BRB No. 08-0383 BLA

O.B. (Deceased) A.B. (Widow of O.B.) Claimant-Respondent v. KENTUCKY ELKHORN COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 02/19/2009 DECISION and ORDER

Appeal of the Decision and Order Award of Living Miner's Claim, Award of Survivor's Claim of Daniel F. Solomon, 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.

Barry H. Joyner (Carol A. DeDeo, Deputy Solicitor; 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: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Award of Living Miner's Claim, Award of Survivor's Claim (06-BLA-5737, 07-BLA-5333) of Administrative Law Judge Daniel

F. Solomon rendered on claims 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] Claimant testified that the miner worked in the coal mines for about fifteen years.[2] March 13, 2007 Transcript at 8.

In his decision, the administrative law judge found that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000)[3] by establishing the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[4] The administrative law judge found that total disability and total disability due to pneumoconiosis were established pursuant to 20 C.F.R. §718.204(b)(2), (c). Accordingly, the administrative law judge awarded benefits on the miner's claim from July 1995, the month in which the miner filed his duplicate claim.

---

[1] The miner filed his first claim on April 11, 1989, and it was denied on August 14, 1992. Director's Exhibit 41 at 5, 488. The miner filed his second and instant claim on July 25, 1995. Director's Exhibit 1. His claim has a lengthy history. Following two remands by the Board to the Office of Administrative Law Judges (OALJ), the OALJ in turn remanded the claim to the district director for further evidentiary development. The miner died on April 29, 2005. Director's Exhibit 131 at 169. The survivor filed her claim on June 27, 2005. Director's Exhibit 133 at 1. The miner's duplicate claim and the survivor's claim were consolidated. March 13, 2007 Transcript at 5.

[2] The record indicates that the miner's coal mine employment was in Kentucky. Director's Exhibits 2, 4. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

[3] 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 (2008). 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.

[4] The administrative law judge found it unnecessary to address the cause of the miner's legal pneumoconiosis pursuant to 20 C.F.R. §718.203(b) because that finding was subsumed within the legal pneumoconiosis finding.

With regard to the survivor's claim, the administrative law judge found that legal pneumoconiosis was established pursuant to 20 C.F.R. §718.202(a).[5] The administrative law judge also found that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c). Consequently, the administrative law judge awarded benefits on the survivor's claim.

On appeal, employer challenges the administrative law judge's findings pursuant to Sections 725.309(d)(2000), 718.202(a)(4), 718.204(c), and 718.205(c). Additionally, employer challenges the administrative law judge's onset date determination on the miner's claim. Claimant responds, urging affirmance of the administrative law judge's decision. The Director, Office of Workers' Compensation Programs (the Director), declined to file a substantive response brief, but noted its support for the administrative law judge's rejection of Dr. Rosenberg's opinion, that the miner did not have pneumoconiosis, as contrary to the regulations, while expressing no opinion on whether Dr. Rosenberg had some other valid basis for his conclusions. Employer filed a reply brief.

Claimant's counsel has filed two fee petitions for work performed before the Board, in this appeal, as well as two prior appeals in the miner's claim. Employer has filed objections to the fee petitions, as well as a motion to dismiss the fee petitions as untimely and prematurely filed, with respect to the two prior appeals and this appeal, respectively. Claimant responded to employer's motion to dismiss, to which employer replied. By Orders dated October 7 and 29, 2008, the Board accepted employer's objections as part of the record, and denied employer's motion to dismiss, as the Board stated that the fee petitions would be addressed in the Board's decision on the merits.

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 and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

We first address employer's challenge to the administrative law judge's award of benefits in the miner's claim. To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements

[5] As he did in the miner's claim, the administrative law judge concluded that his finding of legal pneumoconiosis made it unnecessary to determine whether the miner's pneumoconiosis arose out of his coal mine employment pursuant to Section 718.203(b).

precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-112 (1989); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in failing to consider whether the evidence is sufficient to establish a material change in conditions pursuant to Section 725.309(d)(2000) in accordance with the holding in *Sharondale Corp. v. Ross*, 42 F.3d 993, 997, 999, 19 BLR 2-10, 2-18, 2-21 (6th Cir. 1994). In *Ross*, the United States Court of Appeals for the Sixth Circuit, held that an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether the miner has proven at least one of the elements of entitlement previously adjudicated against him to assess whether the evidence is sufficient to establish a material change in conditions pursuant to Section 725.309(d)(2000). *See Ross*, 42 F.3d at 997, 19 BLR at 2-18. The Sixth Circuit, in *Ross*, also held that a miner must show that the new evidence differs qualitatively from the evidence submitted with the previously denied claim. *See Ross*, 42 F.3d at 999, 19 BLR at 2-21; *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80 (2000). Claimant's previous claim was denied because claimant failed to establish the existence of pneumoconiosis. Decision and Order at 23; Director's Exhibit 41.

The administrative law judge noted that the new evidence was to be considered in light of the old evidence to determine whether a material change in conditions was established. Decision and Order at 24 n.13. The administrative law judge weighed the old and new evidence together in finding that legal pneumoconiosis was established, and that a material change in conditions was established. Decision and Order at 24-28. However, the administrative law judge failed to explain whether the new evidence differed qualitatively from the old evidence in that it was substantially more supportive of claimant. *See Grundy Mining Co. v. Flynn*, 353 F.3d 467, 480, 23 BLR 2-44, 2-65-66 (6th Cir. 2003); *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 609, 22 BLR 2-288, 2-300 (6th Cir. 2001). Consequently, we must vacate the administrative law judge's finding that the evidence established a material change in conditions pursuant to 20 C.F.R. §725.309(d)(2000), and remand the case to the administrative law judge for further consideration of the evidence in accordance with *Ross*.

Employer also contends that the administrative law judge applied an improper legal standard in finding that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a)(4).[6] We reject employer's contention. The administrative law judge properly inquired whether the miner had a chronic respiratory or pulmonary impairment that was significantly related to, or substantially aggravated by dust exposure

[6] "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).

in coal mine employment, and ultimately concluded that legal pneumoconiosis was established because the miner's coal mine employment contributed, at least in part, to his pneumoconiosis. *See* 20 C.F.R. §§718.201(a)(2), (b); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Southard v. Director, OWCP*, 732 F.2d 66, 71, 6 BLR 2-26, 2-35 (6th Cir. 1984); Decision and Order at 25-26.

Employer next contends that the administrative law judge erred in relying on Dr. Alam's opinion and in rejecting the opinions of Drs. Branscomb, Broudy, Bryson, Dahhan, Fritzhand, Halbert, Lane, Rosenberg, and Vuskovich, to find that legal pneumoconiosis was established pursuant to Section 718.202(a)(4). Employer argues that the administrative law judge mechanically credited Dr. Alam's opinion as that of the treating doctor.[7] We agree, and we vacate the administrative law judge's reliance on Dr. Alam's opinion. On remand, the administrative law judge must explain why Dr. Alam's opinion is entitled to dispositive weight as that of the treating doctor, in light of the holding in *Eastover Mining Co. v. Williams*, 338 F.3d 501, 513, 22 BLR 2-625, 2-647 (6th Cir. 2003), that the opinions of treating physicians get the deference they deserve based on their power to persuade. In this regard, the administrative law judge must explain how Dr. Alam's status of treating physician afforded Dr. Alam a better perspective of the miner's respiratory condition.

Employer argues that the administrative law judge erred in rejecting Dr. Rosenberg's opinion because it was contrary to the regulations. An administrative law judge may reject a medical opinion that is contrary to the regulations. *See Adams v. Peabody Coal Co.,* 816 F.2d 1116, 1119, 10 BLR 2-69, 2-72-73 (6th Cir. 1987). However, the administrative law judge discounted Dr. Rosenberg's opinion, as contrary to the regulations, based on only one of his reports,[8] without considering all of them. Consequently, on remand, the administrative law judge must discuss and weigh Dr. Rosenberg's opinion in its entirety, specifically the reports dated January 17, 2003, February 10, 2003, February 16, July 9, and July 27, 2007, and his deposition of March 12, 2007. *See* Director's Exhibit 131 at 582, 637; Employer's Exhibits 1, 5, 6 (miner's claim).

---

[7] Dr. Alam treated the miner from 2002 until his death in 2005.

[8] The administrative law judge focused on Dr. Rosenberg's report dated January 17, 2003, in which Dr. Rosenberg stated that there was not a solid basis to attribute disabling chronic obstructive pulmonary disease to coal mine dust exposure in the absence of complicated coal workers' pneumoconiosis. Decision and Order at 26; Director's Exhibit 131 at 614.

Employer also argues that the administrative law judge substituted his opinion for that of a physician by rejecting Dr. Vuskovich's diagnosis of alpha 1 antitrypsin deficiency, as not logical and not well-reasoned.[9] We reject employer's contention that the administrative law judge substituted his judgment for that of a physician when he assessed the reasoning of Dr. Vuskovich's opinion. *See Marcum v. Director, OWCP,* 11 BLR 1-23, 1-24 (1987). However, on remand, the administrative law judge must consider Dr. Vuskovich's diagnosis of alpha 1 antitrypsin deficiency in light of the opinions of Drs. Branscomb, Fritzhand, and Lane, who also diagnosed that disease. Director's Exhibits 11, 41 at 439, 44.

Employer next argues that the administrative law judge erred in rejecting the opinions of Drs. Branscomb and Dahhan because they failed to explain why coal mine employment did not aggravate the miner's totally disabling respiratory impairment. We agree that substantial evidence does not support the administrative law judge's finding.[10] Consequently, the administrative law judge on remand must reconsider the opinions of Drs. Branscomb and Dahhan.

Employer further argues that the administrative law judge erred in rejecting Dr. Lane's opinion because it did not address the issue of legal pneumoconiosis. Employer's contention has merit. The administrative law judge on remand must reconsider Dr. Lane's opinion.[11]

In light of the foregoing, we vacate the administrative law judge's finding that legal pneumoconiosis was established in the miner's claim pursuant to Section

---

[9] Dr. Vuskovich opined that the miner's chronic obstructive pulmonary disease (COPD)(emphysema) was due to alpha 1 antritrypsin deficiency, aggravated by cigarette smoking, in his reports dated January 18, 2003, February 16, and July 24, 2007. Director's Exhibit 131 at 614; Employer's Exhibits 2, 3 (miner's claim).

[10] Dr. Branscomb explained that coal dust was not a contributing factor to the miner's pulmonary impairment because the miner's pattern of pulmonary impairment (not fixed, relieved by bronchodilators, early morning wheezing) was that of chronic bronchitis and emphysema due to smoking. Director's Exhibit 44 (Dr. Branscomb's deposition) at 32-33, 41. Dr. Dahhan explained that the miner's wheezing on clinical chest examination and abnormal blood gas study that improved after exercise indicated a disease unrelated to coal mine employment. Director's Exhibit 41 at 44, 48.

[11] Dr. Lane did not address the issue of legal pneumoconiosis in his first report dated March 21, 1987, but addressed the issue in his subsequent April 12 and June 19, 1990 reports. Director's Exhibit 41 at 151, 157, 438.

718.202(a)(4), and we remand this case to the administrative law judge for reconsideration. In reweighing the medical opinions of record, the administrative law judge must take into account the physicians' respective qualifications, the explanation of their medical opinions, the documentation underlying their judgments, and the sophistication and bases of their diagnoses. *See Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*).

Pursuant to Section 718.204(c), employer contends that the administrative law judge erred in relying on Dr. Forehand's opinion and in rejecting the opinions of Drs. Rosenberg and Vuskovich, to find that disability causation was established. Because we have vacated the administrative law judge's finding that the existence of pneumoconiosis was established, we also vacate his finding pursuant to Section 718.204(c). Employer argues that the administrative law judge erred in relying on Dr. Forehand's opinion to establish disability causation because Dr. Forehand diagnosed clinical pneumoconiosis only and the administrative law judge found that clinical pneumoconiosis was not established. We agree. On remand, the administrative law judge must explain how Dr. Forehand's opinion supports a finding of total disability due to pneumoconiosis. Additionally, in light of our holding that the administrative law judge must reconsider the opinions of Drs. Rosenberg and Vuskovich at Section 718.202(a)(4), we instruct him to reconsider their opinions as to the cause of the miner's disability at Section 718.204(c). On remand, the administrative law judge must reweigh the medical opinions pursuant to Section 718.204(c) in light of the proper legal standard. *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-185-86 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 825, 13 BLR 2-52, 2-63 (6th Cir. 1989).

Because we vacate the administrative law judge's finding of entitlement to benefits in the miner's claim, we also vacate the administrative law judge's onset date determination pursuant to Section 725.503(b), and we remand this case to the administrative law judge for further consideration. If, on remand, the administrative law judge finds that claimant establishes entitlement to benefits, he must again determine the date from which benefits commence. *See* 20 C.F.R. §725.503(b). If the evidence does not establish when claimant first became totally disabled due to pneumoconiosis, benefits may be awarded as of the month of filing, unless credited medical evidence establishes that the miner was not totally disabled due to pneumoconiosis at any subsequent time. 20 C.F.R. §725.503(b); *Owens v. Jewell Smokeless Coal Corp.*, 14 BLR 1-47, 1-50 (1990).

Next, we address employer's challenge regarding the administrative law judge's award of benefits in the survivor's claim. To establish entitlement to survivor's benefits, 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* 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.205,

718.304; *Trumbo v. Reading Anthracite Co.,* 17 BLR 1-85, 1-89 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if the evidence establishes that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(1),(3), or that pneumoconiosis was a substantially contributing cause or factor leading to the miner's death. 20 C.F.R. §718.205(c)(2), (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); *Griffith v. Director, OWCP*, 49 F.3d 184, 186, 19 BLR 2-111, 2-116 (6th Cir. 1995); *Brown v. Rock Creek Mining Co*., 996 F.2d 812, 817, 17 BLR 2-135, 2-140 (6th Cir. 1993). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112.

Employer contends that the administrative law judge erred in relying on the opinions of Drs. Baker and Dennis and in rejecting Dr. Rosenberg's opinion to find that the existence of legal pneumoconiosis was established pursuant to Section 718.202(a)(4) in the survivor's claim.[12] Employer argues that Dr. Baker's opinion does not relate specifically to the etiology of the miner's case and that it is too equivocal to support a finding of legal pneumoconiosis. In his report dated June 18, 2007, Dr. Baker stated that the miner's severe obstructive pulmonary impairment was due to smoking and coal dust exposure as both etiologies "*may* cause obstructive airway disease." Claimant's Exhibit 6 at 3 (emphasis added). Dr. Baker also stated that "there is *probably* a combination of factors going on in one who has both smoked and had coal dust exposure." *Id.* (emphasis added). Because the administrative law judge did not take the specific language of Dr. Baker's opinion into account before relying on it to establish legal pneumoconiosis pursuant to Section 718.202(a)(4) in the survivor's claim, we vacate the administrative law judge's finding pursuant to Section 718.202(a)(4) in the survivor's claim, and we remand this case to the administrative law judge for reconsideration of Dr. Baker's opinion. On remand, the administrative law judge must take into account the specific language of Dr. Baker's opinion in assessing the probative value of the doctor's opinion. *See Crockett Collieries, Inc. v. Barrett*, 478 F.3d 350, 356, 23 BLR 2-472, 2-483 (6th Cir. 2007); *V.M. v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-75 (2008).

Employer argues that the administrative law judge erred in relying on Dr. Dennis' opinion without explaining how it supported a finding of legal pneumoconiosis. We agree. Dr. Dennis, in his report dated April 5, 2007, diagnosed progressive massive fibrosis by biopsy, as supported by the chest x-rays and pulmonary function testing indicating an obstructive defect. Claimant's Exhibit 4. The administrative law judge

---

[12] Because the survivor's claim is subject to the evidentiary limitations of 20 C.F.R. §725.414, the administrative law judge made separate findings on all the elements of entitlement in the survivor's claim. Thus, the administrative law judge considered the existence of pneumoconiosis twice.

found that Dr. Dennis' report did not establish either complicated pneumoconiosis or simple, clinical coal workers' pneumoconiosis. At legal pneumoconiosis, the administrative law judge found Dr. Dennis' opinion "better reasoned and substantiated by the evidence in the record." Decision and Order at 38. On remand, the administrative law judge must explain how Dr. Dennis' opinion supports a finding of legal pneumoconiosis. *See* 20 C.F.R. §718.201; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103.

The administrative law judge discounted Dr. Rosenberg's opinion that the miner did not have legal pneumoconiosis for the same reason that he gave in the miner's claim, specifically, that one of Dr. Rosenberg's reports contained a premise that was contrary to the regulations. However, in so doing, the administrative law judge did not consider all of Dr. Rosenberg's reports, and his deposition, which were admitted in the survivor's claim. The administrative law judge should consider the entirety of Dr. Rosenberg's opinion on remand. Employer's Exhibits 2, 4 (survivor's claim).

Based on the foregoing, we vacate the administrative law judge's finding that legal pneumoconiosis was established pursuant to Section 718.202(a)(4) in the survivor's claim, and we remand this case to the administrative law judge for reconsideration. In reweighing the medical opinions of record, the administrative law judge must take into account the physicians' respective qualifications and the documentation and reasoning of their opinions. *See Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-155.

Pursuant to Section 718.205(c), employer contends that the administrative law judge erred in relying on the miner's death certificate, completed by Dr. Sekela, and in rejecting the opinions of Drs. Naeye and Rosenberg, to find that claimant established that the miner's death was due to pneumoconiosis. Because we have vacated the administrative law judge's finding as to the existence of pneumoconiosis, we also vacate his finding pursuant to Section 718.205(c). Employer argues that the administrative law judge erred in relying solely on the unexplained death certificate to establish death causation without considering that the death certificate had been amended to include pneumoconiosis as a contributing cause of death. Employer also argues that the administrative law judge erred in finding that Dr. Sekela, who completed the death certificate, had personal knowledge of the miner's condition and that this somehow improved the probative value of the unexplained death certificate, because there is no documentation to support that finding.

We agree with employer. On remand, the administrative law judge must determine whether the fact that the death certificate was amended affects its probative value and explain his basis for finding that Dr. Sekela had personal knowledge of the miner's condition and how that knowledge improved the unexplained death certificate's

probative value.[13] *See Williams,* 338 F.3d at 516-17, 22 BLR at 2-653-54 (6th Cir. 2003); *Bill Branch Coal Corp. v. Sparks*, 213 F.3d 186, 190, 22 BLR 2-251, 2-259 (4th Cir. 2000); *Smith v. Camco Mining, Inc.,* 13 BLR 1-17, 1-22 (1989); *Addison v. Director, OWCP*, 11 BLR 1-68, 1-70 (1988).

Employer argues that the administrative law judge erred in discounting Dr. Rosenberg's opinion without considering the doctor's entire opinion at death causation. We agree. On remand, the administrative law judge must consider Dr. Rosenberg's opinion in its entirety.[14]

We reject employer's remaining contentions at Section 718.205(c). The administrative law judge permissibly discounted Dr. Naeye's opinion because the doctor did not address the issue of legal pneumoconiosis. *Soubik v. Director, OWCP*, 366 F.3d 226, 234, 23 BLR 2-82, 2-99 (3d Cir. 2004); Decision and Order at 39. Moreover, the administrative law judge properly declined to consider the opinions of Drs. Fino and Vuskovich because they were not designated as evidence by employer in the survivor's claim, which is governed by the evidence-limiting rules.[15] *See* 20 C.F.R. §725.414.

---

[13] Dr. Sekela, who attended the miner during his last hospitalization, signed both the initial and amended death certificates. The amended death certificate dated September 9, 2005 identified severe COPD as the immediate cause of death, listing cachexia (general ill health and malnutrition) and tuberculosis as the underlying causes leading to the immediate cause, with coal workers' pneumoconiosis a significant contributor to the miner's death. Director's Exhibit 148 at 42. The initial death certificate, filed on May 18, 2005, listed the same immediate and underlying causes of death as the amended death certificate, but did not include coal workers' pneumoconiosis as a significant condition contributing to death. Director's Exhibit 144.

[14] Dr. Rosenberg rendered an opinion on February 10, 2003 regarding the miner's medical condition, which pre-dated the miner's death in 2005. Employer's Exhibit 1 (survivor's claim). Subsequently, however, Dr. Rosenberg rendered an additional report on February 16, 2007, and was deposed on March 12, 2007, and stated that the miner died due to obstructive lung disease due to smoking, unrelated to the miner's coal mine employment. Employer's Exhibits 2 at 11, 4 at 36 (survivor's claim).

[15] The survivor's claim, filed on June 27, 2005, is governed by the evidence-limiting rules, but the miner's claim, filed on July 25, 1995, is not. *See* 20 C.F.R. §725.2(c).

Lastly, we decline to address the two fee petitions filed by claimant at this time. Because we have vacated the administrative law judge's award of benefits in both the miner's and survivor's claims, there has not been a successful prosecution of the claims before the Board. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993).

Accordingly, the administrative law judge's Decision and Order Award of Living Miner's Claim, Award of Survivor's Claim is vacated, and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

____
ROY P. SMITH
Administrative Appeals Judge

____
BETTY JEAN HALL
Administrative Appeals Judge

____
JUDITH S. BOGGS
Administrative Appeals Judge