BRB No. 02-0401 BLA

ROBERT L. KIRK	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Awarding Benefits and Supplemental Decision and Order Granting Attorney Fees of Gerald M. Tierney, Administrative Law Judge, United States Department of Labor.

Robert F. Cohen, Jr. (Cohen, Abate & Cohen, L.C.), Morgantown, West Virginia, for claimant.

Williams S. Mattingly (Jackson & Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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 the Decision and Order on Remand - Awarding Benefits and the Supplemental Decision and Order Granting Attorney Fees (87-BLA-3223 and 94-BLA-1689) of Administrative Law Judge Gerald M. Tierney (the administrative law judge) 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 is before the Board for the third time. Most recently, the Board, in *Kirk v. Consolidation Coal Co.*, BRB No. 00-0662 BLA (Apr. 10, 2001), vacated the administrative law judge's findings with respect to the opinions of Drs. Renn, Fino, Rasmussen and Abrahams and instructed the administrative law judge to reconsider the substance of these opinions regarding the cause of claimant's totally disabling respiratory impairment.[2] The Board further held, *inter alia*, that the administrative law judge had not followed its order to reconsider the opinions of Drs. Renn and Fino, employer's experts, in light of the decision of the United States Court of Appeals for the Fourth Circuit[3] in *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended (the Black Lung Act). 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 provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c). The Board previously affirmed the administrative law judge's finding that claimant established total disability under 20 C.F.R. §718.204(c). *Kirk v. Consolidation Coal Co.*, BRB No. 98-0229 BLA (Apr. 28, 1999)(unpublished).

[3] The instant case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

304 (4th Cir. 1995).[4] The Board also remanded the case for the administrative law judge to

[4]The Board stated:

> In *Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995), and other cases, the United States Court of Appeals for the Fourth Circuit recognized that a physician's report is probative of the issue of causation, even if the physician determines, in contrast to the administrative law judge's finding, that the miner did not have pneumoconiosis, provided that the physician did not *actually premise* his opinion upon a conclusion that pneumoconiosis was absent. If the physician acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the disability, the Fourth Circuit has held that such an opinion is not premised upon the flawed assumption and is probative evidence regarding the source of a miner's totally disabling impairment. *See Ballard*, *supra*; *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co. [Hobbs II]*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995).

Kirk v. Consolidation Coal Co., BRB No. 00-0662 BLA (Apr. 10, 2001)(unpublished) at 4-5 n.1.

redetermine whether the medical opinions establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(4). The Board noted that it had previously affirmed the administrative law judge's finding that the x-ray evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), and instructed the administrative law judge to consider all the relevant evidence in accordance with the Fourth Circuit's decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Addressing employer's appeal of the administrative law judge's attorney fee award for work performed by counsel while the case was pending before the administrative law judge, the Board held that the administrative law judge did not perform the requisite analysis in considering counsel's drafting of the post-hearing brief. The Board indicated that although the administrative law judge found that taking thirty hours to produce a ninety-three page document was not excessive, the administrative law judge did not render a finding as to the core issue of whether counsel reasonably found it necessary to prepare a brief of this length in order to establish entitlement in this case. The Board thus vacated that portion of the administrative law judge's decision regarding the attorney fee petition and further remanded the case.

On remand, the administrative law judge stated that he continued to rely on the opinions of Drs. Rasmussen and Abrahams on the issues of the existence of pneumoconiosis and the cause of claimant's total respiratory disability. The administrative law judge credited the opinions of Drs. Rasmussen and Abrahams over the opinions of Drs. Renn and Fino. The administrative law judge specifically determined that the opinions of Drs. Rasmussen and Abrahams were sufficient to satisfy claimant's burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(4) and to establish that pneumoconiosis is a substantially contributing cause of claimant's totally disabling respiratory impairment. The administrative law judge also found, pursuant to *Compton*, that claimant established the existence of pneumoconiosis by a preponderance of the x-ray and medical opinion evidence, the two methods available to him. Accordingly, benefits were awarded. The administrative law judge then next considered the Board's remand instruction regarding claimant's attorney fee petition. The administrative law judge concluded that counsel reasonably found it necessary to prepare a ninety-three page post-hearing brief in order to establish entitlement in this case. The administrative law judge thus approved counsel's request for thirty hours of compensation for the preparation of the post-hearing brief.

By Supplemental Decision and Order Granting Attorney Fees dated March 11, 2002, the administrative law judge granted counsel a fee for services performed and for expenses incurred while the case was pending before the Office of Administrative Law Judges during two periods of time following remands by the Board. The administrative law judge awarded a fee in the amount of $2,868.75, representing 12.75 hours at $225.00 per hour. The administrative law judge also awarded an additional $1.39 in expenses. Accordingly, the administrative law judge ordered employer to pay counsel $2,870.17 in costs incurred and services rendered to claimant.

On appeal, employer contends that the administrative law judge failed to weigh properly the medical opinion evidence on the issue of disability causation, as directed by the Board. Employer also indicates that it continues to dispute the administrative law judge's prior finding, previously affirmed by the Board, that the preponderance of the x-ray evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1). Employer also argues that the administrative law judge erred in determining that the preponderance of the relevant evidence establishes the existence of pneumoconiosis at 20 C.F.R. §718.202 in this case. Employer, challenging the administrative law judge's Supplemental Decision and Order Granting Attorney Fees, contends that the administrative law judge erred in determining that the requested hourly rate of $225 is reasonable. Claimant responds, and urges affirmance of the decisions below. The Director, Office of Workers' Compensation Programs (the Director), has filed a response brief, arguing that the Board has misinterpreted the Fourth Circuit's decision in *Ballard*. Employer has filed a reply brief. Employer argues therein, *inter alia*, that if the Board accepts claimant's argument that the administrative law judge may properly discredit the opinions of Drs. Renn and Fino on disability causation, pursuant to the Fourth Circuit's decision in *Scott v. Mason Coal Co.*, 289 F.3d 263, BLR (4th Cir. 2002), then the case must be remanded to allow for further development of the record because *Scott* would constitute a change in law regarding what evidence is sufficient to meet claimant's burden on disability causation.[5] Employer alternatively argues that *Scott* is flawed, and should not be applied in this case, because the administrative law judge therein relied on the true doubt rule to find the existence of pneumoconiosis by x-ray evidence and did not make a valid finding of the existence of pneumoconiosis. Employer's Reply Brief at 6.

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 this Board and may not be disturbed. 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).

[5] The United States Court of Appeals for the Fourth Circuit, in *Scott v. Mason Coal Co.*, 289 F.3d 263, BLR (4th Cir. 2002), held that medical opinions finding that claimant's disability was not caused in part by occupational pneumoconiosis may carry, at most, little weight, where they directly contradict the administrative law judge's finding that claimant suffers from pneumoconiosis arising out of coal mine employment. The Fourth Circuit held that such opinions may not suffice as substantial evidence to support a finding that claimant's respiratory impairment is not caused at least in part by pneumoconiosis, where the physician has found that claimant does not have legal or medical pneumoconiosis and has found no symptoms arising out of his coal mine employment.

Employer challenges the administrative law judge's determination that the evidence establishes total disability due to pneumoconiosis. The regulation at C.F.R. §718.204(c)(1) provides:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in [20 C.F.R.] §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> > (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
> >
> > (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1). Further, the regulation at 20 C.F.R. §718.204(c)(2) provides, in pertinent part, that the cause or causes of a miner's total disability shall be established by means of a physician's documented and reasoned medical report. 20 C.F.R. §718.204(c)(2). Employer argues that the administrative law judge failed to follow the Board's remand instruction to "address the qualifications of [Drs. Renn, Fino, Rasmussen and Abrahams], the explanation of their conclusions, whether the documentation underlying their medical judgments actually relates to the conclusions rendered, and the sophistication and bases for the physicians' diagnoses." *See Kirk*, slip op. at 5. Employer argues that administrative gridlock has been reached in this case inasmuch as the administrative law judge failed to abide by the Board's rulings in reconsidering the opinions of Drs. Renn, Fino, Rasmussen and Abrahams. Employer further argues that the administrative law judge did not address the explanations offered by Drs. Renn, Fino, Rasmussen and Abrahams for their conclusions on disability causation, as directed by Board. Employer argues that the administrative law judge failed to analyze Dr. Rasmussen's opinion that although claimant's impairment is entirely consistent with one caused by cigarette smoking, some part or even a "major contributing factor" of the impairment is due to coal dust exposure, Claimant's Exhibits 1, 29 at 116-117, and that the administrative law judge likewise failed to address Dr. Renn's testimony regarding the studies relied on by Dr. Rasmussen. Finally, employer offers several reasons why the opinions of Drs. Abrahams and Rasmussen, that claimant's totally disabling respiratory impairment is due both to coal mine dust exposure and cigarette smoking, are not credible and should not have been credited by the administrative law judge. Claimant, in response, contends that the administrative law judge adequately resolved the issues regarding the relative qualifications of the physicians, the explanations provided for their

conclusions, whether the underlying evidence supports their conclusions, and that he fully evaluated the sophistication of, and bases for, the physicians' diagnoses, as directed by the Board.

Employer's contentions lack merit. As an initial matter, the administrative law judge fully addressed the relative qualifications of Drs. Renn, Fino, Rasmussen and Abrahams, specifically noting that Drs. Renn, Fino and Abrahams are Board-certified pulmonary specialists. Decision and Order on Remand at 3. The administrative law judge permissibly "reject[ed] the notion that Dr. Rasmussen is lesser qualified than the board-certified pulmonary specialists" and found that, although Dr. Rasmussen does not have the subspecialty certification in pulmonary medicine, he is uniquely qualified. Decision and Order on Remand at 3. Specifically, the administrative law judge explained that Dr. Rasmussen has extensive experience treating coal workers' pneumoconiosis and is an author in the field, that he has testified before Congress, he has held appointments in the field and has been awarded honors. The administrative law judge's findings are supported by substantial evidence and must be affirmed. 33 U.S.C. §921(b)(3); *see generally Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 21 BLR 2-23 (4th Cir. 1997).

Further, the record reflects that the administrative law judge thoroughly considered the substance of, and the support provided for, the opinions expressed by Drs. Rasmussen, Abrahams, Renn and Fino regarding the source of claimant's respiratory disability. The administrative law judge specifically noted Dr. Rasmussen's testimony that it was possible for all of claimant's impairment to be due to cigarette smoking, as well as the physician's clarification, offered on cross-examination, that this was not his opinion. Decision and Order on Remand at 2; *see* Claimant's Exhibits 29, 116, 145. Dr. Rasmussen opined that there is no clear way in which to distinguish between the two primary risk factors causing claimant's impairment because each may produce the impairment independent of the other. Dr. Rasmussen concluded that claimant's exposure to coal dust is at least a major contributing factor in his total respiratory disability. Claimant's Exhibit 1. Dr. Abrahams opined that he could not numerically quantify the contribution coal workers' pneumoconiosis made to claimant's totally disabling pulmonary impairment. Director's Exhibit 102 at 56-57. Dr. Abrahams added that two major diseases are combining to cause claimant's disabling impairment, namely coal workers' pneumoconiosis and ARDS. He added that claimant would still be totally disabled if he had not smoked cigarettes. *Id*. at 55-56. Dr. Abrahams also stated that claimant's exposure to coal mine dust is a significant contributing factor in his disability. Claimant's Exhibit 16. The administrative law judge properly found that the fact that Drs. Rasmussen and Abrahams were not able to apportion or quantify in percentages the effects which claimant's exposure to coal mine dust and cigarette smoking had on his impairment, did not render the physicians' opinions unreasoned. Decision and Order on Remand at 4; 20 C.F.R. §718.204(c); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR

2-225 (4th Cir. l990); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); *see generally Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48 (1990). The administrative law judge acted within his discretion in finding that the opinions of Drs. Rasmussen and Abrahams are documented and reasoned and outweigh the contrary opinions of Drs. Renn[6] and Fino. *Underwood*, *supra*; *Doss v. Director, OWCP*, 53 F.3d 654, 19 BLR 2-181 (4th Cir. 1995).

Employer next asserts that the administrative law judge impermissibly discounted the opinions of Drs. Renn and Fino on the basis that the physicians failed to diagnose clinical or legal pneumoconiosis as envisioned by the Act or regulations, by relying on the newly revised regulations and related comments published in the Federal Register. The administrative law judge stated that in the comments to the revised regulations, the Department of Labor reviewed criticisms of studies that "were the same or similar to those discussed by Drs. Renn and Rasmussen. The criticisms and flaws were offered by Dr. Fino, who also proffered an opinion in this case. The Department of Labor considered those criticisms and flaws and did not find them persuasive." Decision and Order on Remand at 2. The administrative law judge also stated that the criticisms Dr. Renn expressed against the data Dr. Rasmussen relied on were the same or similar to those Dr. Fino expressed to the Department of Labor, which did not find these criticisms persuasive. *Id*. at 4. Employer

[6] Claimant disagrees with the Board's statement in *Kirk v. Consolidation Coal Co.*, BRB No. 00-0662 BLA (Apr. 10, 2001)(unpublished) that "Dr. Renn did not exclude the possibility that pneumoconiosis, whether clinical or legal, can cause an obstructive defect. He indicated that the degree of obstruction caused by coal dust exposure is usually less than that experienced by claimant. Employer's Exhibit 21 at 24, 69." *Kirk*, slip op. at 4. Claimant notes Dr. Renn's testimony that coal dust exposure does not cause obstructive airways disease unless the miner develops complicated pneumoconiosis, *see* Employer's Exhibit 13 at 15, and that coal dust exposure does not cause a clinically significant effect, in terms of obstructive impairment. Employer's Exhibit 21 at 31, 75-79. Claimant argues that Dr. Renn's testimony, that exposure to coal mine dust does not cause a *clinically significant* obstructive impairment, which claimant has, is contrary to the Act. Claimant argues that the administrative law judge, in his initial Decision and Order, correctly found that Dr. Renn's opinion was not credible because he excluded obstructive impairments from the legal definition of pneumoconiosis, and his opinion is "not saved" by his testimony that coal dust exposure may cause statistically significant obstructive lung disease, a condition which, claimant asserts, is not compensable under the Act. Claimant thus asks the Board to revisit its "conclusion" regarding Dr. Renn's opinion. Claimant's Brief at 31 n.16. Inasmuch as the administrative law judge on remand properly found that Dr. Renn's opinion was outweighed by the opinions of Drs. Rasmussen and Abrahams, *see* discussion, *supra*, we need not address further claimant's argument.

argues that the administrative law judge's reliance on the newly revised regulations and the Federal Register is contrary to the Board's holding in *Kirk v. Consolidation Coal Co.*, BRB No. 00-0662 BLA (Apr. 10, 2001)(unpublished), that the opinions of Drs. Renn and Fino "are not inconsistent with either the newly promulgated definition of pneumoconiosis [at 20 C.F.R. §718.201(a)(2)] or the case law" of the Fourth Circuit. *Kirk*, slip op. at 4.

Claimant contends, in response, that the administrative law judge did not impermissibly apply the newly revised regulations retroactively, but properly resolved the conflicting evidence to find the existence of pneumoconiosis and total disability due to pneumoconiosis established in this case.

The Director responds to the issue of whether a physician's opinion, that the miner's total disability did not arise out of his coal mine employment, may be credited by the administrative law judge when, contrary to the administrative law judge's finding, the physician believes that the miner does not suffer from pneumoconiosis. The Director indicates that this issue was previously addressed by the Board in its 1999 and 2001 decisions. The Director contends that the Board misinterpreted *Ballard*. The Director states:

> In *Ballard*, there was no direct inconsistency between what the ALJ found and what the doctors in question believed, and that is why the court stated the doctors' opinions could be considered. The situation in the instant case is different. Here, there was a direct inconsistency: the ALJ found that the x-ray evidence established the existence of coal workers' pneumoconiosis, and Drs. Fino and Renn believed to the contrary.

Director's Brief at 2. The Director requests that the Board revisit this issue when reviewing the administrative law judge's decision on remand.

We find no merit in employer's contention that the administrative law judge impermissibly discounted the opinions of Drs. Renn and Fino, who did not diagnose clinical or legal pneumoconiosis, by relying on the newly revised regulations and related comments published in the Federal Register. The record shows that the administrative law judge recognized, and abided by, the Board's holding that the opinions of Drs. Renn and Fino regarding disability causation are not inconsistent with either the newly promulgated definition of pneumoconiosis at 20 C.F.R. §718.201(a)(2) or the case law of the Fourth Circuit, as neither physician stated that exposure to coal mine dust causes no obstructive impairment, *see Kirk*, slip op. at 4. Decision and Order on Remand at 2-4. While the administrative law judge referred to the Federal Register, he did not rely on any comment therein as a basis for discrediting either Dr. Renn's opinion or that of Dr. Fino. In fact, the administrative law judge *did not discredit* either physician's opinion on remand, but specifically found that the opinions of Drs. Renn and Fino were outweighed by the contrary

opinions of Drs. Rasmussen and Abrahams. *Id*. at 3-4. Given this fact, we hold that the administrative law judge did not err by not reconsidering the opinions of Drs. Renn and Fino under *Ballard*. Specifically, *Ballard* involves an administrative law judge's *discrediting* of medical opinions in which a physician determined, in contrast to the administrative law judge, that the miner did not have pneumoconiosis. Because *Ballard* does not have implications in this case, we do not further address the parties' arguments thereunder.

Employer next contends that the administrative law judge failed, in both his 2000 Decision and Order and his Decision and Order on Remand, to comply with the Board's instruction, given in its 1999 Decision and Order in *Kirk v. Consolidation Coal Co.*, BRB No. 98-0229 BLA (Apr. 28, 1999)(unpublished), that the administrative law judge determine whether the opinions of Drs. Rasmussen and Abrahams are sufficiently reasoned. Employer also contends that the administrative law judge on remand failed to provide any meaningful analysis as to why he accords Dr. Abrahams's opinion great weight, beyond again noting his status as claimant's treating physician.

Employer's contentions lacks merit. The administrative law judge, in his Decision and Order on Remand, provided several bases for his determination that he continued to find that the opinion of Dr. Rasmussen is reasoned. As set forth above, the administrative law judge found that Dr. Rasmussen addressed the different aspects of claimant's case, acknowledging that claimant did not "fit the mold" of one type of patient he had researched and that claimant's pattern of impairment was consistent with that of smoking-induced disease. Decision and Order on Remand at 2. The administrative law judge further found that Dr. Rasmussen also discussed points made by Drs. Renn and Fino, including the reversibility and variability of claimant's pulmonary function studies, the degree of impairment, and the results of other testing, and, by his testimony, Dr. Rasmussen demonstrated that he considered the many aspects of claimant's case in reaching his conclusion. The administrative law judge further specifically found that the documentation underlying Dr. Rasmussen's opinion supports his explanations. The administrative law judge thus provided valid reasons for his decision to credit Dr. Rasmussen's opinion as reasoned and documented. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

Further, the administrative law judge properly considered the substance and import of Dr. Abrahams's opinion that claimant's total disability is due to a combination of two major diseases, namely coal workers' pneumoconiosis and ARDS, and did not rely solely on Dr. Abrahams's status as claimant's treating physician to credit the opinion. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994). The administrative law judge found that the record demonstrates Dr. Abrahams's treatment of claimant from 1990 for his pulmonary problems, and determined that Dr. Abrahams rationally found that both exposure to coal

mine dust and cigarette smoking caused claimant's disabling pulmonary condition. The administrative law judge further found that Dr. Abrahams did not, however, provide as extensive a rationale in his opinion as did Drs. Renn, Fino and Rasmussen in explaining the bases for their respective conclusions regarding the cause of claimant's disability. The administrative law judge stated:

> Nonetheless, I find the opinion of Dr. Abrahams sufficiently reasoned. I find that it has significant probative value. Dr. Abrahams is a pulmonary specialist; he treated the miner. Dr. Abrahams' ultimate conclusion with regard to the critical issue in this case, disability causation, supports the opinion of Dr. Rasmussen.

Decision and Order on Remand at 3. Based on the foregoing, we hold that the administrative law judge's consideration and weighing of the opinion of claimant's treating physician, Dr. Abrahams, is supported by substantial evidence, rational, and in accordance with law. *Grigg*, *supra*; *Akers*, *supra*. We thus reject employer's argument that the administrative law judge erred in crediting the opinion of Dr. Abrahams.

Employer further notes that it continues to dispute the administrative law judge's prior finding, affirmed by the Board, that a preponderance of the x-ray evidence establishes the existence of pneumoconiosis. Employer specifically contests the administrative law judge's reliance on the most recent x-ray evidence to determine that the preponderance of the x-ray evidence establishes the existence of pneumoconiosis. Employer further generally challenges the administrative law judge's finding of the existence of pneumoconiosis on remand, without identifying specific error on the administrative law judge's part. *See* 20 C.F.R. §718.202.

Employer has presented no reason why the Board should revisit its decision, in its 1999 Decision and Order, to affirm the administrative law judge's finding that a preponderance of the x-ray evidence establishes the existence of pneumoconiosis. The Board, in remanding the case in its 2001 Decision and Order in *Kirk*, noted that the Fourth Circuit had issued its decision in *Compton* subsequent to the issuance of the Board's 1999 Decision and Order in *Kirk*. The Board, therefore, instructed the administrative law judge to determine the weight to be assigned to the medical opinion evidence and to consider all the relevant evidence together regarding the existence of pneumoconiosis. On remand, the administrative law judge found the medical opinions of Drs. Rasmussen and Abrahams more persuasive than the contrary opinions of Drs. Renn and Fino. Pursuant to *Compton*, the administrative law judge properly considered all the relevant evidence together, in this case the x-ray readings and medical opinions, and found that it was sufficient to establish the existence of pneumoconiosis. Employer assigns no error to the administrative law judge's finding of pneumoconiosis at 20 C.F.R. §718.202(a)(4) or to his determination on remand

that claimant established the existence of pneumoconiosis in this case under 20 C.F.R. §718.202. *See generally Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986). Employer thus sets forth no valid reason why the Board should reconsider its affirmance of the administrative law judge's finding that a preponderance of the x-ray evidence establishes the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1). Hence, the Board's holding stands as law of the case. *Dean v. Marine Terminals Corp.*, 15 BRBS 394 (1983); *Whitlock v. Lockheed Shipbuilding and Construction Co.*, 15 BRBS 332 (1983); *see also Stark v. Bethlehem Steel Corp.*, 15 BRBS 288 (1983).

Employer also appeals from the administrative law judge's Supplemental Decision and Order Granting Attorney Fees. Employer contends that the administrative law judge failed to review all the relevant evidence in determining that the requested hourly rate of $225 is reasonable and, thus, erroneously approved a rate "which is no more than a number plucked out of a hat." Employer's Brief for Review of Supplemental Decision and Order Awarding Attorney's Fees at 2. Employer argues that counsel failed to establish that he deserves the $225 rate charged for work performed in this case, that it is his customary hourly rate, or that it is the rate charged by similarly experienced attorneys in the community in which he works. Employer also asserts that the hourly rate requested or $225 is excessive and that this objection was not addressed by the administrative law judge. Employer cites certain data, and asserts that an hourly rate of $150 is not excessive and is reasonable and justified by counsel's customary rate.

We reject employer's contention that the $225 hourly rate awarded by the administrative law judge was unreasonable and excessive. The administrative law judge noted that counsel had submitted evidence to justify the setting of his customary hourly rate at $225 even though this is not the amount he charges in all cases. The administrative law judge thus rationally found, pursuant to 20 C.F.R. §725.366(b), that counsel established the reasonableness of the hourly rate of $225. Because substantial evidence in the record supports the administrative law judge's finding that the hourly rate of $225 is reasonable in this case, we reject employer's assertion that the administrative law judge's ruling was arbitrary and an abuse of discretion. *Abbott v. Director, OWCP*, 13 BLR 1-15 (1989). As counsel has justified his requested rate, there is no need to consider employer's counter offer of an hourly rate of $150. *See generally Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992); *Pritt v. Director, OWCP*, 9 BLR 1-159 (1986). We thus affirm the administrative law judge's attorney fee award in the amount of $2,870.14, based on an hourly rate of $225.

Based on the foregoing, we affirm the administrative law judge's findings on remand that claimant established the existence of pneumoconiosis and total disability due to pneumoconiosis in this case. *See* 20 C.F.R. §§718.202, 718.204(c). We further affirm the administrative law judge's attorney fee award in the amount of $2,870.14.

Accordingly, the administrative law judge's Decision and Order - On Remand and Supplemental Decision and Order Granting Attorney Fees are affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge