BRB Nos. 07-0359 BLA
and 07-0359 BLA-A

C.C.	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
WESTMORELAND COAL COMPANY	)	
	)	DATE ISSUED: 05/29/2008
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Third Remand Awarding Benefits and the Attorney Fee Order of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Renae Reed Patrick (Washington and Lee University Legal Clinic), Lexington, Virginia, for claimant.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order on Third Remand and the Attorney Fee Order (94-BLA-1240) of Administrative Law Judge Alice M. Craft awarding benefits and attorney's fees 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] This case involving a duplicate claim for benefits pursuant to 20 C.F.R. §725.309(d) (2000) is before the Board for the fourth time.[2] In the most recent appeal, the Board affirmed in part, and vacated in part, Administrative Law Judge Clement J. Kichuk's denial of benefits, and remanded the case for further consideration. [*C.C.*] *v. Westmoreland Coal Co*., BRB Nos. 03-0432 and 03-0432 BLA/A (April 29, 2004)(unpub.)(Smith, J. concurring and dissenting). The Board vacated Judge Kichuk's denial of claimant's motion to reopen the record to allow claimant to submit a new report from Dr. Wiot, dated December 20, 2002, in which the physician reviewed his previous reports and clarified his conclusions regarding the x-ray and computerized tomography (CT) scan evidence. *Id.* Specifically, the Board held that Judge Kichuk failed to determine whether claimant demonstrated good cause for the untimely submission of Dr. Wiot's report, pursuant to 20 C.F.R. §725.456(b)(1). *Id.* In addition, the Board vacated Judge Kichuk's finding that the medical opinion evidence did not establish the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). *Id*. The Board instructed Judge Kichuk to weigh the relevant evidence together in accordance with the standard enunciated by the United States Court of Appeals for the Fourth Circuit in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22

[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). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The complete procedural history of this case as set forth in the Board's three prior decisions is incorporated herein by reference. [*C.C.*] *v. Westmoreland Coal Co*., 21 BLR 1-69 (1997); [*C.C.*] *v. Westmoreland Coal Co*., BRB Nos. 00-0183 and 00-0183 BLA/A (April 13, 2001)(unpub.), and [*C.C.*] *v. Westmoreland Coal Co*., BRB Nos. 03-0432 and 03-0432 BLA/A (April 29, 2004)(unpub.)(Smith, J., concurring and dissenting). At this point in the claim proceedings, the Board has affirmed Administrative Law Judge Clement J. Kichuk's finding that a material change in conditions was established pursuant to 20 C.F.R. §725.309(d) (2000) based on his finding that total disability was established, and Judge Kichuk's findings that the x-ray evidence did not establish the existence of either simple or complicated pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (3). [2001] [*C.C.*] slip op. at 6, 8.

BLR 2-162 (4th Cir. 2000).[3] *Id.* Finally, the Board rejected employer's contention on cross-appeal that Judge Kichuk erred in retroactively applying the revised regulation set forth at 20 C.F.R. §718.201. *Id.*

On remand, the case was reassigned, without objection, to Administrative Law Judge Alice M. Craft (the administrative law judge). Prior to issuing her decision, the administrative law judge addressed several motions. Initially, in an Order dated March 6, 2006, the administrative law judge granted claimant's motion to reopen the record to allow for the submission of Dr. Wiot's December 20, 2002 report. In the same Order, the administrative law judge denied employer's motion to be dismissed as the responsible operator, rejecting employer's contention that the admission of Dr. Wiot's report violated employer's right to due process. Instead, by Order dated March 14, 2006, the administrative law judge held the record open to allow employer to depose Dr. Wiot. Following Dr. Wiot's deposition, claimant submitted a second motion to reopen the record to "complete" Dr. Wiot's opinion, by having Dr. Wiot review additional x-rays and CT scans. In an Order dated August 8, 2006, the administrative law judge denied claimant's second motion to reopen the record, and set the briefing schedule. After the submission of briefs by both parties, employer moved to strike claimant's brief on several grounds.

In a Decision and Order on Third Remand Awarding Benefits dated December 27, 2006, the administrative law judge initially denied employer's motion to strike claimant's brief. Turning to the merits of entitlement, the administrative law judge noted the parties' stipulation that claimant established thirty years of coal mine employment, and found that the new evidence from Dr. Wiot supported the prior findings that claimant did not establish simple clinical pneumoconiosis or complicated pneumoconiosis by the x-ray and CT scan evidence. However, the administrative law judge found that claimant established the existence of "legal" pneumoconiosis, in the form of chronic obstructive pulmonary disease (COPD) due in part to coal dust exposure, pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). The administrative law judge further found that claimant established that his totally disabling respiratory impairment is due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge awarded benefits. In an Attorney Fee Order dated April 10, 2007, the administrative law judge granted the fee petitions submitted by claimant's counsel and claimant's lay representative, approving the hourly rate, the number of hours, and the expenses requested. Attorney Fee Order, issued April 10, 2007.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

In the present appeal, employer challenges the administrative law judge's March 6, 2006 Order granting claimant's motion to reopen the record for the submission of Dr. Wiot's December 20, 2002 report, and denying employer's motion to be dismissed as the responsible operator. Employer also challenges the administrative law judge's denial of its motion to strike claimant's brief. In addition, employer contends that, through the misapplication of *Compton*, 211 F.3d at 203, 22 BLR at 2-162, the Board in its last decision erred in vacating Judge Kichuk's finding that the existence of legal pneumoconiosis was not established at 20 C.F.R. §718.202(a)(4), and that, therefore, Judge Kichuk's prior determination should be reinstated. In the alternative, employer contends that the current administrative law judge erred in her consideration and weighing of the medical opinions in finding the existence of pneumoconiosis arising out of coal mine employment established pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b). Finally, employer challenges the administrative law judge's award of attorney's fees to claimant's counsel, contesting both the hourly rate and the amount of expenses claimed. Claimant responds, urging affirmance of the administrative law judge's decision awarding benefits and the Order awarding attorney's fees. On cross-appeal, claimant also challenges the administrative law judge's March 6, 2006 Order denying employer's motion to be dismissed as the responsible operator. In addition, claimant challenges the administrative law judge's August 8, 2006 Order denying claimant's second motion to reopen the record to "complete" the opinion of Dr. Wiot. The Director, Office of Workers' Compensation Programs (the Director), has filed letters in response to the responsible operator arguments raised in employer's appeal, and in claimant's cross-appeal, urging the Board to affirm the administrative law judge's denial of employer's motion to be dismissed as the responsible operator.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965). The Board reviews the administrative law judge's procedural rulings for abuse of discretion. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-153 (1989)(*en banc*).

Initially, we reject employer's contention that the administrative law judge abused her discretion in granting claimant's initial motion to reopen the record for the inclusion of Dr. Wiot's report dated December 20, 2002, in which the physician reviewed his previous reports and clarified his conclusions regarding the x-ray and CT scan evidence. Specifically, employer asserts that the administrative law judge failed to determine, pursuant to 20 C.F.R. §725.456, that claimant established good cause for the admission of Dr. Wiot's report several years after the evidentiary record was closed. Employer's Brief at 36-38. Employer further contends that because Dr. Wiot's report contains reviews of x-ray and CT films that have now been destroyed, the admission of Dr. Wiot's report

violated employer's right to due process of law. Employer's Brief at 39. Employer asserts that because it cannot now have the x-ray and CT films reread by an expert of its choice, employer has been precluded from taking "such action as . . . [it] considers appropriate in response" to Dr. Wiot's report, *see* 20 C.F.R. §725.456(b)(4), and thus has been denied a full and fair hearing as required by the Administrative Procedure Act (APA), 5 U.S.C. §556(d), 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's Brief at 39.

Contrary to employer's contention, the transcript of the telephone conference held on February 23, 2005, at which the administrative law judge discussed the matter with the parties, reveals that the administrative law judge found that the x-ray and CT scan evidence on the issue of the existence of pneumoconiosis was incomplete, and determined that Dr. Wiot's report would clarify the case. Feb. 23, 2005 Tr. at 12-14. Therefore, the administrative law judge exercised her discretion to reopen the record for the submission of Dr. Wiot's December 20, 2002 report. Feb. 23, 2005 Tr. at 12-14. In her December 27, 2006 decision, the administrative law judge explicitly clarified that her February 23, 2005 determination to reopen the record had been for "good cause." Decision and Order on Third Remand at 5.

Further, employer has not established how the destruction of the x-ray and CT films referenced by Dr. Wiot in his December 20, 2002 report has deprived employer of its ability to defend its interests. Dr. Wiot did not rely on any new evidence, or reread the prior evidence, but, rather, he simply reviewed his earlier reports and elaborated on his opinions. Claimant's Exhibit 31. In addition, each of the x-ray and CT films reviewed by Dr. Wiot was previously read by several experts of employer's choosing, and all of these readings are contained in the record. Decision and Order on Third Remand at 9-13; Employer's Exhibits 1-3, 5-7, 9, 10. Moreover, the administrative law judge afforded employer the additional protection of deposing Dr. Wiot, and she ultimately determined that Dr. Wiot's deposition testimony supported the prior finding that claimant had *not* established the existence of simple or complicated pneumoconiosis through the x-ray or CT scan evidence. Decision and Order on Third Remand at 25. Therefore, we hold that employer has failed to establish that the administrative law judge abused her discretion or violated employer's due process rights in admitting the December 20, 2002 report of Dr. Wiot.[4] 20 C.F.R. §725.456(b); *see Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762

[4] We also reject employer's contention that the administrative law judge's admission of Dr. Wiot's report violates 20 C.F.R. 718.102(d), which prohibits x-ray films from being used as evidence when they are unavailable for re-readings. First, the regulation does not apply to the admission of medical reports. Second, as noted above, employer has, in fact, had each x-ray and CT scan that was read by Dr. Wiot reread several times by experts of employer's choosing. Decision and Order on Third Remand at 9-13; Employer's Exhibits 1-3, 5-7, 9, 10.

n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir 1999); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 802-03, 21 BLR 2-302, 2-311 (4th Cir. 1998); *Clark*, 12 BLR at 1-153; *White v. Director, OWCP*, 7 BLR 1-348, 1-351 (1988).

We next reject employer's contention that the administrative law judge abused her discretion in denying employer's motion to strike claimant's brief without explicitly addressing employer's objections thereto. Employer's Brief at 45-46. In support of its motion, employer asserted that claimant's brief was submitted twelve days late, was excessive in length, raised arguments that had previously been rejected, and contained citations to, and attachments of, irrelevant case law. In her decision, the administrative law judge noted, in detail, each of employer's objections and further noted claimant's response to each objection. Decision and Order on Third Remand at 6-7. The administrative law judge then concluded that, having considered the arguments of the parties, employer's motion to strike should be denied. Decision and Order on Third Remand at 7. As the administrative law judge's decision reflects that she fully considered each of employer's objections, but was persuaded by claimant's responses, and as employer has failed to allege any specific harm through the admission of claimant's brief and attachments, we hold that employer has failed to establish that the administrative law judge abused her discretion in denying employer's motion to strike claimant's brief. *See Mays*, 176 F.3d at 762 n.10, 21 BLR at 2-603 n.10; *Lockhart*, 137 F.3d at 802-03, 21 BLR at 2-311; *Clark*, 12 BLR at 1-153; *White*, 7 BLR at 1-351 (1988).

We next address employer's contention that, in its prior decision, the Board misapplied *Compton* to vacate Judge Kichuk's finding at 20 C.F.R. §718.202(a)(4), and that, therefore, the Board's prior holding should not be considered controlling as the "law of the case."[5] Employer's Brief at 11. Specifically, employer challenges the Board's

[5] The doctrine of the "law of the case" is a discretionary rule of practice based on the policy that once an issue is litigated and decided, the matter should not be re-litigated. *United States v. U.S. Smelting Refining & Mining Co.*, 339 U.S. 186 (1950), *reh'g denied*, 339 U.S. 972 (1950). Specifically, "the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983); *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989)(Brown, J. dissenting). Exceptions to the law of the case doctrine include: a change in the underlying fact situation, intervening controlling authority demonstrating that the initial decision was erroneous, or a showing that the Board's initial decision was either clearly erroneous or resulted in manifest injustice. *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*)(Hall, C.J., and Nelson, J., concurring and dissenting).

holding that, because Judge Kichuk "apparently found that the x-ray evidence, which relates to the existence of medical pneumoconiosis, was dispositive in evaluating the medical opinion evidence on the issue of legal pneumoconiosis, the manner in which the administrative law judge weighed the evidence under *Compton*, 211 F.3d 203, 22 BLR 2-162, [was] flawed." [2004] [*C.C.*], slip op. at 8; Employer's Brief at 11-12. Employer asserts that the Board erred, because the court in *Compton* explicitly stated that "evidence showing that a miner does not have medical pneumoconiosis is [not] *irrelevant* to the question of whether the miner has established pneumoconiosis for purposes of a black lung claim." *Compton*, 211 F.3d at 210-11 n.8, 9, 22 BLR 2-173-74 n.8, 9; Employer's Brief at 12-13.

Employer's argument lacks merit. Contrary to employer's contention, the Board explicitly recognized that evidence showing that a miner does not have medical pneumoconiosis may be relevant to the question of whether the miner has established pneumoconiosis, but vacated the administrative law judge's finding at 20 C.F.R. §718.202(a)(4) because the Board could not ascertain whether Judge Kichuk had properly weighed the evidence pursuant to *Compton*, or whether he had, as claimant asserted, "confused the issues of medical pneumoconiosis and legal pneumoconiosis in his consideration of the medical opinions."[6] [2004] [*C.C.*], slip op. at 8; *see Consolidation Coal Co. v. Held*, 314 F.3d 184, 187 n.2, 22 BLR 2-564, 2-571 n.2 (4th Cir. 2002). As employer has not shown that the Board's holding was clearly erroneous, or set forth any other valid exception to the law of the case doctrine, we decline to disturb our prior determination to vacate Judge Kichuk's finding at 20 C.F.R. §718.202(a)(4). *See U.S. v. Aramony*, 166 F.3d 655 (4th Cir. 1999); *Church v. Eastern Associated Coal* Corp., 20 BLR 1-8 (1996); *Coleman v. Ramey Coal* Co., 18 BLR 1-9 (1993); *see also Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 (2000)(*en banc*)(Hall, C.J., and Nelson, J., concurring and dissenting).

Turning to the merits of entitlement, in order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these requisite elements precludes

[6] Specifically, the Board stated: "In this case, we are unable to discern whether the administrative law judge actually weighed the evidence supportive of a finding of legal pneumoconiosis contained in the opinions of Drs. Zaldivar and Rasmussen with the conflicting evidence in the other reports of no legal pneumoconiosis, or whether the administrative law judge rejected the evidence supportive of a finding of legal pneumoconiosis because it was outweighed by evidence that established no medical pneumoconiosis." [2004] [*C.C.*], slip op. at 8.

entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer contends that the administrative law judge erred in finding that claimant established the existence of "legal" pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4).[7] Specifically, employer contends that the administrative law judge cited improper reasons for rejecting the opinions of employer's experts, Drs. Stewart, Fino, Renn, Crisalli, and Loudon, and for crediting the opinions of Drs. Rasmussen, Zaldivar, and Daniel. Employer's Brief at 15-32. We disagree.

Initially, we reject employer's contention that the administrative law judge erred in finding that Dr. Loudon did not address the issue of legal pneumoconiosis. Employer's Brief at 21-22. Dr. Loudon opined that claimant does not have coal workers' pneumoconiosis, but does have a mild pulmonary impairment due to COPD, chronic bronchitis, and emphysema. Employer's Exhibit 7. Contrary to employer's contention, Dr. Loudon did not state that coal mine dust was not a factor in claimant's COPD, chronic bronchitis and emphysema, but stated only that coal workers' pneumoconiosis was not implicated in claimant's impairment. We, therefore, uphold the administrative law judge's finding that Dr. Loudon's opinion focused on the presence or absence of clinical coal workers' pneumoconiosis, and its effects, if any, on claimant's impairment, and did not address, relevant to the existence of legal pneumoconiosis, the etiology of claimant's COPD, chronic bronchitis, or emphysema. Decision and Order on Third Remand at 29; *see* 20 C.F.R. §718.201.

Similarly, we uphold the administrative law judge's determination that Dr. Crisalli primarily focused on the presence or absence of clinical coal workers' pneumoconiosis, and did not adequately address whether claimant has legal pneumoconiosis. Decision and Order on Third Remand at 29; Employer's Brief at 20. The administrative law judge noted, correctly, that in his initial medical opinion, Dr. Crisalli diagnosed clinical pneumoconiosis based on x-ray and pulmonary function studies. Dr. Crisalli also diagnosed a mild restrictive defect, most likely related to coal dust exposure, and a mild obstructive defect, which he concluded was most likely due to smoking, but may be in part due to coal dust exposure. Director's Exhibit 33. In his subsequent reports,

[7] Neither party challenges the administrative law judge's conclusion that Dr. Wiot's newly admitted December 20, 2002 report and May 18, 2006 deposition testimony supported the prior findings that claimant did not establish the existence of simple clinical pneumoconiosis at 20 C.F.R. §718.202(a)(1), or complicated pneumoconiosis at 20 C.F.R. §§718.202(a)(3), 718.304(a)-(c). It is therefore affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

however, Dr. Crisalli stated that he had changed his opinion as to the possible role of coal dust exposure, "due to the massive amount of x-ray data" that indicates that claimant does not have occupational pneumoconiosis. Employer's Exhibit 5. Because Dr. Crisalli did not explain why he excluded coal dust as a contributing factor to claimant's COPD once he decided the x-ray and CT scan evidence did not support a diagnosis of clinical pneumoconiosis, the administrative law judge acted within her discretion in according Dr. Crisalli's opinion no weight on the issue of legal pneumoconiosis. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096, 17 BLR 2-123, 2-127 (4th Cir. 1993); Decision and Order on Third Remand at 29.

In evaluating the opinions of Drs. Stewart, Fino, and Renn, the administrative law judge properly found that they each opined that claimant suffered from COPD due to smoking, with no contribution from coal dust exposure. Decision and Order on Third Remand at 27-28; Director's Exhibit 33; Employer's Exhibits 1, 2, 4-7, 9, 11. In determining the probative value to be placed on each opinion, the administrative law judge noted, correctly, that Dr. Stewart explained that because claimant's impairment was obstructive, represented by a reduced FEV1 to FVC ratio on his pulmonary function tests, it was not due to coal dust exposure, which causes restrictive impairment. Decision and Order on Third Remand at 18, 27. The administrative law judge also noted, correctly, that both Drs. Renn and Fino explained their conclusions that coal dust exposure does not cause clinically significant obstructive lung disease. Decision and Order on Third Remand at 19, 21, 28; Employer's Exhibits 8 at 33; 11 at 22-23. Contrary to employer's argument, the administrative law judge specifically recognized that the opinions of Drs. Stewart, Renn, and Fino may not be hostile to the Act, as they did not explicitly state that coal dust can never cause obstructive lung disease, and she did not discredit them on this basis. Decision and Order on Third Remand at 27-28; *see Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); Employer's Brief at 25. Rather, the administrative law judge acted within her discretion in finding that the statements, outlined above, by Drs. Stewart, Renn, and Fino are inconsistent with the prevailing view of the medical community, cited by the Department of Labor when it adopted the revised regulations, that coal dust exposure can be an independent cause of obstructive respiratory impairment. Decision and Order on Third Remand at 26-28; 65 Fed. Reg. 79,938, 79,943 (Dec. 20, 2000); *see Consolidation Coal Co. v. Director, OWCP* [*Beeler*], 521 F.3d 723, --- BLR --- (7th Cir. 2008).

Furthermore, there is no merit to employer assertion that in weighing the opinion of Dr. Renn, the administrative law judge improperly shifted the burden of proof to employer to rule out coal dust exposure as a cause of claimant's COPD. Employer's Brief at 23. Rather, the administrative law judge permissibly rejected Dr. Renn's opinion because she found that it was devoid of any explanation as to why claimant's respiratory

condition was due only to smoking, and could not be related, at least in part, to coal dust exposure. Decision and Order at 13; *see Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-2-127; *Clark*, 12 BLR at 1-155. Nor is there any merit to employer's contention that the administrative law judge impermissibly discredited Dr. Fino's opinion based on his testimony to the Department of Labor, given in 2000, that is not in evidence in this case. Employer's Brief at 32. Rather, the administrative law judge merely noted that Dr. Fino's opinion in the instant claim is consistent with his later testimony, that was rejected by the Department of Labor as inconsistent with the accepted medical views underlying the revised regulations. Decision and Order on Third Remand at 28.

Additionally, there is no merit to employer's contention that the administrative law judge erred in crediting the opinions of Drs. Rasmussen, Zaldivar, and Daniel, on the issue of the existence of legal pneumoconiosis because the physicians relied on discredited x-ray and CT scan evidence. Employer's Brief at 15-16. While an administrative law judge may not ignore evidence that a physician based a diagnosis of clinical pneumoconiosis on a discredited x-ray, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997), an administrative law judge is not required to treat an x-ray or CT scan read as negative for clinical pneumoconiosis as weighing against a physician's diagnosis of legal pneumoconiosis. *See Compton*, 211 F.3d at 210, 22 BLR at 2-173. Nor is there merit to employer's contention that the administrative law judge erred in crediting Dr. Rasmussen's opinion as well-supported by the medical literature, without resolving the conflicting medical opinions of Drs. Fino and Renn as to the import of that medical literature. Employer's Brief at 24. Contrary to employer's arguments, the administrative law judge recognized that, in contrast to employer's experts, Dr. Rasmussen's opinion, and the medical literature upon which he relied, were consistent with the medical literature cited by the Department of Labor when it adopted the revised regulations. Claimant's Exhibit 6; Decision and Order on Third Remand at 29. Because the credibility of the medical experts is a matter of discretion within the purview of the trier-of-fact, we affirm the administrative law judge's decision to accord great weight to Dr. Rasmussen's opinion as well-documented and well-reasoned. *See Compton*, 211 F.3d at 211, 22 BLR at 2-175; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28; *Grizzle*, 994 F.2d at 1096, 17 BLR at 2-127; *Clark*, 12 BLR at 1-155; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); Decision and Order on Third Remand at 29.

Thus, although we agree with employer that the administrative law judge confusingly characterized the opinions of Drs. Stewart and Renn as not addressing the issue of legal pneumoconiosis, as discussed above, a review of the administrative law judge's decision reveals that she properly evaluated each opinion pursuant to 20 C.F.R. §718.202(a)(4), to ascertain which physician better explained the etiology of claimant's respiratory impairment in light of all of the potential causative factors for claimant's

chronic obstructive disease. In addition, while, as employer asserts, the administrative law judge did not explain her statement that the opinions of many of employer's experts, including Drs. Stewart, Renn, Fino, and Crisalli were "less than objective," *see* Decision and Order on Third Remand at 30, the totality of the administrative law judge's decision reflects that she properly weighed the opinions of the physicians, and there is no indication that she made a bald conclusion of bias or prejudice, or that she accorded the opinions diminished weight on this basis. Rather, the administrative law judge properly found that claimant satisfied his burden of proof based on the reasoned and documented opinions of Drs. Rasmussen and Zaldivar, which outweighed the contrary reports of employer's experts. Therefore, we affirm, as supported by substantial evidence, the administrative law judge's determination that claimant established the existence of legal pneumoconiosis under 20 C.F.R. §718.202(a)(4). *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 440-441, 21 BLR at 2-274.

We next address employer's contention that, prior to determining whether claimant met his burden of proof to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a), the administrative law judge erred in failing to weigh the medical opinions of Drs. Zaldivar, Rasmussen, and Daniel, supporting the existence of legal pneumoconiosis, together with the x-ray and CT scan evidence showing that claimant does not have clinical pneumoconiosis, as required by *Compton*. Employer's Brief at 15. Initially, we note that in beginning her analysis of the medical evidence, the administrative law judge specifically acknowledged that, because the evidence in this case is conflicting as to the existence of pneumoconiosis, *Compton* required that she weigh all of the evidence together in determining whether claimant established the existence of pneumoconiosis. Decision and Order on Third Remand at 25. In addition, in concluding that legal pneumoconiosis was established, the administrative law judge principally relied on the opinions of Drs. Zaldivar and Rasmussen, and accorded only "some" probative value to the opinion of Dr. Daniel, based on his lesser qualifications and internal inconsistencies in his report. Decision and Order on Third Remand at 27, 30.

In crediting the opinion of Dr. Zaldivar, contrary to employer's assertion, the administrative law judge specifically noted that the physician's diagnosis of clinical pneumoconiosis was contrary to her finding that the weight of the x-ray evidence did not establish the existence of pneumoconiosis, but permissibly found that his opinion as to the existence of legal pneumoconiosis was nonetheless well-documented, well-reasoned and supported by considerable medical data. Decision and Order on Third Remand at 27. In addition, the administrative law judge noted that Dr. Rasmussen had acknowledged that the majority of the x-ray and CT scan evidence was negative for pneumoconiosis, but had persuasively explained why this evidence did not alter his opinion that claimant suffered from COPD due in part to coal dust exposure. Decision and Order on Third Remand at 23; Claimant's Exhibits 7, 8. Thus, as the administrative law judge properly considered the opinions of Drs. Zaldivar and Rasmussen in light of the contrary medical evidence, consistent with *Compton*, and explained that her determination that claimant

had established the existence of legal pneumoconiosis was based on her "weighing of all the relevant evidence," we affirm the administrative law judge's finding that claimant established the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a). Decision and Order on Third Remand at 30.

Finally, we reject employer's contention that the administrative law judge erred in failing to explain her conclusion that claimant established, pursuant to 20 C.F.R. 718.203(b), that his pneumoconiosis arose out of coal mine employment. Employer's Brief at 34. The administrative law judge clearly stated that claimant "established a causal relationship between his obstructive lung disease and his coal mine employment through the opinions of Dr. Rasmussen and Dr. Zaldivar." Decision and Order on Third Remand at 31.

Pursuant to 20 C.F.R. §718.204(c) the administrative law judge found that coal dust exposure is a substantially contributing cause of claimant's pulmonary disability. Decision and Order on Third Remand at 31-32. Employer, does not challenge the administrative law judge's disability causation finding on appeal. The finding is therefore affirmed. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Consequently, we affirm the administrative law judge's award of benefits.

Having affirmed the administrative law judge's determination that claimant is entitled to benefits, we now turn to employer's assertion that the administrative law judge erred in declining to dismiss employer as the responsible operator liable for payment of those benefits. Employer concedes that the Board previously held, pursuant to *Lester v. Mack Coal Co.*, 21 BLR 1-126 (1999)(*en banc*)(McGranery, J., concurring and dissenting), and *Mitchem v. Bailey Energy, Inc.*, 21 BLR 1-161 (1999)(*en banc*)(Hall and Nelson, J.J., concurring and dissenting), that employer is the responsible operator, and that this holding is now the law of the case. [2001] [*C.C.*], slip op. at 9; Employer's Reply Brief at 8. Employer asserts, however, that the Board's prior holding is "clearly erroneous and would work a manifest injustice," and that, therefore, employer has established an exception to the law of the case doctrine. Employer's Reply Brief at 10. Employer's contention is without merit.

First, employer's current contention that its due process rights were violated when the Department of Labor identified Westmoreland Coal Company as the responsible operator, instead of pursuing the corporate officers of claimant's most recent employer, McKenzie Mining Company, is the same argument that was rejected by the Board in its 2001 decision. Employer's Response Brief at 3, 7, 9, 13; [2001][C.C.], slip op. at 3, 9 n.7. Employer now embellishes its prior argument by asserting additional due process violations. Specifically, employer contends that, in connection with claimant's first claim, employer was deprived of due process of law by the Department of Labor's delay

in identifying employer as the responsible operator. Employer's Response Brief at 3-9. In connection with the current claim, employer again contends that the administrative law judge's admission of Dr. Wiot's December 20, 2002 report violated employer's right to due process of law, requiring that employer be dismissed as the responsible operator and that liability for benefits be transferred to the Trust Fund. Employer's Brief at 40. These arguments also fail.

The United States Court of Appeals for the Fourth Circuit has held that due process is violated by the Department's delay in identifying the responsible operator if that party is deprived of the opportunity to mount a meaningful defense to the proposed deprivation of its property. *Lockhart*, 137 F.3d at 807, 21 BLR at 2-320; Director's Response to Employer at 2. In this case, the administrative law judge found, correctly, that any delay by the Department in identifying employer as the responsible operator in connection with claimant's initial claim was rendered moot by the final denial of that claim on October 11, 1991. Decision and Order on Third Remand at 2, 5. With respect to the instant claim, as we discussed above, the administrative law judge's admission of Dr. Wiot's December 20, 2002 report did not deprive employer of due process. Consequently, we affirm the administrative law judge's corollary determination that the admission of Dr. Wiot's report did not require that employer be excused from liability on due process grounds. Decision and Order on Third Remand at 6. We decline to address claimant's similar contentions, raised on cross-appeal, challenging employer's liability for the payment of benefits.[8] Claimant lacks standing to contest the responsible operator determination. *See Seewald v. Imperial Coal Co.*, 8 BLR 1-469, 1-470 (1986). Therefore, we hold that the administrative law judge properly declined to dismiss employer as the responsible operator.

Finally, we address employer's arguments regarding the administrative law judge's award of attorney's fees to claimant's counsel. Subsequent to the issuance of the administrative law judge's Decision and Order, claimant's counsel at the time, Robert F. Cohen, Jr.,[9] submitted a complete, itemized fee petition to the administrative law judge for work performed between July 28, 1998 and January 5, 2007, requesting a fee of $46,022.58 for 180.25 hours of attorney services at the rate of $250.00 per hour, plus an additional $960.08 in expenses. Employer filed objections to the requested hourly rate

[8] In addition, because we affirm the administrative law judge's award of benefits, we need not address claimant's additional challenge to the administrative law judge's August 8, 2006 Order denying claimant's second motion to reopen the record to "complete" the opinion of Dr. Wiot. Claimant's Petition for Review at 43.

[9] Effective April 7, 2008, Robert F. Cohen, Jr., withdrew as counsel for claimant before the Board.

and to several expense entries. After considering employer's objections and claimant's counsel's response thereto, the administrative law judge approved the request for attorney's fees in full. The administrative law judge also considered an accompanying fee petition by John Cline, who represented claimant before the Office of Administrative Law Judges as a lay representative from October 2, 1995 to January 29, 1996. Noting that no objections to the lay representative fee had been filed, the administrative law judge approved the requested fee of $1,950.00 for 19.5 hours of work at the rate of $100.00 per hour. Accordingly, the administrative law judge directed employer to pay claimant's counsel the amount of $46,022.58, and claimant's lay representative the amount of $1,950.00, for services rendered to claimant in this case.[10]

The amount of an attorney's fee award 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, 1-108 (1998). The adjudicating officer must discuss and apply the regulatory criteria at 20 C.F.R. §725.366 in determining the amount of the fee award due. *See Lenig v. Director, OWCP*, 9 BLR 1-147 (1986).

We first address employer's contention that the administrative law judge's award of $250.00 per hour for claimant's counsel's services in this case is excessive. Employer's Brief at 50. Employer specifically asserts that counsel's current rate of $250.00 per hour exceeds the usual market rate charged by most attorneys in West Virginia or in federal black lung claims, and that the United States Court of Appeals for the Fourth Circuit has established that claimant's counsel's appropriate hourly rate for black lung claims is $200.00. Employer's Brief at 50-51. Employer further contends that, as claimant's counsel's affidavit establishes that he charged $200.00 per hour in federal black lung claims until the fall of 1998 when he raised his rate to $210.00, and that he did not raise his billing rates to $250.00 until the fall of 2005, the administrative law judge erred in awarding an hourly rate of $250.00 for any work completed prior to the fall of 2005. Employer's Brief at 49.

We reject employer's challenge to the administrative law judge's award of $250.00 per hour. The administrative law judge considered the factors set forth at 20 C.F.R. §725.366 and did not abuse her discretion in finding that the current hourly rate of $250.00 is "reasonable given the complexity of the claim and [claimant's counsel's] years of experience," and was "commensurate with the work done by him." Attorney Fee Order at 2; *see* 20 C.F.R. §725.366(b); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986).

[10] The administrative law judge's award of $1,950.00 to claimant's lay representative is affirmed as unchallenged on appeal. *See Coen*, 7 BLR at 1-33; *Skrack*, 6 BLR at 1-711.

We further reject employer's contention that the administrative law judge erred in awarding claimant's counsel $250.00 per hour for all work performed between 1998 and 2007, rather than awarding fees based upon the hourly rate that was in effect at the time the services were rendered. Employer's Brief at 49. In support of his fee petition, claimant's counsel explained that, pursuant to *Missouri v. Jenkins*, 491 U.S. 274, 284 (1989), he was requesting a billing rate of $250.00 an hour for the entire time period in which he represented claimant to compensate for the almost ten-year delay between the performance of his services and the payment for those services. Counsel's February 9, 2007 Letter in Support of Attorney Fee Petition at 7. The administrative law judge approved the requested augmentation, noting that it was consistent with the law of the Fourth Circuit. Attorney Fee Order at 2.

The United States Supreme Court has held that enhancement for the delay in payment of an attorney's fee is an "appropriate factor in what constitutes a reasonable attorney's fee" under a fee shifting statute. *Jenkins*, 491 U.S. at 284. In addition, the Fourth Circuit has also authorized the enhancement of a fee to compensate for delay in payment, *i.e.*, the passage of time between when the services were rendered and when the fee award becomes enforceable. *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 805, 21 BLR 2-631, 2-638 (4th Cir. 1999). Moreover, the Board has held that the factfinder may adjust the fee by employing any reasonable means to compensate counsel for delay, including the use of the current hourly rate. *Nelson v. Stevedoring Services of America*, 29 BRBS 90, 97 (1995), *citing Jenkins*, 491 U.S. at 282, 284. Therefore, the administrative law judge rationally found that claimant's counsel is entitled to an hourly rate of $250.00 for all work performed as enhancement for the delay in payment of the fees, and we affirm this finding. *See Jenkins*, 491 U.S. at 282, 284; *Kerns*, 176 F.3d at 805, 21 BLR at 2-638; *Nelson*, 29 BRBS at 97.

Finally, we reject employer's assertion that the administrative law judge erred in reimbursing claimant for clerical expenses such as postage, photocopying, and long distance telephone calls. In approving the requested expenses, the administrative law judge noted claimant's counsel's explanation that it was the regular business practice of his firm to bill expenses to clients, and determined that the claimed expenses were allowable under these circumstances. Attorney Fee Order at 2; Counsel's March 7, 2007 Letter in Response to Employer's Objections at 2-3. It is within the administrative law judge's discretion to determine whether expenses should be considered compensable or disallowed as overhead. *See Hawker v. Zeigler Coal Co.*, 22 BLR 1-168, 1-175 (2000); *Picinich v. Lockheed Shipbuilding*, 23 BRBS 128 (1989). Because employer has not demonstrated an abuse of discretion in the administrative law judge's award of a fee and expenses, we affirm the fee award. *See Jones*, 21 BLR at 1-108.

Accordingly, the administrative law judge's Decision and Order on Third Remand Awarding Benefits and the administrative law judge's Attorney Fee Order are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge