BRB Nos. 09-0814 BLA,
09-0572 BLA and 06-0400 BLA

ROGER DALE PERSINGER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	
	)	DATE ISSUED: 04/28/2010
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeals of the Decision and Order on Remand Awarding Benefits of Alice M. Craft, and the Decision and Order Denying Employer's Petition for Modification and the Attorney Fee Order of Thomas M. Burke, Administrative Law Judges, United States Department of Labor.

Roger D. Forman (Forman & Huber, L.C.), Charleston, West Virginia, for claimant.

W. William Prochot (Greenberg Traurig, LLP), Washington, D.C. for employer.

Before: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (03-BLA-0144) of Administrative Law Judge Alice M. Craft, and the Decision and Order Denying Employer's Petition for Modification, and the Attorney Fee Order (06-BLA-6068), of Administrative Law Judge Thomas M. Burke, rendered on a claim filed 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*)).[1]

This case involves a miner's claim filed on September 7, 1995.[2] In the initial decision dated August 20, 1997, Administrative Law Judge Daniel L. Stewart credited claimant with twenty years of coal mine employment,[3] as stipulated by the parties, and concluded that, although claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203(b), claimant failed to establish the existence of a totally disabling respiratory impairment, pursuant to 20 C.F.R. §718.204(c) (2000).[4] Director's Exhibit 40.

Pursuant to claimant's appeal, the Board affirmed Judge Stewart's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment, pursuant to 20 C.F.R. §§718.202(a), 718.203(b), as well as his finding that claimant failed to establish the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(c)(1)-(3) (2000). *Persinger v. Peabody Coal Co.*, BRB No. 98-0160 BLA (Sept. 30, 1998) (unpub.); Director's Exhibit 47. The Board, however, held that substantial evidence did not support Judge Stewart's determination that Dr. Rasmussen's opinion, that claimant is totally disabled, was based on a mistaken premise that claimant's coal mine employment involved heavy labor. Therefore, the Board

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[1] The Department of Labor has amended the regulations implementing 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*)). These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2009). All citations to the regulations, unless otherwise noted, refer to the amended regulations. Where a former version of a regulation remains applicable, we will cite to the 2000 edition of the Code of Federal Regulations.

[2] The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the instant case, as the miner's claim was filed before January 1, 2005.

[3] The record reflects that claimant's coal mine employment was in West Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[4] The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c) (2000), 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) (2000), is now found at 20 C.F.R. §718.204(c).

vacated Judge Stewart's finding that the medical opinion evidence was not sufficient to establish total respiratory disability pursuant to 20 C.F.R. §718.204(c)(4) (2000), and remanded the case for further consideration. *Id.*

On remand, following additional proceedings before the Office of Administrative Law Judges and the district director, the case was ultimately reassigned to Judge Craft.[5] In a Decision and Order on Remand issued on January 16, 2006, Judge Craft found that the medical opinion evidence established that claimant has a totally disabling respiratory impairment, due to pneumoconiosis, pursuant to 20 C.F.R. §718.204(b), (c). Director's Exhibit 82. Accordingly, Judge Craft awarded benefits. *Id.*

Employer initially appealed Judge Craft's decision, but later withdrew its appeal so that it could pursue a petition for modification, filed with the district director, alleging a mistake of fact in the award of benefits. Director's Exhibits 87, 94, 96. By Order dated May 31, 2006, the Board granted employer's motion, dismissed employer's appeal, and

[5] On remand, the case was initially returned to Administrative Law Judge Daniel L. Stewart, who remanded the case to the district director for further development of evidence regarding the exertional requirements of claimant's usual coal mine work. Director's Exhibit 51. The district director scheduled claimant for an additional pulmonary evaluation, but claimant refused to attend, on the advice of counsel. Director's Exhibits 53, 54. Instead, the parties developed evidence as to the exertional requirements of claimant's usual coal mine work. Director's Exhibits 58, 60. The case was returned to the Office of Administrative Law Judges, where it was reassigned, without objection, to Administrative Law Judge Daniel L. Leland. Director's Exhibits 61, 65. Employer then moved to compel claimant to attend a pulmonary examination, and Judge Leland granted employer's motion, over claimant's objection. Director's Exhibits 66, 67, 68. On September 29, 2003, claimant was examined by Dr. Zaldivar. Employer's Exhibit 1. The case was then continued, and was later reassigned, without objection, to Administrative Law Judge Michael P. Lesniak, before it was finally reassigned to Administrative Law Judge Alice M. Craft. Director's Exhibits 69-72. Judge Craft scheduled a hearing. Subsequently, during a telephone conference with the parties, Judge Craft ruled that, due to the narrow issue on remand from the Board, no additional evidence or testimony was necessary. Director's Exhibits 73-76. Consequently, Judge Craft excluded the 2003 report from Dr. Zaldivar, obtained by employer pursuant to Judge Leland's order, and claimant's responsive evidence. Director's Exhibit 77. Thus, in her decision dated January 17, 2006, Judge Craft awarded benefits based on the evidence that was developed before Judge Stewart. Director's Exhibit 82.

remanded the case to the district director for modification proceedings.[6] Director's Exhibit 98.

The case was eventually reassigned, without objection, to Judge Burke.[7] Prior to the hearing, claimant moved to dismiss employer's request for modification, and employer moved to compel claimant to submit to a physical examination. By Order dated February 11, 2008, Judge Burke denied claimant's motion to dismiss. Judge Burke also denied employer's motion to compel an examination, finding that employer failed to demonstrate a credible issue regarding the validity of the previous adjudication.

Judge Burke conducted a hearing on March 12, 2008. Following the hearing, the record was held open for the submission, by claimant, of a new medical report by Dr. Cohen, and the submission, by employer, of a supplemental report and deposition testimony from Dr. Renn, in response to Dr. Cohen's report.[8] In a decision dated April 14, 2009, Judge Burke conducted a *de novo* review of the record, including both the original evidence and the new evidence submitted by the parties on modification, and found no mistake in a determination of fact. Accordingly, Judge Burke denied employer's request for modification, pursuant to 20 C.F.R. §725.310 (2000).[9]

Employer appealed, and in its Notice of Appeal, requested that the Board reinstate its previous appeal of Judge Craft's 2006 Decision and Order. By Order dated July 22,

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[6] The Board informed employer that its appeal of Judge Craft's Decision and Order would be reinstated only if employer requested reinstatement. Director's Exhibit 98.

[7] Following the district director's denial of employer's request for modification, the case was referred to the Office of Administrative Law Judges, where it was reassigned, without objection, to Administrative Law Judge Edward Terhune Miller, for a hearing. Director's Exhibit 103. However, claimant requested a continuance, the hearing was cancelled, and the case was ultimately reassigned to Judge Burke.

[8] During the hearing, Judge Burke allowed employer to submit the 2003 medical report from Dr. Zaldivar, previously excluded from evidence by Judge Craft. Judge Burke denied, however, employer's request to submit supplemental reports from Drs. Zaldivar and Crisalli, in response to Dr. Cohen's new report. Hearing Tr. at 21, 31, 57-59.

[9] The revisions to 20 C.F.R. §725.310 apply only to claims filed after January 19, 2001. 20 C.F.R. §725.2(c).

2009, the Board granted employer's request for reinstatement of the prior appeal, and consolidated that appeal with employer's appeal of Judge Burke's decision.

In its appeal of Judge Craft's Decision and Order on Remand Awarding Benefits, employer contends that Judge Craft erred in her evaluation of the medical opinion evidence relevant to the issues of total disability and disability causation, pursuant to 20 C.F.R. §§718.204(b)(2)(iv), 718.204(c). In its appeal of Judge Burke's Decision and Order Denying Employer's Petition for Modification, employer contends that Judge Burke erred in failing to find that there was a mistake in a determination of fact in the award of benefits pursuant to 20 C.F.R. §725.310 (2000). Employer also argues that Judge Burke erred in denying its request to compel claimant to undergo a medical examination, and in denying its request to submit additional medical evidence on modification. In a separate appeal, employer contests Judge Burke's award of an attorney's fee to claimant's counsel. Claimant responds, urging affirmance of the award of benefits, the denial of employer's request for modification, and the fee award. The Director, Office of Workers' Compensation Programs, has declined to participate in these appeals. In a combined reply brief, employer reiterates its previous contentions.

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

Appeal of Administrative Law Judge Craft's Decision and Order on Remand

We initially address employer's reinstated appeal of Judge Craft's January 17, 2006 Decision and Order on Remand Awarding Benefits (Decision and Order on Remand). In order to establish entitlement to benefits under 20 C.F.R. Part 718 in a miner's claim, a claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

Employer asserts that Judge Craft erred in finding that the opinion of Dr. Rasmussen establishes a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer specifically asserts that in crediting Dr. Rasmussen's opinion, Judge Craft failed to consider that the opinion is unexplained, and unsupported by the pulmonary function studies and blood gas studies of record, which Judge Stewart previously found did not establish total respiratory disability. Employer's Brief at 21-2. We disagree.

Addressing, the medical opinions relevant to total disability, Judge Craft correctly noted that Judge Stewart had previously found, and the Board had agreed, that Dr. Rasmussen was the only physician of record to address claimant's ability to perform his usual coal mine employment as a truck driver. Decision and Order on Remand at 4; *Persinger*, slip op. at 3. Dr. Rasmussen opined:

> This patient appears to have significant chronic pulmonary disease as reflected by the significant reduction in diffusing capacity as well as the resting hypoxia. This degree of impairment would obviously render this patient totally disabled for resuming his former coal mine employment with its attendant requirement for heavy manual labor.

Director's Exhibit 13; Decision and Order on Remand at 4.

Contrary to employer's arguments, Judge Craft initially found, within her discretion, that as Dr. Rasmussen had examined claimant, taken histories and administered a chest x-ray, pulmonary function study, and a blood gas study, his opinion was adequately documented to form a reasoned medical opinion. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 212, 22 BLR 2-162, 2-176 (4th Cir. 2000); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 763, 21 BLR 2-587, 2-605 (4th Cir. 1999); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997); Decision and Order on Remand at 4; Employer's Brief at 21-22; Director's Exhibit 13. In addition, Judge Craft specifically found that the record, as a whole, supports Dr. Rasmussen's conclusions that claimant has a reduction in diffusing capacity, and resting hypoxemia. Decision and Order on Remand at 4; Employer's Brief at 21. The United States Court of Appeals for the Fourth Circuit has held that a physician's opinion, that a claimant is disabled due to a diffusing capacity abnormality, may constitute a valid basis for a finding of total disability under the Act. *See Walker v. Director, OWCP*, 927 F.2d 181, 184-85, 15 BLR 2-16, 2-23-24 (1991). Moreover, in evaluating Dr. Rasmussen's conclusion that claimant is totally disabled for his usual coal mine work, Judge Craft properly determined, in accordance with the Board's prior holding that, although claimant was classified as a truck driver, he was also required to perform heavy manual labor as part of his job when he was not driving the truck. *See Braenovich v. Cannelton Indus., Inc.*, 22 BLR 1-236 (2003); Decision and Order on Remand at 4; Employer's Brief at 22. Thus, Judge Craft found that the uncontradicted opinion of Dr. Rasmussen, that claimant's pulmonary impairment would prevent him from performing his former coal mine employment "with its attendant requirement for heavy manual labor," established total respiratory disability. *See Fuller v. Gibraltar Coal Corp.*,

6 BLR 1-1291, 1-1294 (1983); Decision and Order on Remand at 4; Director's Exhibit 13. Because Judge Craft permissibly credited the opinion of Dr. Rasmussen as documented and reasoned, and as Dr. Rasmussen's opinion supports Judge Craft's finding of total respiratory disability, we affirm Judge Craft's finding that claimant established total disability pursuant to Section 718.204(b)(2)(iv). *See Compton*, 211 F.3d at 212, 22 BLR at 2-176; *Mays*, 176 F.3d at 763, 21 BLR at 2-605; *Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Underwood*, 105 F.3d at 949, 21 BLR at 2-28.

Employer next contends that Judge Craft erred in crediting Dr. Rasmussen's opinion, over those of Drs. Zaldivar and Renn, to find that claimant is totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Employer's Brief at 25. A miner is totally disabled due to pneumoconiosis if pneumoconiosis is a "substantially contributing cause" of the miner's totally disabling respiratory impairment. 20 C.F.R. §718.204(c)(1). Contrary to employer's argument that "the issue all along has been whether [claimant] has disabling legal pneumoconiosis," Employer's Reply Brief at 6, Judge Craft properly recognized that claimant was previously found to have clinical pneumoconiosis. Decision and Order on Remand at 4. Thus, on remand, Judge Craft permissibly discounted the opinions of Drs. Zaldivar and Renn, that claimant's lung impairment is unrelated to pneumoconiosis, because they did not diagnose clinical pneumoconiosis, contrary to Judge's Stewart's finding, which was affirmed by the Board. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 269, 22 BLR 2-372, 2-384 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 116, 19 BLR 2-70, 2-83 (4th Cir. 1995); Decision and Order on Remand at 5; Director's Exhibits 33, 35. By contrast, as Judge Craft properly found, Dr. Rasmussen diagnosed clinical pneumoconiosis, consistent with the prior finding that clinical pneumoconiosis was established. *See Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 224, 23 BLR 2-393, 2-412 (4th Cir. 2006); *Scott*, 289 F.3d at 269, 22 BLR at 2-384; *V.M.* [*Matney*] *v. Clinchfield Coal Co.*, 24 BLR 1-65, 1-76 (2008); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19, 1-21 (1987); Decision and Order on Remand at 5; Director's Exhibit 13. Further, contrary to employer's contention, Dr. Rasmussen explained his conclusion that pneumoconiosis contributed to claimant's disability, stating:

> This patient has a significant history of exposure to coal mine dust and x-ray changes consistent with pneumoconiosis. It is medically reasonable to conclude that he has coal workers' pneumoconiosis which arose from his coal mine employment. There are only two known risk factors for the patient's disabling respiratory insufficiency. These include his cigarette smoking and his coal mine dust exposure.

Director's Exhibit 13. Judge Craft also considered Dr. Rasmussen's additional statement that "[o]ther risk factors cannot be entirely excluded such as possible right to left shunting or diffuse interstitial fibrosis," but that "[a]bsent evidence for other causative factors, one must conclude his coal mine dust exposure is a significant contributing factor to his disabling respiratory insufficiency." Decision and Order on Remand at 5. Thus, there is no merit to employer's assertion that Judge Craft failed to consider the entirety of Dr. Rasmussen's opinion. Employer's Brief at 25. As Judge Craft properly concluded that Dr. Rasmussen's opinion, that both smoking and coal dust exposure contributed to claimant's impairment, is sufficient to establish disability causation, we affirm Judge Craft's finding that claimant is totally disabled due to clinical pneumoconiosis pursuant to Section 718.204(c). *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 483, 22 BLR 2-266, 2-281 (7th Cir. 2001). Based on Judge Craft's affirmable findings that claimant is totally disabled due to pneumoconiosis, we affirm judge Craft's award of benefits.

Appeal of Judge Burke's Evidentiary Rulings on Modification

Turning to the denial of employer's request for modification by Judge Burke (hereinafter, the administrative law judge), we first address employer's arguments regarding the administrative law judge's evidentiary rulings, both in his February 11, 2008 Order denying employer's motion to compel an examination, and at the March 12, 2008 hearing. Citing *Old Ben Coal Co. v. Director, OWCP* [*Hilliard*], 292 F.3d 533, 22 BLR 2-429 (7th Cir. 2002), employer argues that the administrative law judge erred in requiring employer to prove the need for a physical examination on modification. Employer's Brief at 13-16. We disagree.

In *Hilliard*, the administrative law judge had refused to compel a widow who was receiving survivor's benefits to release her husband's autopsy results during a modification proceeding initiated by the employer. The United States Court of Appeals for the Seventh Circuit held that:

> The regulations implementing the Act are not silent with respect to a miner's obligation to cooperate under these circumstances. Looking first to the regulation governing modification proceedings, 20 C.F.R. §725.310(b) (2001) provides that "[m]odification proceedings shall be conducted in accordance with the provisions of this part as appropriate...." Included within Part 725 is §725.414 which states in relevant part that "[i]f a miner unreasonably refuses . . . [t]o provide the Office or the designated responsible operator with a complete statement of his or her medical history and/or to authorize access to his or her medical records . . . the miner's claim may be denied by reason of abandonment." 20 C.F.R.

> §725.414(a)(3)(i) (2001). According to the regulations, therefore, the requirements of §725.414 apply to modification proceedings.

Hilliard, 292 F.3d at 548, 22 BLR at 2-455 (footnote omitted). However, the revised regulations at 20 C.F.R. §725.414, applied by the court in *Hilliard*, are inapplicable to the instant claim, which involves a request for modification of a claim filed prior to January 1, 2001. *See* 20 C.F.R. §725.2(c). Rather, the submission of evidence in this modification proceeding is governed by two provisions, 20 C.F.R. §725.310(b) (2000) and 20 C.F.R. §718.404(b) (2000).[10] Section 725.310(b) (2000) provides that "[m]odification proceedings shall be conducted in accordance with the provisions of this part as appropriate." 20 C.F.R. §725.310(b) (2000). Section 718.404(b) (2000) provides that:

> An individual who has been finally adjudged to be totally disabled due to pneumoconiosis shall, if requested to do so upon reasonable notice, *where there is an issue pertaining to the validity of the original adjudication of disability*, present himself or herself for, and submit to, examinations or tests as provided in §718.101, and shall submit medical reports and other evidence necessary for the purpose of determining whether such individual continues to be under a disability. Benefits shall cease as of the month in which the miner is no longer determined to be eligible for benefits.

20 C.F.R. §718.404(b) (2000) (emphasis added).[11]

Pursuant to 20 C.F.R. §725.310(b) (2000) and 20 C.F.R. §718.404(b) (2000), the Board has held that an employer's right to have a claimant undergo an examination

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[10] For this reason, we also reject employer's contention that the revisions to 20 C.F.R. §725.310 support its position that employer is entitled to obtain an examination during modification proceedings. As noted previously, revised Section 725.310 applies only to claims filed after January 19, 2001. *See* 20 C.F.R. §725.2(c).

[11] Section 718.404 (2000) is now found in substantially identical form at 20 C.F.R. §725.203(d). Section 725.203(d) provides that:

> Upon reasonable notice, an individual who has been finally adjudged entitled to benefits shall submit to any additional tests or examinations the Office deems appropriate, and shall submit medical reports and other relevant evidence the Office deems necessary, *if an issue arises pertaining to the validity of the original award.*

20 C.F.R. §725.203(d) (emphasis added).

pursuant to a request for modification is not absolute, and the determination of whether an employer is entitled to such an examination rests within the discretion of the administrative law judge. *Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37, 1-40-42 (2000) (*en banc*); *Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173, 1-177-78 (1999) (*en banc*); *accord Cumberland River Coal Co. v. Caudill*, No. 05-3680 (6th Cir. Nov. 17, 2006) (unpub.).

In support of its motion to compel a new pulmonary examination, employer asserted that the last pulmonary examination in the record was conducted on January 8, 1997. In reviewing employer's motion, the administrative law judge found that employer's motion to compel was "predicated on no more than a disagreement with the weighing of the evidence" in the prior award of benefits and was "a general request that more recent data be obtained." February 11, 2008 Order at 4-5. Noting that employer had already compelled claimant to attend a medical examination by Dr. Zaldivar in 2003, and had "offer[ed] no reason why the results from the [2003] pulmonary evaluation . . . [were] not being offered into evidence" in support of employer's modification request, the administrative law judge concluded that employer's request for a second examination was "unreasonable . . . wholly unjustified and burdensome." February 11, 2008 Order at 5. In this case, the administrative law judge's basis for rejecting employer's request for an examination, *i.e.*, that employer "failed to demonstrate a credible issue regarding the previous adjudication such that the interests of justice require [c]laimant to submit to an examination," constitutes a permissible exercise of his discretion. *See Stiltner*, 22 BLR at 1-40-42; *Selak*, 21 BLR at 1-177-78; February 11, 2008 Order at 4. We, therefore, hold that the administrative law judge permissibly rejected employer's request to have claimant examined pursuant to its request for modification. 20 C.F.R. §718.404(b) (2000); *see Stiltner*, 22 BLR at 1-40-42.

Employer next argues that, during the March 12, 2008 hearing, the administrative law judge erred when he granted claimant's request to submit a new medical report from Dr. Cohen, but denied employer's request to submit additional medical reports from Drs. Zaldivar and Crisalli, in response to Dr. Cohen's report. Employer's Brief at 16. Employer specifically contends that due process gives a party the right to submit rebuttal evidence, and that the revised regulations at 20 C.F.R. §725.414(a)(3)(i), (ii), codify this right, by giving a party the right to rehabilitate its doctors' opinions and to rebut new evidence. Employer's Brief at 16. First, the revised regulations at 20 C.F.R. §725.414 are inapplicable to the instant case, which involves a request for modification of a claim filed prior to January 19, 2001. *See* 20 C.F.R. §725.2(c). In addition, contrary to employer's contention, a review of the hearing transcript reveals that the administrative law judge granted employer's request to respond to Dr. Cohen's opinion by holding the record open to allow employer the opportunity to depose Dr. Renn, following Dr. Renn's review of Dr. Cohen's opinion. Hearing Tr. at 21, 31, 57-59. Finally, as discussed *infra*, there is no merit to employer's contention that the administrative law judge discredited

the opinions of Drs. Zaldivar and Crisalli as to the cause of claimant's disability, on the ground that they had not reviewed Dr. Cohen's report. Employer's Brief at 16; Decision and Order Denying Modification at 18. We, therefore, hold that the administrative law judge acted within his discretion in limiting employer to one opinion in response to Dr. Cohen's new report. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2-430 (4th Cir. 2007).

Appeal of the Merits of Judge Burke's Decision and Order Denying Employer's Petition for Modification

We now turn to the administrative law judge's evaluation of the evidence in his April 14, 2009 Decision and Order Denying Employer's Petition for Modification (Decision and Order Denying Modification). While employer may establish a basis for modification of the award of benefits by establishing either a change in conditions since the issuance of the previous decision or a mistake in a determination of fact in the previous decision,[12] 20 C.F.R. §725.310(a) (2000); *see Betty B Coal Co. v. Director, OWCP* [*Stanley*], 194 F.3d 491, 497, 22 BLR 2-1, 2-11 (4th Cir. 1999); *Jessee v. Director, OWCP*, 5 F.3d 723, 725, 18 BLR 2-26, 2-28 (4th Cir. 1993); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993), the burden of proof to establish a basis for modifying the award of benefits rests with employer. Claimant does *not* have the burden to reestablish his entitlement to benefits. *See Metropolitan Stevedore Co. v. Rambo*, 521 U.S. 121, 139 (1997). Employer, as the proponent of an order terminating an award of benefits, bears the burden of disproving at least one element of entitlement. *Id.*; *see also Branham v. BethEnergy Mines*, 20 BLR 1-27 (1996). An administrative law judge has the authority to reconsider all the evidence for any mistake of fact or change in conditions, *Stanley*, 194 F.3d at 497, 22 BLR at 2-11, but the exercise of that authority is discretionary. *See Jessee*, 5 F.3d at 726, 18 BLR at 2-28.

Regarding the administrative law judge's weighing of the evidence submitted on modification, employer contends that the administrative law judge erred in finding that the newly submitted x-ray evidence did not establish a mistake in a determination of fact in the prior award of benefits. Employer's Brief at 16. In evaluating the x-ray evidence, the administrative law judge correctly noted that in the prior decision, Judge Stewart considered fourteen interpretations of seven x-rays, and accorded greatest weight to the January 8, 1997 x-ray, which was the most recent by a year. Decision and Order Denying Modification at 11. The administrative law judge further noted that, as four of

[12] As the administrative law judge found, employer's modification request is premised on a mistake in a determination of fact. Decision and Order Denying Modification at 2. Because employer does not challenge this finding, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

the five readings of that x-ray were positive, including three readings by the most highly qualified readers, Judge Stewart concluded that claimant established the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), and the Board affirmed that finding. Decision and Order Denying Modification at 11. Considering the evidence submitted on modification, the administrative law judge noted that employer proffered four negative interpretations of a September 29, 2003 x-ray, including three readings by dually-qualified Board-certified radiologists and B readers, and one reading by a B reader. In response, claimant submitted three positive readings of the September 29, 2003 x-ray, including two readings by dually-qualified readers, and one by a B reader. Decision and Order Denying Modification at 11. Noting that the positive x-ray readings relied upon by Judge Stewart, and the negative x-ray readings now relied upon by employer, "cannot all be correct," the administrative law judge concluded that employer failed to meet its burden to establish that the prior x-ray finding was incorrect. Decision and Order Denying Modification at 11-12.

Because the administrative law judge conducted a complete analysis of the x-ray evidence in determining that employer did not meet its burden to establish a mistake in fact in the prior finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), we reject employer's assertion that the administrative law judge erred in his "application of principles of collateral estoppel to bar reconsideration of [the existence of] pneumoconiosis." Employer's Brief at 16. We further reject employer's assertion that the administrative law judge required employer to show that the prior x-ray had been "incorrectly interpreted." Employer's Brief at 17. Rather, the administrative law judge permissibly exercised his discretion to determine that employer's submission, on modification, of additional negative x-ray readings, which were countered by claimant's submission of positive readings by equally qualified physicians, was not sufficient to establish a mistake in Judge Stewart's prior determination that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1). *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 272-76, 18 BLR 2A-1, 2A-6-9 (1994); *Jessee*, 5 F.3d at 725, 18 BLR at 2-28; Decision and Order Denying Modification at 11-12. The issue of whether the newly submitted x-ray evidence, considered in conjunction with the previously submitted x-ray evidence of record, establishes a mistake in the prior determination, is for the administrative law judge, as trier-of-fact to determine. *Stanley*, 194 F.3d at 497, 22 BLR at 2-11; *Jessee*, 5 F.3d at 726, 18 BLR at 2-28. We therefore reject employer's allegation that the administrative law judge erred in finding no mistake in the previous determination that the x-ray evidence established clinical pneumoconiosis.

Employer further asserts that the administrative law judge erred in finding the medical opinion evidence sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 17. Employer's contention lacks merit. Initially, we note that employer appears to be under the mistaken impression

that the administrative law judge found the existence of legal pneumoconiosis established pursuant to 20 C.F.R. §718.202(a)(4). Employer's Brief at 17. Rather, in considering the medical opinion evidence, the administrative law judge correctly noted that, in the prior proceeding, Judge Stewart found the existence of clinical pneumoconiosis established at 20 C.F.R. §718.202(a)(1). Decision and Order Denying Modification at 12. Thus, the prior award of benefits was based on a finding of clinical pneumoconiosis, not legal pneumoconiosis. Therefore, contrary to employer's assertion, when considering the medical opinions on modification the administrative law judge focused on clinical pneumoconiosis. The administrative law judge acted within his discretion in according diminished weight to the opinions of Drs. Zaldivar, Crisalli, and Renn, because they relied, in part, on negative x-ray readings to conclude that claimant does not have clinical pneumoconiosis, contrary to the administrative law judge's finding that there was no mistake in the prior determination that claimant established the existence of clinical pneumoconiosis through x-ray evidence. *See Akers*, 131 F.3d at 441, 21 BLR at 2-274; Employer's Brief at 17-18. Moreover, finding that, by contrast, Dr. Cohen's diagnosis of clinical coal workers' pneumoconiosis was based on both positive x-ray evidence of clinical pneumoconiosis and a computerized tomography scan that was read as consistent with pneumoconiosis, the administrative law judge permissibly credited Dr. Cohen's opinion as well-reasoned and documented by the evidence of record. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; Decision and Order Denying Modification at 13. As the administrative law judge provided a valid reason for according less weight to the opinions of Drs. Zaldivar, Crisalli, and Renn, that claimant does not suffer from clinical pneumoconiosis, and greater weight to the contrary opinion of Dr. Cohen, we affirm the administrative law judge's finding that employer failed to establish a mistake in a determination of fact in the prior finding of clinical pneumoconiosis. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983). We, therefore, need not address employer's remaining allegations of error with respect to the administrative law judge's evaluation of the medical opinion evidence pursuant to 20 C.F.R. §718.202(a)(4) and 725.310 (2000). *Id;* Employer's Brief at 19.

We next address employer's contention that the administrative law judge erred in finding that the new medical opinions do not establish a mistake in the prior determination that claimant established the existence of a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer contends that the administrative law judge erred in "rel[ying] on the notion that [claimant's] work was heavy even though at best, it only required periodic heavy labor." Employer's Brief at 22-23. Employer further contends that the administrative law judge misstated the opinions of Drs. Zaldivar, Crisalli, Renn, and Cohen, substituted his own judgment for that of the experts, and failed to consider their opinions together with the objective evidence of record. Employer's Brief at 23-24. We disagree.

First, there is no merit to employer's assertion that the administrative law judge erred in determining the exertional requirements of claimant's coal mine work. Employer's Brief at 22. Rather, in evaluating the medical opinion evidence relevant to the issue of total disability, the administrative law judge properly found, consistent with the Board's prior holding, that the relevant inquiry is whether claimant has a pulmonary impairment that prevents him from performing his usual coal mine work as a truck driver, which requires claimant to perform heavy manual labor when he is not driving the truck. Decision and Order Denying Modification at 16-17.

Nor is there merit to employer's argument that the administrative law judge erred in his evaluation of the medical opinions. Reviewing the opinions of Drs. Zaldivar, Crisalli, Renn, and Cohen, the administrative law judge correctly found that while "[a]ll four physicians recognized that Claimant's spirometry and resting blood gas [study] results are normal or close to normal," in that they do not indicate the presence of an obstructive or restrictive impairment, the physicians also agree that the September 29, 2003 pulmonary function study, the most recent by almost seven years, revealed an abnormally low diffusing capacity of 56% of predicted. Decision and Order Denying Modification at 16; Employer's Exhibit 2. The physicians disagreed, however, as to whether the low diffusing capacity results accurately reflected the presence of a disabling lung condition, or whether the results were artificially lowered by claimant's carbon monoxide levels due to smoking, and therefore did not indicate the presence of an impairment. Decision and Order Denying Modification at 16.

The administrative law judge initially considered Dr. Crisalli's November 12, 2007 report, in which the physician opined that, based on claimant's diffusion capacity results and hypoxemia, claimant is "likely disabled from a pulmonary standpoint," together with Dr. Crisalli's March 3, 2008 testimony that without additional testing, he "would not be able to say that [claimant] could do heavy manual labor."[13] Employer's Exhibits 7 at 6, 10 at 23; Decision and Order Denying Modification at 16-17. Contrary to employer's assertion, in light of Dr. Crisalli's statements, the administrative law judge permissibly concluded that Dr. Crisalli's opinion does not support employer's burden to establish a mistake in the prior determination that claimant is totally disabled. Decision and Order Denying Modification at 17; Employer's Brief at 23.

The administrative law judge next noted that, in a report dated December 11, 2003, Dr. Zaldivar concluded that claimant is fully capable of performing his usual coal

[13] Dr. Crisalli further stated that, without additional testing, he "would not feel comfortable sending [claimant] back to heavy employment" and that he is "not sure that [claimant] has the pulmonary functional wherewithal to do heavy manual labor." Employer's Exhibit 10 at 50-51.

mine work from a pulmonary standpoint. Employer's Exhibit 1 at 4. The administrative law judge further considered that during his March 3, 2008 deposition, Dr. Zaldivar initially reiterated his opinion that "[a]s of 2003, [claimant] did not have disabling lung disease," but added that the significance of the low 2003 diffusion capacity results was "undetermined" because carbon monoxide levels in the blood can interfere with the results. Employer's Exhibit 9 at 35. Dr. Zaldivar explained that exercise blood gas testing was necessary to establish whether the diffusion capacity result "really has any physiological meaning," or is simply an error due to claimant's high carbon monoxide blood levels, and stated that "[i]f it is real, then it may represent a pulmonary impairment." Employer's Exhibit 9 at 35. Thus, Dr. Zaldivar concluded that, "without the blood gases during exercise, which we don't have," he "didn't know if [claimant] was disabled from the pulmonary standpoint." Employer's Exhibit 9 at 36. As the record reflects that Dr. Zaldivar expressed uncertainty as to whether claimant is able to perform his usual coal mine work from a pulmonary standpoint, substantial evidence supports the administrative law judge's determination that Dr. Zaldivar's opinion is equivocal. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 366, 23 BLR 2-374, 2-386 (4th Cir. 2006); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999); Decision and Order Denying Modification at 17. We, therefore, reject employer's contention that the administrative law judge misstated Dr. Zaldivar's opinion. Employer's Brief at 23.

The administrative law judge next considered the opinions of Drs. Cohen and Renn. Dr. Cohen opined, in a May 30, 2008 report, that claimant has a "moderately severe diffusion impairment." Claimant's Exhibit 4 at 12; Decision and Order Denying Modification at 17. The administrative law judge correctly noted that, while Dr. Cohen acknowledged that claimant had high carboxyhemoglobin levels due to smoking, Dr. Cohen opined that claimant's true diffusion capacity could be determined through the application of a formula provided by the American Thoracic Society and European Respiratory Society (ATS/ERS) to adjust for the presence of carbon monoxide in the blood.[14] Claimant's Exhibit 4 at 12; Decision and Order Denying Modification at 17. Dr. Cohen stated that, as adjusted, the September 29, 2003 pulmonary function study indicated a diffusion capacity of approximately 61% of normal, which was "clearly disabling." Claimant's Exhibit 4 at 7, 12. The administrative law judge found Dr. Cohen's opinion to be well-reasoned and supported by the evidence of record. Decision and Order Denying Modification at 17. Contrary to employer's contention, whether Dr. Cohen's opinion is adequately explained is a determination for the administrative law judge. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274; *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989).

[14] Dr. Cohen set forth the formula as follows: DLCO predicted for COHb = DLCO predicted x (102% - COHb%).

The administrative law judge noted that, by contrast, while Dr. Renn concurred with Dr. Cohen's use of the ATS/ERS formula to adjust for carbon monoxide levels and determine claimant's true diffusion capacity, and further agreed with Dr. Cohen that claimant had a carboxyhemoglobin level of 13% and a starting predicted DLCO of 34.2, Dr. Renn concluded that application of the ATS/ERS formula revealed that claimant's adjusted diffusion capacity is 75% of predicted, which is "above normal" and thus, not indicative of a disabling impairment. Decision and Order Denying Modification at 17; Employer's Exhibit 11 at 20-23, 25. The administrative law judge found, however, that a review of Dr. Renn's deposition testimony revealed a mathematical error in Dr. Renn's calculation of the adjusted predicted diffusing capacity, as application of the ATS/ERS formula to the starting data used by both Drs. Renn and Cohen yielded an adjusted diffusing capacity of, at best, only 63% of predicted.[15] Decision and Order Denying Modification at 17. Thus, the administrative law judge found that Dr. Renn's opinion was entitled to less weight than that of Dr. Cohen.

Employer specifically asserts that, in finding that Dr. Renn misapplied the ATS/ERS formula, the administrative law judge impermissibly substituted his judgment for that of a physician. Employer's Brief at 23-24. Employer further asserts that, even assuming that Dr. Renn misapplied the formula, the administrative law judge erred in failing to consider Dr. Renn's statement, that even if the ATS/ERS formula were not applied, additional factors, including the fact that claimant's measured diffusing capacity exceeds 55% of predicted, indicate that claimant is not disabled from a pulmonary standpoint. Employer's Brief at 24; Employer's Exhibit 11 at 28.

Contrary to employer's assertions, in reviewing Dr. Renn's calculations, the administrative law judge did not make an independent medical judgment, but made a permissible determination that the objective evidence of record did not support Dr. Renn's conclusions. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at

[15] Dr. Renn stated that because Dr. Zaldivar's September 29, 2003 pulmonary function study report contained the notation: "carboxy and hemoglobin are corrected," it was preferable to use the average "raw" diffusing capacity value obtained by Dr. Zaldivar, or 17.43, instead of the 19.2 diffusing capacity value listed in Dr. Zaldivar's final report. Employer's Exhibit 11 at 23. As the administrative law judge noted, using the formula sanctioned by both Drs. Cohen and Renn, the average "raw" diffusing capacity value of 17.43 is 57% of predicted, and the "corrected" value is 63% of predicted. Decision and Order Denying Modification at 17. Dr. Cohen also discussed Dr. Zaldivar's notation, and explained that, taking into account Dr. Zaldivar's correction, claimant's diffusing capacity would be approximately 61% of predicted, slightly higher than the 56% of predicted recorded by Dr. Zaldivar. Claimant's Exhibit 4 at 7; Employer's Exhibit 2.

441, 21 BLR at 2-274. In addition, employer does not contest the administrative law judge's ultimate conclusion that Dr. Renn's calculations are in error. *See Cox v. Benefits Review Board*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986); *Sarf v. Director, OWCP*, 10 BLR 1-119 (1987). Thus, while employer is correct that Dr. Renn gave additional support for his opinion that claimant is not disabled, we hold that the administrative law judge acted within his discretion in finding that Dr. Renn's calculation errors regarding the ATS/ERS formula called into question the overall credibility of his conclusion that claimant is not totally disabled. *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d at 441, 21 BLR at 2-274. Moreover, as the administrative law judge found, the prior finding of total disability was based on Dr. Rasmussen's opinion that claimant suffered from a significant reduction in diffusing capacity, and resting hypoxemia. The administrative law judge permissibly credited, as well reasoned, Dr. Cohen's opinion that 61% of predicted would be a disabling diffusing capacity impairment, and accurately found that both Drs. Crisalli and Zaldivar expressed uncertainty as to whether claimant could perform heavy manual labor with a diffusing capacity of 56% predicted. Decision and Order Denying Modification at 16; Employer's Exhibits 9 at 36; 10 at 33. We therefore hold that substantial evidence supports the administrative law judge's determination to discount the opinion of Dr. Renn. Employer asks for a reweighing of the evidence, which the Board is not empowered to do. *See Anderson*, 12 BLR at 1-113.

Finally, as the administrative law judge specifically acknowledged that claimant's pulmonary function and blood gas studies do not establish the presence of a totally disabling respiratory or pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2)(i), (ii), and explicitly stated that he considered the medical opinion evidence, together with the pulmonary function study and blood gas study test results in finding claimant to be totally disabled, there is no merit to employer's contention that the administrative law judge failed to consider the medical opinions in light of the objective evidence of record. Decision and Order Denying Modification at 15, 17; Employer's Brief at 22. We, therefore, affirm the administrative law judge's conclusion that employer failed to establish a mistake in fact in the prior determination of total disability pursuant to 20 C.F.R. §718.204(b).

We next address employer's contention that, in considering the cause of claimant's disabling impairment, pursuant to 20 C.F.R. §718.204(c), the administrative law judge erred in crediting the opinion of Dr. Cohen, over the opinions of Drs. Zaldivar, Crisalli, and Renn, in finding that employer failed to establish a mistake in the prior determination that claimant's totally disabling respiratory impairment is due, in part, to pneumoconiosis. Contrary to employer's contention, the administrative law judge permissibly discounted the opinions of Drs. Zaldivar, Crisalli, and Renn, that claimant's lung impairment is not due to pneumoconiosis, because they did not diagnose clinical pneumoconiosis, contrary to Judge Stewart's finding, which was affirmed by the Board. *See Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Toler*, 43 F.3d at 116, 19 BLR at 2-83. By

contrast, as the administrative law judge properly found, Dr. Cohen diagnosed coal workers' pneumoconiosis, based on the x-ray and CT scan evidence, consistent with the administrative law judge's own findings and the prior finding by Judge Stewart, as affirmed by the Board. *See Collins*, 468 F.3d at 224, 23 BLR at 2-412; *Scott*, 289 F.3d at 269, 22 BLR at 2-384; *Matney*, 24 BLR at 1-76; *Clark*, 12 BLR at 1-155; *Fields*, 10 BLR at 1-21.

As the administrative law judge permissibly discredited the opinions of Drs. Zaldivar, Crisalli, and Renn, the only physicians to opine that claimant's respiratory disability is not due to pneumoconiosis, we affirm the administrative law judge's finding that employer failed to establish that a mistake was made in the determination that claimant established disability causation. The administrative law judge's finding that claimant is totally disabled due, in part, to pneumoconiosis is, accordingly, affirmed. *See* 20 C.F.R. §718.204(c). Therefore, we need not address employer's additional allegations of error regarding the administrative law judge's evaluation of Dr. Cohen's opinion, as it was not the basis for the prior finding at Section 718.204(c).

Appeal of Judge Burke's Attorney Fee Order

Finally, we address employer's appeal of the administrative law judge's Attorney Fee Order. Claimant's counsel, Roger D. Forman, submitted a fee petition to the administrative law judge requesting a fee of $10,725.00, representing 42.9 hours of legal services at the rate of $250.00 per hour, plus an additional $1,811.20 in expenses. After considering employer's objections and claimant's counsel's response thereto, the administrative law judge approved the hourly rate and all of the hours requested, but disallowed $409.97 of the requested expenses. Accordingly, the administrative law judge awarded a total fee of $12,126.23.

On appeal, employer asserts that the hourly rate of $250.00 is not supported by market evidence, that the number of hours claimant's counsel spent preparing for Dr. Renn's deposition was excessive, and that there is no statutory authorization for expenses associated with fees for expert witnesses who did not attend or testify at the hearing. The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998)(*en banc*).

Employer initially asserts that, in awarding an hourly rate of $250.00, the administrative law judge failed to apply the correct standard for determining an appropriate hourly rate. Specifically, employer contends that the administrative law judge improperly took judicial notice of the Altman & Weil Survey of Law Firm Economics, erred in relying on prior fee awards to claimant's counsel, and erred in relying on affidavits from other attorneys.

In considering claimant's counsel's fee petition, the administrative law judge correctly noted:

> In support of his fee petition, Claimant's affidavit asserts that he has 24 years of experience in black lung litigation and is an expert in this area of law. He provides that the hourly rate represents his regular hourly rate for black lung claims and has attached 20 decisions, dating from as early as 1995, wherein he received $250.00 per hour. He also attaches a February 7, 1990, affidavit from Attorney Thomas Zerbe asserting that the market rate for black lung representation in Charleston, West Virginia in 1990 was between $150.00 and $250.00"[16]

Attorney Fee Order at 1-2. The administrative law judge further noted that the determination of whether a requested hourly rate is reasonable requires consideration of the factors set forth at 20 C.F.R. §725.366(b), including the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved and the level of the proceedings. *See* 20 C.F.R. §725.366(b); *B&G Mining, Inc. v. Director, OWCP* [*Bentley*], 522 F.3d 657, 664, 24 BLR 2-106, 2-122 (6th Cir. 2008); Attorney Fee Order at 2.

In approving claimant's counsel's requested hourly rate of $250.00, the administrative law judge stated that he took judicial notice that the 2007 Altman Weil survey for attorneys in the South Atlantic region provides a range of fees from $352.00 to $470.00 per hour for attorneys with twenty-one to thirty years of experience, and from $294.00 to $450.00 for attorneys with similar experience working in small firms. Attorney Fee Order at 2. However, in awarding the hourly rate of $250.00, the administrative law judge also applied the regulatory criteria appropriately, to find that counsel's "lengthy experience, prior receipt of the hourly rate sought, Mr. Zerbe's affidavit attesting to comparable rates being paid nearly 20 years ago, and the quality of the representation herein" established "that the amount sought is reasonable." *See* 20 C.F.R. §725.366(b); *Bentley*, 522 F.3d at 661, 24 BLR at 2-117; *see Pritt v. Director, OWCP*, 9 BLR 1-159 (1986); Attorney Fee Order at 2. In addition, contrary to employer's contentions, the Fourth Circuit has held that evidence of fees an attorney has received in the past, and affidavits of other lawyers who are familiar with the skills of the fee applicant or the type of work in the relevant community, constitute satisfactory evidence of the prevailing market rates. *See Westmoreland Coal Co. v. Cox*, F.3d , 2010 WL 1409418, at *11 (4th Cir. 2010). Based on the administrative law judge's

[16] Claimant's counsel also submitted affidavits from three other attorneys attesting to the limited number of attorneys practicing black lung law, and the difficulties of black lung litigation. Fee Petition at 3; Director's Exhibit 83.

proper analysis of the regulatory criteria and the relevant evidence of record, we affirm his finding that an hourly rate of $250.00 is reasonable.[17] *See* 20 C.F.R. §725.366(b); *Cox*, 2010 WL 1409418, at *11; *Bentley*, 522 F.3d at 664, 24 BLR at 2-126; *Amax Coal Co. v. Director, OWCP* [*Chubb*], 312 F.3d 882, 894-895, 22 BLR 2-514, 2-535-36 (7th Cir. 2002); *Peabody Coal Co. v. Estate of J.T. Goodloe*, 299 F.3d 666, 672, 22 BLR 2-483, 2-493 (7th Cir. 2002).

Employer next argues that the administrative law judge erred in compensating claimant's counsel for seven hours charged for preparing for, and participating in, Dr. Renn's deposition, because the administrative law judge "applied no test to determine whether seven hours for Dr. Renn's deposition was reasonable." Employer's Brief in Support of Petition for Review on Fees at 6. Employer's contention lacks merit. The administrative law judge applied the criteria set forth in *Lanning v. Director, OWCP*, 7 BLR 1-314, 1-316-17 (1984), requiring an administrative law judge to first decide whether a service was necessary, and thus compensable, and to then decide whether the amount of time expended in the performance of that service was excessive or unreasonable. Noting that employer did not contend that preparation for the deposition was unnecessary, and considering counsel's explanation that the time spent was necessary to discredit Dr. Renn's opinion, the administrative law judge concluded that in view of counsel's need for research and preparation, the time spent was "reasonable under the circumstances." Attorney Fee Order at 2-3. Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused his discretion, in finding that the requested charges were reasonable. *See* 20 C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Lanning*, 7 BLR at 1-316-17; Attorney Fee Order at 2-3.

We also reject employer's assertion that the administrative law judge abused his discretion in reimbursing claimant's counsel $1,125.00 for the cost of Dr. Cohen's report because Dr. Cohen did not appear at the hearing. Section 28(d) of the Longshore Act, 33 U.S.C. §928(d), as incorporated into the Black Lung Benefits Act by 30 U.S.C. §932(a), permits the recovery of fees for medical experts who do not attend the hearing. *Zeigler Coal Co. v. Director, OWCP* [*Hawker*], 326 F.3d 894 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001). Further, although employer is correct in noting that case law from the United States Court of Appeals for the Seventh Circuit does not

[17] As set forth above, employer argues that the administrative law judge erred in taking judicial notice of the Altman & Weil Survey. However, the administrative law judge did not rely on the survey, but specifically stated that, according to the survey, "the prevailing market rate is substantially in excess of the amount requested." Attorney Fee Order at 2. Moreover, because the administrative law judge relied on other data to support his award, any error in the administrative law judge's taking judicial notice of the survey is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984).

constitute binding precedent in this case arising within the jurisdiction of the Fourth Circuit, the standard of review of an administrative law judge's findings regarding attorney fee petitions, namely, whether the administrative law judge's findings are arbitrary, capricious, or an abuse of discretion, is uniform throughout the circuits. *See Cox*, 2010 WL 1409418, at *10; *Robinson v. Equifax Info. Serv., LLC*, 560 F.3d 235, 243 (4th Cir. 2009); *Kerns v. Consolidation Coal Co.*, 176 F.3d 802, 804, 21 BLR 2-631, 2-636 (4th Cir. 1999); *Hawker*, 326 F.3d at 902, *aff'g Hawker*, 22 BLR at 1-180; *Jones*, 21 BLR at 1-108. Nor is there any merit to employer's contention that the administrative law judge erred in awarding claimant's counsel $65.63 for the cost of travelling to the hearing, and $210.60 for court reporting services during the hearing. In this case, the administrative law judge reviewed the documented cost entries and specifically determined that the costs were reasonably necessary to establish entitlement to benefits. *See* 20 C.F.R. §725.366(c); *Branham v. Eastern Associated Coal Corp.*, 19 BLR 1-1 (1994); Attorney Fee Order at 3. We therefore hold that the administrative law judge did not abuse his discretion in allowing reimbursement to claimant's counsel for these costs. *Picinich v. Lockheed Shipbuilding*, 22 BRBS 128 (1989).

Therefore, employer has failed to demonstrate that the attorney fee awarded in this matter was arbitrary, capricious, or an abuse of discretion. *Jones*, 21 BLR at 1-108; *Lanning*, 7 BLR 1-314. Consequently, the administrative law judge's award of an attorney fee of $12,126.23, reflecting 42.9 hours of services at an hourly rate of $250.00, plus $1,401.23 in expenses, is affirmed.

Accordingly, Judge Craft's Decision and Order on Remand Awarding Benefits, and Judge Burke's Decision and Order Denying Employer's Petition for Modification and his Attorney Fee Order, are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge