BRB No. 06-0599 BLA

MARY R. WRIGHT (o/b/o and as Widow of CLIFFORD WRIGHT)	)	
Claimant-Respondent	)	
v.	)	
RUSSELL COAL COMPANY	)	DATE ISSUED: 04/27/2007
and	)	
AMERICAN RESOURCE INSURANCE COMPANY	)	
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-Award of Benefits of Ralph A. Romano, Administrative Law Judge, United States Department of Labor.

Lance O. Yeager (Ferreri & Fogle PLLC), Louisville, Kentucky, for employer/carrier.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order-Award of Benefits (2005-BLA-5639 and 2005-BLA 5640) of Administrative Law Judge Ralph A. Romano (the administrative law judge) rendered on claims filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] The administrative law judge found that the existence of simple coal workers' pneumoconiosis arising out of coal mine employment and the presence of a totally disabling respiratory impairment were conceded by employer. 20 C.F.R. §§718.202, 718.203, 718.204(b). The administrative law judge further found that the newly submitted evidence, considered in conjunction with the previously submitted evidence, established that the miner's totally disabling respiratory impairment was due to pneumoconiosis (disability causation) pursuant to 20 C.F.R. §718.204(c). Accordingly, the administrative law judge found that claimant had established a basis for modifying the previously denied miner's claim pursuant to 20 C.F.R. §725.310. Turning to the survivor's claim, the administrative law judge found that the evidence of record established that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, 30 U.S.C. §921(c)(3), and that claimant was therefore entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis. The administrative law judge, therefore, found entitlement to benefits on both the miner's claim and the survivor's claim.

On appeal, regarding the miner's claim, employer contends that the administrative law judge erred in finding modification established since the administrative law judge failed to make a specific determination that the evidence established a change in conditions. Employer argues that in order to establish modification, the new evidence must first establish a change in conditions by, in this case, demonstrating disability causation pursuant to Section 718.204(c). Employer contends that the administrative law judge erred in relying on the opinions of Drs. Westerman and Brasfield to find that the

[1] Claimant is the widow of the miner. This appeal encompasses awards of benefits on both the miner's claim and the survivor's claim. The miner initially filed a claim on August 14, 2000, which was denied by Administrative Law Judge Gerald M. Tierney in a Decision and Order issued on March 29, 2002. Judge Tierney found that the miner established a coal mine employment history of forty-two years and that the existence of pneumoconiosis arising out of coal mine employment was conceded by employer. After finding that the miner failed to establish that his totally disabling respiratory impairment was due to pneumoconiosis, Judge Tierney denied benefits. Subsequent to an appeal by the miner, the Board, on February 25, 2003, affirmed the denial of benefits. *Wright v. Russell Coal Co.*, BRB No. 02-0533 BLA (Feb. 25, 2003)(unpub.). On July 21, 2003 the miner died and claimant filed a timely survivor's claim. Director's Exhibit 61. As the survivor's claim was filed less than a year after the miner's claim was denied, it was treated as a request for modification of the miner's claim, as well as a separate survivor's claim.

miner's total disability was due to pneumoconiosis, and not due to the miner's numerous other problems.

Regarding the survivor's claim, employer argues that the administrative law judge erred in finding the existence of complicated pneumoconiosis established based on autopsy evidence, because the administrative law judge did not make the requisite equivalency determination pursuant to Section 718.304. 30 U.S.C. §921(c)(3). Employer also asserts that even if the administrative law judge had properly determined that the evidence established the existence of complicated pneumoconiosis, the administrative law judge erred in finding that the miner's death was due to complicated pneumoconiosis because claimant failed to establish that it substantially contributed to, or hastened, the miner's death. Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, arguing that employer incorrectly characterized the standard for establishing modification. The Director argues that claimant is not required to show a specific change in condition in order to establish modification, but that, in considering modification, the administrative law judge is to consider the claim *de novo*, and determine whether the ultimate finding, *i.e.*, the award or denial of benefits, was correct.[2]

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

At the outset, we reject employer's argument regarding the standard for determining modification. Employer contends that claimant must prove, through newly submitted evidence, that claimant has established a change in condition in order to establish a basis for modification, *i.e.*, that the opinions of Drs. Westerman and Brasfield established disability causation.

Pursuant to Section 725.310, the Board has held that, in considering whether claimant has established a change in conditions, an administrative law judge is obligated to perform an independent assessment of newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated

[2] Because no challenge has been made to the administrative law judge's finding that claimant established the presence of simple pneumoconiosis arising out of coal mine employment or the presence of a totally disabling respiratory impairment, these findings are affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

entitlement in the prior decision. *See Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6, 1-11 (1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993); *Kovac v. BCNR Mining Corp.*, 14 BLR 1-156 (1990), *modified on recon.*, 16 BLR 1-71 (1992). Modification may also be based upon a finding of a mistake in a determination of fact. In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971); *see also Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). Further, the United States Court of Appeals for the Eleventh Circuit, within whose jurisdiction this case arises, has held that in considering the issue of modification, the fact-finder has broad discretion to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection the evidence initially submitted. *Director, OWCP v. Drummond Coal Co.* [*Cornelius*], 831 F.2d 240, 242, 10 BLR 2-322, 2-324 (11th Cir. 1987).

In this case, the administrative law judge reviewed the entire record and determined that "a mistake in a determination of fact in the prior denial of benefits[,]" had been made and that the evidence now established disability causation in the miner's claim. Decision and Order at 12. We reject, therefore, employer's assertion that the administrative law judge had to, as a threshold issue, determine whether claimant established a change in conditions in the miner's claim before finding a basis for modifying the denial of the miner's claim. We will address, *infra*, whether the administrative law judge properly found that the evidence supports a finding of a mistake in fact by establishing disability causation.

Employer next contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis and, therefore, finding claimant entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis. Section 718.304 provides an irrebuttable presumption that a miner's disability and death are due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter in diameter; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304. Logic commands that prongs (A) and (B) be similarly equivalent so that the determination of complicated pneumoconiosis be based on the severity of the disease and not the method of diagnosis. Further, because prong (A) sets out an entirely objective scientific standard, it provides the mechanism for determining equivalencies under prong (B) or prong (C). In prong (A), Congress mandated that the condition that triggers the irrebuttable presumption is one that creates on an x-ray, at least one opacity greater than one centimeter in diameter. When that condition is diagnosed by biopsy or autopsy rather than x-ray, it must therefore be determined whether the biopsy results show a condition that would produce opacities of greater than one centimeter on an x-ray. That is to say, "massive lesions," as

described in prong (B), are lesions that when x-rayed, show as opacities greater than one centimeter in diameter. *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Braenovich v. Cannelton Industries, Inc.*, 22 BLR 1-236 (2003)(Gabauer, J., concurring); *Clites v. Jones & Laughlin Steel Corp.*, 663 F.2d 14, 16 (3d Cir. 1981).

The introduction of legally sufficient evidence of complicated pneumoconiosis, however, does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must weigh together the evidence at subsections (A), (B), and (C) before determining whether invocation of the irrebuttable presumption has been established, *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615, 2-628-629 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993)(claimant is entitled to the irrebuttable presumption "not because he has provided a single piece of relevant evidence, but because he has a 'chronic dust disease of the lung' commonly known as complicated pneumoconiosis.") and the administrative law judge must examine all the evidence on this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, and resolve any conflicts in the evidence and make a finding of fact. *See Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

Employer contends that the administrative law judge failed to adequately explain his equivalency determination when he found that Dr. Guerry-Force's autopsy finding were sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304.[3] Employer contends that it was not enough for the administrative law judge to state that because Dr. Guerry-Force found large lesions the existence of complicated pneumoconiosis was established, since Dr. Guerry-Force never related the lesions seen on autopsy to x-ray evidence, *i.e.*, determine whether they would show as an opacity of over one centimeter in diameter on x-ray. Instead, employer contends that the administrative law judge should have credited the opinions of Drs. Caffrey and Naeye,

[3] The administrative law judge noted that Dr. Guerry-Force found "black macules/lesions from .3 cm to .6 cm in diameter in all lobes, smaller nodules coalesced into larger masses, up to 2.0 to 3.0 cm in greatest dimensions, and black nodules from 1.3 to 2.0 cm in diameter throughout and especially in the upper lobes[,]" on autopsy. Decision and Order at 11.

who reviewed autopsy slides and related the larger lesions and masses to the miner's cancer.[4]

In considering the issue of complicated pneumoconiosis, the administrative law judge stated that he made the requisite equivalency determination and found that the lesions seen on autopsy by Dr. Guerry-Force were sufficient to satisfy the statutory definition of complicated pneumoconiosis.[5] The administrative law judge further found that Dr. Guerry-Force's opinion was persuasive because she clearly identified the findings on autopsy that were attributable to cancer and those that were attributable to coal workers' pneumoconiosis. The administrative law judge found that the opinions of the consulting pathologists, Drs. Caffrey and Naeye, were insufficient to establish the absence of complicated pneumoconiosis. The administrative law judge noted that while Drs. Caffrey and Naeye found complicated pneumoconiosis to be absent, they failed to state whether the lesions they saw met the statutory definition of the disease, not merely the pathological or medical definition. Decision and Order at 12. In conclusion, the administrative law judge found that, on taking into account the qualifications of the physicians[6] and the reasoning provided by them in their opinions, the autopsy finding of

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[4] In a report dated July 20, 2004, after reviewing numerous records, including the autopsy report, death certificate, and glass slides of lung tissue removed at autopsy, Dr. Naeye found an anthracotic lesion that measured 1.1 cm x 0.1 cm, which he found to be an anthracotic macronodule, and opined that such lesions have to reach 2 cm in most dimensions to meet the size requirement for the diagnosis of complicated coal workers' pneumoconiosis. He found that the coal workers' pneumoconiosis lesions found in the miner were "too old," "too few in number," "too small," and "too inactive" to have caused increasing pulmonary insufficiency. Director's Exhibit 74.

Dr. Caffrey in a report dated August 24, 2004, and after review of the autopsy report, as well as the report of Dr. Naeye and five autopsy slides, found lesions of simple coal workers' pneumoconiosis with micronodules and one macronodule (9 mm, 0.9 mm). Director's Exhibit 74.

Both Dr. Naeye and Dr. Caffrey concluded that while simple coal workers' pneumoconiosis was present, complicated pneumoconiosis was not present.

[5] The administrative law judge noted that neither the newly submitted nor the previously submitted x-ray evidence, was sufficient to establish the existence of complicated pneumoconiosis. The administrative law judge also found that there was no biopsy or CT scan evidence of complicated pneumoconiosis. Decision and Order at 11.

[6] Drs. Guerry-Force, Naeye, and Caffrey are Board-certified in anatomic and clinical pathology. Decision and Order at 7-8.

Dr. Guerry-Force was entitled to the greatest weight. Accordingly the administrative law judge concluded that complicated pneumoconiosis was established by autopsy evidence and that claimant was therefore entitled to the irrebuttable presumption that the miner was totally disabled due to pneumoconiosis and that his death was due to pneumoconiosis. Decision and Order at 12.

As employer contends, however, while the administrative law judge stated that he made an equivalency determination, his decision does not include an explanation for his conclusion. Decision and Order at 12. Dr. Guerry-Force's autopsy evidence showed small nodules coalescing into larger masses of 2.0 to 3.0 centimeters, and black nodules measuring from 1.3 to 2 centimeters in diameter. While the administrative law judge held that this evidence establishes complicated pneumoconiosis based on his equivalency determination, the administrative law judge did not explain the basis for his finding. An administrative law judge's failure to explain the rationale for his findings requires remand of the case. *See* The Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), 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. The administrative law judge's finding that complicated pneumoconiosis has been established must, therefore, be vacated and the case remanded. On remand, the administrative law judge must determine if the findings on autopsy establish the statutory definition of complicated pneumoconiosis, and then consider that evidence along with all other relevant evidence at Section 718.304(a) and (c), including evidence showing only simple pneumoconiosis, to determine if the existence of complicated pneumoconiosis is established based on all the relevant evidence. 20 C.F.R. §718.304(a)-(c); *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33.[7]

If the administrative law judge finds that complicated pneumoconiosis is established, then claimant is entitled to the irrebuttable presumption that the miner's disability and death were due to pneumoconiosis, and benefits should be awarded on both the miner's and the survivor's claim. If the administrative law judge finds that complicated pneumoconiosis is not established, the administrative law judge must consider whether claimant has met her burden of proving that the miner's disability and death were due to pneumoconiosis. 20 C.F.R. §§718.204(c); 718.205(c).

[7] Dr. Naeye states that lesions would have to reach 2 cm in diameter to meet the size requirement for a diagnosis of complicated pneumoconiosis. In *Double B Mining Inc. v. Blankenship*, 177 F.3d 204, 22 BLR 2-554 (4th Cir. 1999), the court declined to impose a two-centimeter rule for determining whether "massive lesions," as seen on autopsy or biopsy, were complicated pneumoconiosis.

We reject employer's argument that, even if complicated pneumoconiosis is established, the survivor's claim must be denied because the evidence fails to prove that complicated pneumoconiosis contributed to, or hastened, the miner's death. If complicated pneumoconiosis is established, claimant is entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis and the administrative law judge is not required to further address whether the evidence is sufficient to establish death due to pneumoconiosis. 30 U.S.C. §921(c)(3); *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). If, however, the administrative law judge determines that claimant is not entitled to the irrebuttable presumption, claimant bears the burden of establishing that the miner's death was caused, substantially contributed to, or hastened by pneumoconiosis pursuant to 20 C.F.R. §718.205(c).

Employer contends that the evidence does not establish that the miner's death was due to pneumoconiosis. Employer contends that while Dr. Brasfield's death certificate, Director's Exhibit 71, listed "black lung" as a condition contributing to death, it does not list it as one of the top four causes of death and, although listing it as a secondary contribution, Dr. Bransfield does not explain how it contributed to death. Employer contends, therefore, that Dr. Bransfield's listing of "black lung" on the death certificate was a conclusory statement and insufficient to carry claimant's burden of establishing that the miner's death was due to pneumoconiosis. Likewise, employer contends that Dr. Guerry-Force's autopsy report, Director's Exhibit 72, cannot establish death due to pneumoconiosis because Dr. Guerry-Force failed to address what role pneumoconiosis played in the miner's death. In conclusion, employer contends that the administrative law judge should have credited the opinions of Drs. Caffrey and Naeye as they both explained why the miner's death was not caused by pneumoconiosis.[8] Because, the administrative law judge found claimant entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis, he did not consider whether the evidence established that the miner's death was caused, contributed to, or hastened by pneumoconiosis. If reached, the administrative law judge must make a finding under Section 718.205(c), considering all the relevant evidence. *See* 20 C.F.R. §718.205(c)(5).

[8] Based on a review of medical evidence in the miner's claim, the autopsy report, the death certificate, and the slides of lung tissue taken at autopsy, Dr. Naeye concluded that the miner's death was entirely attributable to malignant neoplasm of undertermined origin that had spread widely through the miner's lungs. Director's Exhibit 74.

Likewise, based on similar evidence, Dr. Caffrey concluded that the miner had simple pneumoconiosis, not complicated pneumoconiosis, and that the miner's death was not caused by complications of pneumoconiosis. Rather, Dr. Caffrey opined that the miner's death was due to large cell undifferentiated carcinoma. Director's Exhibit 74.

Although we remand this case for the administrative law judge to consider whether claimant is entitled to the irrebuttable presumption that the miner's disability was due to pneumoconiosis, we will, nonetheless address the administrative law judge's finding that disability causation was established at Section 718.204(c). A finding of disability causation is essential to entitlement on the miner's claim, if the administrative law judge, on remand, finds that complicated pneumoconiosis has not been established. *See Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Employer contends that the administrative law judge erred in finding that the reports of Dr. Westerman and Dr. Brasfield served to meet claimant's burden of proving that the miner's total respiratory disability was due to coal workers' pneumoconiosis. Employer contends that "it [was] unclear what statements from Dr. Westerman's and Dr. Brasfield's record" the administrative law judge relied on to conclude that these physicians believed that the miner was totally disabled from coal workers' pneumoconiosis, and not the miner's numerous other problems. Employer's Brief at 4.

In finding disability causation established at Section 718.204(c),[9] the administrative law judge found the opinions of Drs. Westerman and Brasfield "sufficient to affirmatively establish that the [m]iner's coal workers' pneumoconiosis had a material

[9] The United States Court of Appeals for the Eleventh Circuit has held that in order to establish disability causation a claimant need only prove that his pneumoconiosis was a substantial contributor to his total disability. *See Lollar v. Alabama By-Products*, 893 F.2d 1258, 13 BLR 2-277 (11th Cir. 1990).

Section 718.204(c)(1) provides that:

> A miner shall be considered totally disabled due to pneumoconiosis if pneumoconiosis, as defined in §718.201, is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment. Pneumoconiosis is a "substantially contributing cause" of the miner's disability if it:
>
> (i) Has a material adverse effect on the miner's respiratory or pulmonary condition; or
>
> (ii) Materially worsens a totally disabling respiratory or pulmonary impairment which is caused by a disease or exposure unrelated to coal mine employment.

20 C.F.R. §718.204(c)(1).

adverse effect on the [m]iner's respiratory condition and/or it had a materially worsening effect on his respiratory or pulmonary condition and/or it materially worsened a totally disabling respiratory impairment suffered by a [m]iner." Decision and Order at 9. The administrative law judge noted that Dr. Westerman and Dr. Brasfield, who saw the miner throughout 2001, and 2002, and in 2003, the last year of his life, had, as the miner's treating physicians, a detailed understanding of the miner's ongoing condition, and provided opinions that were well-documented.[10] Decision and Order at 9. The administrative law judge further noted that their findings were supported by the reports of Drs. Hasson and Guerry-Force and that the opinion of Dr. Kim, the miner's cardiologist, did not necessarily provide an etiology for the miner's respiratory problems. The administrative law judge concluded that the opinions of Drs. Goldstein, Naeye, and Caffrey were not sufficient to outweigh the opinions of Drs. Westerman and Brasfield. *See* Decision and Order at 5; Director's Exhibit 74.

As employer contends, however, it is unclear what, in the opinions of Drs. Westerman and Brasfield, the administrative law judge relied upon to find that their opinions established disability causation, since these opinions diagnosed numerous problems.[11] The administrative law judge may properly credit the fact that both physicians treated the miner during his lifetime and both physicians provided thorough, well-reasoned opinions, which were buttressed by the previously submitted opinion of Dr. Hasson.[12] The administrative law judge, however, failed to discuss the opinions of

[10] Claimant is not eligible for derivative survivor's benefits based on the filing date of the miner's claim. *See Smith v. Camco Mining, Inc.*, 13 BLR 1-17, 1-18-22 (1989); *cf.*, *Neeley v. Director, OWCP*, 11 BLR 1-85, 1-86-87 (1988).

[11] Dr. Westerman diagnosed severe respiratory insufficiency with dyspnea, advanced interstitial lung disease associated with coal workers' pneumoconiosis, hypertension, and cardiomyopathy. Dr. Brasfield diagnosed chronic obstructive pulmonary disease with respiratory failure, acute pneumonia, hypoxemia, acute cardiopulmonary arrest, black lung, prostate cancer, hypertension and pulmonary hypertension.

[12] Dr. Hasson diagnosed simple coal workers' pneumoconiosis, chronic bronchitis, cardiovascular disease, and coronary artery disease. Dr. Hasson opined that the miner's pneumoconiosis rendered him severely impaired and that the miner's chronic bronchitis, which he attributed to pneumoconiosis and cigarette smoking, accounted for a moderate impairment, but that the miner's two heart conditions resulted in only a mild impairment.

Drs. Goldstein and Kim attributed the miner's total respiratory disability to heart disease.

Drs. Westerman and Brasfield in terms of what they found regarding disability causation. Accordingly, we must vacate the administrative law judge's finding that the opinions of Drs. Brasfield and Westerman establish disability causation at Section 718.204(c) and remand the case for more specific findings concerning their opinions and the other relevant opinions of record, if reached.

Accordingly, the administrative law judge's Decision and Order-Award of Benefits is affirmed in part, and vacated in part, and the case is remanded for further findings consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge