BRB No. 11-0230 BLA

MARIE L. WILKINSON (Widow of LOUIS WILKINSON)	)	
Claimant-Respondent	)	
v.	)	
PITTSBURG & MIDWAY COAL MINING	)	DATE ISSUED: 01/31/2012
and	)	
METLIFE INSURANCE OF CONNECTICUT	)	
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 Donald W. Mosser, Administrative Law Judge, United States Department of Labor.

Brent Yonts (Brent Yonts, PSC), Greenville, Kentucky, for claimant.

Scott A. White (White & Risse, L.L.P.), Arnold, Missouri, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2008-BLA-05149) and Attorney Fee Order of Administrative Law Judge Donald W. Mosser, with respect to a survivor's claim filed on February 5, 2007, pursuant to the provisions of the Black

Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] The administrative law judge credited the miner with at least twenty-nine years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge initially found that the presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), did not apply in this case, as the evidence did not establish that the miner was totally disabled from a respiratory standpoint at 20 C.F.R. §718.204(b). However, the administrative law judge determined that claimant established that the miner had clinical and legal pneumoconiosis arising from his coal mine employment at 20 C.F.R. §§718.202(a), 718.203(b), and that pneumoconiosis was a substantially contributing cause of the miner's death at 20 C.F.R. §718.205(c). 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. The administrative law judge found that the hourly rate of $150.00 and the costs requested were appropriate, but reduced the number of hours from 36.25 to 33.60 to account for work not performed before him, and awarded a fee totaling $6,671.50.

On appeal, employer argues that the administrative law judge's findings violate the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d), 30 U.S.C. §932(a), because he applied inconsistent and incorrect standards and did not fully explain his findings. Employer further asserts that the record does not establish clinical or legal pneumoconiosis at 20 C.F.R. §718.202(a), and that the administrative law judge misinterpreted or mischaracterized the physicians' opinions. In addition, employer states that the administrative law judge erred in finding that claimant established death due to pneumoconiosis at 20 C.F.R. §718.205(c). Employer also challenges the administrative law judge's award of attorney's fees, arguing that claimant's counsel failed to establish the reasonableness of his hourly rate or a basis for reimbursement of deposition costs. Claimant responds, urging affirmance of the award of benefits and the award of attorney's fees, noting that he has no objection to the reduction for work performed before the district director. The Director, Office of Workers' Compensation Programs, has declined to file a response brief in this appeal.[2]

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[1] Claimant is the widow of the miner, Louis Wilkinson, who died on October 25, 1999. Director's Exhibit 15.

[2] We affirm, as unchallenged on appeal, the administrative law judge's determination that the miner had at least twenty-nine years of coal mine employment. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[3] 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).

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. Part 718, claimant must demonstrate, by a preponderance of the evidence, that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, in which the rebuttable presumption set forth in amended Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4), is not applicable, death will be considered due to pneumoconiosis if the evidence establishes 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 the miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *Brown v. Rock Creek Mining Co.*, 996 F.2d 812, 17 BLR 2-135 (6th Cir. 1993). Failure to establish any one of these elements 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).

I. 20 C.F.R. §718.202(a)

A. The Administrative Law Judge's Findings

In considering whether claimant established the existence of clinical and legal pneumoconiosis at 20 C.F.R. §718.202(a), the administrative law judge weighed the x-ray evidence and the opinions of Drs. Stiles, Renn, Tuteur, Oesterling and Naeye. Drs. Renn and Tuteur reviewed medical records and the reports of Drs. Oesterling, Naeye and Stiles. Employer's Exhibits 2, 7, 12, 14, 16. The administrative law judge determined that the sole x-ray interpretation, which was taken twenty years prior to the miner's death and was read as negative, was insufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Decision and Order at 14. Concerning the autopsy reports at 20 C.F.R. §718.202(a)(2), the administrative law judge found that the reports of Dr. Stiles, the autopsy prosector, who diagnosed anthracosis, and the reports of Drs. Oesterling and Naeye, who reviewed the tissue slides and ruled out the presence of

[3] The record reflects that the miner's last coal mine employment was in Kentucky. Director's Exhibit 3. Accordingly, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(en banc).

pneumoconiosis, were entitled to equal probative weight. The administrative law judge concluded, therefore, that claimant did not establish that the miner had pneumoconiosis at 20 C.F.R. §718.202(a)(2). *Id*.

Upon weighing the medical opinion evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge accorded greatest weight to Dr. Stiles's opinion and discredited the opinions in which Drs. Renn, Tuteur and Oesterling stated that the miner did not have pneumoconiosis. Decision and Order at 17-18. Based upon these findings, the administrative law judge determined that Dr. Stiles's opinion was sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4). *Id*. Addressing the conflict between his findings at 20 C.F.R. §718.202(a)(2) and (a)(4), the administrative law judge stated that when the autopsy evidence was "considered together with the medical reports, [he] was persuaded by" Dr. Stiles's opinion. *Id*. at 18-19. The administrative law judge concluded, therefore, that claimant established the existence of both clinical and legal pneumoconiosis under 20 C.F.R. §718.202(a).

B. Arguments on Appeal

Employer contends that the administrative law judge mischaracterized the opinions of Drs. Stiles, Renn, Tuteur, Oesterling, and Naeye concerning pneumoconiosis. With respect to Dr. Stiles's diagnoses of clinical and legal pneumoconiosis, employer maintains that Dr. Stiles did not explain the inconsistency between the negative x-ray of record and his autopsy finding of anthracosis. Employer further alleges that, Dr. Stiles's use of the term "anthracosis" was not a diagnosis of pneumoconiosis, as he found only anthracotic pigment, without fibrosis. Employer argues, therefore, that the administrative law judge "put a diagnosis [of clinical pneumoconiosis] in Dr. Stiles' mouth." Employer's Brief at 27, *citing* Claimant's Exhibit 2 at 69-70. Employer also contends that, contrary to the administrative law judge's finding, Dr. Stiles is not a "well-qualified pathologist with excellent credentials" because he had only performed one autopsy on a coal miner when he was first out of medical school eleven years ago. Employer's Reply Brief at 5, *quoting* Decision and Order at 21. In addition, employer questions the administrative law judge's finding that the autopsy evidence was "equally balanced" and his determination that "when [the autopsy evidence was] considered together with the medical reports, I was persuaded by Dr. Stiles' opinions," as the administrative law judge's determination at 20 C.F.R. §718.202(a)(2) was "in direct opposition to his finding crediting Dr. Stiles' testimony with a finding of pneumoconiosis." Employer's Brief at 28, *quoting* Decision and Order at 18; Employer's Reply Brief at 5. Employer argues that Dr. Stiles was not in any better position than the other pathologists who reviewed the autopsy slides and notes that Dr. Stiles's 1999 autopsy report did not contain many of the details that he recalled in his deposition, which occurred approximately ten years later, including an explicit diagnosis of pneumoconiosis.

Regarding the administrative law judge's weighing of the opinions of Drs. Renn, Tuteur, Oesterling, and Naeye, employer contends that the administrative law judge relied on an impermissible rationale when discrediting their opinions. Employer maintains that it is not employer's burden to exclude coal dust as a source of claimant's impairment. Employer further argues that the administrative law judge substituted his opinion for that of the physicians in equating anthracosis with pneumoconiosis. Employer asserts that Drs. Renn and Tuteur, in ruling out the presence of clinical or legal pneumoconiosis, explained that pneumoconiosis and anthracosis are not the same. Employer also alleges that, contrary to the administrative law judge's findings, Dr. Oesterling provided a reasoned opinion and suggests that the administrative law judge might not have considered Dr. Oesterling's supplemental report, dated February 23, 2010, in which he explained that the presence of silica crystals helps distinguish between anthracotic pigment observed in coal miners and that observed in cigarette smokers and urban dwellers.

Employer's arguments have merit, in part.[4] As an initial matter, we note that, in considering whether claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4), the administrative law judge rendered findings that should have been made at 20 C.F.R. §718.202(a)(2). The evidence relevant to 20 C.F.R. §718.202(a)(2) consists of Dr. Stiles's autopsy report, including his subsequent deposition testimony and affidavits regarding what he observed on gross and microscopic examination, and the reports of Drs. Oesterling and Naeye. Dr. Stiles performed the miner's autopsy and submitted a report dated October 25, 1999. Director's Exhibit 16. In the section labeled "Microscopic Description," he identified the presence of "diffuse emphysema with abundant anthracotic pigment" and hilar lymph nodes "with anthracotic pigment deposition." *Id*. Dr. Stiles also noted the presence of "[p]ulmonary emphysema, bilateral[,] with marked anthracosis," in the section labeled "Final Anatomic Diagnoses." *Id*. Dr. Stiles was deposed on October 27, 2009, and testified that he saw macules up to 2.3 millimeters in size on microscopic examination of the miner's lung tissue and that it was his opinion that the miner had pneumoconiosis. Claimant's Exhibit 2 at 17, 20. Dr. Stiles also submitted affidavits, dated January 8, 2010 and January 27, 2010, in which he

[4] We reject employer's allegation that, in finding that claimant established the existence of clinical pneumoconiosis, the administrative law judge did not resolve the conflict between the negative x-ray of record and Dr. Stiles's alleged diagnosis of clinical pneumoconiosis. The administrative law judge acted within his discretion as fact-finder in determining that the probative value of this x-ray, which was taken twenty years prior to the miner's death, is questionable in light of its age. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(en banc); *Stanford v. Director, OWCP*, 7 BLR 1-541 (1984); *Tokarcik v. Consolidation Coal Co.*, 6 BLR 1-666 (1983); Decision and Order at 14; Employer's Exhibit 9.

discussed the preparation of additional slides and his determination that the autopsy contained no evidence of a hematoma in the miner's neck. Claimant's Exhibits 5, 6. Drs. Oesterling and Naeye both concluded, based upon their review of the tissue slides, that anthracotic pigment was present, but not in the quantity or quality necessary to support a diagnosis of pneumoconiosis. Employer's Exhibits 1, 15, 21.

When weighing the autopsy evidence at 20 C.F.R. §718.202(a)(2), the administrative law judge summarized Dr. Stiles's autopsy report and the reports of Drs. Oesterling and Naeye and found that each was well documented and well reasoned. Decision and Order at 15-16. Based upon the physicians' differing opinions as to the significance of the anthracotic pigment viewed on the tissue slides, the administrative law judge found that the autopsy evidence was equally balanced and, therefore, insufficient to establish the existence of pneumoconiosis. *Id*. at 16. The administrative law judge did not consider Dr. Stiles's deposition testimony as to the presence of macules, however, until he addressed all of the medical reports of record at 20 C.F.R. §718.202(a)(4). He then relied upon Dr. Stiles's finding of macules to discredit the opinions in which Drs. Renn and Tuteur ruled out the presence of pneumoconiosis based, in part, upon their review of the pathology reports. *Id*. at 17-18. Thus, the administrative law judge did not resolve, at 20 C.F.R. §718.202(a)(2), the conflict in the autopsy evidence as to whether the tissue slides reflected the presence of coal macules in the miner's lungs, sufficient to support a diagnosis of pneumoconiosis.

Accordingly, we must vacate the administrative law judge's findings under 20 C.F.R. §718.202(a)(2), (4), and remand this case to the administrative law judge. *See Hughes v. Clinchfield Coal Co.*, 21 BLR 1-134, 1-139 (1999)(en banc). The administrative law judge must first reconsider whether claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2), in light of Dr. Stiles's autopsy report and deposition testimony, and the reports of Drs. Oesterling and Naeye. In resolving the conflict between Dr. Stiles's findings and the findings of Drs. Oesterling and Naeye, the administrative law judge must consider the respective credentials of the physicians, their expertise relevant to assessing the presence of pneumoconiosis on autopsy, and the sophistication of, and bases for, their respective conclusions.[5] *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody*

[5] Employer contends that the administrative law judge did not address whether Dr. Stiles's statement that "[a]nthracosis means blackening or darkening of tissues," makes it unclear whether Dr. Stiles actually diagnosed pneumoconiosis. Claimant's Exhibit 2 at 67. Employer also asserts that the administrative law judge did not consider the discrepancy between the brevity of Dr. Stiles's autopsy report and his detailed deposition and affidavit testimony. The administrative law judge should address employer's arguments when reconsidering the evidence at 20 C.F.R. §718.202(a)(2) on remand.

Coal Co. v. Groves, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

After the administrative law judge has determined whether claimant has established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(2), he must then reconsider his weighing of the opinions of Drs. Tuteur and Renn at 20 C.F.R. §718.202(a)(4), in light of his findings regarding the autopsy evidence. In so doing, the administrative law judge must again consider the respective qualifications of the physicians and the extent to which their conclusions are reasoned and documented. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. When rendering his findings on remand, the administrative law judge is required to make a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented," in accordance with the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1985).

II. 20 C.F.R. §718.205(c)

A. The Administrative Law Judge's Findings

The administrative law judge's determination that claimant established that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c) was based upon his crediting of Dr. Stiles's opinion at 20 C.F.R. §718.202(a)(2), (4). Accordingly, we must also vacate the administrative law judge's findings at 20 C.F.R. §718.205(c). However, in the interest of judicial economy, we will address employer's allegations of error regarding these findings.

The administrative law judge determined that the miner's death certificate, in which Dr. McGhee identified cardiac dysrhythmia as the sole cause of death, was entitled to "little probative weight," because Dr. McGhee's credentials were not in the record and the physician noted that he did not have access to the autopsy findings when he completed the death certificate. Decision and Order at 19-20; Director's Exhibit 15. The administrative law judge then found that Dr. Stiles's opinion, that the presence of coal dust in the miner's lungs impaired the delivery of oxygen to the blood, leading to cardiac dysrhythmia and death, was supported by the medical evidence, because Dr. McGhee listed cardiac dysrhythmia as the cause of death. Decision and Order at 20.

Regarding the opinions of Drs. Renn and Tuteur, the administrative law judge determined that, although both physicians assumed that the miner had pneumoconiosis when identifying the cause of the miner's death, their opinions were not well reasoned. Decision and Order at 20. Drs. Renn and Tuteur indicated that a hematoma on the miner's neck, observed on a CT scan taken during the miner's final hospitalization, led to his death. Employer's Exhibits 4, 12, 13, 16. The administrative law judge found that

Dr. Renn relied on the CT scan, rather than Dr. Stiles's finding that the miner did not have a hematoma, and only speculated as to how the hematoma caused the miner's death. *Id*. 20-21; Claimant's Exhibit 5. The administrative law judge also stated that Dr. Tuteur's testimony that the miner had a thyroidectomy, which led to the formation of the hematoma, was unsupported by the record. Decision and Order at 20-21.

The administrative law judge further found that the concerns expressed by Drs. Renn and Tuteur regarding whether Dr. Stiles properly examined the miner for a hematoma at autopsy were not persuasive, as "Dr. Stiles credibly explained his procedure for examining the miner's neck and what he expected to find if a hematoma was present." Decision and Order at 21. The administrative law judge concluded that Dr. Stiles was in the best position to identify the presence of a hematoma, since he actually examined the miner's body, and that the hematoma described by Drs. Renn and Tuteur would have been visible to Dr. Stiles, upon his examination of the lower part of the miner's neck. *Id*. Further, the administrative law judge determined that the fact that Drs. Renn and Tuteur disagreed, as to how the hematoma caused the miner's death, diminished the credibility of their opinions, especially as both acknowledged that there was insufficient medical evidence on which to base their conclusions. *Id.*

With respect to Dr. Oesterling's opinion, that the miner's death was not related to pneumoconiosis, the administrative law judge accorded it little weight because Dr. Oesterling did not diagnose pneumoconiosis. Decision and Order at 20, *citing Osborne v. Clinchfield Coal Co.*, BRB No. 96-1523 BLA (Apr. 30, 1998)(recon. en banc)(unpub.). Thus, the administrative law judge found that Dr. Stiles's opinion was entitled to controlling weight, because he "is a well-qualified pathologist with excellent credentials" and he was in the best position to comment on the cause of death, as he personally conducted the autopsy and reviewed medical records. *Id*. at 21. Accordingly, the administrative law judge determined that claimant established that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). *Id*.

B. Arguments on Appeal

Employer argues that the administrative law judge erred in discrediting the opinions of Drs. Renn and Tuteur and in determining that Dr. Stiles's opinion was entitled to controlling weight at 20 C.F.R. §718.205(c). Employer also maintains that Dr. Stiles's opinion does not satisfy the requirement that pneumoconiosis hastened the miner's death "through a specially defined process that reduced the miner's life by an estimable time." Employer's Reply Brief at 10, *quoting Eastover Mining Co. v. Williams*, 338 F.3d 501, 518, 22 BLR 2-625, 2-655 (6th Cir. 2003). Employer further alleges that the administrative law judge impermissibly required it to "rule out" coal workers' pneumoconiosis as a cause of the miner's death.

Employer's contentions have merit, in part.[6] The administrative law judge's determination that the death certificate bolstered Dr. Stiles's opinion, that cardiac dysrhythmia caused the miner's death, was not rational in light of the administrative law judge's finding that the death certificate was entitled to little probative weight. *See Wojtowicz*, 12 BLR at 1-165; *Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988). In addition, employer argues correctly that the administrative law judge did not adequately explain why he credited Dr. Stiles's statement that his autopsy examination was sufficient to detect the presence of a hematoma in the miner's neck over the statements of Drs. Renn and Tuteur, indicating that Dr. Stiles did not examine several anatomic structures key to the post-mortem diagnosis of the hematoma in question. *See Wojtowicz*, 12 BLR at 1-165; *see also Urgolites v. Bethenergy Mines, Inc.*, 17 BLR 1-20, 1-23 (1992) (holding that the administrative law judge did not explain how the autopsy prosector's ability to conduct a gross examination gave him an advantage over reviewing pathologists).

Furthermore, as employer contends, although the administrative law judge cited the proper standard before weighing the evidence relevant to whether pneumoconiosis hastened the miner's death, he did not apply this standard to Dr. Stiles's opinion. The United States Court of Appeals for the Sixth Circuit has held that pneumoconiosis must have hastened the miner's death through "a specially defined process that reduced the miner's life by an estimable time." *Williams*, 338 F.3d at 518, 22 BLR at 2-655. The administrative law judge determined that Dr. Stiles's opinion satisfied this standard without addressing his statements that: The coal dust in the miner's lungs "[*p*]*robably*" shortened the miner's life; that a definitive determination "would be up to his primary care physician to better help quantify because he took care of the individual; and that "[y]ou *could* have low oxygen causing a dysrhythmia because it *could* affect certain nerve bundles or certain fibers in the heart that would lead to an irregular heartbeat and in his demise." Claimant's Exhibit 2 at 23, 26 (emphasis added); *Wojtowicz*, 12 BLR at 1-165; *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1983). In light of employer's meritorious allegations of error regarding the administrative law judge's findings under 20 C.F.R. §718.205(c), we vacate the administrative law judge's determination that claimant established that pneumoconiosis was a contributing cause of the miner's death.

[6] We reject employer's assertion that the administrative law judge should have discredited Dr. Stiles's opinion, that pneumoconiosis hastened the miner's death, as it was contradicted by evidence in the record demonstrating that the miner did not have a respiratory impairment. The administrative law judge acted rationally in omitting this factor when weighing Dr. Stiles's opinion, as the only pulmonary function and blood gas studies admitted into the record were performed in 1979, twenty years prior to the miner's death. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Schetroma v. Director, OWCP*, 18 BLR 1-17 (1993); Employer's Exhibits 1, 10.

On remand, if the administrative law judge again finds clinical or legal pneumoconiosis established at 20 C.F.R. §718.202(a), he must re-evaluate the evidence to determine whether claimant has established death due to pneumoconiosis at 20 C.F.R. §718.205(c). When conducting this analysis, the administrative law judge must consider the respective qualifications of the physicians and the extent to which their conclusions regarding the cause of the miner's death are reasoned and documented. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325. In addition, if the administrative law judge again credits Dr. Stiles's opinion, he must explain how it established that a specifically defined process reduced the length of the miner's life in accordance with the Sixth Circuit's standard. Lastly, the administrative law judge must set forth his findings on remand in detail, including the underlying rationale, as required by the APA. *See Wojtowicz*, 12 BLR at 1-165.

III. Administrative Law Judge's Attorney Fee Order

The administrative law judge awarded claimant's counsel a fee of $6,671.50, after subtracting 2.65 hours of services that were not performed before the Office of Administrative Law Judges (OALJ).[7] Employer challenges the administrative law judge's decision, arguing that counsel did not establish the reasonableness of his hourly rate, did not adequately document the expenses requested, and overstated the number of hours of services that he performed before the OALJ.[8]

Based upon our decision to vacate the administrative law judge's award of benefits, there has not been a successful prosecution of the claim at this time. 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); *Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993)(en banc) (Brown, J., concurring); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987). Consequently, we decline to address employer's objections to the administrative law judge's award of attorney fees at this time. If the administrative

[7] Counsel requested $7,069.00 for 36.25 hours of legal services at an hourly rate of $150.00 and expenses of $1,631.50 for Dr. Stiles's deposition in his amended fee petition. In counsel's initial fee petition, he sought compensation for the same hours of services, performed at the same hourly rate, and the same costs. Counsel misstated, however, the total dollar amount of the fee to which he was entitled.

[8] While employer argues that 2.65 of the requested hours were not performed before the administrative law judge, the administrative law judge addressed this argument in the Attorney Fee Order and reduced the requested hours accordingly.

law judge awards benefits on remand, employer may renew its challenge to the administrative law judge's Attorney Fee Order.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is 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