BRB No. 02-0455 BLA

DELBERT LEE MILLER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BIG ELK CREEK COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC 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 on Remand – Awarding Benefits of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand - Awarding Benefits (99-BLA-1199) of Administrative Law Judge Joseph E. Kane on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case is on appeal to the Board for the second time.

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

Pursuant to employer's previous appeal, the Board affirmed the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis at Section 718.304(a), but vacated the administrative law judge's finding that the medical opinion evidence established the existence of complicated pneumoconiosis at Section 718.304(c) and remanded for reconsideration of the medical opinion evidence under that subsection and for the administrative law judge to weigh all the relevant evidence together before determining whether claimant was entitled to invocation of the irrebuttable presumption of totally disabling coal workers' pneumoconiosis. Because the Board vacated the administrative law judge's finding that claimant was entitled to the irrebuttable presumption of totally disabling coal workers' pneumoconiosis, the Board addressed the administrative law judge's finding that the existence of simple pneumoconiosis was established at Section 718.202(a)(1) and (2), vacating the administrative law judge's findings thereunder and remanding the case for further consideration of the evidence pursuant to those subsections, if reached. *Miller v. Big Elk Creek Coal Co.*, 00-0966 BLA (Jul. 20, 2001) (unpub.).

On remand, the administrative law judge reaffirmed his previous conclusion that Dr. Branscomb's 2/2 positive reading of the September 9, 1997 x-ray established the presence of simple pneumoconiosis despite additional comments made by Dr. Branscomb on the x-ray. Consequently, the administrative law judge reaffirmed his previous finding that the preponderance of the x-ray evidence establishes the presence of simple pneumoconiosis. Likewise, the administrative law judge again found the biopsy report of Dr. Chan sufficient to establish the existence of simple pneumoconiosis based on the diagnosis of a "pneumoconiosis pulmonary infiltrate." Decision and Order on Remand at 6. Accordingly, the administrative law judge reaffirmed his finding that the existence of simple pneumoconiosis was established at Section 718.202(a)(1) and (2) based on x-ray and biopsy evidence.

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citations to the regulations, unless otherwise noted, refer to the amended regulations.

Turning to the medical opinion evidence, the administrative law judge again found it sufficient to establish the existence of complicated pneumoconiosis and, after weighing all of the relevant evidence, found that the existence of complicated pneumoconiosis was established based on a preponderance of the evidence, thus finding claimant entitled to invocation of the irrebuttable presumption of totally disabling pneumoconiosis. Accordingly, benefits were awarded commencing September 1, 1997, the month in which claimant was first diagnosed with complicated pneumoconiosis.[2]

On appeal, employer argues that the administrative law judge erred in not complying with the Board's remand order. Employer also contends that the administrative law judge's findings are not supported by the record. Claimant has not filed a response brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), as party-in-interest, has filed a letter indicating that he is not participating in the appeal.[3]

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with the applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer first argues that the administrative law judge erred in failing to comply with the Board's remand instructions and respectfully requests that the case be remanded to a new administrative law judge for a "fresh look" at the evidence. Employer's Brief in Support of Petition for Review at 15. Our review of the record, however, shows that the administrative law judge considered all of the relevant medical evidence under the appropriate subsections and, after conducting a qualitative analysis of the conflicting evidence, adequately explained his rationale for crediting certain evidence. Contrary to employer's contention, the administrative law judge rendered a Decision and Order that comports with the Board's instructions. Accordingly, we reject employer's argument that the administrative law judge failed to follow the Board's remand instructions and reject its request to remand the case to a new administrative law judge. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21

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[2] On September, 19, 2002, the administrative law judge issued a Supplemental Decision and Order -- Granting Attorney Fees and awarded claimant's counsel attorney's fees totalling $850.00, representing 4.25 hours of service at a rate of $200.00 per hour. Employer has not appealed this decision.

[3] Because the parties do not challenge the administrative law judge's determination with respect to the date of the commencement of benefits, this finding is affirmed. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order on Remand at 15.

BLR 2-323, 2-343 (4th Cir. 1998); *see also McRoy v. Peabody Coal Co.*, 10 BLR 1-33, 1-34 (1987) (same administrative law judge who heard case initially should hear case on remand unless he/she is unavailable).

Employer next asserts that with respect to the medical opinion evidence the administrative law judge erred in crediting the opinions of Drs. Wicker and Powell based on their status as treating and examining physicians, notwithstanding the Board's directive that an automatic preference for treating and examining physicians was not permissible. Employer also asserts that the administrative law judge erred in discounting Dr. Branscomb's opinion, that claimant suffers from neither simple nor complicated pneumoconiosis, because he did not examine claimant. Contrary to employer's contention, however, the administrative law judge did not give presumptive weight to the opinions of Drs. Wicker and Powell because they were treating and examining physicians, but instead examined all of the opinions on their merits and rendered reasoned judgments relative to the credibility of the physicians' opinions. *See Peabody Coal Co. v. Groves*, 277 F.3d 829, 834, 22 BLR 2-320, 2-326-327 (6th Cir. 2002), *cert. denied*, U.S. , 2003 WL 102516 (U.S. Jan. 13, 2003). The administrative law judge found that more weight, but not necessarily dispositive weight, may be accorded to the conclusions of treating and examining physician and, therefore, accorded probative weight to the opinions of Drs. Wicker and Powell, who diagnosed the existence of complicated pneumoconiosis, because they had a greater opportunity for observation of claimant, had a greater understanding of the progression of claimant's condition, and were more familiar with his condition. This was rational. *See Groves*, 277 F.3d at 835, 22 BLR at 2-330; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *Cole v. East Kentucky Collieries*, 20 BLR 1-50, 1-55 (1996); Decision and Order on Remand at 8, 9. Furthermore, because their treating and examining status was only one of the factors the administrative law judge utilized in according greater weight to their opinions than to the contrary opinion of Dr. Branscomb, we reject employer's argument that the administrative law judge applied a mechanical preference for these treating and examining physicians' opinions. *See Groves*, *supra*; *Hicks*, *supra*.

Employer also asserts that the administrative law judge erred in failing to accept the Board's holding that the diagnosis of complicated pneumoconiosis by Drs. Wicker and Powell were based solely upon their x-ray interpretations of chest films dated September 9, 1997 and December 6, 1998, respectively, because the physicians specifically referred to the ILO classifications to support their opinions. Additionally, employer asserts that, even assuming Drs. Wicker and Powell relied on evidence other than x-rays, such as Dr. Wicker's reliance on his treatment notes and claimant's coal mine employment or Dr. Powell's reliance on his physical examination and "battery of tests," their opinions nonetheless do not contain documentation sufficient to reveal the existence of complicated pneumoconiosis.

The Board questioned the administrative law judge's crediting of Dr. Wicker's

opinion of complicated pneumoconiosis because it relied solely on an x-ray reading of complicated pneumoconiosis. Dr. Wicker, however, also clearly stated that his diagnosis was based on an examination of claimant's hospitalization history. Further, at the time Dr. Wicker rendered his opinion, he was in possession of substantial records concerning claimant general health and respiratory condition, including x-ray interpretations by other physicians, CT scans, and hospital notes. Accordingly, we conclude that the administrative law judge's crediting of Dr. Wicker's opinion on remand was rational. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 8; Director's Exhibit 10. Likewise, noting the Board's concern that Dr. Powell's opinion was merely a restatement of an x-ray reading, the administrative law judge found that Dr. Powell rendered a definitive diagnosis of complicated pneumoconiosis by replacing the term pneumoconiosis for "silicosis" and omitting the phrase "consistent with" that he used on his x-ray reading. The administrative law judge found that Dr. Powell's opinion was entitled to determinative weight because it was comprehensive and based on the most recent pulmonary evaluation of claimant, the doctor's observations during the physical examination, claimant's employment, medical, and smoking histories, pulmonary function and arterial blood gas studies, and an electrocardiogram. This was rational. *See Peabody Coal Co. v. Hill*, 123 F.3d 412, 21 BLR 2-192 (6th Cir. 1997); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Clark*, *supra*; *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic*, *supra*; Director's Exhibit 41.

Additionally, employer asserts that the administrative law judge erred in discrediting Dr. Fino's opinion based on the fact that he was the only physician to opine that the October 13, 1997 CT scan was of poor quality. Employer contends that this was an invalid reason for discounting Dr. Fino's opinion because the administrative law judge had previously found that the CT scan evidence was insufficient to establish the existence of complicated pneumoconiosis.

The administrative law judge found that Dr. Fino opined that, due to "blurring," he was uncertain as to whether the changes seen in claimant's lungs on the October 1997 CT scan "really represented complicated pneumoconiosis disease or [were] just a film artifact due to poor quality." Director's Exhibit 41. The administrative law judge found that, of the six physicians who interpreted the October 1997 CT scan (all of whom were either dually-qualified radiologists or B-readers) Dr. Fino was the only physician to opine that the CT scan was of "very poor quality." Decision and Order on Remand at 10. Accordingly, the administrative law judge found that Dr. Fino's explanation for the lesions in claimant's lungs was undermined. This was rational. *See Hicks*, *supra*; *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Accordingly, the administrative law judge permissibly found that the reliability of Dr. Fino's opinion concerning the CT scan was called into question; hence, employer's assertion is rejected. *See Winters v. Director,*

OWCP, 6 BLR 1-877 , 1-881 n.4.

Employer avers that, in defiance of the Board's remand directive, the administrative law judge discredited Dr. Branscomb's opinion by mistakenly relying on his conclusion that the tests used to diagnose the presence of tuberculosis were negative because these tests did not rule out the presence of tuberculosis. Thus, employer asserts that the administrative law judge erred when he discredited Dr. Branscomb's opinion because Dr. Branscomb was not certain as to whether the tuberculosis claimant had was active or inactive and because he was unaware of claimant's medical history.

The administrative law judge found that Dr. Branscomb testified, during his December 8, 1998 deposition, that the medical records he had reviewed did not contain any information showing that a diagnosis of tuberculosis had been ruled out and recommended that a tuberculin skin test, a bronchoscopic biopsy, and an extraction of bronchial washings should be administered to ascertain whether claimant had tuberculosis. Decision and Order on Remand at 12; Director's Exhibit 41. The administrative law judge questioned the reliability of Dr. Branscomb's opinion, however, because all of the procedures that Dr. Branscomb had recommended to determine the presence of tuberculosis had in fact been administered, and none of the tests "yielded evidence of the disease." Decision and Order on Remand at 12-13. In considering Dr. Branscomb's comments regarding the negative bronchoscopic examination results, the administrative law judge concluded that Dr. Branscomb's opinion, that claimant "may" suffer from tuberculosis "but it could be another granulomatous disease such as histoplasmosis, blastomycosis," or any of several other diseases, was equivocal. This was permissible. *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 764, 21 BLR 2-589, 2-606 (4th Cir. 1999) ("both the meaning of an ambiguous word or phrase and the weight to give the testimony of an uncertain witness are questions for the trier of fact"); *Justice v. Island Creek Coal Co.*, 11 BLR 1-91, 1-94 (1988); *Campbell v. Director, OWCP*, 11 BLR 1-16, 1-19 (1987); Decision and Order on Remand at 12; Director's Exhibit 41. Additionally, the administrative law judge found Dr. Branscomb's opinion undermined because he reached inconsistent conclusions: initially diagnosing "probable active tuberculosis" in his September 28,1998 report, while later opining "inactive" tuberculosis during the December 1998 deposition. *See Fagg v. Amax Coal Co.*, 12 BLR 1-77, 1-79 (1988); Director's Exhibit 41. Consequently, due to Dr. Branscomb's unfamiliarity with claimant's complete medical history and his refusal to acknowledge undisputed negative tests, the administrative law judge rationally determined that Dr. Branscomb's opinion was unreasoned, and rationally accorded it diminished weight. *See Rowe*, *supra*; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 (1984).

We turn next to employer's argument that the administrative law judge, in his attempt to comply with the Board's instructions, rendered inconsistent rationales that are not supported by the record and are not in accordance with controlling authority. Specifically, employer contends that the administrative law judge accorded disparate treatment to the

opinions of Drs. Powell, Fino and Branscomb by accepting the change in Dr. Powell's diagnosis from complicated pneumoconiosis to complicated silicosis as an "amalgamation" while criticizing the failure of Drs. Fino and Branscomb to state their later conclusions in the same terms as earlier opinions. Because the medical condition known as silicosis constitutes a compensable pulmonary condition, however, *see* 20 C.F.R. §718.201(a)(2); *Cornett v. Benham Coal, Inc.*, 227 F.3d 569, 22 BLR 2-107 (6th Cir. 2000); *see also Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *Barber v. Director, OWCP*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995), we fail to see, nor does the record reveal, how the use of this term constituted a "change" in Dr. Powell's opinion. Director's Exhibit 41. We, therefore, reject employer's argument.

Employer also argues that the administrative law judge mischaracterized Dr. Fino's opinion by concluding that it was based only on CT scan evidence when in fact Dr. Fino also relied on the September 1997 x-ray and normal lung function studies. Contrary to employer's argument, however, the administrative law judge did not characterize Dr. Fino's opinion as based only on CT scan evidence. The administrative law judge correctly found that Dr. Fino, "after reviewing the medical evidence of record," issued a report dated October 13, 1998 and testified in a deposition on January 15, 1999 that claimant suffers from simple pneumoconiosis, but not a complicated form of the disease. Decision and Order on Remand at 10; Director's Exhibit 41.

Employer also mistakenly argues that Dr. Fino was improperly criticized for not reviewing all the medical evidence of record,[4] the administrative law judge observed that Dr. Fino's claim to have reviewed all of the objective evaluations of claimant was inaccurate since the doctor's testimony on cross-examination revealed that he had not reviewed reports rendered by Drs. Wicker, Westerfield, and Halbert. Decision and Order on Remand at 10 [emphasis in original]. Thus, the administrative law judge, within a rational exercise of his discretion, found Dr. Fino' opinion worthy of less weight. *See Clark*, *supra*; *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); *Rickey v. Director, OWCP*, 7 BLR 1-106, 1-108 (1984). Because an administrative law judge need not accept the opinion or theory of any given medical witness and may properly weigh the medical evidence and draw his/her own conclusions, *see Campbell v. Consolidation Coal Co.*, 811 F.2d 302, 303, 9 BLR 2-221, 2-223 (6th Cir. 1987); *Rowe*, *supra*; *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 7 BLR 2-202 (4th Cir. 1985), we affirm the administrative law judge's determination that Dr. Fino's opinion was entitled to little weight.

[4] Dr. Fino claimed that his review consisted of "all of the objective evaluations of claimant." Director's Exhibit 41.

Employer next contends that the administrative law judge erred in crediting the opinions of Drs. Wicker and Powell, who are both Board-certified in internal medicine and the subspecialty of pulmonary disease, over the opinions of Drs. Dahhan and Wright because only Dr. Dahhan is similarly qualified. The administrative law judge assessed the respective qualifications of the physicians of record and properly accorded determinative weight to the opinions of Drs. Wicker and Powell, both of whom opined that the changes in claimant's lungs were attributable to complicated pneumoconiosis, because their qualifications, which are indicators of the reliability of their opinions, were superior to those of Drs. Dahhan and Wright, physicians who held the contrary opinion that complicated pneumoconiosis was not present. *See Hicks*, 138 F.3d at 537, 21 BLR at 2-341.

Similarly, we reject employer's argument that the administrative law judge erred in crediting the opinions of Drs. Wicker and Powell because their examinations were more recent than that of Dr. Dahhan. The United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, while adopting the holding of the United States Court of Appeals for the Fourth Circuit that "a bare appeal to recency is an abdication of rational decision making," has further held that "there may be new or additional evidence developed that discredits an earlier opinion; a comparison of medical reports and tests over a long period may conceivably provide a physician with a better perspective that the pioneer examiner." *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 718, 18 BLR 2-16, 2-23 (4th Cir. 1993). Hence, we affirm the administrative law judge's rational determination to accord "the combined examinations" of Dahhan and Wright diminished weight because Dr. Wright's examination preceded those of Drs. Wicker and Powell by four and five years, respectively. *See Wetzel v. Director, OWCP*, 8 BLR 1-139, 1-142 n.6 (1985)(recency is relevant consideration in weighing medical reports); *Gillespie v. Badger Coal Co.*, 7 BLR 1-839 (1985); Director's Exhibits 10, 27, 41.

Employer also contends that by declining to consider the pulmonary function studies of record the administrative law judge erred in failing to review all of the medical evidence together to determine whether complicated pneumoconiosis was established. Noting the Board's instruction to consider all relevant evidence in determining whether complicated pneumoconiosis was established, including the pulmonary function and arterial blood gas studies, the administrative law judge concluded that this directive was "a mistaken oversight" because pulmonary function studies are not diagnostic of the presence of pneumoconiosis. Decision and Order on Remand at 14 n.10; *see Miller*, slip op. at 8. It is well established that pulmonary function studies are not relevant to a determination under Section 718.304(c) since such studies are relevant only to the issue of total disability and not the presence of pneumoconiosis. *Trent v. Director, OWCP*, 11 BLR 1-26, 1-28 (1987); *Tucker v. Director, OWCP*, 10 BLR 1-35, 1-41 (1987); *Piniansky v. Director, OWCP*, 7 BLR 1-171, 1-174. Accordingly, the administrative law judge did not err when he did not consider the pulmonary function and blood gas studies in determining whether the existence of

complicated pneumoconiosis was established. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000) (administrative law judge must in every case review evidence under each prong of Section 718.304 for which relevant evidence is presented to determine whether complicated pneumoconiosis is present); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993).

Likewise, employer contends that, in determining that pulmonary function and blood gas studies were not relevant to the issue of the existence of complicated pneumoconiosis, the administrative law judge irrationally credited Dr. Powell's opinion because it was based on a "battery of tests" consisting of pulmonary function tests, blood gas studies and an electrocardiogram. The Sixth Circuit has held that the determination as to whether a physician's opinion is documented and reasoned "requires the fact finder to examine the validity of the reasoning of a medical opinion in light of the studies conducted and the objective indications upon which the medical opinion or conclusion is based." *Rowe*, 710 F.2d at 255, 5 BLR at 2-103. Because the administrative law judge permissibly examined the underlying documentation of Dr. Powell's opinion to determine whether it provided a basis for the physician's conclusion, employer's argument is rejected.

Finally, employer argues that the administrative law judge failed to comply with his duty under the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), by failing to properly weigh the contrary probative evidence pursuant to Section 718.304 in accordance with the Administrative Procedure Act (APA) and to explain his determination that the medical opinion and x-ray evidence establishing the existence of complicated pneumoconiosis outweighed the CT scan evidence.

Contrary to employer's contention, however, the administrative law judge adequately explained his determination that claimant established, by a preponderance of the evidence, the existence of complicated pneumoconiosis pursuant to Section 718.304 in compliance with the requirements of the APA. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Vickery v. Director, OWCP*, 8 BLR 1-430 (1986). The administrative law judge had previously evaluated the relevant evidence under each prong of Section 718.304(a)-(c), and his findings that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis under Section 718.304(a), that the biopsy evidence weighed neither in favor of nor against a finding of complicated pneumoconiosis under Section 718.304(b), and that the CT scan evidence was insufficient to establish complicated pneumoconiosis under Section 718.304(c) were affirmed by the Board. *Miller*, slip op. at 4, 5 n.4. Reiterating his determinations that the x-ray and medical opinion evidence was sufficient to establish the existence of complicated pneumoconiosis, the biopsy evidence was inconclusive as to its presence, and the CT scan evidence was negative for complicated pneumoconiosis, the

administrative law judge, within a rational exercise of his discretion, determined that the x-ray and medical opinion evidence outweighed the CT scan evidence. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243-244, BLR (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick, supra*. Because the administrative law judge's evaluation of the evidence is rational, supported by substantial evidence, and contains no reversible error, we affirm his determination that because claimant established the existence of complicated pneumoconiosis, claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304.[5]

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[5] Our affirmance of the administrative law judge's determination that claimant established invocation of the irrebuttable presumption that he is totally disabled due to pneumoconiosis pursuant to Section 718.304 obviates the need to address employer's arguments concerning the administrative law judge's determination under Sections 718.202(a)(1) and (2). *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).