No. 15-3553

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

DIXIE FUEL CO. LLC, and
BITUMINOUS CASUALTY CORP.,

Petitioners

v.

ARLIS HENSLEY
and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

Respondents

On Petition for Review of an Order of the Benefits Review Board, United States Department of Labor

BRIEF FOR THE FEDERAL RESPONDENT

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JURISDICTIONAL STATEMENT

This case is before the Court for a second time. It concerns the 2006 claim of Arlis Hensley, a former coal miner, for disability benefits under the Black Lung Benefits Act (BLBA or the Act), 30 U.S.C. §§ 901-944. In the first appeal, the Court issued an opinion on November 28, 2012, remanding the case to the administrative law judge (ALJ) for further proceedings. Appendix (Apx.) 42.

ALJ Kenneth A. Krantz issued a decision and order awarding benefits on remand on October 28, 2013. Apx. 18. Dixie Fuel Co., LLC (Dixie) appealed this decision to the United States Department of Labor Benefits Review Board on November 20, 2013, within the thirty days allowed by 33 U.S.C. § 921(a) as incorporated by 30 U.S.C. § 932(a). The Board had jurisdiction to review the ALJ's decision pursuant to 33 U.S.C. § 921(b)(3), as incorporated by 30 U.S.C. § 932(a). The Board affirmed the ALJ's award on August 26, 2014. Apx. 9. Dixie moved for reconsideration on September 23, 2014, within the thirty days allowed by 20 C.F.R. § 802.401(a). Administrative Record (A.R.) 250. The Board denied Dixie's motion on March 27, 2015. Apx. 7. The Board's denial is a final decision within the meaning of 33 U.S.C. § 921(b).

Dixie petitioned this Court for review on May 21, 2015, within the sixty days allowed by 33 U.S.C. § 921(c) as incorporated by 30 U.S.C. § 932(a). Thus, this appeal is timely. Hensley last worked as a coal miner in the Commonwealth

of Kentucky. Pursuant to 33 U.S.C. § 921(c), an aggrieved party may seek review of a final Board decision in the court of appeals with jurisdiction over the territory where the miner was exposed to coal-mine dust. This Court therefore has jurisdiction over Dixie's petition for review.

STATEMENT OF THE ISSUES

ALJs are vested with wide discretion to decide procedural matters, including the admissibility of evidence. After this Court remanded the case to the ALJ to re-weigh the medical evidence already of record, petitioner sought to reopen the record and have admitted a previously excluded x-ray interpretation or, alternatively, to substitute the excluded interpretation for one in the record. The ALJ expressly declined to consider the excluded x-ray. The first issue on appeal is whether the ALJ's failure to specifically deny petitioner's request to substitute the excluded x-ray constitutes reversible error.

Benefits are awarded under the BLBA to miners who are totally disabled by lung disease – pneumoconiosis – arising out of coal mine employment. Parties can establish these elements through various presumptions and through the introduction of several types of medical evidence, including x-rays and other radiology, biopsies, pulmonary function tests, and opinions from medical experts. ALJs are charged with determining the credibility and probative value of this evidence and weighing it to determine entitlement. The second issue on appeal is

whether the ALJ's finding – as affirmed by the Board – that the miner is totally disabled by pneumoconiosis and entitled to benefits is supported by substantial evidence of record.

STATEMENT OF THE CASE

I. Legal Framework

A. The Black Lung Benefits Act

The BLBA provides disability compensation and certain medical benefits to coal miners who are totally disabled by pneumoconiosis, commonly referred to as black lung disease. 30 U.S.C. §§ 901(a), 902(b); 20 C.F.R. § 718.1. Miners seeking to recover under the Act must prove four elements: (1) that they suffer from pneumoconiosis; (2) that their pneumoconiosis arose out of coal mine employment; (3) that they are totally disabled by a respiratory or pulmonary impairment; and (4) that their pneumoconiosis contributed to their total disability. 20 C.F.R. § 725.202(d). These elements can be established either directly or by the Act's various presumptions. *Peabody Coal Co. v. Hill*, 123 F.3d 412, 416 (6th Cir. 1997) (A claimant "bears the burden of proving each element of his claim by a preponderance of the evidence, except insofar as he is aided by a presumption.").

Compensable pneumoconiosis takes two distinct forms, "clinical" and "legal." 20 C.F.R. § 718.201(a); *see also Cumberland River Coal Co. v. Banks*, 690 F.3d 477, 482 (6th Cir. 2012) (explaining clinical and legal pneumoconiosis).

Clinical (or "medical") pneumoconiosis refers to a collection of diseases recognized by the medical community as fibrotic reactions of lung tissue to the "permanent deposition of substantial amounts of particulate matter in the lungs[.]" 20 C.F.R. § 718.201(a)(1). It is typically diagnosed by chest x-ray, biopsy, or autopsy. 20 C.F.R. §§ 718.102, 718.106, 718.202(a)(1)-(2); *see Cumberland River Coal*, 690 F.3d at 482; *Eastover Mining Co. v. Williams*, 338 F.3d 501, 509 (6th Cir. 2003).[1] Claimants may establish the presence of clinical pneumoconiosis through introduction of these tests and through medical opinion evidence. *Dixie Fuel Co., LLC v. Dir., Office of Workers' Comp. Programs (OWCP)*, 700 F.3d 878, 880 (6th Cir. 2012). All relevant evidence must be weighed in determining whether the disease is present. *Id.* at 881.

Claimants who have established clinical pneumoconiosis and have worked for at least ten years in the coal mines are aided in proving the second element of entitlement – disease causation – by a rebuttable presumption that their clinical pneumoconiosis arose out of their coal mine employment. *See* 30 U.S.C. § 921(c)(1); 20 C.F.R. § 718.203(b); *see Southard v. Dir., OWCP*, 732 F.2d 66, 68 (6th Cir. 1984). The third element, total disability, can be established by

[1] Legal pneumoconiosis, which is not at issue in this case, is a broader category, referring to "any chronic lung disease or impairment . . . arising out of coal mine employment." 20 C.F.R. § 718.201(a)(2).

introduction of medical tests that satisfy the criteria contained in 20 C.F.R. § 718.204(b), or through well-reasoned and well-documented medical opinions.

The final element, disability causation, is established when pneumoconiosis "is a substantially contributing cause" of the miner's disability, meaning it "has a material adverse effect on the miner's respiratory or pulmonary condition; or materially worsens a totally disabling respiratory impairment which is caused by a disease or exposure unrelated to coal mine employment." 20 C.F.R. § 718.204(c).

Adjudication of BLBA claims begins with an informal process conducted by a Department of Labor official known as a district director. 20 C.F.R. § 725.401. The district director collects evidence regarding the miner's employment and social history, and facilitates the development of medical evidence. 20 C.F.R. §§ 725.404-.406, .410. When this process is completed, the district director prepares a proposed decision and order, which purports to resolve the miner's entitlement to benefits. 20 C.F.R. § 725.418. Parties are allowed 30 days after the proposed decision and order to request a formal hearing before an administrative law judge (ALJ). *Id.* (If an operator timely requests a hearing following a proposed decision awarding benefits, the operator is not required to initiate the payment of benefits; instead, the Black Lung Disability Trust Fund pays interim benefits.[2] 20 C.F.R. §§ 725.420; 725.502(a)(1).) Although the record compiled by the district director is

[2] The Trust Fund is currently paying interim benefits and has paid $94,073 to date.

forwarded to the ALJ, the case is adjudicated *de novo* after the opportunity for the submission of additional evidence. *See Webster County Coal Corp. v. Menser*, 59 F. App'x 682, 684 (6th Cir. 2003). The ALJ is not bound by or required to defer to the district director's findings.

B. BLBA Bulletin 14-09

In October 2013, the Center for Public Integrity (CPI), in conjunction with ABC news, produced a series of investigative reports regarding the Black Lung Benefits Program titled, "Breathless and Burdened."[3] The series won a number of awards for investigative journalism, including a Pulitzer Prize.[4] The second part of the three-part series focused on the doctors that perform medical evaluations on behalf of coal mine operators in black lung claims.[5] This report was particularly critical of Dr. Paul Wheeler, an Associate Professor of Radiology at the Johns Hopkins Medical Institutions, finding among other things that in over 1,500 cases

[3] The original series as well as several articles detailing the events that followed are available on CPI's website at http://www.publicintegrity.org/environment/breathless-and-burdened.

[4] *See supra* n.3; *see also* The 2014 Pulitzer Prize Winners, Investigative Reporting, http://www.pulitzer.org/citation/2014-Investigative-Reporting.

[5] Chris Hamby *et al., Breathless and Burdened; Johns Hopkins medical unit rarely finds black lung, helping coal industry defeat miners' claims*, Center for Public Integrity (Oct. 30, 2013 7:00 am), http://www.publicintegrity.org/2013/10/30/13637/johns-hopkins-medical-unit-rarely-finds-black-lung-helping-coal-industry-defeat.

decided since 2000, Dr. Wheeler never diagnosed a miner with complicated pneumoconiosis, the most severe form of black lung disease. After the series was published, Hopkins suspended its black lung x-ray reading program and conducted an internal investigation into the story's allegations. That investigation, which remains private despite congressional requests for its release, has concluded. Hopkins terminated its black lung x-ray reading program, and Dr. Wheeler – who was never disciplined in connection with these allegations – has retired.[6]

In June 2014, the Department of Labor's Division of Coal Mine Workers' Compensation Programs (DCMWC) – the office that administers claims under the BLBA – issued Bulletin 14-09. The bulletin provides guidance to DCMWC's staff in evaluating x-ray readings by Dr. Wheeler in light of the CPI reports' allegations. *See* BLBA Bulletin 14-09, Weighing Chest X-ray Evidence that Includes a Negative Reading by Dr. Paul Wheeler (June 2, 2014), *available at* http://www.dol.gov/owcp/dcmwc/blba/indexes/bulletins.htm. Specifically, the bulletin instructs DCMWC staff not to credit negative x-ray readings from Dr. Wheeler unless the proponent of such a reading provides persuasive evidence challenging the news reports or otherwise rehabilitating Dr. Wheeler's readings.

[6] *See* Jamie Smith Hopkins, *Breathless and Burdened, Johns Hopkins terminates black lung program*, Center for Public Integrity (Sep. 30, 2015 5:26pm), http://www.publicintegrity.org/2015/09/30/18104/johns-hopkins-terminates-black-lung-program.

II. Factual Background

A. Occupational and other exposures

Hensley worked as an underground coal miner for thirteen years in positions where he was exposed to significant amounts of coal-mine dust. *See* Transcript of the Apr. 29, 2009 Hearing before the ALJ (HT) at 14, 23. He retired from mining in 1988 after suffering a work-related injury to his hand and arm. HT 13, 16, 19. Hensley smoked approximately one-half pack of cigarettes daily for 20 years, quitting over 25 years ago. HT 15, 18.

B. Medical evidence

X-rays. Beyond its contention that the ALJ should have substituted Dr. Wheeler's x-ray reading of a July 2008 x-ray for Dr. Rosenberg's reading of that x-ray, Dixie does not challenge the ALJ's weighing of the x-ray evidence on remand. *See generally* Petitioner's Brief (Pet.'s Br.). The following table lists the x-ray interpretations of record and the qualifications[7] of the physicians who offered their interpretations:

[7] Pursuant to 20 C.F.R. § 718.202(a)(1), ALJs are directed to resolve conflicts in the interpretation of x-rays by reference to the reading physicians' radiological qualifications.

Exhibit Number	*X-ray Date*	*Physician/ Qualifications*[8]	*Positive/Negative*
DX 1-25	9/10/90	Dahhan B-reader	Negative
DX 1-24	9/10/90	Gordonson BCR/B-reader	Negative
DX 1-23	9/10/90	Sargent BCR/B-reader	Positive
DX 2-91	2/23/04	Baker B-reader	Positive
DX 2-24	2/23/04	Halbert BCR/B-reader	Negative
CX 1	11/1/06	Alexander BCR/B-reader	Positive
EX 7	11/1/06	Wheeler BCR/B-reader	Negative
DX 16	1/5/07	Baker B-reader	Positive
DX 38/39	1/5/07	Wheeler BCR/B-reader	Negative
CX 4	1/5/07	Ahmed BCR/B-reader	Positive
DX 33/34	4/12/07	Dahhan B-reader	Positive
EX 4/CX 8	7/28/08	Rosenberg B-reader	Negative
CX 3	7/28/08	Alexander BCR/B-reader	Positive

[8] In this column, "BCR" denotes a radiologist who is certified "in radiology or diagnostic radiology by the American Board of Radiology, Inc., or the American Osteopathic Association." 20 C.F.R. § 718.102(e)(2)(i). A "B-reader" is "a physician who has demonstrated proficiency in evaluating chest radiographs for radiographic quality and in the use of the ILO classification for interpreting chest radiographs for pneumoconiosis and other diseases." 20 C.F.R. § 718.102(e)(2)(iii).

Exhibit Number	*X-ray Date*	*Physician/ Qualifications*[8]	*Positive/Negative*
CX 2	1/16/09	Miller BCR/B-reader	Positive
EX 10	1/16/09	Wheeler BCR/B-reader	Negative

Biopsy evidence. On March 24, 2008, a biopsy was performed to evaluate a large mass in Hensley's lower right lung. The specimen lacked normal lung tissue and consisted of "granulomatous inflammatory process characterized by areas of geographic caseous necrosis." The pathologic diagnosis was "caseating granulomatous pneumonitis."[9] CX-6.

Dr. Everett Oesterling evaluated four slides and a cytologic [cellular] preparation obtained from the biopsy. Dr. Oesterling concluded that there was evidence of coal mine dust inhalation but the specimen did not include a sufficient amount of tissue to make a definitive diagnosis. EX-11.

CT scans. Three CT scans, dated February 19, 2008, July 22, 2008, and January 27, 2009, were taken at the request of Hensley's treating physicians. CX-6. The doctors found multiple pulmonary nodules and masses and adenopathy [enlarged lymph nodes], as well as scattered scarring, atelectasis [under-expanded

[9] Caseous necrosis is a morphological change indicative of cell death "in which the tissue becomes a soft, dry crumbly mass resembling cheese." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 303 (30th ed. 2003). Granulomatous pneumonitis is an inflammation of the lungs with "granulomas, usually resulting from an infection or inhalation of organic dust." *Id*. at 1465.

lungs], and inflammatory changes. The doctors did not specify whether any or all of these changes were indicative of pneumoconiosis or otherwise related to coal dust exposure. CX-6.

Medical Opinions[10]

Dr. A. Dahhan, a Board-certified internist and pulmonologist and B-reader, examined the miner on April 12, 2007.[11] Apx. 115. He read an x-ray as positive for simple category 1 pneumoconiosis, despite suggesting that the miner's rheumatoid arthritis might be responsible for the changes. He further opined that the miner's disabling pulmonary impairment resulted from his rheumatoid lung disease and possibly his smoking habit. Apx. 117.

At deposition, Dr. Dahhan elaborated that the effects of rheumatoid arthritis can mimic those of pneumoconiosis and that the x-ray markings of the two conditions cannot be distinguished with certainty. Apx. 125-126. When asked if rheumatoid arthritis was the likely cause of the miner's pulmonary problems, Dr.

[10] Hensley also submitted short reports from his treating physicians, Drs. Powers, Stolfutz, and Augustine. CX-6, 7. Although these doctors all found pneumoconiosis, the ALJ accorded little weight to their diagnoses. According to the ALJ, Dr. Powers' opinion was equivocal, Dr. Stolfutz's unexplained, and Dr. Augustine's lacked critical information about the miner's medical history, *i.e.*, his rheumatoid disease, and thus was insufficiently reasoned. Apx. 26-27.

[11] Dr. Dahhan also examined the miner in 1990 in connection with his first claim. DX-1. He determined that the miner did not have pneumoconiosis or a respiratory disability.

Dahhan obliquely stated that it was "a very high diagnosis on the differential." Apx. 126. Although Dr. Dahhan conceded that coal dust exposure can have latent effects, he nonetheless explained that because the miner had retired in 1988, coal dust exposure "should not" have accounted for the worsening of his pulmonary condition between his September, 1990, and April, 2007 exams. Apx. 128-29.

Dr. David M. Rosenberg, a Board-certified internist and pulmonologist and B-reader, examined the miner in July 2008 at Dixie's request. Apx. 102. He administered an x-ray, which he read as negative for pneumoconiosis. Dr. Rosenberg believed the scarring shown on the x-ray was caused by rheumatoid arthritis, not coal dust exposure. Apx. 105. Dr. Rosenberg explained that medical studies linking coal dust with linear interstitial lung disease[12] failed to address known risk factors, particularly smoking, while other studies proved that rheumatoid arthritis "classically causes interstitial pulmonary fibrosis and thus linear parenchymal changes on chest x-ray or CT." Apx. 106. Dr. Rosenberg specifically correlated Hensley's disabling pulmonary impairment with his scarring on x-ray, which, as noted, he believed was due to rheumatoid arthritis. Apx. 106.

[12] Interstitial lung disease "describes a large group of disorders characterized by progressive scarring of the lung tissue between and supporting the air sacs." *Diseases and Conditions: Interstitial Lung Disease*, Mayo Clinic (Jun. 11, 2015), http://www.mayoclinic.org/diseases-conditions/interstitial-lung-disease/basics/definition/CON-20024481.

Dr. Rosenberg thus concluded that the miner was disabled from his interstitial lung disease, and not from any past coal mine dust exposure. Apx. 106.

Dr. Rosenberg's subsequent review of an additional chest x-ray reading, CT scan reports, and the treatment records of Drs. Powers and Stoltzfus, confirmed his view that the miner's pulmonary impairment was in no way attributable to coal dust exposure, but rather was caused by linear interstitial changes from rheumatoid arthritis and newly-developing granulomas from an unidentified inflammatory process. Apx. 110-113.

Dr. Glen Baker, also a Board-certified internist and pulmonologist and B-reader, examined Hensley in January 2007, pursuant to the Department's statutory obligation to provide Hensley with a complete pulmonary evaluation. Apx. 132; *see* 30 U.S.C. § 923(b). Dr. Baker diagnosed clinical pneumoconiosis based on the positive x-ray he administered and his view that Hensley suffered from no other medical condition that accounted for the changes visible on film. Apx. 132. He cautioned, however, that a biopsy would be the only way to definitively prove the presence of pneumoconiosis. Apx. 132-133. Dr. Baker concluded that Hensley is totally disabled from a pulmonary standpoint and explained that his clinical pneumoconiosis in conjunction with other issues adversely affect his respiratory condition and contribute to his disability. Apx. 132-133.

III. Decisions Below

A. February 9, 2010 ALJ Decision and Order Awarding Benefits[13]

ALJ Kenneth A. Krantz issued a decision awarding benefits on February 9, 2010. Apx. 64. Because this was a subsequent claim, the ALJ first determined, based on the newly-submitted medical reports, that Hensley was totally disabled, an element of entitlement previously decided against him. Apx. 85; *see* 20 C.F.R. § 725.309(d). The ALJ then considered the entirety of the medical evidence of record to determine whether it established entitlement to benefits.

Turning first to whether Hensley has clinical pneumoconiosis, the ALJ weighed the chest x-rays in the record. Of the seven films in evidence, the ALJ found two positive for pneumoconiosis (dated April 2007 and July 2008[14]), one

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[13] As discussed *infra* at 19, this Court, in remanding the case, advised the ALJ that he was not required to revisit factfindings left undisturbed by the Court's decision. Because the ALJ stood by his original findings, his initial decision is summarized in detail.

[14] Under the BLBA regulations, coal mine operators are entitled to submit two x-ray interpretations as affirmative evidence. Claimants are entitled to rebut those readings by introducing interpretations from a different doctor. In response to the rebuttal evidence, the operator can introduce an additional statement from the doctor who performed the original, affirmative, reading, but cannot introduce evidence from a third physician. *See* 20 C.F.R. § 725.414(a)(3). Claimants are subject to the same evidentiary limitations. *See* 20 C.F.R. §725.414(a)(2).

In this case, Dixie designated an interpretation of the July 28, 2008 x-ray by Dr. Rosenberg, a B-reader, as affirmative evidence. Hensley rebutted that reading by designating a contradictory reading of the same film by Dr. Alexander, who is a B-

negative (dated February 2004), and four in equipoise (dated September 1990, November 2006, January 2007, and January 2009) based on his weighing of the doctors' respective credentials. Apx. 91. Finding the most recent x-rays to be more probative of Hensley's condition, the ALJ concluded that the x-ray evidence as a whole was preponderantly positive because those films were "either positive for pneumoconiosis or in equipoise." Apx. 91. The ALJ then considered the biopsy and medical opinion evidence and found neither to be supportive of a diagnosis of pneumoconiosis. Apx. 91-94. In his analysis of the medical opinion evidence, the ALJ gave specific reasons for discrediting five of the six medical experts, but simply summarized Dr. Rosenberg's opinion. Apx. 92-94. Rather than weigh the positive x-ray evidence against the other negative evidence, the ALJ concluded that pneumoconiosis was established, relying on Board precedent permitting a claimant to establish the disease by satisfying any one of the alternate methods found in 20 C.F.R. § 718.202(a). Apx. 94.

Because Hensley had 13 years of qualifying coal mine employment, the ALJ found he was entitled to the statutory rebuttable presumption that his

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reader and also a board-certified radiologist, *see supra*, n.7. Rather than introduce an additional statement from Dr. Rosenberg as the regulations require, Dixie attempted to answer Hensley's rebuttal evidence by introducing a third reading (from Dr. Wheeler). This was clearly improper under 20 C.F.R. § 725.414(a)(3), and the ALJ refused to consider Dr. Wheeler's reading. Apx. 68-70. The ALJ then determined that Dr. Alexander's positive reading was more credible than Dr. Rosenberg's based on Dr. Alexander's superior qualifications. Apx. 90.

pneumoconiosis arose from coal mine employment. Apx. 94-95. The ALJ determined that the biopsy evidence and the medical opinions of Drs. Rosenberg and Dahhan failed to rebut that presumption. With respect to the biopsy evidence, the ALJ recognized that negative biopsy evidence does not constitute conclusive proof of the absence of pneumoconiosis. 20 C.F.R. § 718.106. In addition, the biopsy only examined a mass in the lower right lung and therefore failed to "rebut the presumption that the *other* abnormalities noted on x-ray, which were found to be consistent with pneumoconiosis, were caused by coal mine employment." Apx. 95-96.

The ALJ also rejected Drs. Dahhan's and Rosenberg's opinions that the linear interstitial changes seen on x-ray were unrelated to coal dust exposure. The ALJ found that Dr. Dahhan inadequately explained why, given its latent and progressive nature, pneumoconiosis "'should not' have had a latent impact on [the miner's] respiratory system." Apx. 96. The ALJ further found that Dr. Rosenberg improperly criticized scientific studies linking interstitial x-ray changes to coal dust exposure. Apx. 97.

Having already determined that Hensley was now totally disabled, the ALJ considered whether pneumoconiosis was a substantially contributing cause of that disability. Although the ALJ declined to rely on Dr. Baker's diagnosis of pneumoconiosis in light of his failure to report Hensley's history of rheumatoid

arthritis, the ALJ found probative Dr. Baker's assessment of the disease's contribution to Hensley's disability. Apx. 98. The ALJ also noted that Drs. Dahhan and Rosenberg opined that Hensley's interstitial lung disease – which the ALJ determined was pneumoconiosis – was disabling. Apx. 98-99. Finding all four elements of entitlement established, the ALJ awarded benefits.

B. March 30, 2011 Board Decision and Order Affirming Award

On appeal to the Board, Dixie challenged the ALJ's finding of pneumoconiosis based solely on the x-ray evidence, asserting that the ALJ erred in not weighing all the relevant evidence regarding the existence of the disease. Rejecting this contention, the Board stated that in the absence of controlling Sixth Circuit law, it would apply its own precedent allowing a miner to establish pneumoconiosis under any of the alternate methods listed in 20 C.F.R. § 718.202(a). Apx. 54 n. 7.

On the merits, the Board determined that the ALJ permissibly found persuasive the positive reading by the dually qualified radiologist Dr. Alexander[15] of the July 2008 x-ray (one of the most recent of record). It also affirmed the ALJ's exclusion of Dr. Wheeler's reading of that x-ray. It further observed that the ALJ performed both a "qualitative and quantitative analysis" of the x-ray evidence and adequately explained his resolution of the conflicting readings. The Board

[15] *See supra* n.7.

thus upheld the ALJ's determination as supported by substantial evidence. Apx. 50-54.

The Board also affirmed the ALJ's finding that the negative biopsy evidence and medical opinions were insufficient to rebut the presumption that the pneumoconiosis arose out of coal mine employment. Apx. 60. The Board agreed with the ALJ that the negative biopsy of the right lower lung mass did not conclusively establish the absence of pneumoconiosis or address the etiology of *other* x-ray abnormalities (which had been found to be consistent with pneumoconiosis). Apx. 55-56. In addition, the Board held that it was within the ALJ's discretion to find Dr. Dahhan's opinion insufficiently reasoned because the doctor failed to explain the basis for his conclusion that coal mine dust "should not" have had a latent impact on Hensley's respiratory system. Apx. 56-57. Likewise, the Board affirmed the ALJ's discrediting of Dr. Rosenberg's opinion because the ALJ reasonably rejected Dr. Rosenberg's premise that linear interstitial fibrosis, in general, is not related to coal dust exposure. Apx. 57-59. In particular, the Board found that the ALJ permissibly reviewed the medical studies referenced by Dr. Rosenberg, and ruled that his rejection of Dr. Rosenberg's criticism of these studies did not constitute an impermissible substitution of his opinion for Dr. Rosenberg's. Apx. 59-60.

Last, the Board affirmed the ALJ's finding that the medical opinions established that the miner's total disability was due to pneumoconiosis. Apx. 61-62. It accordingly affirmed the award of benefits and denied Dixie's petition for reconsideration. Apx. 47.

C. Dixie Fuel Co., LLC v. Director, OWCP,700 F.3d 878 (6th Cir. 2012)

Dixie petitioned this Court for review, alleging various errors, including the ALJ's decision to find pneumoconiosis established based on the x-ray evidence alone without weighing the other contrary medical evidence. Finding that the "ALJ erred by singling out the x-ray evidence to the exclusion of the other evidence," the Court vacated the ALJ's decision and remanded with instructions to weigh all the evidence. Apx. 44. It observed, however, that "[t]his 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." Apx. 46. In closing, the Court implored the agency to resolve Mr. Hensley's claim expeditiously: "[i]f Hensley deserves benefits under the Act, he should not have to wait this long to obtain them." Apx. 46.

D. October 28, 2013 ALJ Decision and Order Awarding Benefits on Remand

On remand, Dixie renewed several objections to the ALJ's weighing of the x-ray evidence, including his exclusion of Dr. Wheeler's reading of the July 2008 x-ray. For the first time, Dixie additionally requested to withdraw Dr. Rosenberg's

reading of the July 2008 x-ray and replace it with Dr. Wheeler's, if Dr. Wheeler's reading could not be admitted in its own right. *See* Dixie's Brief on Remand at 10 n.2. Referencing this Court's mandate requiring him only to weigh all the relevant evidence of record on remand, the ALJ generally declined to reevaluate any given category of evidence and specifically declined to consider Dr. Wheeler's reading. Apx. 23. The ALJ accordingly restated his prior conclusions regarding the individual categories of medical evidence, including his finding that the x-ray evidence was positive for pneumoconiosis.

Weighing the evidence as a whole, the ALJ characterized x-ray evidence generally as more "objective" than medical opinion evidence, and thus found the x-ray evidence "highly persuasive, and entitled to greater weight here. Apx. 32. Citing to Dr. Oesterling's characterization of the limitations of the biopsy evidence, the ALJ determined that the biopsy supported neither Dixie's nor claimant's position. Apx. 32. He found the CT scan evidence similarly limited as none of the reports referenced pneumoconiosis positively or negatively. Apx. 33. Finally, he assigned limited probative value to the medical treatment records. Relying on the x-ray evidence, the ALJ again determined that Hensley has clinical pneumoconiosis. Apx. 34. The ALJ then reiterated his prior findings with regard to the remaining elements of entitlement and awarded benefits. Apx. 34-40.

E. August 2, 2014 Board Decision and Order Affirming the ALJ's Award of Benefits on Remand

Dixie sought review once again before the Benefits Review Board and renewed its prior objections to the ALJ's weighing of the x-ray evidence. Recognizing that this Court's remand order left undisturbed many of its prior rulings, the Board declined to revisit them, finding no compelling reason to do so and citing the "law of the case" doctrine. Apx. 12. The Board did conclude, however, that the ALJ failed to rule on Dixie's request to substitute Dr. Wheeler's reading of the July 2008 x-ray for Dr. Rosenberg's. Apx. 13. The Board determined that the omission was harmless inasmuch as substituting the x-rays would – at best – lead the ALJ to find the July 2008 x-ray in equipoise (in light of the dually qualified Dr. Alexander's positive reading). Apx. 13. That finding, the Board reasoned, would not change the ALJ's ultimate determination because his rationale – that the most recent x-rays were either positive or in equipoise and the only negative x-ray was from 2004 – would still be correct. Apx. 13. In addition to this explanation, the Board added a footnote referencing Bulletin 14-09. Apx. 13 n.6; *see supra* at 6-7.

Finding no reversible error in the ALJ's weighing of the evidence on remand, the Board affirmed the ALJ's conclusion that Hensley suffers from clinical pneumoconiosis. Apx. 13. The Board went on to affirm the ALJ's findings regarding the remaining elements of entitlement, concluding that its prior

rulings in this case continued to control. Apx. 13-17. It accordingly affirmed the award of benefits and denied Dixie's motion for reconsideration *en banc*. This appeal followed. Apx. 7.

SUMMARY OF ARGUMENT

The Board properly upheld the ALJ's refusal to reopen the record and consider Dr. Wheeler's July 2008 x-ray interpretation. The ALJ's action was not only an appropriate exercise of his broad discretion over procedural and evidentiary matters, but also harmless, as the Board held. Dixie's contention – that the Board's conclusion of harmless error resulted from its determination that Dr. Wheeler was unreliable as a matter of law based on Bulletin 14-09 – grossly mischaracterizes the Board's analysis. Nothing about Bulletin 14-09 is improper, and the Board's citation to it was wholly immaterial in this case.

The ALJ's finding that Hensley has clinical pneumoconiosis caused by coal-dust exposure is supported by the evidence and should be affirmed. Although the ALJ incorrectly assumed that x-ray interpretations are inherently more objective than medical opinions, he justifiably gave them the greatest weight in light of his findings that the other medical evidence was either unreliable or not probative.

The ALJ and the Board properly utilized the "law of the case" doctrine. On remand, they reasonably limited their consideration to the issues specifically

identified by this Court and accordingly declined to reconsider additional issues that they had previously decided.

Last, the ALJ correctly applied the regulatory substantially contributing cause standard for disability causation, and his evaluation of the expert evidence on this point was rational and supported by substantial evidence.

ARGUMENT

I. Standard of Review

This Court reviews the ALJ's decision "to determine whether it is supported by substantial evidence and is consistent with applicable law." *Peabody Coal Co. v. Odom*, 342 F.3d 486, 489 (6th Cir. 2003). The Court defers to an ALJ's determinations as to the credibility and weight afforded various medical opinions. *Big Branch Resources, Inc. v. Ogle*, 737 F.3d 1063, 1072 (6th Cir. 2013). "This deference extends to whether a medical opinion is well-reasoned – a determination ordinarily left to the ALJ." *Id.; see also Island Creek Kentucky Min. v. Ramage*, 737 F.3d 1050, 1059 (6th Cir. 2013). The ALJ, in turn, "is not bound to accept the opinion or theory of any medical expert, but may weigh the evidence and draw his own inferences." *McCain v. Dir., OWCP*, 58 F. App'x 184, 193 (6th Cir. 2003).

This Court will only disturb an ALJ's ruling on a procedural matter if it is arbitrary and capricious or an abuse of discretion. *See Dotson v. Dotson Coal Co.*, 893 F.2d 1334 (6th Cir. 1990) (citing 5 U.S.C. § 706 (1988) (Administrative

Procedure Act) and 20 C.F.R. § 725.455(c) (1989) (Department of Labor regulations)). Accordingly, an ALJ has "broad discretion in dealing with procedural matters, including the submission of evidence." *McKamey v. River Basin Coals, Inc.*, 187 F.3d 636 (6th Cir. 1999).

II. The ALJ denied Dixie's request to substitute Dr. Wheeler's x-ray reading for Dr. Rosenberg's, but even if he had not, the Board's determination of harmless error is correct.

On remand, Dixie asked the ALJ, for the very first time in these lengthy proceedings, to reopen the record and allow it to withdraw Dr. Rosenberg's interpretation of the July 2008 x-ray and introduce as a substitute the previously-excluded interpretation by Dr. Wheeler. The Board ruled that the ALJ did not consider Dixie's request, but determined the "omission was harmless." Apx. 13. Dixie has now challenged the Board's no-harm finding.[16] Pet. Br. 15-20.

As an initial matter, the Director disagrees with the Board that the ALJ failed to rule on Dixie's request to reopen the record and substitute Dr. Wheeler's

[16] Aside from this procedural argument, Dixie does not challenge in this appeal the ALJ's underlying weighing of the x-ray evidence or his conclusion that it is positive for pneumoconiosis. Rather, Dixie contends that the ALJ erred in weighing the positive x-ray evidence against the biopsy, CT scans, and medical opinions. We address those arguments *infra* at 34-41. To the extent Dixie directly challenged the ALJ's weighing of the x-ray evidence in its prior appeal or in the agency proceedings below, it has waived the contention by not raising it in its opening brief. *See Marks v. Newcourt Credit Grp., Inc.*, 342 F.3d 444, 462 (6th Cir. 2003) ("An appellant waives an issue when he fails to present it in his initial briefs before this court.").

x-ray interpretation.[17] In his decision and order on remand, the ALJ specifically cited to the page of Dixie's remand brief where the request was made. Apx. 20. But Dixie provided no legal argument to justify reopening the record after nearly seven years of litigation or its failure to make the substitution request when the case was first before the ALJ. The ALJ accordingly dealt with Dixie's bare request in summary fashion – he simply and clearly declined to consider Dr. Wheeler's reading. Apx. 23 n.1. That decision, in turn, amounted to a *de facto* determination that the ALJ would not reopen the record and permit a substitution of the x-ray readings. Under these circumstances, nothing more was required of the ALJ. *See McKamey,* 187 F.3d at 636 (ALJ procedural rulings are afforded broad discretion).

Granting Dixie's substitution request, moreover, would have necessitated extensive reconstitution of the evidentiary record. Although substitution would remove Dr. Rosenberg's reading from the record, his medical opinion would remain. His opinion, however, would be based in large part on a now-excluded x-ray interpretation. Apx. 105-107. The BLBA regulations prohibit this. A medical opinion may not rely on inadmissible evidence. 20 C.F.R. § 725.414(a)(3)(i). Consequently, Dr. Rosenberg's medical opinion would have to be partially or

[17] The Board and Director are separate entities within the Labor Department. The Board hears appeals of ALJ decisions, 30 U.S.C. § 932(a) incorporating 33 U.S.C. § 921, whereas the Director, as designee of the Secretary of Labor, is the administrator of the black lung program and a statutory party in all proceedings. *Pauley v. Clinchfield Coal Co.*, 501 U.S. 680, 696 (1991); 30 U.S.C. § 932(k).

totally excluded from the record as well. *Cumberland River Coal Co. v. Jent*, 506 F. App'x 470, 472 (6th Cir. 2012) (affirming ALJ's decision not to consider expert's report and deposition testimony when she could not tell which parts of the report were based on inadmissible medical evidence). Such a dramatic revamping of the administrative record is not what this Court expected on remand. Apx. 46 (observing the ALJ need not reconsider his assessment of particular pieces of evidence).

In any event, Dixie's contention that the Board erred by affirming the ALJ's refusal to consider Dr. Wheeler's reading is incorrect. Pet. Br. 15-20. According to Dixie, the Board reasoned that the substitution "would not have altered the ALJ's conclusion that the most recent x-rays were either positive or in equipoise *because the Department of Labor has concluded that Dr. Wheeler's negative readings were 'not to be credited.'*" Pet. Br. 16 (emphasis added). That is a mischaracterization of the Board's decision. The Board's no-harm finding was based on its determination that even with the substitution *and crediting* of Dr. Wheeler's reading, the ALJ's reasoning – that the most recent x-ray evidence was positive or in equipoise with only one negative x-ray from 2004 – would remain

true.[18] Apx. 12-13. That being the case, the Board upheld the ALJ's conclusion that the x-ray evidence established pneumoconiosis. *Id*. at 13.

As a result of its misunderstanding of the Board's decision, Dixie dramatically overstates the significance of a one-sentence footnote referencing Bulletin 14-09, claiming that the Board "resolve[d] a dispute as to the contents and credibility of proof [in this case] as a matter of law." Pet. Br. 16. Again, that simply did not happen. Bulletin 14-09 played no role in the Board's (or ALJ's) assessment of Dr. Wheeler's x-ray readings or in the Board's no-harm finding.

In point of fact, the ALJ credited *three* negative Dr. Wheeler x-ray readings and found them offset by positive readings, thereby placing the disputed x-rays in equipoise. Apx. 22-24, 89-91. The Board, in turn, *upheld* the ALJ's crediting of Dr. Wheeler's negative readings. Apx. 11-13; 51. If the Board had rejected Dr. Wheeler's readings outright because of Bulletin 14-09, as Dixie claims, it would

[18] The Board noted that the ALJ had already compared Drs. Wheeler and Alexander's contrary readings of the November 2006 x-ray and found both physicians equally persuasive. Apx. 12 n.5. (The ALJ reached an equipoise finding for three other x-rays when faced with conflicting readings by equally qualified readers. *Id*.) The Board's no-harm finding thus reasonably anticipates a similar result for the July 2008 x-ray: substituting and then comparing Dr. Wheeler's negative reading against Dr. Alexander's positive reading would take the x-ray from being positive to equipoise. Apx. 13. If that occurred, the most recent x-ray evidence would be positive (the April 2007 x-ray) or in equipoise (with a negative x-ray from 2004), just as the ALJ originally stated. Thus, the Board ruled that the ALJ's ultimate conclusion would not change, and any error was harmless.

have ruled that the interpretations of those three x-rays were preponderantly positive. But the Board did not discredit Dr. Wheeler's readings, and the x-rays stayed in equipoise.

Against the Board's actual treatment of Dr. Wheeler's readings, the Board's passing reference to Bulletin 14-09 in a footnote is immaterial. The footnote merely reiterates the bulletin's conclusion. The Board thus neither identifies the bulletin's impact on this case nor intimates that it (or an ALJ) is bound by it. Indeed, there is not even a suggestion that the Board will defer to the Department's policy. Most importantly, as explained above, the Board made its no-harm finding because substitution would have made no difference in the ALJ's reasoning.

In sum, Dixie's complaint that the Board violated Administrative Procedure Act requirements by relying on the bulletin is baseless. Dixie has raised no other challenge to the ALJ's weighing of the x-ray evidence or to the ALJ's supposed failure to explicitly reject its substitution request. Therefore, remand for the ALJ to remedy this alleged defect in his decision is unnecessary. *See* Apx. 46 (Court's expectation that Hensley's claim would be expeditiously resolved).

III. Bulletin 14-09 is a proper response to credible allegations of misconduct in the black lung program.

In criticizing the Board's reference to Bulletin 14-09, Dixie attacks the bulletin itself, claiming it was not promulgated through notice and comment rulemaking and is generally unreasonable. Neither argument has merit.

A. Bulletin 14-09 is a general statement of policy that was not required to be promulgated through notice and comment.

Although many agency communications qualify as "rules" under the Administrative Procedure Act, only those that are legislative in nature must be promulgated using formal notice and comment procedures. The remaining types of agency communications – namely "interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice" – are explicitly exempted from notice and comment procedures. 5 U.S.C. § 553(b)(A). Bulletin 14-09 is a general statement of policy.

General statements of policy are "agency action[s] that merely explain[] how the agency will enforce a statute or regulation—in other words, how it will exercise its broad . . . discretion under some extant statute or rule." *Nat'l Min. Ass'n v. McCarthy*, 758 F.3d 243, 251 (D.C. Cir. 2014). Unlike legislative rules,[19] policy statements are not binding on the public, or on the agency itself. *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). Courts typically look at the policy's legal effect and characterization, and whether it allows new or non-discretionary agency action to determine if it is a general

[19] Legislative rules are those that "grant rights, impose obligations, or produce other significant effects on private interests." *Batterton v. Marshall*, 648 F.2d 694, 701-02 (D.C. Cir. 1980). They tend to significantly restrict or eliminate adjudicator discretion, and carry the force of law. *Id.*

statement of policy. Under these well-established criteria, Bulletin 14-09 is a general statement of policy.

First and foremost, courts look at the "actual legal effect (or lack thereof) of the agency action in question on regulated entities." *Nat'l Min. Ass'n*, 758 F.3d at 252. Bulletin 14-09 does not compel or prohibit any behavior from regulated entities or even from decision-makers beyond the district director level. The bulletin is directed only at DCMWC personnel who are involved in initial benefits determinations. After that initial decision, parties may request a *de novo* hearing before an ALJ, who is not bound by the bulletin, and doing so relieves a responsible operator from having to commence benefit payments. *See* 20 C.F.R. § 725.502(a)(1). Thus, "while regulated parties may feel pressure to voluntarily conform their behavior because the writing is on the wall" about how the district director is likely to weigh a Dr. Wheeler x-ray reading, that "pressure" quickly recedes, leaving "no 'order compelling the regulated entity to do anything.'" *Nat'l Min. Ass'n*, 758 F.3d at 253 (quoting *Indep. Equip. Dealers Assoc. v. EPA*, 372 F.3d 420, 428 (D.C. Cir. 2004)).

Second, courts consider the way that the agency has characterized its communication to determine whether the action is legislative. *Nat'l Min. Ass'n*, 758 F.3d at 252. The Director has never characterized Bulletin 14-09 as binding on any party other than the internal DCMWC personnel to whom it is directed.

While the Director, OWCP, has made ALJs, the Board, and the courts, aware of the bulletin and the public news stories that it references, the Director has never suggested that those adjudicators – who operate independently of the Director and the DCMWC – must adopt its recommendations. There is simply no basis to conclude that the agency has treated the bulletin as a legislative rule.

Third, courts consider whether the agency action is legislative in nature because it functionally prevents the agency from exercising its discretion. *See Ass'n of Flight Attendants-CWA, AFL-CIO*, 785 F.3d at 718 (holding that FAA notice was not a legislative rule though it "arguably inclines aviation safety inspectors toward certain outcomes," because "it does not constrain their discretion enough to create a binding norm."). Internal DCMWC personnel – the only ones bound by the bulletin – still retain significant discretion to credit an x-ray reading by Dr. Wheeler when the proponent (typically a coal company) of that negative reading rebuts the news reports or rehabilitates the reading.[20] At most, the bulletin establishes something akin to a rebuttable presumption, and it is well-settled that "an agency may announce presumptions through policy statements rather than notice-and-comment rulemaking." *Panhandle Producers & Royalty Owners Ass'n v. Econ. Reg. Admin.*, 822 F.2d 1105, 1110 (D.C. Cir. 1987).

[20] DCMWC personnel also permit coal companies to substitute a different doctor's reading of the same x-ray for a previously-submitted Dr. Wheeler reading while the medical record is under development.

Finally, the bulletin does not authorize new agency action. *See Am. Mining Cong. v. MSHA*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) ("The first and clearest case [of agency intent to exercise legislative power] is where, in the absence of a legislative rule by the agency, the legislative basis for agency [action] would be inadequate."). Bulletin 14-09 instructs agency personnel to do something – consider publically-available news articles that bear on the credibility of an expert witness – that they are already authorized to do. *See* 30 U.S.C. § 923(b) ("In determining the validity of claims . . . *all relevant evidence* shall be considered.") (emphasis added); *see also* 30 U.S.C. § 932(a) incorporating 33 U.S.C. § 923(a) (proceedings "shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure. . ."); 20 C.F.R. § 725.455(b) (same).

In short, Bulletin 14-09 has the earmarks of a general statement of policy, and it was not required to go through notice and comment rulemaking before issuance.

B. Bulletin 14-09 is a reasonable and appropriate response to allegations of misconduct in the black lung program.

In addition to challenging its promulgation, Dixie suggests that Bulletin 14-09 is fundamentally unreasonable. This is not the case. Rather, Bulletin 14-09 is a timely, measured, and appropriate programmatic response to troubling allegations that were published in a Pulitzer Prize-winning investigative journalism series.

Dixie suggests that Bulletin 14-09 was inappropriate because the Department issued it before Hopkins concluded its internal investigation (which took almost one and a half years to complete). Pet. Br. at 15. Waiting for Hopkins, however, was untenable – it would have meant either indefinitely suspending the processing of black lung claims (clearly unfair to the parties who deserve a prompt decision) or ignoring evidence of potential bias in Dr. Wheeler's x-ray readings (even more unfair to claimants). The bulletin takes a middle-ground approach – it notifies DCMWC personnel of the news reports and instructs them to consider that evidence but also notes the then-pending investigation and explains the circumstances under which readings from Dr. Wheeler might be credited. Regardless, the investigation has now concluded and, while its results remain confidential, Hopkins has terminated its black lung x-ray reading program.

Dixie's criticisms of the news reports, including poor methodology, sensationalist motivation, and inaccurate reporting, are all examples of the sort of arguments that, *if raised and proved in a timely manner*, could allow consideration of an x-ray reading by Dr. Wheeler. Finally, contrary to Dixie's suggestion – relying on *Richardson v. Perales*, 402 U.S. 389 (1971) – Bulletin 14-09 does not *assume* bias based merely on the expert's party affiliation; rather, it recognizes documented *evidence* of bias and instructs DCMWC personnel charged with making credibility determinations not to turn a blind eye to that evidence. *See*

Woodward v. Dir., OWCP, 991 F.2d 314, 321 (6th Cir. 1991) ("experts hired exclusively by either party tend to obfuscate rather than facilitate a true evaluation of a claimant's case").

IV. The ALJ's findings regarding the presence of pneumoconiosis and its cause are in accordance with law and supported by substantial evidence.

Dixie argues that this case must be remanded for a second time because the ALJ failed to follow this Court's instructions and weigh the evidence relevant to the existence of pneumoconiosis in a rational manner. Dixie claims that the ALJ's remand decision was an exercise "simply to cross 't's' and 'i's'" and not a meaningful reevaluation of the evidence. Pet. Br. 29. This Court's remand decision, however, explicitly stated that the ALJ was not required to revisit his prior findings with respect to any one particular category of evidence. Apx. 46. And the ALJ and Board both took this guidance to heart – they reasonably declined to revisit previously-decided issues that this Court left undisturbed.[21] *See Howe v. City of Akron*, 801 F.3d 718, 740 (6th Cir. 2015) ("The law-of-the-case doctrine is a prudential practice; a court may revisit earlier issues, but should decline to do so to encourage efficient litigation and deter indefatigable diehards.") (internal quotations omitted). The ALJ and Board thus complied with this Court's mandate.

[21] Dixie's suggestion that the ALJ misquoted this Court's opinion is simply not true. *See* Pet.'s Br. at 30; Apx. 19-20.

Moreover, none of Dixie's several arguments regarding the merits of the ALJ's factfinding requires remand.

A. The ALJ did not commit prejudicial error in weighing the evidence of pneumoconiosis.

Dixie first contends that the ALJ wrongly accorded greatest weight to the x-ray evidence based on an erroneous belief that x-ray readings in general are less subjective than medical opinions. Pet. Br. 20-21. Dixie did not raise this argument before the Board, and has therefore waived it. *See Brandywine Explosives & Supply v. Dir., OWCP*, 790 F.3d 657, 663 (6th Cir. 2015) (refusing to consider challenge that was not raised before the Benefits Review Board).

If the Court considers Dixie's argument, the Director believes the ALJ's broad rationale – unmoored to the specific facts of this case – is unsupported.[22] A certain degree of inter-reader variability in interpreting x-rays is to be expected. *See Zeigler Coal Co. v. Dir., OWCP*, 312 F.3d 332, 334 (7th Cir. 2002) ("Radiologists frequently disagree about the interpretation of x-ray films."); *see also Memorandum of Understanding between the Department of Labor Office of Workers' Compensation Programs (OWCP) and the Department of Health and*

[22] Dixie suggests that consistency requires that the ALJ give dispositive weight to the CT scan evidence, but Dixie misconstrues the ALJ's opinion. The ALJ assigned less weight to the CT scan evidence because he found it did not directly address the existence of pneumoconiosis and thus was inconclusive, not because he found it subjective. Apx. 33.

Human Services, Centers for Disease Control and Prevention, National Institute for Occupational Safety and Health (NIOSH) establishing a B reader quality assurance program (classification of x-rays in a given case may differ because "the classification of chest radiographs is an inherently subjective process.").[23] Although a general rule elevating x-ray evidence over medical opinion evidence as more objective would be improper, there may be specific instances or fact patterns in which that reasoning is appropriate. The ALJ failed to make that case here, but remand is not necessary because it is plain that the ALJ was required to give determinative weight to the x-ray evidence in light of the ALJ's other findings establishing significant infirmities in the medical opinions, biopsy and CT scans. *Youghiogheny & Ohio Coal Co. v. Webb*, 49 F.3d 244, 249 (6th Cir. 1995) ("'If the outcome of a remand is foreordained, we need not order one.'") (quoting *Sahara Coal Co. v. Dir., OWCP*, 946 F.2d 554, 558 (7th Cir.1991)).

B. The ALJ properly afforded greater weight to the x-ray evidence in light of the shortcomings he found in Dr. Rosenberg's opinion.

Dixie contends that the ALJ erred in finding the positive x-ray evidence more persuasive than Dr. Rosenberg's diagnosis of no pneumoconiosis. But the doctor's diagnosis cannot support the weight Dixie places on it.

[23] Available at www.dol.gov/owcp/dcmwc/MOUbetweenOWCPandNIOSH.pdf.

Simply put, accepting Dr. Rosenberg's diagnosis of no pneumoconiosis is implausible in light of the ALJ's rejection of the doctor's reasons for his conclusion. First, the ALJ rejected Dr. Rosenberg's negative x-ray reading, which forms the basis of his no pneumoconiosis diagnosis. The ALJ credited a more qualified reader, Dr. Alexander, who interpreted the same x-ray as positive for pneumoconiosis. Apx. 23. Second, the ALJ discredited Dr. Rosenberg's explanation that the x-ray abnormalities were due to rheumatoid arthritis because the doctor's criticism of scientific studies linking these same abnormalities to coal dust exposure was unfounded. Apx. 35-37. Logically, the ALJ could not accord full probative weight to Dr. Rosenberg's diagnosis of no pneumoconiosis after discrediting the very *reasons* for that diagnosis.[24] Thus, the ALJ committed no error in giving little or no weight to such a diminished diagnosis.

Contrary to Dixie's contention, the ALJ did not exceed his authority in discrediting Dr. Rosenberg's opinion. ALJs are required to evaluate the persuasiveness of expert opinions by considering whether they are well-reasoned and well-documented. *See Moseley v. Peabody Coal Co.*, 769 F.2d 357, 360 (6th

[24] Admittedly, the ALJ at one point uncritically describes Dr. Rosenberg's opinion and accords it some indeterminate amount of weight. Apx. 28, 34. But given the ALJ's specific rejection of the doctor's findings and reasoning, the only sensible way to reconcile the ALJ's opinion is to conclude either that the ALJ did not find Dr. Rosenberg's opinion credible, or that, at most, it was entitled to minimal weight.

Cir. 1985). To do so, ALJs routinely review the materials that experts rely on to determine whether they support the expert's conclusions. *See, e.g.*, *Peabody Coal Co. v. Dir., OWCP*, 746 F.3d 1119, 1124 (9th Cir. 2014) (holding that the ALJ did not violate the Administrative Procedure Act in case where "the Benefits Review Board explicitly permitted the ALJ to review the medical literature in the record to determine whether [expert] 'accurately characterized the literature.'"); *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 456 (8th Cir. 1997) (holding ALJ did not abuse his discretion or substitute her judgment for the medical experts by reviewing the medical records on which the expert's opinion is based).

Moreover, ALJs are not bound to accept medical opinions simply because they seem to be well-*cited*; they are bound to accept medical opinions that are well-*reasoned*. This Court has specifically cautioned against an ALJ accepting an expert opinion at face value merely because it contains citations to medical evidence:

> [T]he mere fact that an opinion is asserted to be based upon medical studies cannot by itself establish as a matter of law that it is documented and reasoned. Rather, that determination requires the factfinder to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which such medical opinion or conclusion is based.

Dir., OWCP v. Rowe, 710 F.2d 251, 255 (6th Cir. 1983). The ALJ here properly examined the medical literature relied on by Dr. Rosenberg, reasonably determined that it did not support his conclusion, and discredited his opinion as a result.

Significantly, Dixie does not contend that the ALJ misunderstood the studies or that the ALJ was wrong in concluding that Dr. Rosenberg's criticism of them was unfounded. Rather, it contends the ALJ improperly took judicial notice of the studies. Pet. 25-27. But it was Dixie, through Dr. Rosenberg, who brought the studies to the ALJ's attention. Dixie can hardly complain when the ALJ reviews evidence it mentions as part of its expert's opinion. There is no question that the ALJ could have reviewed the articles if Dr. Rosenberg attached them to his report, rather than providing citations to the publicly-available documents. *See Central Ohio Coal Co. v. Dir., OWCP*, 762 F.3d 483, 491 (6th Cir. 2014).

In short, Dixie cannot have it both ways. It cannot try to impress an ALJ with the depth of its expert's research and then prohibit the ALJ from reading those same materials.

C. The ALJ properly found Dr. Dahhan's opinion unreasoned and unworthy of significant weight.

Dixie argues that the ALJ erred in discrediting Dr. Dahhan because the ALJ wrongly presumed that pneumoconiosis is always latent and progressive. Pet. Br. at 24-25. Once again, Dixie has mischaracterized the ALJ's opinion. The ALJ properly construed and rejected Dr. Dahhan's opinion because it was internally inconsistent.

Dr. Dahhan, as the ALJ observed, agreed with the scientific proposition that pneumoconiosis *can be* a latent and progressive disease. Apx. 35; Apx. 129. The

doctor then reasoned, however, that Hensley's symptoms were not attributable to pneumoconiosis precisely *because* his condition worsened after his exposure to coal dust ended. Apx. 129. The ALJ astutely recognized that this reasoning is internally inconsistent, and therefore the doctor's conclusion that Hensley's lung disease was not caused by coal dust exposure was illogical. Apx. 35-36. Moreover, the ALJ correctly observed that Dr. Dahhan offered no additional explanation for his conclusion. Apx. at 35-36. Given these findings, the ALJ properly determined that Dr. Dahhan's opinion was not entitled to significant weight. *See Sunny Ridge Mining Co., Inc. v. Keathley*, 773 F.3d 734, 739-40 (6th Cir. 2014) (affirming ALJ who discredited an expert whose only reason for finding chronic bronchitis was not pneumoconiosis was time since dust exposure ceased).

D. The ALJ reasonably accorded no weight to the biopsy and CT scan evidence.

Finally, Dixie's criticism of the ALJ's weighing of the biopsy and CT scan evidence is equally unavailing. The ALJ determined that both types of evidence were essentially neutral, supporting neither Dixie's nor claimant's position. Apx. 32-33.

Contrary to Dixie's contention, Pet. Br. 28, the ALJ did not recharacterize the biopsy evidence; rather, he determined that it was not probative of the existence of pneumoconiosis. The biopsy, which was taken from a large mass in Hensley's lung, was reviewed by Dixie's own expert, Dr. Oesterling. Dr.

Oesterling stated that the sample revealed coal dust exposure but was too small to make a definitive diagnosis of pneumoconiosis. The ALJ thus properly classified the biopsy as neither supporting nor refuting a diagnosis of pneumoconiosis. Apx. 32.

The ALJ's treatment of the CT scans was similarly appropriate. He recognized that the CT scans were taken for the purpose of evaluating the markings in Hensley's lungs, but also noted that the physicians who interpreted the scans did not explicitly consider whether the markings were indicative of pneumoconiosis. The only expert who remarked on that issue was Dr. Rosenberg, whose analysis the ALJ rejected. Thus, it was entirely appropriate for the ALJ to "place limited weight" on the CT scans. Apx. 33.

V. The ALJ applied the proper legal standard for disability causation and his findings are supported by substantial evidence.

Finally, Dixie is incorrect that this Court's decision in *Arch on the Green v. Groves*, 761 F.3d 594 (6th Cir. 2014), requires a second remand. *Groves* made clear that a miner must show that pneumoconiosis (either legal or clinical) is a substantially contributing cause of his disability. *Id.* at 601. The *Groves* court remanded because an ALJ, while *citing* to the proper legal standard, actually *employed* a more lenient disability causation standard that had been superceded by regulation. *Id.* The ALJ's decision here does not suffer from a similar infirmity.

The ALJ discussed the appropriate legal standard, explaining that disability causation is satisfied when pneumoconiosis has a material adverse effect on the miner's condition, or materially worsens a totally disabling impairment. Apx. 38 (citing 20 C.F.R. § 718.204(c)(1)). He then clarified that a negligible, inconsequential, or insignificant contribution is legally insufficient. Apx. 38 (citing 65 Fed. Reg. 79,946).

Addressing the medical opinions, the ALJ observed that although he had initially rejected Dr. Baker's diagnosis of pneumoconiosis, he would consider Dr. Baker's disability causation opinion because the doctor's diagnosis of pneumoconiosis was consistent with the ALJ's own finding. Apx. 38. The ALJ then reasonably credited Dr. Baker's disability causation opinion that Hensley's pneumoconiosis had "an *adverse effect* on his respiratory condition and contribute[d] to his class 3 pulmonary impairment, which has been *caused primarily* by his coal dust exposure." Apx. 132 (emphasis added). Those findings more than satisfy the "substantially contributing cause" standard. *See, e.g.*, *Pittsburgh & Midway Coal Mining Co. v. Dir., OWCP*, 508 F.3d 975, 985 (11th Cir. 2007) (holding that a physician was not required to use magic regulatory phrase to prove that miner had complicated pneumoconiosis); *Peabody Coal Co. v. Lowis*, 708 F.2d 266, 274 (6th Cir. 1983) (vacating ALJ's rejection of expert who failed to use specific phrase).

Further, even if Dr. Baker's opinion were insufficient, the ALJ reasonably relied on Drs. Dahhan and Rosenberg's opinions in finding disability causation established. Both opined that Hensley's interstitial lung disease – which the ALJ determined was clinical pneumoconiosis – was the sole cause of Hensley's total respiratory disability. There is no question that their opinions, once their misdiagnoses are corrected, likewise satisfy the *Groves* standard.

Dixie argues that the ALJ was wrong to use their opinions in this way. It cites a line of Fourth Circuit cases restricting an ALJ from relying on a disability causation opinion when an expert wrongly diagnoses no pneumoconiosis. Pet. Br. at 33-34 (citing cases). The justification for the rule is simple – when an expert determines that a miner does not have pneumoconiosis, the expert must necessarily determine that pneumoconiosis did not cause the miner's disability as well. (If X does not exist, X cannot cause Y.) Thus, if an expert is wrong about the existence of the disease, his opinion denying disability causation is, in all likelihood, incorrect as well. *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015); *Toler v. Eastern Assoc. Coal Co.*, 43 F.3d 109, 116 (4th Cir. 1995).

This sequential logic, however, does not hold when the expert's opinion can reasonably be interpreted *in support* of an affirmative finding of disability causation. In that instance, the direct link between the initial misdiagnosis and the subsequent causation finding is severed. Thus, the Fourth Circuit also recognizes

that an expert may be wrong in identifying a disease (or its cause), but may nonetheless be correct in describing its effects, however named. *See Collins v. Pond Creek Mining Co.*, 751 F.3d 180, 186-87 (4th Cir. 2014) (medical opinions that incorrectly believed miner's COPD was due solely to smoking and not pneumoconiosis nonetheless established death causation because they agreed that the COPD caused the miner's death).

And that is the case here with respect to Drs. Dahhan and Rosenberg's opinions. Despite their mischaracterization of Hensley's disease as a manifestation of rheumatoid arthritis and not pneumoconiosis, the ALJ found persuasive and well-reasoned their conclusions that the disease was totally disabling. As the experts' conclusions about the impact of the disease were independent of their conclusions about its etiology, the ALJ was within his discretion to credit their opinions to find disability causation. *See Collins*, 751 F.3d at 186-87; *see also Drummond Coal Co. v. Freeman*, 17 F.3d 361, 366 (11th Cir. 1994) ("An ALJ need not, as the Board suggested, find that a medical opinion is either wholly reliable or wholly unreliable.").

CONCLUSION

For the reasons stated herein, the Court should affirm Hensley's award of benefits.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that this brief is proportionally spaced, using Times New Roman 14-point typeface, and, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii), contains 10,176 words as counted by Microsoft Office Word 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2015, the Director's brief was served electronically using the Court's CM/ECF system on the Court and the following:

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