BRB No. 14-0049 BLA

ARLIS HENSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIXIE FUEL COMPANY, LLC	)	DATE ISSUED: 08/26/2014
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand of Administrative Law Judge Kenneth A. Krantz, United States Department of Labor.

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

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

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order on Remand (2007-BLA-06085) of Administrative Law Judge Kenneth A. Krantz, rendered on a subsequent claim, filed pursuant to the provisions of the Black Lung Benefits Act, as amended, 30

U.S.C. §§901-944 (2012) (the Act).[1] This case is before the Board for the second time. In its prior decision, the Board affirmed, as unchallenged on appeal, the administrative law judge's findings that claimant established total disability at 20 C.F.R. §718.204(b)(2) and a change in an applicable condition of entitlement at 20 C.F.R. §725.309.[2] *Hensley v. Dixie Fuel Co.*, BRB No. 10-0363 BLA, slip op. at 3 n.3 (Mar. 30, 2011) (unpub.). The Board also affirmed, as supported by substantial evidence, the administrative law judge's finding that claimant established the existence of pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(1), 718.203, and total disability due to pneumoconiosis at 20 C.F.R. §718.204(c). *Id*. at 7, 13-15. The Board declined to apply *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997), and *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), as this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit,[3] and held that the methods claimant may use to establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) are alternative methods. *Hensley*, BRB No. 10-0363 BLA, slip op. at 7 n.7. Accordingly, the Board affirmed the award of benefits, and denied employer's subsequent motion for reconsideration. *Id*. at 15; *Hensley v. Dixie Fuel Co.*, BRB No. 10-0363 BLA (Sept. 30, 2011) (unpub. Order).

Upon considering employer's appeal, the Sixth Circuit vacated the Board's Decision and Order and joined the Third and Fourth Circuits in holding that all of the different types of evidence, referenced under 20 C.F.R. §718.202(a)(1)-(4), must be weighed together before determining whether claimant has established the existence of pneumoconiosis. *Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 25 BLR 2-213 (6th Cir. 2012). Accordingly, the court instructed the Board to remand the case to

[1] The prior procedural history is set forth in the administrative law judge's 2013 Decision and Order on Remand at 2 and in *Hensley v. Dixie Fuel Co.*, BRB No. 10-0363 BLA, slip op. at 1 n.1 (Mar. 30, 2011) (unpub.). Because claimant was credited with less than fifteen years of qualifying coal mine employment, claimant is not entitled to the Section 411(c)(4) presumption. Therefore, the administrative law judge addressed whether claimant has satisfied his burden to establish all the elements of entitlement under 20 C.F.R. Part 718.

[2] The Department of Labor has revised the regulation at 20 C.F.R. §725.309, effective October 25, 2013. The applicable language formerly set forth in 20 C.F.R. §725.309(d) is now set forth in 20 C.F.R. §725.309(c). *See* 78 Fed. Reg. 59,102, 59,118 (Sept. 25, 2013).

[3] Because claimant's last coal mine employment was in Kentucky, the Board will apply the law of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 1.

the administrative law judge for further consideration. *Hensley*, 700 F.3d at 881, 25 BLR at 2-218. On remand, the administrative law judge again awarded benefits, finding that claimant established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, and total disability due to pneumoconiosis at 20 C.F.R. §718.204(b), (c).

On appeal, employer argues that the administrative law judge erred in 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 and total disability causation at 20 C.F.R. §718.204(c). Claimant has not responded, and the Director, Office of Workers' Compensation Programs, declined to file a substantive response, unless specifically requested to do so by the Board.

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).

I. The Existence of Pneumoconiosis

On appeal, employer has revived its arguments, previously rejected by the Board, that in reaching his determination pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge: improperly excluded the negative x-ray reading by Dr. Wheeler, who is dually qualified as a Board-certified radiologist and B reader; failed to resolve the "dispute among the positive readings" as to the "size and location of the opacities;" and relied on a "presumption" that pneumoconiosis is a progressive disease, in giving greatest weight to the more recent x-rays.[4] Employer's Brief in Support to

[4] Employer also argues that, by essentially reiterating his findings at 20 C.F.R. §718.202(a)(1), (a)(2), (a)(3), the administrative law judge failed to comply with the United States Court of Appeals for the Sixth Circuit's remand instructions. Contrary to employer's argument, the administrative law judge observed correctly that the Sixth Circuit remanded the case in order that all types of evidence relevant to the existence of pneumoconiosis be weighed together under 20 C.F.R. §718.202(a). The administrative law judge properly noted the remand instructions as follows:

> The [ALJ] must weigh all of the evidence – for and against a finding of pneumoconiosis – before granting benefits. This is not to say that the ALJ must reconsider his prior judgment with respect to any one piece of contrary evidence or end up with a different conclusion. All of that is up to the ALJ in the first instance.

Petition for Review at 10-13. In *Hensley*, the Sixth Circuit did not disturb the Board's prior holdings with regard to these issues. *Hensley*, 700 F.3d at 881, 25 BLR at 2-218. Therefore, they constitute the law of the case, as employer has not advanced any arguments providing a basis for an exception to the application of the doctrine. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9, 1-15 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-150-51 (1990). We decline, therefore, to revisit our prior holdings: affirming the administrative law judge's exclusion of Dr. Wheeler's negative reading of the July 28, 2008 x-ray as being in excess of the evidentiary limitations at 20 C.F.R. §725.414(a)(3)(ii); rejecting employer's argument that the administrative law judge was required to resolve the conflict in the readings as to the location and shape of the opacities observed on x-ray; and affirming the administrative law judge's findings that Dr. Dahhan's reading of the April 12, 2007 x-ray was positive for pneumoconiosis, the February 23, 2004 x-ray was negative for pneumoconiosis, and the x-rays dated January 16, 2009, January 5, 2007, November 1, 2006, and September 10, 1990, were in equipoise. *Hensley*, BRB No. 10-0363 BLA, slip op. at 6-7.

Employer further contends that the administrative law judge erred in failing to rule on its request to substitute Dr. Wheeler's negative reading of the July 28, 2008 x-ray for a negative reading performed by Dr. Rosenberg.[5] *See* Employer's Brief in Support of

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Decision and Order on Remand at 5, *quoting Dixie Fuel Co. v. Director, OWCP* [*Hensley*], 700 F.3d 878, 881, 25 BLR 2-213, 2-218-9 (6th Cir. 2012).

[5] The record contains fifteen readings of seven x-rays dated September 10, 1990, February 23, 2004, November 1, 2006, January 5, 2007, April 12, 2007, July 28, 2008 and January 16, 2009. Dr. Sargent, dually qualified as a Board-certified radiologist and B reader, read the September 10, 1990 x-ray as positive for simple pneumoconiosis, while Dr. Gordonson, also dually qualified, and Dr. Dahhan, a B reader, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 1. Dr. Baker, a B reader, read the February 23, 2004 x-ray as positive for simple pneumoconiosis, while Dr. Halbert, a dually qualified radiologist, read the same x-ray as negative for pneumoconiosis. Director's Exhibit 2. Dr. Alexander, a dually qualified radiologist, read the November 1, 2006 x-ray as positive for pneumoconiosis, while Dr. Wheeler, also dually qualified, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 7. Dr. Ahmed, a dually qualified radiologist, read the January 5, 2007 x-ray as positive, while Dr. Wheeler read the x-ray as negative. Director's Exhibit 39; Claimant's Exhibit 4. Dr. Baker also read the January 5, 2007 x-ray as positive for pneumoconiosis. Director's Exhibits 16, 17. Dr. Dahhan checked a box on the ILO form indicating that the April 12, 2007 x-ray showed parenchymal abnormalities consistent with pneumoconiosis (1/1, q/q), but no pleural abnormalities consistent with pneumoconiosis. Director's Exhibit 33. Dr. Alexander read the July 28, 2008 x-ray as positive for

Petition for Review at 11; Employer's Remand Brief at 10 n.2. Employer is correct in asserting that the administrative law judge did not make a determination as to whether employer could substitute x-ray readings. The administrative law judge's omission was harmless, however, because substituting Dr. Wheeler's negative reading of the July 28, 2008 x-ray for Dr. Rosenberg's negative reading would not render inaccurate the administrative law judge's determinations that "the most recent x-rays have been found to be either positive for pneumoconiosis or in equipoise," and that "the only negative x-ray is from 2004."[6] Decision and Order on Remand at 7; *see Johnson v. Jeddo-Highland Coal Co.*, 12 BLR 1-53 (1988); *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Accordingly, we affirm the administrative law judge's finding that claimant established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1), as it is rational and supported by substantial evidence. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). Because employer has raised no other allegations of error regarding the administrative law judge's determination that claimant established the existence of clinical pneumoconiosis at 20 C.F.R. §718.202(a), based on a weighing of all of the relevant evidence, it is affirmed. *See* 20 C.F.R. §§802.211(b), 802.301(a); *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf v. Director, OWCP*, 10 BLR 1-119, 1-120-21 (1987); *Fish v. Director, OWCP*, 6 BLR 1-107, 1-109 (1983).

II. Pneumoconiosis Arising Out of Coal Mine Employment

Pursuant to 20 C.F.R. §718.203(b), the administrative law judge determined that claimant was entitled to the presumption that his pneumoconiosis arose out of coal mine employment and that employer failed to rebut it. Decision and Order on Remand at 21. Employer asserts that the administrative law judge did not adequately consider whether

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pneumoconiosis, while Dr. Rosenberg, a B reader, read the x-ray as negative. Claimant's Exhibit 3; Employer's Exhibit 4. Lastly, Dr. Miller, a dually qualified radiologist, read the January 16, 2009 x-ray as positive, while Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 10.

[6] Moreover, the Department of Labor has concluded that Dr. Wheeler's negative readings for pneumoconiosis are not to be credited "in the absence of persuasive evidence challenging" published reports finding that Dr. Wheeler's negative readings are not credible, or otherwise rehabilitating Dr. Wheeler's x-ray readings. *See BLBA Bulletin No. 14-09* (June 2, 2014), Office of Workers' Compensation Programs, Division of Coal Mine Workers' Compensation.

Dr. Dahhan's opinion, that the abnormalities observed on claimant's x-rays showed rheumatoid arthritis, not pneumoconiosis, was sufficient to establish that the miner's lung disease did not arise out of coal mine employment.[7] To support its contention, employer asserts:

> Dr. Dahhan stated that the opacities could be consistent with pneumoconiosis but he found no pleural abnormalities consistent . . . with the disease. And when he considered the x-ray evidence in light of claimant's medical history and treatment, he concluded that, in fact, the films showed rheumatoid arthritis.

Employer's Brief in Support of Petition for Review at 12. Employer also alleges that the administrative law judge erred in discrediting Dr. Dahhan's opinion, based on "invocation of a presumption of latency." *Id.* at 17. We reject employer's arguments.

Upon considering the weight to accord Dr. Dahhan's opinion regarding the etiology of the opacities that he identified on claimant's April 12, 2007 x-ray, the administrative law judge observed Dr. Dahhan's testimony that "x-ray images of rheumatoid disease affecting the respiratory system could appear on an x-ray to be similar to markings caused by coal workers' pneumoconiosis . . . ." Decision and Order on Remand at 18, *quoting* Employer's Exhibit 1 at 8. Specifically, Dr. Dahhan opined that it is not possible to differentiate between radiological changes caused by rheumatoid arthritis and those caused by coal workers' pneumoconiosis, "with certainty," as the former can "mimic" the latter insofar as "[t]hey will have similar appearance [and] [w]e are looking at shadows and so the opacities can simulate each other." Employer's Exhibit 1 at 8-9. The administrative law judge also observed that, although "Dr. Dahhan noted that [c]laimant's biopsy involved a 'generous piece that was removed from the lung,' Dr. Oesterling emphasized that the tissue was insufficient to perform a meaningful analysis." Decision and Order on Remand at 15, *quoting* Employer's Exhibit 1 at 10. Lastly, the administrative law judge acknowledged Dr. Dahhan's comment that, because

[7] Employer placed the bulk of its argument in the section of its Brief In Support of Petition for Review addressing the issue of the existence of pneumoconiosis. *See* Employer's Brief in Support of Petition for Review at 11-12. The Board has held, however, that evidence relevant to a determination of whether the opacities seen on x-ray are opacities of coal workers' pneumoconiosis, and not some other disease process, cannot be used to negate a properly classified positive reading at 20 C.F.R. §718.202(a)(1). *See Kiser v. L&J Equipment Co.*, 23 BLR 1-246, 1-257-9 (2006). Rather, such evidence is relevant to the source of the pneumoconiosis diagnosed by x-ray and is to be considered at 20 C.F.R. §718.203. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5-6 (1999) (en banc).

claimant had not been exposed to coal mine dust since 1988, coal mine dust "should not" be a cause of changes on pulmonary functions from 1990 until 2007. Decision and Order on Remand at 19. Based on these statements, the administrative law judge acted within his discretion as fact-finder in determining that Dr. Dahhan's opinion, that claimant's radiological abnormalities were caused solely by rheumatoid arthritis, was inadequately reasoned. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Peabody Coal Co. v. Groves*, 277 F.3d 829, 22 BLR 2-320 (6th Cir. 2002), *cert. denied*, 537 U.S. 1147 (2003).

Employer also reiterates arguments raised and rejected by the Board in its prior appeal, *i.e.*, that the administrative law judge violated the Administrative Procedure Act (APA),[8] by relying on his internet research of articles cited by Dr. Rosenberg, and substituted his opinion for that of Dr. Rosenberg. Employer also maintains that the administrative law judge erred in assigning "minimal probative value" to the uncontradicted CT scan evidence. Employer's Brief in Support of Petition for Review at 18 quoting Decision and Order on Remand at 16. .

Based on the doctrine of "law of the case," we decline to alter our prior holding that the administrative law judge did not violate the APA in considering whether Dr. Rosenberg accurately characterized the medical studies that he cited in support of his opinion that claimant's linear interstitial x-ray changes were not caused by coal dust exposure. *See Coleman*, 18 BLR at 1-15; *Brinkley*, 14 BLR at 1-150-51; *Hensley*, BRB No. 10-0363 BLA, slip op. at 12. We also reject employer's contention that the administrative law judge erred in giving "minimal probative value" to the CT scan evidence at 20 C.F.R. §718.203. Decision and Order on Remand at 16. Dr. Rosenberg relied, in part, upon the CT scan evidence to exclude coal dust exposure as the source of the abnormalities seen on claimant's x-rays, and the administrative law judge observed correctly that Dr. Rosenberg was the only physician to analyze the CT scan evidence.[9]

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[8] The Administrative Procedure Act, 5 U.S.C. §500 *et seq*., provides that "[w]hen an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary." 5 U.S.C. §556(e), as incorporated into the Act by 30 U.S.C. §932(a).

[9] Pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge found that the physicians' readings of the CT scans, which appear in claimant's treatment records, assessed claimant's lungs for consolidation, masses and nodules, but did not explicitly analyze whether claimant suffers from clinical or legal pneumoconiosis. Decision and Order on Remand at 16. The administrative law judge considered that Dr. Rosenberg opined that the CT scans demonstrated linear interstitial scarring, with evolution of granulomatous changes, which Dr. Rosenberg opined did not support a diagnosis of pneumoconiosis arising out of coal mine employment. *Id.*; Employer's Exhibit 9 at 3.

See Id.; Employer's Exhibit 9. However, as discussed *supra* at *7*, the administrative law judge provided a valid rationale for discrediting Dr. Rosenberg's opinion regarding the etiology of claimant's lung disease. We affirm, therefore, the administrative law judge's finding that employer did not rebut the presumption that claimant's pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b).

III. Total Disability Causation

Employer argues that the administrative law judge erred in relying on the opinion of Dr. Baker to find that claimant established total disability causation at 20 C.F.R. §718.204(c), when the administrative law judge had discredited his diagnosis of pneumoconiosis at 20 C.F.R. §718.202(a)(4). Employer asserts that the administrative law judge ignored Dr. Baker's reliance on an x-ray deemed inconclusive for clinical pneumoconiosis and a discredited pulmonary function study. Employer also contends that the administrative law judge did not address Dr. Baker's failure to consider whether claimant had rheumatoid arthritis. We reject employer's arguments.

The administrative law judge found that Dr. Baker opined that claimant's impairment was caused by coal workers' pneumoconiosis, chronic obstructive pulmonary disease, mild resting hypoxemia, and chronic bronchitis. The administrative law judge observed correctly that a physician's opinion may be reasoned and documented as to some issues and not as to others. Decision and Order on Remand at 15, citing *Drummond Coal Co. v. Freeman*, 17 F.3d 361, 366–67 (11th Cir. 1994). The administrative law judge acknowledged that he had given little weight to Dr. Baker's opinion "regarding the etiology of the abnormalities present on the [c]laimant's x-ray and the etiology of the [c]laimant's other conditions because Dr. Baker was unaware of the [c]laimant's rheumatoid arthritis." Decision and Order on Remand at 21. The administrative law judge further stated that, "[f]or the purposes of this section, however, given my finding that the x-ray evidence establishes the presence of pneumoconiosis and that the [c]laimant's pneumoconiosis arose out of his coal mine employment, I give probative weight to Dr. Baker's finding of coal workers' pneumoconiosis and his opinion that this disease contributed to the [c]laimant's impairment." *Id*.

Because the administrative law judge rationally determined that claimant established the existence of clinical pneumoconiosis arising out of coal mine employment

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The administrative law judge gave "limited weight" to the CT scan evidence on the issue of the existence of pneumoconiosis, "as there is very little evidence presented in which a physician explicitly utilizes these scans to determine whether [c]laimant suffers from pneumoconiosis." Decision and Order on Remand at 16.

and permissibly discredited the opinions excluding coal dust exposure as a cause for claimant's x-ray changes, we affirm the administrative law judge's crediting of Dr. Baker's opinion at 20 C.F.R. §718.204(c), as being within his discretion. *See Napier*, 301 F.3d at 713-714, 22 BLR at 2-553; *Groves*, 277 F.3d at 836, 22 BLR at 2-325-26. In addition, the administrative law judge reasonably concluded that the opinions of Drs. Rosenberg and Dahhan, that claimant's linear interstitial fibrosis was responsible for claimant's restrictive impairment and the decrement in his pO2, support a finding that claimant is totally disabled due pneumoconiosis. *Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 611, 22 BLR 2-288, 2-303 (6th Cir. 2001); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 576, 22 BLR 2-107, 2-121 (6th Cir. 2000); *Peabody Coal Co. v. Smith*, 127 F.3d 504, 507, 21 BLR 2-180, 2-186 (6th Cir. 1997). We, therefore, affirm the administrative law judge's finding that claimant established total disability causation at 20 C.F.R. §718.204(c), and we further affirm the award of benefits.

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

SO ORDERED.

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BETTY JEAN HALL, Acting Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge