only if the original film is otherwise available to the Office and other parties. Where the chest X-ray of a deceased miner has been lost, destroyed[,] or is otherwise unavailable, a report of a chest X-ray submitted by any party shall be considered in connection with the claim.
>
> (e) No chest X-ray shall constitute evidence of the presence or absence of pneumoconiosis unless it is in substantial compliance with the requirements of this section and Appendix A, except that in the case of a deceased miner where the only available X-ray is of sufficient quality for determining the presence or absence of pneumoconiosis and such X-ray was interpreted by a Board-certified or Board-eligible radiologist or a certified "B" reader . . . such X-ray shall be considered and shall be accorded such weight and probative value as is appropriate in light of all of the evidence applicable to the individual case. It shall be presumed, in the absence of evidence to the contrary, that the requirements of Appendix A have been met.

20 C.F.R. §718.102(d), (e)(2000).

[6] As the Director, Office of Workers' Compensation Programs (the Director), notes, the language of Section 718.102(2000) differs slightly from the version that was in effect at the time Dr. Martin's 1980 x-ray was created. Director's Supplemental Brief at 3 n.5. Language in the initial version of Section 718.102(e) suggested that "special consideration" should be given to non-conforming x-rays of deceased miners that had been read by Board-certified or Board-eligible radiologists or B readers. Section

comments to the regulation make clear that if a deceased miner's x-ray film is lost and the only reading is by a physician who is not a Board-certified or Board-eligible radiologist, or B reader, Section 718.102 would not preclude reliance on that reading to establish or disprove pneumoconiosis, so long as the x-ray is in substantial compliance with the quality standards. Director's Supplemental Brief at 4-6; *see* 45 Fed. Reg. 13680 (Feb. 29, 1980) ("Nothing in this part excludes from consideration a chest X-ray of suitable quality interpreted by a competent physician, whatever his or her specialty."). In the instant case, although the administrative law judge found that Dr. Martin's x-ray interpretation could be considered despite the unavailability of the April 11, 1980 x-ray film, he did not address whether the x-ray substantially complies with the quality standards. Consequently, we vacate the administrative law judge's finding at 20 C.F.R. §718.102. On remand, the administrative law judge must determine whether Dr. Martin's x-ray report substantially complies with Section 718.102 (2000).

20 C.F.R. §718.304: Complicated Pneumoconiosis

As the administrative law judge's finding at 20 C.F.R. §718.102 could affect his weighing of the evidence at 20 C.F.R. §718.304, we additionally vacate his finding that the preponderance of the evidence establishes that the miner had complicated pneumoconiosis. If, on remand, the administrative law judge determines that Dr. Martin's x-ray interpretation substantially complies with Section 718.102 (2000), the administrative law judge must again consider whether claimant has established that the miner had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Specifically, the administrative law judge must consider all relevant evidence on this issue, i.e., evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*).

We, however, reject employer's assertion that the administrative law judge erred in failing to weigh the treatment record x-rays at 20 C.F.R. §718.304. The administrative

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718.102(e) was revised in 1983 to clarify that non-conforming x-rays of deceased miners that had been read by Board-certified or Board-eligible radiologists or B readers were entitled to "such weight and probative value as is appropriate under the circumstances of the case." 48 Fed. Reg. 24273 (May 31, 1983). Because Dr. Martin is neither a radiologist nor a B reader, this clarifying change in language has no effect on the outcome of this case. Therefore, as the Director asserts, it is unnecessary to determine which of the two "old" versions of Section 718.102 applies to Dr. Martin's x-ray.

law judge found that the x-rays contained in the miner's treatment records were not taken for the purpose of determining the existence or extent of pneumoconiosis, that the credentials of the interpreting physicians are not of record, and that there was no record of the film quality for any of the treatment x-rays. Decision and Order at 6 n.10. Substantial evidence supports these findings. Contrary to employer's assertion, therefore, the administrative law judge permissibly determined that the treatment x-rays are not probative of the existence of pneumoconiosis. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983).

Due Process

Because we have vacated the award of benefits, employer's due process argument is moot. If the administrative law judge, on remand, again finds that Dr. Martin's x-ray interpretation may be considered, he must address employer's assertion that reliance on Dr. Martin's x-ray report violates employer's right to due process where it "had no opportunity to have the film reread or to have the credibility of the doctor's reading tested."[7] Employer's Brief at 11.

Attorney Fee Order

In remanding this case, we note that claimant's counsel is not entitled to fees for services rendered until the claim has been successfully prosecuted and all appeals are exhausted. *See* 20 C.F.R. §725.367(a); *Goodloe v. Peabody Coal Co.*, 19 BLR 1-91, 1-100 n.9 (1995). Because we have vacated the administrative law judge's award of benefits, there has not been a successful prosecution of this claim. However, in the interest of judicial economy, we address employer's challenge to the administrative law judge's award of attorney fees. The relevant procedural history follows:

The administrative law judge issued the Decision and Order – Award of Benefits on May 29, 2008. In this decision, the administrative law judge gave claimant's counsel, William Lawrence Roberts (Attorney Roberts), thirty days to file his attorney fee application, and gave employer ten days, after the mailing date of the fee application, to file any objections. On June 20, 2008, Attorney Roberts filed his petition for attorney fees. The petition requested an hourly rate of $300, but the attached itemized bill listed counsel's hourly rate as $250 per hour for each line item. Further, although the petition stated that affidavits from other black lung attorneys were attached, no affidavits were attached to counsel's petition.

[7] Although employer argued before the administrative law judge that its due process rights would be violated if the administrative law judge relied upon Dr. Martin's x-ray reading, the administrative law judge did not address this issue.

On July 1, 2008, employer moved to hold claimant's fee petition in abeyance until employer had "completed discovery on claimant's counsel's hourly rate and billing practices." Employer's Motion to Hold Fee Petitions in Abeyance at 1. Employer asserted that discovery was necessary because claimant's counsel provided no market evidence establishing that he receives $300 per hour from fee-paying clients for work similar to the litigation in this case, or that other similarly-qualified attorneys earn $300 per hour for similar work in the same geographic area. Employer submitted interrogatories[8] to claimant's counsel on this same date.

On July 15, 2008, Attorney Roberts objected to the interrogatories, and submitted three cases in which Joseph Wolfe was awarded $300 per hour for services rendered while his cases were pending before an administrative law judge. He also submitted a decision of the United States Court of Appeals for the Sixth Circuit affirming a fee award to Attorney Roberts at $200 per hour for services rendered while that case was pending before the district director, at $250 per hour for services rendered while that case was pending before the administrative law judge, and $225 per hour for services rendered while that case was pending before the Board.

On July 25, 2008, employer responded that the cases that Attorney Roberts submitted did not establish that his market rate is $300 per hour, where there is no indication that he is similarly qualified to Joseph Wolfe. Employer further asserted that Attorney Roberts's prior awards are only inferential evidence of his market rate. Based on the foregoing, employer requested that the fee petition be dismissed, or, in the alternative, that employer be given fifteen days to file objections to the fee petition.

On September 25, 2008, the administrative law judge awarded the requested hourly rate and fees, specifically, $7,050.00 for 23.5 hours of legal work at $300 per hour, and denied employer's motions to hold the fee petition in abeyance and to give employer fifteen days to file objections to the fee petition. The administrative law judge stated:

> I find that I am not obligated to hold these fees in abeyance in order for Employer to complete "discovery." Employer has spent nearly a month in replying to the fee petition, and has provided his objections and arguments. There should not be a need to do discovery and/or interrogatories on a fee petition. Claimant should not have to litigate the attorney fee petition. The undersigned has the fee petition and Employer's objections to it, and will

[8] Employer's interrogatories requested that William Lawrence Roberts state the rate and structure of fees that he charges fee-paying clients.

> rule accordingly. Therefore, the undersigned will not hold the fee petition in abeyance.
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> The undersigned will rule on Employer's objection to the $300.00 per hour claimed by Mr. Roberts. Mr. Roberts has been representing clients for the past twenty-eight years, and his practice consists of a large amount of federal black lung to which he has developed an expertise in the field. This matter did go to hearing and involved quite a bit of medical evidence. In addition, the undersigned did review a recent BRB decision which was *O.R.H. v. Blue Star Coal Corp.*, BRB No. 07-0124 BLA (Oct. 30, 2007)(unpub.). In this matter, the BRB affirmed the ALJ's fee award to Claimant's attorney [Joseph Wolfe] at an hourly rate of $300.00. The ALJ in that case noted that Claimant's counsel was "highly experienced" in the area of black lung and that his office was "one of the few in the area that accepted these types of case[s]." The undersigned agrees that $300.00 per hour is not excessive, and will award this hourly rate.

Supplemental Decision and Order at 3. Further finding that Attorney Roberts claimed compensation for 23.50 hours of legal work at the rate of $300 per hour for services rendered while the case was pending before the administrative law judge, the administrative law judge awarded $7,050.00 to Attorney Roberts.

On appeal, employer asserts that the administrative law judge erred in awarding an hourly rate of $300, in failing to give employer the opportunity to file objections to the fee petition, and in failing to allow discovery. Employer additionally asserts that the administrative law judge erred in allowing Attorney Roberts to bill in quarter-hour increments. Claimant responds in support of the award of attorney's fees.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion, *Jones v. Badger Coal Co.*, 21 BLR 1-102 (1998) (*en banc*); *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989).

Employer asserts that the administrative law judge erred in awarding an hourly rate of $300 to Attorney Roberts because the administrative law judge did not adequately explain his finding that $300 per hour is a reasonable hourly rate for claimant's counsel. We agree. Although 20 C.F.R. §725.366 lists what factors should be considered in assessing the amount of an attorney fee award, the Sixth Circuit has held that the lodestar method of calculating fees (the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate) is "the appropriate starting point in [black-lung benefits] cases." *B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 662, 24 BLR 2-106, 2-119 (6th Cir. 2008). In *Bentley*, the Sixth Circuit defined "reasonable

hourly rate" as "the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record." *Bentley*, 522 F.3d at 663, 24 BLR at 2-121. In the instant case, the administrative law judge did not address whether $300 per hour is the rate that lawyers of comparable skill and experience can reasonably expect to command within the venue of the court of record. Further, the administrative law judge did not explain how the itemized bill, listing Attorney Roberts's hourly rate as $250, or the fee awards he submitted, supported a finding that counsel's reasonable hourly rate is $300. Consequently, we vacate the administrative law judge's attorney fee award and remand this case for further consideration. *See Jones*, 21 BLR at 1-108. On remand, the administrative law judge must address whether the requested hourly rate is a "reasonable hourly rate," and must adequately explain his findings. *Bentley*, 522 F.3d at 664, 24 BLR at 2-121.

We additionally find merit in employer's assertion that the administrative law judge erred in failing to allow employer to file objections to the attorney fee petition because employer spent nearly a month replying to the fee petition. Although the administrative law judge gave Attorney Roberts thirty days to file his petition and gave employer ten days to file objections, as employer asserts, Attorney Roberts provided no evidence in support of his fee petition until after the thirty-day deadline provided by the administrative law judge had passed. Further, the record reflects that employer requested additional time to file its objections to the fee petition ten days after Attorney Roberts submitted the three decisions awarding Joseph Wolfe $300 per hour, and the Sixth Circuit decision affirming awards of $200, $225, and $250 to Attorney Roberts. For these reasons, the administrative law judge must reconsider employer's request for additional time to file its objections to the fee petition. *See Jones*, 21 BLR at 1-108.

Employer additionally asserts that the administrative law judge erred in failing to permit discovery. We disagree. An administrative law judge exercises broad discretion in procedural matters, 20 C.F.R. §725.455, and employer has identified no authority for its argument that the administrative law judge should have allowed discovery. Employer's Brief at 11. We, therefore, reject employer's allegation of error.

Employer next argues that the administrative law judge erred by compensating claimant's counsel for an unreasonable number of hours for legal services. Specifically, employer contends 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 at 9. Contrary to employer's contention, the administrative law judge did not err in allowing counsel to bill in quarter-hour increments. *See Bentley*, 522 F.3d at 666, 24 BLR at 2-127; *Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993); 20 C.F.R. §802.203(d)(3).

Accordingly, the administrative law judge's Decision and Order – Award of Benefits and the Supplemental Decision and Order Granting Attorney's Fees are vacated and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

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ROY P. SMITH
Administrative Appeals Judge

BOGGS, Administrative Appeals Judge, concurring, and dissenting in part:

I agree with my colleagues that this case must be remanded for further consideration of whether employer was properly named the responsible operator, whether Dr. Martin's April 11, 1980 x-ray interpretation is legally sufficient to support a finding of pneumoconiosis at 20 C.F.R. §718.102 (2000), and therefore, whether this x-ray supports a finding of complicated pneumoconiosis under 20 C.F.R. §718.304, and for further consideration of the attorney fee award. However, I would additionally instruct the administrative law judge to consider the treatment records, including the treatment-related x-ray readings, in conjunction with Dr. Martin's x-ray reading under 20 C.F.R. §718.304. The administrative law judge made no mention of these records with respect to his determination of complicated pneumoconiosis under 20 C.F.R. §718.304. Decision and Order at 16. The United States Court of Appeals for the Sixth Circuit has held that an administrative law judge must consider all relevant evidence in determining whether a miner has complicated pneumoconiosis. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 388-89, 21 BLR 2-615, 2-626-29 (6th Cir. 1999). It would be error, therefore, for the administrative law judge to not consider the treatment records. Consequently, I would

instruct the administrative law judge also to consider the treatment records on remand. I concur with my colleagues in all other respects.

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JUDITH S. BOGGS
Administrative Appeals Judge