BRB No. 02-0642 BLA

JOHN MACMUNN	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	DATE ISSUED: 08/26/2003
	)	
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 of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sandra M. Fogel (Culley & Wissore), Carbondale, Illinois, for claimant.

Laura Metcoff Klaus (Greenberg Traurig, LLP), Washington, D.C., for employer.

Sarah M. Hurley (Howard 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.

McGRANERY, Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand (97-BLA-1888) of Administrative Law Judge Rudolf L. Jansen awarding benefits 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 second time. In the original Decision and Order dated July 29, 1999, the administrative law judge credited claimant with nineteen years and eleven months of coal mine employment based upon the parties= stipulation and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found the evidence sufficient to establish the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. ''718.202(a)(1) (2000) and 718.203(b) (2000). The administrative law judge also found the evidence sufficient to establish total disability pursuant to 20 C.F.R. '718.204(c)(2) and (c)(4) (2000).[2] Further, the administrative law judge found the evidence sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. '718.204(b) (2000). Accordingly, the administrative law judge awarded benefits. In a Supplemental Decision and Order, the administrative law judge granted claimant=s counsel a fee in the amount of $13,756.80.

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The 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).

In response to employer=s appeal, the Board affirmed the administrative law judge=s length of coal mine employment finding and his findings at 20 C.F.R. ''718.202(a)(1) (2000)[3] and 718.204(c)(2) (2000). However, the Board vacated the administrative law judge=s findings at 20 C.F.R. ''718.203(b) (2000), 718.204(c)(4) (2000) and 718.204(b) (2000). The Board also affirmed the administrative law judge=s award of attorney=s fees in the amount of $13,756.80. *MacMunn v. Old Ben Coal Co.*, BRB No. 99-1203 BLA (Oct. 31, 2000)(unpub.). The Board subsequently granted employer=s request for reconsideration. On reconsideration, the Board additionally vacated the administrative law judge=s finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(1),[4] and remanded the case for further consideration.[5] The Board also awarded claimant=s counsel a fee in the amount of $1,300.00 for services performed before the Board. *MacMunn v. Old Ben Coal Co.*, BRB No. 99-1203 BLA (July 10, 2001)(Decision and Order on Motion for Reconsideration)(unpub.).

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[3]In rejecting employer=s argument that the administrative law judge ignored the written comments and deposition testimony indicating that the opacities viewed on the x-ray films are not consistent with pneumoconiosis, the Board stated that A[it] held in *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999), that a physician=s comments addressing the source of pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis under Section 718.202(a)(1), but should be addressed at Section 718.203.@ *MacMunn v. Old Ben Coal Co.*, BRB No. 99-1203 BLA, slip op. at 3 (Oct. 31, 2000)(unpub.).

[4]In its 2001 Decision and Order on Reconsideration, the Board stated that A[t]he present case is distinguishable from *Cranor*, as Drs. Selby and Binns provided a positive ILO/UC classification of a film dated September 15, 1997, but then suggested that the disease observed was not pneumoconiosis.@ *MacMunn v. Old Ben Coal Co.*, BRB No. 99-1203 BLA, slip op. at 3 (July 10, 2001)(Decision and Order on Motion for Reconsideration) (unpub.). In *Cranor*, the comments related to the source of pneumoconiosis; however, the comments in the case at bar relate to the existence of pneumoconiosis. Thus, the Board stated that Athe comments made by Drs. Selby and Binns concern the credibility of the ILO/UC classification and are relevant to whether their readings support a finding of pneumoconiosis in accordance with Sections 718.102 and 718.202(a)(1).@ *Id.*

[5]The Board instructed the administrative law judge to address on remand the comments made by Drs. Selby and Binns in conjunction with their classification of the film dated September 15, 1997 at 20 C.F.R. '718.202(a)(1). The Board also instructed the administrative law judge to consider the testimony of Drs. Hippensteel and Repsher regarding whether the x-rays that received a positive ILO/UC classification constitute evidence of pneumoconiosis, regardless of its source, at 20 C.F.R. '718.202(a)(1).

On remand, the administrative law judge found the evidence sufficient to establish: the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(1); total disability at 20 C.F.R. '718.204(b)(2)(iv); and causation at 20 C.F.R. '718.204(c). Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges all three of the administrative law judge=s findings. Claimant responds, urging affirmance of the administrative law judge=s award of benefits. The Director, Office of Workers= Compensation Programs (the Director), has filed a letter, contending that the Board should reject employer=s argument that coal workers= pneumoconiosis is not a progressive and latent disease.[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 into the Act by 30 U.S.C. '932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

[6]Employer has filed a brief in reply to claimant=s response brief, reiterating its prior contentions.

Initially, employer contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of pneumoconiosis at 20 C.F.R. ' 718.202(a)(1). Of the sixty-one interpretations of record, twenty-four readings are positive for pneumoconiosis and thirty-seven readings are negative for pneumoconiosis.[7] The administrative law judge stated that A[o]f the twelve more recent interpretations [of the x-rays dated September 15, 1997 and May 4, 1998] by dually-qualified physicians, two are negative and ten are positive for the disease.@ Decision and Order on Remand at 14. Drs. Spitz and Wiot, B readers and Board-certified radiologists, read the September 15, 1997 x-ray as negative for pneumoconiosis. Employer=s Exhibits 33, 35. In contrast, Drs. Abramowitz, Ahmed, Baek, Binns, Cappiello, Gogineni, Mathur, Pathak, Shipley and Whitehead, B readers and Board-certified radiologists, read the September 15, 1997 and the May 4, 1998 x-rays as positive for pneumoconiosis. Employer=s Exhibits 34, 44-47; Claimant=s Exhibits 2, 7, 8, 10, 14.

Employer argues that the administrative law judge erred in applying the later evidence rule to the conflicting x-ray evidence, based upon the theory that pneumoconiosis is progressive. Citing *Nat=l Mining Ass=n v. Department of Labor*, 292 F.3d 849, BLR (D.C. Cir. 2002), *aff=g in part and rev=g in part Nat=l Mining Ass=n v. Chao*, 160 F.Supp.2d 47, BLR (D.D.C. 2001), employer asserts that the court upheld the revised regulation at 20 C.F.R. ' 718.201(c) with a narrowed construction based only upon the concession of the Director=s counsel that simple pneumoconiosis is not latent at all and rarely progressive.[8] In response, the Director argues that his counsel merely conceded, at oral argument, that not every case of pneumoconiosis is progressive and that not every coal miner who does not have pneumoconiosis at the end of his mining career will eventually develop the disease. The Director also argues that the United States Court of Appeals for the District of Columbia Circuit affirmed the validity of the revised regulation at 20 C.F.R. ' 718.201. In addition, the Director argues that, in *Amax Coal Co. v. Franklin*, 957 F.2d 355, 16 BLR 2-50 (7th Cir. 1992), the United States Court of Appeals for the Seventh Circuit,

[7]The record contains seven x-rays dated January 29, 1992, February 9, 1993, May 5, 1994, March 28, 1996, June 3, 1996, September 15, 1997 and May 4, 1998.

[8]The pertinent regulation provides that A>pneumoconiosis= is recognized as a latent and progressive disease which may first become detectable only after the cessation of coal mine dust exposure.@ 20 C.F.R. ' 718.201(c).

within whose jurisdiction this case arises, recognized the progressive nature of pneumoconiosis.

In considering the seven x-rays of record, the administrative law judge found the two most recent x-rays dated September 15, 1997 and May 4, 1998 to be the most probative evidence at 20 C.F.R. ' 718.202(a)(1). The administrative law judge stated:

> As in my previous Decision, I assign greater weight to the most recent films and readings, particularly those readings of the x-rays dated September 15, 1997 and May 4, 1998. The Board affirmed this method of weighing the evidence, based on the premise, recognized in the Act and by the courts, that pneumoconiosis is a progressive disease.

Decision and Order on Remand at 13-14. The administrative law judge additionally stated, AI also assign the greatest weight to the readers who are dually-qualified as B-readers and [B]oard-certified radiologists.@ *Id*. at 14. We hold that the administrative law judge, within his discretion as trier-of-fact, rationally accorded greater weight to the readings of the most recent x-rays dated September 15, 1997 and May 4, 1998 by the physicians who are dually qualified as B readers and Board-certified radiologists. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). Employer=s assertion that counsel for the Director in *Nat=l Mining Ass=n* acknowledged, at oral argument, that latent and progressive pneumoconiosis is rare, does not nullify the administrative law judge=s substantive weighing of the x-ray evidence in this case. Thus, we reject employer=s assertion that the administrative law judge erred in applying the later evidence rule to the conflicting x-ray evidence based upon the theory that pneumoconiosis is progressive. *See Woodward v. Director, OWCP*, 991 F.2d 314, 320, 17 BLR 2-77, 2-85 (6th Cir. 1993).

Employer also argues that the administrative law judge erroneously based his x-ray evidence analysis on a Ahead count@ of recent readings. Contrary to employer=s assertion, the administrative law judge=s conclusion with respect to the conflicting x-rays was based upon both a quantitative and a qualitative analysis of the most recent x-ray evidence. In addition to noting the number of physicians who provided positive readings of the September 15, 1997 and May 4, 1998 x-rays, the administrative law judge also considered the dual

qualifications of the physicians who are B readers and Board-certified radiologists.[9] *See*

[9]The administrative law judge stated, AI assign less probative weight to the [negative] readings by Drs. Hippensteel, Dahhan and Repsher because they are qualified as B-readers, only.@ Decision and Order on Remand at 14. The administrative law judge also stated that ADr. Selby is a B-reader, but not dually-qualified as a radiologist.@ *Id*. at 4. Further, while Drs. Aycoth and Cohen are B readers, they too, are not dually qualified. Claimant=s Exhibits 9, 15.

Sahara Coal Co. v. Fitts, 39 F.3d 781, 18 BLR 2-384 (7th Cir. 1994).[10]

[10]Employer asserts that the administrative law judge should have accorded dispositive weight to the negative reading of the September 15, 1997 x-ray provided by Dr. Wiot because of Dr. Wiot=s superior credentials. Employer states that A[i]n addition to being a dually-qualified reader, Dr. Wiot is a professor of radiology, a member of the American College of Radiology=s task force on pneumoconiosis, and a developer of the test for B-reader certification.@ Employer=s Brief at 19-20. While an administrative law judge may accord greater weight to x-ray readings provided by physicians who are dually qualified as B readers and Board-certified radiologist, as well as professors of radiology, he is not required to do so. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The administrative law judge considered Dr. Wiot=s dual qualifications as a B reader and a Board-certified radiologist. Thus, we reject employer=s assertion that the administrative law judge should have accorded dispositive weight to Dr. Wiot=s negative reading of the September 15, 1997 x-ray because Dr. Wiot is a professor of radiology in addition to being dually qualified as a B reader and a Board-certified radiologist.

Employer further asserts that the administrative law judge ignored the Board=s instructions to consider the explanatory comments that accompanied the x-ray readers= classifications, positive and negative alike. Contrary to employer=s assertion, the administrative law judge addressed the comments by the physicians who provided the relevant x-ray readings.[11] The administrative law judge stated that ADr. Wiot and Dr. Spitz unequivocally found no evidence of pneumoconiosis in reading the September 1997 film.@[12]

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[11]The administrative law judge stated that A[t]his narrative will include any relevant written or verbal comments about those readings (*i.e.*, the readings of the most recent x-rays by the most qualified readers) and specifically, any comments made by Drs. Selby, Binns, Hippensteel, Wiot and Repsher in connection with their readings.@ Decision and Order on Remand at 4.

[12]The administrative law judge stated that A[o]n his classification sheet and accompanying letter, Dr. Wiot noted evidence of previous coronary by-pass surgery and pulmonary congestion.@ Decision and Order on Remand at 4. The administrative law judge also stated that ADr. Spitz=s classification report included very similar comments about [c]laimant=s cardiac condition.@ *Id*.

Decision and Order on Remand at 4. The administrative law judge also stated that ADrs. Ahmed, Pathek, Aycoth, Cappiello, Cohen, Whitehead and Mathur all unequivocally found the existence of at least simple pneumoconiosis.@ *Id*. at 8. However, the administrative law judge found Dr. Shipley=s x-ray reading to be equivocal and not a finding of pneumoconiosis. The administrative law judge stated that A[a]lthough Dr. Shipley offered a positive reading on his classification form, this doctor listed >NO CWP= on the comments section of that same report.@[13] *Id*.

[13]Dr. Shipley provided a 1/1 classification of the September 15, 1997 x-ray. Employer=s Exhibit 34. However, the administrative law judge discredited Dr. Shipley=s positive classification of pneumoconiosis based upon his finding that it is equivocal because Dr. Shipley noted ANO CWP@ on the comments section of the same report. Since Dr. Shipley=s comments relate to the source of pneumoconiosis, the administrative law judge erred in considering Dr. Shipley=s comments pursuant to 20 C.F.R. '718.202(a)(1). *See Cranor*, 22 BLR at 1-5, 1-6. Nonetheless, since Dr. Shipley=s positive reading supports the administrative law judge=s finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(1), we hold that the administrative law judge=s error in considering Dr. Shipley=s comments is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

With regard to the comments of Drs. Abramowitz and Binns, the administrative law judge stated that A[b]oth Drs. Abramowitz and Binns listed a positive finding of pneumoconiosis on their interpretation forms and neither doctor could exclude pneumoconiosis as a possible cause for the changes they observed on the 1997 x-ray.@[14] *Id*. In considering Dr. Selby=s comments, the administrative law judge concluded, AI consider Dr. Selby=s reading as positive for the disease even though he added comments that the changes >could= or >may= be entirely from heart disease.@ *Id*. at 14. Based upon Dr. Selby=s comments, the administrative law judge found that ADr. Selby never retracted his finding that the profusion he listed on his classification report revealed simple pneumoconiosis.@ *Id*. With regard to Dr. Baek=s comments, the administrative law judge stated that ADr. Baek found interstitial lung markings on the 1997 x-ray with overall profusion of 1/1.@ *Id*. at 6. The administrative law judge further stated that A[a]lthough he believed the changes were >nonspecific,= [Dr. Baek] remarked that they were >consistent with occupational pneumoconiosis.= @ *Id*. Similarly, the administrative law judge stated that ADr. Gogineni provided a reading of 1/0 after reviewing the 1997 film and finding, without qualification, abnormalities consistent with pneumoconiosis.@ *Id*. The

[14]The administrative law judge stated that ADr. Abramowitz indicated finding abnormalities consistent with pneumoconiosis of a 1/0 profusion in his 1998 reading of the 1997 film.@ Decision and Order on Remand at 6. The administrative law judge also stated that A[Dr. Abramowitz=s] impression, on a letter accompanying the classification sheet, was that he >cannot exclude borderline changes of occupational pneumoconiosis.= @ *Id*. Further, the administrative law judge stated that A[Dr. Abramowitz] also noted evidence of [claimant=s] previous cardiac surgery.@ *Id*. The administrative law judge found that ADr. Binns provided a reading very similar to that of Dr. Abramowitz, in that he marked a profusion of 1/0 on his classification sheet and a positive findings (sic) under >abnormalities consistent with pneumoconiosis.= @ *Id*. The administrative law judge additionally stated that A[Dr. Binns] then explained on an accompanying letter that the findings are >borderline but consistent with occupational disease.= @ *Id*.

administrative law judge additionally stated that A[t]his doctor noted >post op changes.= @[15]

[15]The administrative law judge stated that ADrs. Hippensteel , Dahhan and Repsher, who are B-readers but not [B]oard-certified radiologists, all read the 1997 film as negative for the presence of pneumoconiosis.@ Decision and Order on Remand at 6. Although the administrative law judge considered the comments in the depositions of Drs. Hippensteel and Repsher with regard to the September 15, 1997 x-ray, the administrative law judge did not consider the comments of Dr. Dahhan. *Id*. at 6-7. Nonetheless, since the administrative law judge permissibly accorded less weight to the negative readings of the September 15, 1997 x-ray by Drs. Dahhan, Hippensteel and Repsher than to the positive readings of the same x-ray by physicians who are dually qualified as B readers and Board-certified radiologists, *see Worhach v. Director, OWCP*, 17 BLR 1-105 (1993); *Roberts v. Bethlehem Mines Corp.*, 8

Id. Lastly, the administrative law judge found that ADr. Hippensteel, in a subsequent deposition, stated that the interstitial markings he saw, of the irregular type, >S and T variety,= were >more typical of congestive heart failure than of coal worker=s (sic) pneumoconiosis *even though they can occur in both*.= @[16] *Id*. (emphasis in original). Thus,

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BLR 1-211 (1985), we hold that any error by the administrative law judge in failing to consider their comments with regard to the September 15, 1997 x-ray is harmless, *see Larioni*, 6 BLR at 1-1278.

[16]Employer argues that the administrative law judge impermissibly substituted his opinion for that of Dr. Hippensteel. The administrative law judge stated that ADr. Hippensteel=s reading is questionable in that it is based on his belief that no significant change (over two profusion categories) would be shown on x-rays taken over a period of less than five years unless the process was due to some disease other than black lung.@ Decision and Order on Remand at 15. The administrative law judge further stated that A[t]his theory is not discussed in the regulations and is not a standard used to determine the existence of pneumoconiosis under Part 718.@ *Id*. Since the administrative law judge permissibly accorded less weight to Dr. Hippensteel=s negative reading of the September 15, 1997 x-ray than to the positive readings of the same x-ray by physicians who are dually qualified as B readers and Board-certified radiologists, *see Worhach*, 17 BLR at 1-108; *Roberts*, 8 BLR at 1-213, we hold that any error by the administrative law judge in discrediting Dr. Hippensteel=s negative x-ray reading because it is based on a premise

we reject employer=s assertion that the administrative law judge ignored the Board=s instructions to consider the explanatory comments that accompanied the x-ray readers= classifications.

We also reject employer=s assertion that the administrative law judge impermissibly ignored the overwhelming evidence that the abnormality detected in claimant=s September 1997 x-ray is related to heart disease and not to pneumoconiosis. Drs. Abramowitz, Baek, Binns, Cohen and Gogineni did not comment on claimant=s cardiac condition. The administrative law judge addressed the comments of Drs. Ahmed, Cappiello, Mathur, Pathak and Whitehead with respect to claimant=s cardiac condition. The comments of Drs. Ahmed, Cappiello, Mathur, Pathak and Whitehead are indicative of another disease process, rather than the cause of pneumoconiosis. The administrative law judge stated:

> All of these readers recognized and noted evidence of [c]laimant=s cardiac conditions as revealed on the 1997 and 1998 films, particularly his previous bypass surgery and cardiomegaly. However, there is no indication, either on their classification sheets or in their accompanying letter reports, that the abnormalities they observed were caused by any disease other than pneumoconiosis.

Decision and Order on Remand at 8. Further, as previously noted, the administrative law judge stated that A[o]n his classification sheet and accompanying letter, Dr. Wiot noted evidence of previous coronary by-pass surgery and pulmonary congestion.@ *Id*. at 4. The administrative law judge also stated that ADr. Spitz=s classification report included very similar comments about [c]laimant=s cardiac condition.@ *Id*. In addition, the administrative law judge noted that A[u]nder the block for >other comments,= Dr. Selby wrote: >previous mediansternotomy,= >cardiomegaly probable CHF,= and >parenchymal changes may all be due to CHF.= @ *Id*. An administrative law judge, as fact-finder, has broad discretion in assessing the evidence and determining whether a party has met its burden of proof. *See Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984). Moreover, the Board will not interfere with credibility determinations unless they are inherently incredible or patently unreasonable. *See Tackett v. Cargo Mining Co.*, 12 BLR 1-11, 1-14 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985). Thus, since the administrative law judge rationally determined that the positive x-ray readings by physicians who are dually qualified as B readers and Board-certified radiologists are credible, after considering the comments of the physicians with

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that is not discussed in the regulations and the Act is harmless, *see Larioni*, 6 BLR at 1278.

regard to claimant=s cardiac condition, we reject employer=s assertion that the administrative law judge impermissibly ignored the overwhelming evidence that the abnormality detected in claimant=s x-ray readings is related to heart disease and not to pneumoconiosis.

The administrative law judge did not consider the comments on the x-ray forms of Drs. Aycoth, Dahhan, Hippensteel, Repsher and Shipley with respect to claimant=s cardiac condition. Dr. Aycoth noted Amild cardiomegaly,@ Claimant=s Exhibit 9; Dr. Dahhan noted Apost mediastrinotomy,@ Employer=s Exhibit 51; Dr. Hippensteel noted prior cardiac surgery and pulmonary vascular congestion B mild CHF, Employer=s Exhibit 48; Dr. Repsher noted As/p CABG@ (coronary artery bypass graph), Employer=s Exhibit 54; and Dr. Shipley noted Amild cardiomegaly,@ Employer=s Exhibit 34. We hold that any error by the administrative law judge in failing to consider Dr. Shipley=s comments with respect to claimant=s cardiac condition is harmless, *see Larioni v. Director,* OWCP, 6 BLR 1-1276 (1984), since the administrative law judge did not rely on Dr. Shipley=s positive reading of the September 15, 1997 x-ray. Further, we hold that any error by the administrative law judge in failing to consider the comments by Drs. Aycoth, Dahhan, Hippensteel and Repsher with respect to claimant=s cardiac condition is harmless, *id.*, since the administrative law judge permissibly accorded less weight to their negative readings of the September 15, 1997 x-ray than to the positive readings of the same x-ray by physicians who are dually qualified as B readers and Board-certified radiologists, *see Worhach*, 17 BLR at 1-108; *Roberts*, 8 BLR at 1-213. Since it is supported by substantial evidence, we affirm the administrative law judge=s finding that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(1).

Addressing the issue of total disability, employer reasserts its objections to the Board=s affirmance of the administrative law judge=s finding that the evidence is sufficient to establish total disability at 20 C.F.R. '718.204(c)(2) (2000). In his prior decision, the administrative law judge found the evidence sufficient to establish total disability at 718.204(c)(2) (2000). The administrative law judge stated that A[b]ecause [the June 3, 1996 arterial blood gas study] and the most recent [arterial blood gas study dated May 4, 1998] produced qualifying results, I find that the arterial blood gas study evidence supports a finding of total disability.@ 1999 Decision and Order at 15. In its 2000 Decision and Order, the Board affirmed the administrative law judge=s finding at 20 C.F.R. '718.204(c)(2) (2000). The Board stated that Athe administrative law judge acted within his discretion in according greatest weight to the most recent blood gas study of record which produced qualifying values.@ *MacMunn v. Old Ben Coal Co.*, BRB No. 99-1203 BLA, slip op. at 5 (Oct. 31, 2000)(unpub.). The Board=s prior disposition of this issue constitutes the law of the case, as employer has advanced no new argument in support of altering the Board=s previous holding and no intervening case law has contradicted the Board=s resolution of this issue. *See Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993). Thus, we reject employer=s

assertion that the administrative law judge erred in previously finding the evidence sufficient to establish total disability at 20 C.F.R. '718.204(c)(2) (2000).

In addition, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability at 20 C.F.R. '718.204(b)(2)(iv). Whereas Drs. Houser, Cohen, Combs and Goodman [17] opined that claimant suffers from a disabling respiratory impairment, Director=s Exhibits 11, 17, 33, 34; Claimant=s Exhibit 1; Employer=s Exhibit 32, Drs. Dahhan, Hippensteel, Repsher and Selby opined that claimant does not suffer from a disabling respiratory impairment, Employer=s Exhibits 28-31, 55, 57, 58, 60. Based upon his consideration of the conflicting medical opinions, the administrative law judge found that the opinions of Drs. Houser, Cohen and Combs outweigh the contrary opinions of Drs. Dahhan, Hippensteel, Repsher and Selby.

Initially, we note that employer raises no specific argument with respect to the administrative law judge=s assignment of greatest weight to the opinion of pulmonary specialist, Dr. Houser, finding claimant totally disabled due to pneumoconiosis. Nor does employer raise a specific argument with respect to the administrative law judge's crediting of the opinion of pulmonary specialist Dr. Combs, who also found claimant totally disabled due to pneumoconiosis. With respect to Dr. Cohen=s opinion, employer argues that the administrative law judge did not provide a valid reason for crediting it over the opinions of Drs. Selby, Dahhan, Hippensteel and Repher. The administrative law judge explained his decision to credit Dr. Cohen=s opinion:

> For the reasons that Dr. Cohen is also a pulmonary specialist and also has a well-documented and well-reasoned report, I assign great probative weight to his opinion. Moreover, Dr. Cohen provided a well-reasoned and detailed statement explaining the medical basis for his disagreement with the contrary opinions of Drs. Selby, Dahhan, Hippensteel and Repsher.

Decision and Order on Remand at 16. Employer asserts that this explanation is insufficient because the administrative law judge did not discuss the explanations provided by Asome of those same expertsY@ for their disagreement with Dr. Cohen=s views. Brief for Employer at 26. Because employer did not identify the specific doctors whose opinions the administrative law judge is said to have overlooked, we would ordinarily dismiss employer=s argument out of hand as lacking sufficient specificity. However, our dissenting colleague has interpreted

[17]The administrative law judge stated, Athe Board affirmed my [prior] finding that Dr. Goodman=s opinion was entitled to less probative weight because it was vague.@ Decision and Order on Remand at 15.

employer=s argument as a reference to Dr. Repsher=s opinion.

A review of the administrative law judge's decision reveals that he fully discussed Dr. Repsher=s disagreement with Dr. Cohen=s opinion. The administrative law judge determined, however, that Dr. Repsher=s opinion did not constitute substantial evidence:

> I also assign less probative value to Dr. Repsher=s opinion that claimant=s past exposure to coal dust has not contributed to his current respiratory problems, because of this doctor=s belief that clinically significant chronic obstructive pulmonary disease cannot develop from exposure to coal dust alone. This premise was considered and rejected by the Seventh Circuit when presented before the court in a pulmonary specialist=s medical report. *Freeman* [*United Coal Mining Co. v. Summers*, 272 F.3d 473, 22BLR 2-265 (7th Cir. 2001).]
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> [18]

Decision and Order On Remand at 17.

The administrative law judge's citation of *Summers* is directly on point. In *Summers*, the Seventh Circuit upheld the administrative law judge's discounting of essentially the same opinion, voiced by a different expert, Dr. Fino. The Seventh Circuit explained why it found the administrative law judge's determination rational:

> Dr. Fino stated in his written report of August 30, 1998 that Athere is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.@ (Br. Supp. Pet. Modif=n at 23 (March 10, 1999)). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions Aare not in accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature.@ 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).

Id., 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7.

In comments to the regulation, the Department of Labor specifically rejected the opinion that

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[18]At his deposition Dr. Repsher addressed Dr. Cohen=s criticism of his report:

> [I]n response I would say that the literature is clear that coal dust alone has not been shown to be able to cause clinically significant or potentially disabling COPD.

Employer=s Exhibit 58 at 31.

coal dust alone cannot cause clinically significant COPD: Athe available pathologic evidence is to the contraryYYthe severity of the emphysema was related to the amount of dust in the lungs.@ 65 Fed. Reg. 79,994. This was the fundamental point of disagreement between Drs. Cohen and Repsher, which the Department of Labor has now resolved in favor of Dr. Cohen.

[19] Hence, the administrative law judge was entirely correct in discounting Dr. Repsher=s opinion because it was premised on data Acontrary@ to Athe available pathologic evidenceY@ *Id*. The Seventh Circuit=s words in *Summers* regarding the administrative law judge's treatment of the opinions of Drs. Cohen and Fino apply with equal force to the administrative law judge's treatment of the opinions of Drs. Cohen and Repsher in the instant case:

> It was rational to give great weight to Dr. Cohen=s views, particularly in light of his remarkable clinical experience and superior knowledge of cutting-edge research. [citation omitted]. It also was rational to discount Dr. Fino=s opinions, based on a finding that they were not supported by adequate data or sound analysis. [citations omitted].

Summers, 272 F.3d at 483, 22 BLR at 2-280-1. The administrative law judge=s citation of *Summers* reflects his determination that Dr. Repsher=s opinion, like Dr. Fino=s opinion in *Summers*, is not in accord with the weight of medical and scientific literature and that this is a valid ground upon which to discount Dr. Repsher=s opinion. The administrative law judge was correct. The only relevant, legal authority supports the administrative law judge=s weighing of the medical opinion evidence. *Id*.

When our dissenting colleague asserts that the administrative law judge erred in finding that Dr. Repsher=s opinion contravenes the Act, essentially, that it is hostile to the Act, the dissent is building a straw man in order to knock it down. The administrative law judge never said that he found Dr. Repsher=s opinion to contravene the Act or to be hostile to the Act. The administrative law judge stated:

> I also assign less probative value to Dr. Repsher=s opinion that

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[19]Dr. Repsher disputed the credibility of the studies supporting Dr. Cohen=s opinion:

> Basically my comment would be that Dr. Cohen either has not read those articles very carefully or he has a basic lack of familiarity with the fundamentals of epidemiologic research and epidemiologic studies, because these studies all--the data in these studies does not support his conclusion that COPD can develop from exposure to coal dust alone, that is clinically significant COPD.

Employer=s Exhibit 58 at 34.

> [c]laimant=s past exposure to coal dust has not contributed to his current respiratory problem, because of this doctor=s belief that clinically significant chronic obstructive pulmonary disease cannot develop from exposure to coal dust alone. This premise was considered and rejected by the Seventh Circuit when presented before the court in a pulmonary specialist=s medical report. [*See Summers*, 272 F.3d at 483, 22 BLR at 2-280-1].

Decision and Order On Remand at 17.

As we demonstrated above, the administrative law judge was entirely correct in citing the Seventh Circuit=s decision in *Summers* as authority for assigning less weight to Dr. Repsher=s opinion, which, like Dr. Fino=s opinion in *Summers*, is not Ain accord with the prevailing view of the medical community or the substantial weight of the medical and scientific literature. 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).@ *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7. The Seventh Circuit has also cited the comments to the Federal Register when affirming an administrative law judge's determination to credit a doctor. *See Consolidation Coal Co. v. Director, OWCP* [*Stein*], 294 F.3d 885, 895, 22 BLR 2-411, 2-426-27 (7th Cir. 2002) (A[T]here is >overwhelming scientific and medical evidence= supporting Dr. Cohen=s opinion that exposure to coal dust can cause, aggravate, or contribute to obstructive lung diseases. 65 Fed. Reg. at 79,944@ (citations omitted)). *See also Zeigler Coal Co. v. Director*, OWCP [*Villain*], 312 F.3d 332, 335, BLR , (7th Cir. 2002)(Court held that the administrative law judge properly credited claimant=s treating physician over employer=s expert where there was a medical basis for the physician=s opinion: A[A]s the Secretary observed when promulgating '718.205(c)(5), the proposition that persons weakened by pneumoconiosis may expire quicker from other diseases *is* a medical point, with some empirical support. *See* 65 Fed. Reg. 79,920, 79,950 (Dec. 20, 2000)@ (emphasis in original)). These cases reflect that a determination of whether a medical opinion is supported by accepted scientific evidence is a valid criterion in deciding whether to credit the opinion. This is very different from finding an opinion hostile to the Act. We note that in arguing that the issue is whether the opinion is hostile, our dissenting colleague relies upon decisions of the Seventh Circuit, the same court which upheld the discrediting of Dr. Fino=s opinion because Ahis opinions >are not in accord with the prevailing view of the medical community or the substantial weight of the medical community or the substantial weight of the medical and scientific literature.= 65 Fed. Reg. 79,920, 79,939 (Dec. 20, 2000).@ *Summers*, 272 F.3d at 483 n.7, 22 BLR at 2-281 n.7. The obvious conclusion to be drawn from the Seventh Circuit=s decision in *Summers* is that it did not apply its caselaw on hostility because it is irrelevant when an administrative law judge rejects a medical opinion which is contrary to the prevailing view of the medical community or the weight of medical and scientific knowledge, as revealed in the comments to the regulations.
[20]

Finally, unlike our dissenting colleague, we believe the administrative law judge properly assigned less weight to Dr. Selby=s opinion that claimant retained the respiratory capacity to return to his usual coal mine duties. In his prior decision, the administrative law judge had credited the opinions of Drs. Cohen and Houser over those of Dr. Repsher and others because the former Ademonstrated superior knowledge of claimant=s work duties.@ Decision and Order (August 3, 1999) at 16. In his current decision, the administrative law judge acknowledged that on appeal of his prior decision, the Board had vacated his weighing of the medical opinion evidence on the issue of total disability because the opinions of Drs. Selby, Dahhan, Hippensteel and Repsher either reflected Aa >detailed description of claimant=s usual coal mine work or indicated they had reviewed the description contained in Dr. Houser=s report dated June 15, 1998.= @ Decision and Order on Remand at 16. The administrative law judge made clear in his current decision that he discounted Dr. Selby=s opinion because his discussion of claimant=s jobs did not reflect an understanding of the exertional requirements of those jobs:

> Dr. Selby=s description of the jobs [c]laimant held did not include a description of the physical exertional requirements associated with each of those jobs and, by Dr. Selby=s own admission, this physician reviewed no other information, either by his own questioning of the patient or by review of other medical opinions, that would have allowed him to be better acquainted with the requirements of Mr. MacMunn=s coal mine work. Thus, his opinion on this issue is entitled to little probative weight. *See Cornett v. Benham Coal, Inc.*, 227 F.3d 569 (6th Cir. 2000); *Scott v. Mason Coal Co.*, 60 F.3d 1138 (4th Cir. 1995); *Kowalchick v. Director, OWCP*, 893 F.2d 615, 623 (3d Cir. 1990); *Wilburn v. Director, OWCP*, 11 BLR 1-135 (1988).

Decision and Order on Remand at 16.

A glance at the record reveals that the administrative law judge correctly determined that Dr. Selby=s report did not show an understanding of the demanding exertional requirements of claimant=s last coal mine employment.
[21] His description of claimant=s work as a driller contrasts starkly with the descriptions in the reports of Dr. Cohen
[22] and Dr. Houser.

[23] We note that employer does not dispute any detail of the descriptions in the opinions of Drs. Cohen and Houser. Dr. Selby was apparently unaware that every day claimant was required to crawl, climb ladders, push a 200 lb. wrench and that the levers and buttons he pushed most of the time required extending his arms over his head. The doctor was also unaware that claimant changed tracks once a month, not once a year, and that this entailed, *inter alia*, carrying heavy chains. Given Dr. Selby=s lack of information of the exertional requirements of a driller, and the wealth of information contained in the opinions of Drs. Cohen and Houser, the administrative law judge properly discounted Dr. Selby=s opinion that claimant had the

respiratory capacity to perform his usual coal mine employment.

Further, we reject employer=s assertion that the administrative law judge erred in failing to consider and weigh all of the relevant evidence of record, including the contrary probative evidence, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. ' 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). The administrative law judge stated, A[a]lthough Drs. Hippensteel and Dahhan are [B]oard-certified pulmonologists, I find the weight of the medical evidence, specifically the opinions of Drs. Houser, Cohen and Combs, along with the blood gas study evidence, is in favor of finding that [claimant] is totally disabled from pneumoconiosis.@ Decision and Order on Remand at 17. Since substantial evidence supports the administrative law judge=s weighing of the conflicting evidence, we affirm the administrative law judge=s finding that the evidence is sufficient to establish total disability at 20 C.F.R. ' 718.204(b). *See Fields*, 10 BLR at 1-21; *Rafferty*, 9 BLR at 1-232; *Shedlock*, 9 BLR at 1-198.

Next, employer contends that the administrative law judge erred in finding the evidence sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c). Whereas Drs. Cohen, Combs and Houser opined that claimant suffers from a disabling respiratory impairment caused by coal mine employment, Drs. Hippensteel, Repsher and Selby opined that claimant does not suffer from a disabling respiratory impairment caused by coal mine employment.[24] Based upon his reliance on the opinions of Drs. Cohen, Combs and Houser, the administrative law judge found that the weight of the evidence established total disability due to pneumoconiosis.

Employer asserts that the administrative law judge erred in failing to consider whether claimant is precluded from establishing entitlement to benefits because claimant=s heart condition caused his disability. The Seventh Circuit has held that a claimant cannot satisfy his burden of establishing total disability due to pneumoconiosis if he is totally disabled from a pre-existing nonrespiratory disability. *See Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995); *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994). In *Foster*, the Seventh Circuit held that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. ' 727.203(b)(2) where the miner=s inability to work was not due to pneumoconiosis, but a back injury that occurred during his coal mine employment. Similarly, the Seventh Circuit held, in *Vigna*, that the evidence was sufficient to establish rebuttal of the interim presumption at 20 C.F.R. ' 727.203(b)(3) where the miner had become totally disabled by a stroke that was not caused by coal dust exposure and where there was no evidence establishing a nexus between the miner=s stroke and his respiratory condition.

The administrative law judge stated that ADr. Hippensteel believed that only heart disease and smoking caused [claimant=s] disability.@ Decision and Order on Remand at 17; Employer=s Exhibit 57. Dr. Repsher opined that claimant=s disability is due to severe ischemic cardiomyopathy

as a result of severe underlying arteriosclerotic heart disease. Employer=s Exhibits 30, 58. Dr. Selby opined that claimant is eligible for severe desaturation during exercise due to cardiac disease and probable pulmonary edema. Employer=s Exhibits 31, 60. Although Dr. Combs noted that claimant has a history of heart disease and Drs. Dahhan and Houser diagnosed heart disease, they did not render an opinion with regard to whether claimant is disabled by this condition. Director=s Exhibit 13; Claimant=s Exhibit 1; Employer=s Exhibit 28. Dr. Cohen opined that claimant=s heart disease did not play any significant role in his gas exchange abnormalities. Claimant=s Exhibit 17. Since the administrative law judge rationally found that the opinions of Drs. Cohen, Combs and Houser, which do not support a finding that claimant suffers from a pre-existing, nonrespiratory disability, outweigh the contrary opinions of Drs. Hippensteel, Repsher and Selby, employer has failed to prove that claimant has a pre-existing, disabling heart condition which would preclude his entitlement to black lung benefits. *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993); *see also Foster*, 30 F.3d at 839, 18 BLR at 2-340-1; *Vigna*, 22 F.3d at 1394, 18 BLR at 2-225-6.

Employer also asserts that the administrative law judge erred in failing to provide an explanation for finding that the opinions of Drs. Cohen, Combs and Houser outweigh the contrary opinions of Drs. Hippensteel, Repsher and Selby. It is well established in the Seventh Circuit that Ain black lung adjudications, the decision of whether a medical opinion is reasoned is a decision that rests ultimately with the ALJ, not with [the court]@ or the Board (citation omitted). *Stein*, 294 F.3d at 895, 22 BLR at 2-426. The administrative law judge stated, A[f]or the same reasons described, above, I assign less probative weight to the opinions by Drs. Selby and Repsher surrounding the cause of [claimant=s] total disability.@ Decision and Order on Remand at 17. As we demonstrated above, the administrative law judge properly discounted the opinions of both Drs. Selby and Repsher. After weighing the opinions of Drs. Cohen, Combs and Houser against the contrary opinion of Dr. Hippensteel, the administrative law judge determined that the weight of the evidence supports a finding that claimant is totally disabled due to pneumoconiosis.[25] *See Summers*, 272 F.3d at 483, 22 BLR at 2-281.

In sum, the administrative law judge has provided valid reasons for crediting the opinions of Drs. Houser, Cohen and Combs, along with the blood gas study evidence, over the contrary opinions of Drs. Hippensteel, Repsher, Selby and Dahhan. Like the administrative law judge in *Summers*, the administrative law judge in the instant case Adid exactly what he was supposed to do: give these varying opinions more or less weight based on his view of the credibility of the witnesses, the reliability of their medical analyses and the depth of support for their conclusions.@ *Summers*, 272 F.3d at 484, 22 BLR at 282 (citations omitted). We reject employer=s request that we reweigh the evidence. The Seventh Circuit has repeatedly declared: AIt is the sole province of the ALJ to weigh the evidence and resolve conflicts therein.@ *Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1277-78, 18 BLR 2-42, 2-48 (7th Cir. 1991). The Board, like the court, reviews the entire record, Ayet we neither decide the facts anew nor substitute our judgment for the ALJ=s.@ *Keeling v. Peabody Coal*

Co., 984 F.2d 857, 862, 17 BLR 2-38, 2-44 (7th Cir. 1993). Because substantial evidence supports the administrative law judge's determination that claimant is totally disabled due to pneumoconiosis, we must affirm it. *See* 33 U.S.C. ' 921(b)(3).

Finally, claimant=s counsel has filed a complete, itemized statement requesting a fee for services performed in the appeal before the Board in BRB No. 99-1203 BLA/S pursuant to 20 C.F.R. ' 802.203.[26] Claimant=s counsel requests a fee of $2,400.00 for 12 hours of legal services at an hourly rate of $200.00. No objections to the fee petition have been received. Consequently, we award claimant=s counsel a fee of $2,400.00 to be paid directly to claimant=s counsel by employer. 33 U.S.C. ' 928, as incorporated by 30 U.S.C. ' 932(a); 20 C.F.R. ' 802.203. This fee becomes enforceable upon claimant=s ultimate success in the prosecution of the instant claim.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

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REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge

SMITH, Administrative Appeals Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority=s decision to affirm the administrative law judge=s finding at 20 C.F.R. ' 718.204(b) and (c). At 20 C.F.R. ' 718.204(b)(2)(iv), employer argues that the administrative law judge arbitrarily found that Dr. Cohen=s opinion outweighs the contrary opinions of Drs. Dahhan, Hippensteel, Repsher and Selby. The administrative law judge merely stated that ADr. Cohen provided a well-reasoned and detailed statement explaining the medical basis for his disagreement with the contrary opinions of Drs. Selby, Dahhan, Hippensteel and Repsher.@ Decision and Order on Remand at 16. The Administrative Procedure Act, 5 U.S.C. ' 557(c)(3)(A), as incorporated into the

Act by 5 U.S.C. '554(c)(2), 33 U.S.C. '919(d) and 30 U.S.C. '932(a), requires that an administrative law judge independently evaluate the evidence and provide an explanation for his findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *see also Hall v. Director, OWCP*, 12 BLR 1-80 (1988); *Shaneyfelt v. Jones & Laughlin Steel Corp.*, 4 BLR 1-144 (1981). As employer argues, the administrative law judge credited Dr. Cohen=s opinion because Dr. Cohen explained why he disagreed with the opinions of Drs. Dahhan, Hippensteel, Repsher and Selby, but the administrative law judge did not acknowledge that Dr. Repsher also explained why he disagreed with the opinion of Dr. Cohen. Employer=s Exhibit 58. Thus, since the administrative law judge=s basis for according dispositive weight to Dr. Cohen=s opinion is conclusory, I would hold that the administrative law judge did not provide a valid explanation for according greater weight to the opinion of Dr. Cohen than to the contrary opinions of Drs. Dahhan, Hippensteel, Repsher and Selby. *See Wojtowicz*, 12 BLR at 1-165.

Employer also argues that the administrative law judge erred in finding that Dr. Repsher=s opinion is hostile to the Act Aby claiming that Dr. Repsher believes that dust exposure never causes clinically significant COPD.@ Employer=s Brief at 24-25. In considering Dr. Repsher=s opinion, the administrative law judge stated, AI also assign less probative value to Dr. Repsher=s opinion that [c]laimant=s past exposure to coal dust has not contributed to his current respiratory problems, because of this doctor=s belief that clinically significant chronic obstructive pulmonary disease cannot develop from exposure to coal dust alone.@ Decision and Order on Remand at 17. In a report dated March 2, 1998, Dr. Repsher stated:

Inhalation of coal mine dust, when associated with coal workers= pneumoconiosis causes a pure restrictive disease, that may have some obstructive features. However, [claimant] has pure COPD, which is clearly related to his long history of heavy cigarette smoking. The very mild COPD of the small airways, associated with CWP, does not cause measurable impairment or disability.

Employer=s Exhibit 30. In a subsequent deposition dated January 20, 1999, Dr. Repsher stated, AI would say that the literature is clear that coal dust *alone* has not been shown to be able to cause clinically significant or potentially disabling COPD.@ *Id.* (emphasis added).

The United States Court of Appeals for the Seventh Circuit has held that a medical opinion is hostile to the Act when it is affected by a physician=s subjective personal opinions about pneumoconiosis which are contrary to the congressional determinations implicit in the Act=s provisions. *See Blakley v. Amax Coal Co.*, 54 F.3d 1313, 19 BLR 2-192 (7th Cir. 1995). However, the Seventh Circuit declared that Aa physician=s expression of an opinion that is at odds with the Act is not enough by itself to exclude that opinion from consideration.@ *Blakley*, 54 F.3d at 1321, 19 BLR at 2-206. Citing *Wetherill v. Director, OWCP*, 812 F.2d 376, 9 BLR 2-239 (7th Cir. 1987), the Seventh Circuit indicated that the test for determining A >whether an opinion is hostile to the

Act is whether and to what extent those hostile opinions affected the medical diagnosis.= @[27] *Id*. After noting that Dr. Tuteur=s testimony, that coal mine employment cannot lead to obstructive impairment, neither falls into a traditionally hostile category nor contravenes the Act=s definition of pneumoconiosis, the Seventh Circuit concluded that his opinion is not hostile to the Act.[28] *Id*. The Seventh Circuit reasoned that the Act and its regulations define pneumoconiosis broadly and do not establish that dust exposure from coal mine work can necessarily cause obstructive pulmonary disease or impairment. In the instant case, the administrative law judge did not specifically identify which aspects of Dr. Repsher=s opinion are hostile to the Act. Moreover, even if the administrative law judge properly found that Dr. Repsher expressed an opinion that is hostile to the Act, he erred in his consideration of Dr. Repsher=s opinion because he did not undertake an analysis with respect to whether and to what extent Dr. Repsher=s hostile opinion affected the medical diagnosis. Dr. Repsher did not assume that coal mine dust exposure can never cause chronic obstructive pulmonary disease. Employer=s Exhibits 30, 58. Rather, Dr. Repsher provided explanations for concluding that claimant=s chronic obstructive pulmonary disease is due to his cigarette smoking and not coal dust exposure. *Id*.

The majority relies upon the Seventh Circuit=s decision in *Freeman United Coal Mining Co. v. Summers*, 272 F.3d 473, 22 BLR 2-265 (7th Cir. 2001), to hold that the administrative law judge provided a proper basis for discrediting Dr. Repsher=s opinion. In *Summers*, the Seventh Circuit addressed employer=s argument that Athe ALJ >erred by preferring Dr. Cohen=s unfounded claims to the well reasoned analysis of Dr. Fino.= @ *Summers*, 272 F.3d at 483, 22 BLR at 2-280. The Seventh Circuit held that the administrative law judge rationally accorded great weight to Dr. Cohen=s views based upon his remarkable clinical experience and superior knowledge of cutting edge research. The Seventh Circuit also held that the administrative law judge rationally discounted Dr. Fino=s opinions based on a finding that they were not supported by adequate data or sound analysis. The Seventh Circuit noted that:

Dr. Fino stated in his written report of August 30, 1998 that Athere is no good clinical evidence in the medical literature that coal dust inhalation in and of itself causes significant obstructive lung disease.@ (Br. Supp. Pet. Modif=n at 23 (March 10, 1999)). During a rulemaking proceeding, the Department of Labor considered a similar presentation by Dr. Fino and concluded that his opinions Aare not in accord with the prevailing view of the medical and scientific literature.@ 65 Fed.Reg. 79,920, 79,939 (Dec. 20, 2000).

Summers, 272 F.3d at 483, 22 BLR at 281 n.7. The facts in *Summers* are distinguishable from the facts in the instant case. In *Summers*, the administrative law judge discredited Dr. Fino=s opinion because it was not adequately supported by medical science. In the instant case, the only indication that the administrative law judge provided for discrediting the opinion of Dr. Repsher is A[Dr. Repsher=s] belief that clinically significant chronic obstructive pulmonary disease cannot develop from exposure to coal dust alone.@ Decision and Order on Remand at 17. The administrative law

judge in the instant case cited to *Summers* in noting that A[t]his premise was considered and rejected by the Seventh Circuit when presented before the court in a pulmonary specialist=s medical report.@ *Id*. However, unlike the facts in *Summers*, the administrative law judge in the case at bar did not find that Dr. Repsher=s opinion is not adequately supported by medical science. It is the role of the administrative law judge to evaluate each medical opinion in the context of the unique factual circumstances of each case. *See Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. 1990); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). It is not the role of the Board to speculate as to whether Dr. Repsher=s opinion is similar to an earlier opinion by Dr. Fino that was rejected by another administrative law judge in a separate case.

In addition, the administrative law judge discredited Dr. Repsher=s opinion that simple pneumoconiosis rarely progresses after cessation of exposure to coal dust because Congress reached a different conclusion in formulating the amended regulations. Decision and Order on Remand at 17. 20 C.F.R. '718.201(c) provides that A>pneumoconiosis= is recognized as a latent and progressive disease.@ 20 C.F.R. '718.201(c). In the January 20, 1999 deposition, Dr. Repsher stated that A[s]imple pneumoconiosis *rarely*, if ever, progresses following cessation of exposure.@ Employer=s Exhibit 58 at 31 (emphasis added). Dr. Repsher did not preclude the possibility that pneumoconiosis is a progressive disease. *Id*. Thus, since Dr. Repsher=s opinion does not contravene the statutory and regulatory definition of pneumoconiosis, I would hold that employer=s assertion that the administrative law judge did not provide a valid basis for discrediting Dr. Repsher=s opinion has merit. *See Blakley*, 54 F.3d at 1321, 19 BLR at 2-206; *Wetherill*, 812 F.2d at 382-3, 9 BLR at 2-247-8.

Employer further argues that the administrative law judge erred in discrediting Dr. Selby=s opinion because Dr. Selby is not familiar with the exertional requirements of claimant=s usual coal mine work. In the prior decision, the administrative law judge accorded dispositive weight to the opinions of Drs. Cohen and Houser because Ait is significant that Drs. Cohen and Houser demonstrated superior familiarity with [c]laimant=s work requirements since they both described his coal mining duties in great detail.@ 1999 Decision and Order at 16. However, in its 2000 Decision and Order, the Board stated that ADrs. Dahhan, Hippensteel, Repsher, and Selby either independently set forth a detailed description of claimant=s usual coal mine work or indicated that they had reviewed the description of claimant=s usual coal mine work.@ *MacMunn v. Old Ben Coal Co.*, BRB No. 99-1203 BLA, slip op. at 5 (Oct. 31, 2000)(unpub.). Hence, the Board stated that Athe administrative law judge relied upon an inaccurate characterization of the respective merits of the medical opinions relevant to the issue of total disability.@ *Id*. The Board previously stated that the administrative law judge=s characterization was incorrect and on remand it remains so. The administrative law judge=s additional findings on remand do not alter the fact that all of the doctors in question had an understanding of what claimant did in his usual coal mine work. Thus, I would hold that employer=s assertion that the administrative law judge erred in discrediting Dr. Selby=s opinion because Dr. Selby is not familiar with the exertional requirements of claimant=s usual coal

mine work has merit.

I would instruct the administrative law judge to consider and weigh all of the relevant evidence of record, like and unlike, to determine whether the evidence is sufficient to establish total disability at 20 C.F.R. ' 718.204(b). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon. en banc*, 9 BLR 1-236 (1987). As employer asserts, the administrative law judge did not weigh the medical evidence on which he relied against all of the contrary probative evidence.

In addition, since the administrative law judge relied upon his 20 C.F.R. ' 718.204(b)(2)(iv) findings in rendering his finding at 20 C.F.R. ' 718.204(c), I would vacate the administrative law judge=s finding that the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c). Finally, I would instruct the administrative law judge to consider, if reached on remand, whether the evidence is sufficient to establish total disability due to pneumoconiosis at 20 C.F.R. ' 718.204(c), *see Shelton v. Director, OWCP*, 899 F.2d 630, 13 BLR 2-444 (7th Cir. 1990); *Hawkins v. Director, OWCP*, 906 F.2d 697, 14 BLR 2-17 (7th Cir. 1990), and in accordance with the Seventh Circuit=s decisions in *Freeman United Coal Mining Co. v. Foster*, 30 F.3d 834, 18 BLR 2-329 (7th Cir. 1994), *cert. denied*, 514 U.S. 1035 (1995), and *Peabody Coal Co. v. Vigna*, 22 F.3d 1388, 18 BLR 2-215 (7th Cir. 1994).

In all other respects, I agree with the majority=s opinion.

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ROY P. SMITH
Administrative Appeals Judge