BRB No. 10-0363 BLA

ARLIS HENSLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
DIXIE FUEL COMPANY, LLC	)	
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION	)	DATE ISSUED: 03/30/2011
	)	
	)	
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 - Awarding Benefits of Kenneth A. Krantz, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order - Awarding Benefits (2007-BLA-06085) of Administrative Law Judge Kenneth A. Krantz, rendered on a subsequent claim[1] filed pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006),

[1] Claimant filed an initial claim on August 24, 1990, which was denied by the district director on January 25, 1991, because the evidence did not establish any of the

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*)) (the Act). In a Decision and Order issued on February 9, 2010, the administrative law judge credited claimant with thirteen years of coal mine employment and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the newly submitted evidence was sufficient to establish a totally disabling respiratory impairment pursuant to 20 C.F.R. §718.204(b)(2)(iv) and, therefore, found that claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Reviewing the claim on the merits, the administrative law judge found 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 pursuant to 20 C.F.R. §718.204(b)(2), (c).

On appeal, employer challenges the administrative law judge's finding of clinical pneumoconiosis,[2] asserting that he failed to consider all of the relevant evidence. Employer contends that the administrative law judge applied an impermissible rationale in concluding that the evidence was insufficient to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203. Employer also contends that the administrative law judge erred in weighing the evidence

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requisite elements of entitlement. Director's Exhibit 1. Claimant filed a second claim on October 1, 2003. Director's Exhibit 2. In a Proposed Decision and Order issued on September 9, 2004, the district director denied benefits because the evidence was insufficient to establish total disability. *Id*. Claimant took no action with regard to that denial until he filed his current subsequent claim on December 4, 2006. Director's Exhibit 4.

[2] Clinical pneumoconiosis "consists of those diseases recognized by the medical community as pneumoconioses, i.e., the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes but is not limited to, coal workers' pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment." 20 C.F.R. §718.201(a)(1).

Legal pneumoconiosis includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment. This definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment." 20 C.F.R. §718.201(a)(2).

relevant to disability causation at 20 C.F.R. §718.204(c). Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a substantive response, unless specifically requested to do so by the Board.[3]

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.[4] 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).

In order to establish entitlement to benefits pursuant to 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, that he is totally disabled and that his disability is due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986) (*en banc*).

I. Existence of Pneumoconiosis

Employer contends that the administrative law judge erred in finding that claimant established the existence of pneumoconiosis based on the x-ray evidence. Pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge first considered six readings of two x-rays, dated September 10, 1990 and February 23, 2004, which were submitted in conjunction with claimant's prior claims. Dr. Sargent, dually qualified as a Board-certified radiologist and B reader, read the September 10, 1990 x-ray as positive for simple pneumoconiosis, (1/0, t/s), while Dr. Gordonson, dually qualified as a Board-certified radiologist and B reader, 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, (2/1, t/s), while Dr. Halbert, dually qualified as a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis and Dr. Barrett read the x-ray for purposes of assessing quality only. Director's Exhibit 2. In weighing this evidence, the

[3] We affirm, as unchallenged by the parties 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 pursuant to 20 C.F.R. §725.309. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[4] 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.

administrative law judge gave determinative weight to the readings by the dually qualified radiologists. Thus, he found that the September 10, 1990 x-ray evidence was in equipoise and that the February 23, 2004 x-ray evidence was negative for pneumoconiosis. Decision and Order at 27.

The administrative law judge next weighed the x-ray evidence submitted with the current, subsequent claim. He noted that there are eleven newly submitted readings of five x-rays dated November 1, 2006, January 5, 2007, April 12, 2007, July 28, 2008 and January 16, 2009. Decision and Order at 27. Dr. Alexander, dually qualified as a Board-certified radiologist and B reader, read the November 1, 2006 x-ray as positive for pneumoconiosis (2/2, p/s), while Dr. Wheeler, dually qualified as a Board-certified radiologist and B reader, read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 7. Dr. Ahmed, dually qualified as a Board-certified radiologist and B reader, read the January 5, 2007 x-ray as positive (1/2, q/t), while Dr. Wheeler read the x-ray as negative. Director's Exhibit 39; Claimant's Exhibit 4. Dr. Baker, a B reader, also read the January 5, 2007 x-ray as positive for pneumoconiosis (2/1, q/p) and Dr. Barrett provided a quality reading. Director's Exhibits 16, 17. There was one reading of the April 12, 2007 x-ray by Dr. Dahhan, a B reader, which was positive for pneumoconiosis (1/1, q/q). Director's Exhibit 33. Dr. Alexander read the July 28, 2008 x-ray as positive for pneumoconiosis (2/2, t/p), while Dr. Rosenberg, a B reader, read the x-ray as negative. Claimant's Exhibit 3; Employer's Exhibit 4. Lastly, Dr. Miller, dually quailed as a Board-certified radiologist and B reader, read the January 16, 2009 x-ray as positive (2/3, t/q), while Dr. Wheeler read the same x-ray as negative for pneumoconiosis. Claimant's Exhibit 2; Employer's Exhibit 10.

The administrative law judge determined that the November 1, 2006, January 5, 2007 and January 16, 2009 x-rays were in equipoise, as each film had an equal number of positive and negative readings by dually qualified radiologists. Decision and Order at 27-28. He found that the April 12, 2007 x-ray was positive for pneumoconiosis, based on Dr. Dahhan's uncontradicted reading. *Id*. at 27. The administrative law judge further found that the July 28, 2008 x-ray was positive for pneumoconiosis, giving greatest weight to the positive reading by the one dually qualified radiologist. *Id*. Then, taking into consideration the x-ray evidence as a whole, the administrative law judge noted:

> Because pneumoconiosis is a progressive and irreversible disease, it may be appropriate to accord greater weight to the most recent evidence of record. In this case, the most recent x-rays have been found to be either positive for pneumoconiosis or in equipoise. The only negative x-ray is from [February 23,] 2004.

Id. at 28. Thus, the administrative law judge found that claimant satisfied his burden to prove the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).

Employer argues on appeal that the administrative law judge erred in relying on Dr. Alexander's qualifications as a Board-certified radiologist and B reader to find that the July 28, 2008 x-ray is positive for pneumoconiosis, "after precluding [employer] from submitted a reading [of that same x-ray] by an equally qualified doctor [Dr. Wheeler]." Employer's Brief in Support of Petition for Review at 13. Employer's assertion of error is without merit.

The record discloses that employer submitted, as part of its affirmative case,[5] a negative reading by Dr. Rosenberg, a B reader, of the x-ray dated July 28, 2008. Employer's Evidence Summary Form dated April 13, 2009; Employer's Exhibit 4. In rebuttal, claimant submitted Dr. Alexander's positive reading of that film. Claimant's Evidence Summary Form dated April 13, 2009; Claimant's Exhibit 3. Employer also submitted Dr. Wheeler's negative reading of the July 28, 2008 x-ray, which was designated as rebuttal evidence.[6] Employer's Evidence Summary Form dated April 13, 2009; Employer's Exhibit 8. In his Decision and Order, the administrative law judge found that since claimant had not submitted any affirmative readings of the July 28, 2009

[5] Pursuant to 20 C.F.R. §725.414(a), each party may submit, in support of his affirmative case, "no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of autopsy, no more than one report of each biopsy, and no more than two medical reports." 20 C.F.R. §725.414(a)(2)(i), (a)(3)(i). In rebuttal of the case presented by the opposing party, each party may also submit "no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy" submitted by the opposing party and the Director, Office of Workers' Compensation Programs, pursuant to §725.406. 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), (a)(3)(iii). Moreover, notwithstanding the evidentiary limitations, "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4).

[6] Claimant submitted duplicate copies of Dr. Rosenberg's medical evaluation conducted on July 28, 2008, at the request of employer. Claimant's Exhibit 8. Contained within that submission was the original positive reading of the July 28, 2008 x-ray by Dr. Halbert. *Id*. Dr. Rosenberg re-read the x-ray as negative and employer submitted Dr. Rosenberg's reading as part of its affirmative case. Employer's Exhibit 4. Employer also submitted, in rebuttal to Dr. Halbert's positive reading, Dr. Wheeler's negative reading of the July 28, 2008 x-ray. Employer's Exhibit 8. The administrative law judge, however, excluded Dr. Halbert's reading because it had not been designated by either party as evidence and did not constitute a treatment record. Decision and Order at 5. The administrative law judge, in turn, excluded Dr. Wheeler's reading. *Id*. at 5-6.

x-ray, Dr. Wheeler's reading was not admissible as rebuttal evidence. Decision and Order at 5. Furthermore, because employer had submitted its complement of evidence permitted under 20 C.F.R. §725.414, the administrative law judge determined that Dr. Wheeler's reading should be excluded. *Id*.

Employer does not provide any specific argument in this appeal that the administrative law judge erred in finding that Dr. Wheeler's reading was submitted by employer in excess of the evidentiary limitations at 20 C.F.R. §725.414. *Cox v. Director, OWCP*, 791 F.2d 445, 9 BLR 2-46 (6th Cir. 1986), *aff'g* 7 BLR 1-610 (1984); *Sarf*, 10 BLR 1-119; *Fish v. Director, OWCP*, 6 BLR 1-107 (1983). Employer states only that Dr. Wheeler's reading is relevant to the full presentation of its case and that it has been denied due process. Because a mere assertion of relevancy is insufficient to support the admission of evidence in excess of the evidentiary limitations, we reject employer's due process argument. *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47, 1-62 (2004) (*en banc*). Because employer has not shown how it was denied due process, we affirm the administrative law judge's decision to exclude Dr. Wheeler's reading and the administrative law judge's finding that the July 28, 2008 x-ray is positive for pneumoconiosis, based on Dr. Alexander's reading of that film. *See Arthur Murray Studios of Wash., Inc. v. Federal Trade Commission*, 458 F.2d 622 (5th Cir. 1972); *Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190, 1-192-193 (1989).

Employer next argues that the administrative law judge erred in finding the x-ray evidence to be positive for pneumoconiosis, without first resolving "the dispute among the positive readings" as to the "size and location of the opacities." Employer's Brief in Support of Petition for Review at 14. Contrary to employer's contention, the administrative law judge permissibly found that claimant established the existence of pneumoconiosis, based on the preponderance of positive readings, even though the readings were not uniformly classified with respect to the size of the opacities, as the regulation at 20 C.F.R. §718.102(b) specifically provides that an x-ray may establish the existence of pneumoconiosis if it is classified as Category 1, 2, 3, A, B, or C. *See* 20 C.F.R. §718.102(a).

We also reject employer's contention that the administrative law judge erred in treating Dr. Dahhan's reading (1/1, q/q) of the April 12, 2007 x-ray as positive for pneumoconiosis, since Dr. Dahhan specifically noted on the ILO classification form that there were "no pleural abnormalities for pneumoconiosis." Employer's Brief in Support of Petition for Review at 14, *quoting* Director's Exhibit 16. The ILO classification form requires that a physician who interprets an x-ray first determine whether there are any parenchymal abnormalities consistent with pneumoconiosis. If the physician answers in the affirmative, then he/she proceeds to the sections regarding the size/profusion of the opacities, and whether there are large opacities present, Category A, B, or C. *See* Form CM-933, questions 2A, 2B and 2C. However, if the physician answers the question in

the negative, then he/she is instructed to skip the section regarding the size of the opacities and determine whether there are pleural abnormalities consistent with pneumoconiosis. *See* Form CM-933, question 2A. In this case, because Dr. Dahhan specifically identified parenchymal abnormalities consistent with pneumoconiosis on the ILO classification form, and he classified the opacities in accordance with 20 C.F.R. §718.102(b), the administrative law judge properly considered his reading to be positive for pneumoconiosis. Director's Exhibits 16, 17.

We also reject employer's assertion that, in giving greatest weight to the most recent evidence, the administrative law judge applied an improper presumption that pneumoconiosis is always latent and progressive. An administrative law judge may properly consider the chronology of the x-ray evidence. *See Wilt v. Wolverine Mining Co.*, 14 BLR 1-70 (1990). In this case, the administrative law judge properly credited the positive reading by a dually qualified radiologist of the most recent x-ray in finding that claimant established the existence of pneumoconiosis. *See Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1993); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). Because the administrative law judge performed both a quantitative and qualitative analysis of the x-ray evidence, and explained how he resolved the conflict in the evidence, we affirm, as supported by substantial evidence, his finding that claimant established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1).[7] *See Director, OWCP v. Greenwich Collieries* [*Ondecko*], 512 U.S. 267, 18 BLR 2A-1 (1994); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 19 BLR 2-271 (6th Cir. 1995); *Woodward*, 991 F.2d at 321, 17 BLR at 2-87.

II. Causal Relationship

Employer also challenges the administrative law judge's finding at 20 C.F.R. §718.203, that claimant is entitled to a presumption that his pneumoconiosis arose out of coal mine employment and that employer did not establish rebuttal of that presumption.

[7] Citing to *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), employer contends that the administrative law judge erred in "failing to consider other evidence that shed light on the meaning or significance of the x-rays, namely, the CT scans and biopsy evidence." Employer's Brief in Support of Petition for Review at 15-16. Employer's contention is without merit. As this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, we decline to apply *Williams* and *Compton* and continue to hold in cases arising within the Sixth Circuit that the methods by which claimant may establish the existence of pneumoconiosis under 20 C.F.R. §718.202(a)(1)-(4) are alternate methods. *See* 20 C.F.R. §718.202(a); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985).

Employer first argues that the administrative law judge applied an improper burden of proof when he stated that "biopsy results found to be negative for pneumoconiosis do not constitute conclusive evidence that the miner does not have pneumoconiosis."[8] Employer's Brief in Support of Petition for Review at 18, *quoting* Decision and Order 32. Employer contends that the burden of rebutting the presumption does not require "conclusive proof." *Id*.

Contrary to employer's contention, in assessing the significance of the biopsy results, in comparison to the x-ray evidence, the administrative law judge properly referenced the regulation at 20 C.F.R. §718.106 which states, in pertinent part, that "a negative biopsy is not conclusive evidence that the miner does not have pneumoconiosis." 20 C.F.R. §718.106(c). The administrative law judge also properly explained why the biopsy evidence was insufficient to rebut the presumption that claimant's pneumoconiosis is due to coal mine employment. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4-5 (1999) (*en banc*); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). The administrative law judge acknowledged that the biopsy results were taken from a large mass in claimant's right lung, and that the biopsy evidence did not establish this mass to be consistent with either simple or complicated pneumoconiosis. Decision and Order at 23, 32. However, the administrative law judge noted that, while the biopsy results of the large mass did not establish pneumoconiosis, Dr. Alexander specifically interpreted the July 28, 2008 x-ray as revealing other "small opacities consistent with pneumoconiosis." *Id*. Therefore, the administrative law judge determined that the biopsy results "did not rebut the presumption that the *other* abnormalities noted on the x-rays, which were found to be consistent with pneumoconiosis, were caused by the [c]laimant's coal mine dust exposure." *Id*. at 32 (emphasis in original). Because the administrative law judge has discretion to determine

[8] Claimant underwent a needle core biopsy on March 24, 2008, for evaluation of a right lung mass. A surgical pathology report prepared by Dr. Eberts indicated that there was no normal lung tissue present in the sample and that "the specimen consists of a granulomatous inflammatory process characterized by areas of geographic caseous necrosis, surrounded by layers of histiocytes." Claimant's Exhibit 6. There was no malignancy reported. *Id*. Dr. Oesterling examined the slides from the biopsy and concluded that, while there was evidence of coal mine dust inhalation, the specimens did not include an adequate amount of interstitial tissue for a diagnosis of interstitial lung disease. Employer's Exhibit 11. He concluded that the "limited tissue precludes an adequate way of assessing the extent of change, and therefore in any way assessing any respiratory distress which [claimant] may have suffered due to his coalworkers' disease." *Id*.

the weight to accord the evidence, we affirm his finding that the biopsy evidence is insufficient to rebut the presumption at 20 C.F.R. §718.203. *See Cranor*, 22 BLR at 1-4-5; *Clark*, 12 BLR at 1-155.

Furthermore, we reject employer's contention that the administrative law judge erred in his treatment of Dr. Dahhan's opinion.[9] Although Dr. Dahhan indicated that rheumatoid arthritis mimics pneumoconiosis on x-ray, the administrative law judge permissibly found that Dr. Dahhan did not adequately explain why he attributed claimant's x-ray findings to rheumatoid arthritis, as opposed to coal workers' pneumoconiosis, other than citing to the fact that claimant "had not been exposed to coal mine dust since 1988." Decision and Order at 33. The administrative law judge further noted that, while Dr. Dahhan conceded that coal mine dust can have a latent and progressive effect on claimant's respiratory system, he "did not cite any medical evidence or offer any explanation for his contrary opinion that, in [c]laimant's case, coal mine dust 'should not' have had a latent impact on the respiratory system."[10] *Id*. We conclude that the administrative law judge acted within his discretion in finding that Dr. Dahhan's opinion is not sufficiently reasoned to rebut the presumption that claimant's pneumoconiosis arose out of his coal mine employment at 20 C.F.R. §718.203. *See Tennessee Consol. Coal Co. v. Crisp*, 866 F.2d 179, 185, 12 BLR 2-121, 2-129 (6th Cir.

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[9] Dr. Dahhan examined claimant on April 12, 2007, and diagnosed pneumoconiosis, based on his interpretation of an x-ray. Director's Exhibit 34. He noted that claimant has rheumatoid arthritis and opined that this disease "could very well be responsible for the changes noted on the chest x-rays[,] including the opacities in the thickening of the major fissure." *Id*. In a deposition conducted on February 25, 2009, Dr. Dahhan testified that he previously examined claimant in 1990 and, since that time, x-rays have presented "more spots on his lungs" and claimant has been prescribed more medication for the rheumatoid arthritis. Employer's Exhibit 1 at 11. He stated that rheumatoid disease is a progressive condition that produces x-ray marking similar to that of coal workers' pneumoconiosis and, even with sufficient history, one cannot differentiate, with certainty, the images caused by scarring from a rheumatoid condition as opposed to coal workers' pneumoconiosis. *Id*. at 7-9. When asked whether coal dust exposure could account for claimant's deteriorating pulmonary function, given that claimant had not worked in the mines since 1987 or 1988, Dr. Dahhan stated that "[i]t should not[,] although the literature does not rule out a latent impact of coal dust on the respiratory system." *Id*. at 12.

[10] Employer mischaracterizes the administrative law judge's credibility finding, insofar as employer argues that the administrative law judge improperly found Dr. Dahhan's opinion to be contrary to the Act. Rather, the administrative law judge properly found that Dr. Dahhan did not provide an explanation for his opinion.

1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark*, 12 BLR at 1-151; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987).

We also reject employer's assertion that the administrative law judge failed to consider the CT scan evidence[11] and erred in discrediting Dr. Rosenberg's opinion. The administrative law judge summarized the CT scan evidence and discussed it in conjunction with Dr. Rosenberg's opinion. Decision and Order at 14, 33-34. He noted that Dr. Rosenberg opined, based on the CT scans, that claimant has no micronodules consistent with pneumoconiosis, but that he has a large mass consistent with granulomatous disease, as well as linear interstitial scarring consistent with rheumatoid arthritis. *Id.* at 33; Employer's Exhibit 3. Dr. Rosenberg offered the following explanation as to why coal dust exposure was not a causative factor for claimant's x-ray findings:

> [W]hen coal mine dust exposure cause[s] interstitial lung disease, it is as micronodularity (p, q, or r) in the upper lung zones, as opposed to linear changes in the lower lung zones. While [claimant] has restriction and worsening oxygenation in association with exercise, this relates to his linear interstitial scarring, with basilar predominance. Also, he has an infiltrative process in the right lower lobe, apparently for which he underwent a lung biopsy. The results of the biopsy outlined the presence of caseating granulomatous pneumonitis. This is highly suggestive of a condition such as tuberculosis or a fungal infection. These changes are not related to his past coal dust exposure. Furthermore, it is well known that rheumatoid arthritis[,] which [claimant] was reported to have[,] classically causes the development of linear interstitial changes. Clearly, based on the above information, [claimant] does not have the clinical form of coal workers' pneumoconiosis.

Employer's Exhibit 3. Dr. Rosenberg opined that "[b]ecause many of the medical [studies] purporting to demonstrate that linear interstitial lung disease occurs in relationship to coal dust exposure" have not controlled for the known factors causing interstitial linear scarring, those articles should not be used as support for a conclusion

[11] Claimant submitted four CT scans in treatment notes. A CT scan was taken on February 19, 2008, that revealed a 3.7 centimeter mass in the right lung base. Claimant's Exhibit 6. A July 22, 2008 CT scan revealed a mass in the right lung base along with multiple nodules and pulmonary fibrosis. *Id.* A February 19, 2008 CT scan identified multiple pulmonary nodules and diffuse granulomatous disease. *Id.* Another CT scan conducted on January 27, 2009, revealed "multiple pulmonary nodules and masses." *Id.*

that coal dust exposure causes the types of abnormalities demonstrated by x-ray in this case. *Id*.

In assessing the credibility of Dr. Rosenberg's opinion, the administrative law judge took judicial notice of three studies cited by Dr. Rosenberg to support his opinion that linear interstitial scarring is not caused by coal dust exposure. Decision and Order at 33 n. 9. The administrative law judge also took judicial notice of contrary studies, indicating that coal dust exposure causes linear scarring, which were specifically referenced and criticized by Dr. Rosenberg for failing to control for smoking and age, which he indicated were known factors for interstitial lung disease. Decision and Order at 34 n. 10, 12, 13. The administrative law judge determined, based on his review of two of the three contrary studies, that Dr. Rosenberg's criticisms of the studies were unfounded and explained:

> Specifically, [Dr. Rosenberg] noted one study that evaluated [one hundred and twenty-]four coal miners and ex-coal miners. He stated that the majority of miners in the study were smokers or ex-smokers, and because smoking was not controlled for, the study could not be used to support the theory that primary interstitial disease is related to coal mine dust exposure. However, after reviewing the study, it is clear that the authors did take smoking into account when interpreting their data, breaking down the group into smokers, non-smokers, and ex-smokers. The authors noted that irregular opacities were significantly higher for smokers than non-smokers. However, they noted that both non-smokers and smokers separately showed an increase in irregularity of opacities related to years of underground exposure, with a greater effect in non-smokers. They opined that smoking might be enhancing dust-related disease processes. Cockroft, et al. *Prevalence and Relation to Underground Exposure of Radiological Irregular Opacities in South Wales Coal Workers with Pneumoconiosis*, 40 BRIT J. IND. MED. 169, 170-172 (1983).
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> Dr. Rosenberg did not specifically state what control data was lacking in the other three studies he cited. I note that the authors of the Collins study accounted for age, smoking history, and level of dust exposure in the analysis of their data. They determined that the profusion of both rounded and irregular opacities was related to dust exposure, and that the "[r]esults from those who had predominatly irregular small opacities . . . showed no significant effect of the variation in smoking habit. . . . The regression analysis, however, indicated that the chance of having small irregular opacities increased with dust exposure and with age . . . ." Collins, H.P.R., *Irregularly Shaped Small Shadows on Chest Radiographs, Dust Exposure,*

and Lung Function in Coalworkers' Pneumoconiosis, 45 BRIT J. IND. MED. 43, 44, 47 (1988).

Decision and Order at 34. Because the administrative law judge rejected Dr. Rosenberg's premise, that linear interstitial fibrosis, in general, is not related to coal dust exposure, he found Dr. Rosenberg's specific opinion, that claimant's x-ray changes were unrelated to coal mine employment, to be unreasoned, and insufficient to rebut the presumption at 20 C.F.R. §718.203(b). *Id*.

Employer contends that the administrative law judge erred in taking judicial notice of the online versions of the contrary medical studies cited by Dr. Rosenberg in his report. Employer argues that the administrative law judge has violated the Administrative Procedure Act (APA)[12] because he "reached outside of the record," when locating and reading studies cited by Dr. Rosenberg. Employer's Brief in Support of Petition for Review at 19. Employer notes that the APA requires that a decision be made based on the record before the administrative law judge. *Id*. Employer asserts that "medical literature" is not a proper fact under 29 C.F.R. §18.201(b) and is not a subject of judicial notice. Alternatively, employer argues that the administrative law judge did not follow the proper steps for taking judicial notice of facts since employer was not given "notice or opportunity to be heard as to the propriety" of the administrative law judge's consideration of the studies in question. *Id*. at 20.

Contrary to employer's argument, because Dr. Rosenberg specifically referenced medical studies in his report, the administrative law judge did not go outside the record in rendering his credibility determinations, such that judicial notice was required for him to consider the evidence cited by Dr. Rosenberg for his opinion. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986). Thus, we reject employer's assertions that the administrative law judge did not follow the proper procedure for taking judicial notice in this case, and that the medical studies were not subject to judicial notice. Employer has also failed to demonstrate, under the facts of this case, how it has been substantially prejudiced[13] by the administrative law judge's review

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[12] The Administrative Procedure Act (APA) provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 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).

[13] An administrative law judge may take judicial notice of a fact necessary to make his decision if substantial prejudice will not result and the parties are given an adequate opportunity to respond. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990).

of the studies, as employer had the opportunity to consider the substance of the studies cited by Dr. Rosenberg in deciding whether to rely on Dr. Rosenberg's opinion to support its case. Thus, we consider any error by the administrative law judge in failing to follow the formal procedures for taking judicial notice of facts to be harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Additionally, we reject employer's assertion that, in reviewing the medical articles cited by Dr. Rosenberg, the administrative law judge improperly substituted his opinion for that of a medical expert and "took it upon himself to develop a cross-examination of Dr. Rosenberg that [claimant] did not himself undertake." Employer's Brief in Support of Petition for Review at 21-22. The administrative law judge had discretion to consider the documentation underlying Dr. Rosenberg's opinion and to determine whether Dr. Rosenberg's characterization of the studies was correct. The administrative law judge did not act as a medical expert in reviewing the studies, but merely examined the validity of Dr. Rosenberg's assertions that contrary studies, that indicated a link between coal dust exposure and linear interstitial lung disease, had failed to control for causative factors such as smoking and age.[14] *Crisp*, 866 F.2d at 185, 12 BLR at 2-129; *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Clark*, 12 BLR at 1-151; *Fields*, 10 BLR at 1-20. We consider this to be a permissible exercise of discretion by the trier-of-fact. The Board has long held that an administrative law judge need not accept the opinion of any particular medical witness or expert, but must weigh all the evidence and draw his/her own conclusions and inferences. *See Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). Thus, we affirm the administrative law judge's finding that Dr. Rosenberg's opinion, that claimant's linear x-ray changes were unrelated to coal dust exposure, is not sufficiently reasoned to establish rebuttal of the 20 C.F.R. §718.203 presumption. *See Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 22 BLR 2-537 (6th Cir. 2002); *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 22 BLR 2-494 (6th Cir. 2002). We therefore affirm the administrative law judge's finding that employer did not rebut the presumption at 20 C.F.R. §718.203, that claimant's pneumoconiosis arose out of his coal mine employment.

III. Disability Causation

Employer also challenges the administrative law judge's finding that claimant established total disability due to pneumoconiosis. Pursuant to 20 C.F.R. §718.204(c),

[14] Employer does not challenge the administrative law judge's characterization of the studies; rather, employer asserts only that the administrative law judge cannot independently review the studies.

the administrative law judge found that Dr. Baker's opinion, that coal workers' pneumoconiosis contributed to claimant's disabling pulmonary impairment, combined with the "opinions of Dr. Rosenberg and Dr. Dahhan[,] that [claimant's] linear interstitial fibrosis was responsible for [claimant's] restriction, as well as Dr. Rosenberg's opinion that [claimant]'s loss in p02 was [attributable] to the interstitial fibrosis," are sufficient to establish that claimant is totally disabled due, in part, to coal workers' pneumoconiosis. Decision and Order at 35-36.

Employer asserts that the administrative law judge's decision to credit Dr. Baker's opinion on the issue of disability causation is illogical, given the administrative law judge's specific finding, at 20 C.F.R. §§718.202(a)(4) and 718.203, that Dr. Baker had not considered claimant's rheumatoid arthritis in rendering his opinion. Employer also contends that the administrative law judge erred in relying on the opinions of Drs. Rosenberg and Dahhan to support claimant's burden of proof. Contrary to employer's contention, the administrative law judge reasonably found that the opinions of Drs. Rosenberg and Dahhan establish that claimant is totally disabled as a result of the condition seen on claimant's x-ray, which satisfies the regulatory definition of clinical pneumoconiosis arising out of coal mine employment. *See Fife v. Director, OWCP*, 888 F.2d 365, 13 BLR 2-109 (6th Cir. 1989); *Rowe*, 710 F.2d at 255, 5 BLR at 2-103; *Trumbo v. Reading Anthracite Co*., 17 BLR 1-85 (1993). As noted by the administrative law judge, claimant has established that his "lung abnormalities, including his linear interstitial fibrosis, constitute pneumoconiosis," pursuant to 20 C.F.R. §718.202(a), and that he is entitled to a presumption that his pneumoconiosis arose out of coal mine employment, under 20 C.F.R. §718.203; Decision and Order at 36. Because Drs. Rosenberg and Dahhan specifically attribute claimant's disability, in part, to his x-ray changes of linear interstitial fibrosis,[15] we affirm the administrative law judge's finding that the opinions of Drs. Rosenberg and Dahhan are sufficient to establish that claimant is totally disabled due to pneumoconiosis.[16] Thus, we affirm the administrative law judge's finding that claimant satisfied his burden of proving disability causation pursuant to 20

[15] The x-ray evidence in this case includes findings of irregular opacities consistent with pneumoconiosis. The administrative law judge specifically noted that "[a]cording to one of the studies cited by Dr. Rosenberg, the term 'irregular' includes linear." Decision and Order at 34.

[16] Because we affirm the administrative law judge's finding at 20 C.F.R. §718.204(c), based on the opinions of Drs. Rosenberg and Dahhan, we conclude that any error committed by the administrative law judge in also finding that Dr. Baker's opinion satisfied claimant's burden of proof is harmless error. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

C.F.R. §718.204(c), and we affirm the award of benefits.[17] *See Peabody Coal Co. v. Smith*, 127 F.3d 504, 21 BLR 2-180 (6th Cir. 1997); *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989).

[17] In light of our affirmance of the award of benefits, we hold that application of the recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, would not alter the outcome of this case. *See* 30 U.S.C. §921(c)(4).

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

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

_____
REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge