BRB No. 04-0415 BLA

PHYLLIS I. MABE (Widow of ROBERT M. MABE)	)	
Claimant-Respondent	)	
v.	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 01/31/2005
Employer-Petitioner	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Second Remand of Robert L. Hillyard, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order on Second Remand (98-BLA-0008) of Administrative Law Judge Robert L. Hillyard awarding benefits on a survivor's 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 before the

[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

Board for the third time.[2] In the most recent appeal, the Board vacated the administrative law judge's finding that the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304(a), and remanded the case for reconsideration of all the relevant evidence of record. The Board instructed that if, on remand, the administrative law judge found the evidence insufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, he must consider whether claimant is entitled to benefits on her survivor's claim by proving that the miner suffered from pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203, and by proving that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). On second remand, the subject of the current appeal, rather than readdressing the issue of complicated pneumoconiosis at 20 C.F.R. §718.304, the administrative law judge instead addressed whether claimant had established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a), 718.203, and whether the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). The administrative law judge found the evidence sufficient to establish the existence of simple pneumoconiosis at 20 C.F.R §718.202(a)(1) and (a)(4), and that pneumoconiosis hastened the miner's death pursuant to 20 C.F.R. §718.205(c). Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings that the evidence is sufficient to establish the existence of pneumoconiosis at 20 C.F.R. §§718.202(a)(1) and (a)(4), and that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c). Claimant[3] responds, urging affirmance of the administrative law

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(2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The complete procedural history of this claim is contained in the Board's prior decisions. *See Mabe v. Consolidation Coal Co.*, BRB No. 00-0373 BLA (Jan. 30, 2001)(unpub.); *Mabe v. Consolidation Coal Co.*, BRB No. 00-0370 BLA (Nov. 20. 2002)(unpub.)

[3] Claimant is the widow of the miner, Robert M. Mabe. Director's Exhibit 1. The miner filed a claim with the Social Security Administration on June 25, 1973. Director's Exhibit 13. After several denials by the Social Security Administration, this claim was finally denied by the Department of Labor (DOL) on February 10, 1981. *Id.* The miner filed a claim with the DOL on October 30, 1984. *Id*. On October 7, 1988, Administrative Law Judge Robert J. Shea issued a Decision and Order denying benefits. *Id*. The miner filed another claim with the DOL on February 21, 1990. *Id.* On July 10, 1992, Administrative Law Judge Lawrence Gray issued a Decision and Order awarding benefits. *Id*. The miner died on November 9, 1996. Director's Exhibits 1, 3. No

judge's award of benefits. The Director, Office of Workers' Compensation Programs, has declined to participate in this appeal.

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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer contends that the administrative law judge erred in finding the x-ray evidence supportive of a finding of pneumoconiosis at 20 C.F.R. §718.202(a)(1). The record consists of eighty-two interpretations of twenty-one x-rays taken from 1966 to 1996, of which fifty-nine are positive, twenty-two are negative, and one is unreadable. Director's Exhibits 5, 12B, 13; Claimant's Exhibit 2; Employer's Exhibits 1-5. In addition, the record reflects that of the fifty-nine positive readings, fifty-seven were by B-readers, Board-certified radiologists or dually qualified readers. Claimant's Exhibits 2, 3; Director's Exhibits 5, 13; Employer's Exhibit 2. Of the twenty-two negative readings, thirteen were by B-readers, Board-certified radiologists or dually qualified readers. Director's Exhibits 5, 12B, 13; Employer's Exhibits 1-4.

Employer argues that the administrative law judge failed to give sufficient consideration to the radiographic interpretations as a whole, and instead gave a "scorecard" of positive and negative readings. Employer's Brief at 6-7. Employer also argues that the administrative law judge failed to discuss the fact that although early x-rays were read positive by Drs. Kim, Wheeler, Scott, Shipley, Spitz and Wiot, following a review of a September 20, 1996 computerized tomography (CT) scan each of these physicians concluded that the x-ray evidence was not representative of pneumoconiosis, and later read x-rays as negative for pneumoconiosis. Employer's Brief at 7. We disagree.

In considering the x-ray evidence pursuant to 20 C.F.R. §718.202(a)(1), the administrative law judge stated: "Because of the numerous positive interpretations, most by highly qualified readers … , and in consideration of the x-ray narratives provided by Drs. Kim, Wheeler, Scott, Shipley, Spitz and Wiot, I find that the preponderance of the x-ray evidence establishes the existence of pneumoconiosis." Decision and Order on Second Remand at 3. Because the administrative law judge properly conducted a both a qualitative and quantitative review of the x-ray evidence by considering both the number of positive and negative x-ray readings and the radiological expertise of the readers, and

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autopsy was performed. Claimant filed a survivor's claim on November 22, 1996. Director's Exhibit 1.

further fully considered the recent negative narrative x-ray reports by Drs. Kim, Wheeler, Scott, Shipley, Spitz and Wiot, we affirm the administrative law judge's findings pursuant to 20 C.F.R. §718.202(a)(1). *Edmiston v. F & R Coal Co.*, 14 BLR 1-65 (1990); *McMath v. Director, OWCP*, 12 BLR 1-6 (1988). However, in light of our findings at 20 C.F.R. §718.202(a)(4), *infra*, in determining on remand whether claimant has established the existence of pneumoconiosis, the administrative law judge is instructed to consider together all relevant evidence at 20 C.F.R. §718.202(a)(1)-(4) in determining whether claimant has met her burden of proof by a preponderance of the evidence. *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).

Employer next contends that the administrative law judge erred in his evaluation of the evidence pursuant to 20 C.F.R. §718.202(a)(4). Initially, employer asserts that the administrative law judge failed to consider all of the CT scan readings of record. Employer's Brief at 8. Employer's argument has merit.

In addressing the evidence at 20 C.F.R. §718.202(a)(4), the administrative law judge considered only the four narrative positive interpretations of a September 20, 1996 CT scan submitted by Drs. Ahmed, Capiello, Pathak, and Aycoth, and concluded that the narrative CT scan reports supported the existence of pneumoconiosis. Claimant's Exhibit 2; Decision and Order on Second Remand at 5-6. The Board notes, however, that the administrative law judge did not address, either at 20 C.F.R. §§718.202(a)(1) or (a)(4), the interpretations of the September 20, 1996 CT scan by Drs. Shipley, Spitz, Scott, Wheeler, Kim or Wiot, all of which were negative for the existence of pneumoconiosis. Director's Exhibit 12B; Employer's Exhibits 1-5; Decision and Order on Second Remand at 5-6. In evaluating the record, if the adjudicator misconstrues either the quality or the quantity of relevant evidence, *i.e.*, if the evidentiary analysis does not coincide with the evidence of record, the case must be remanded for reevaluation of the issue to which the evidence is relevant. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985); *Branham v. Director, OWCP*, 2 BLR 1-111, 1-113 (1979). Thus, as the administrative law judge failed to consider the CT scan interpretations of Drs. Shipley, Spitz, Scott, Wheeler, Kim and Wiot, we vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(4) and instruct the administrative law judge to consider, on remand, all of the relevant medical evidence as required by the Administrative Procedure Act (APA). *See* 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); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Employer also asserts that the administrative law judge erred in his weighing of the medical opinion evidence at 20 C.F.R. §718.202(a)(4). Specifically, employer contends that in finding that the miner suffered from pneumoconiosis, the administrative law judge erred in mechanically according great weight to the opinion of Dr. Bhasin on the grounds that she was a treating physician. Employer's Brief at 9, 12.

Contrary to employer's arguments, the administrative law judge did not mechanically credit Dr. Bhasin based on her status as a treating physician, but permissibly found her opinion to be well reasoned, despite her lack of specialized credentials, based on her thorough diagnostic method, her access to the most recent medical information available on the miner, and her reliance on objective testing data and extensive physical examinations. Claimant's Exhibit 3 at 10-12; Decision and Order on Second Remand at 6. As the administrative law judge considered Dr. Bhasin's qualifications, her access to the miner, her review of objective testing, and the degree to which she explained how the objective testing supported her diagnosis, we reject employer's arguments and find that the administrative law judge acted within his discretion in crediting the opinion of Dr. Bhasin. *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); *Grizzle v. Pickands Mather & Co./Chisolm Mines*, 994 F.2d 1093, 1096 (4th Cir. 1993). Nonetheless, as we vacate the administrative law judge's ultimate determination at 20 C.F.R. §718.202(a)(4), the administrative law judge must reconsider Dr. Bhasin's opinion on remand, along with the other evidence relevant to the existence of pneumoconiosis, in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-162.

Employer next asserts that the administrative law judge provided insufficient reasoning for discrediting Dr. Castle's opinion that the miner did not have pneumoconiosis. Employer's Brief at 16. Employer's arguments have merit. A review of the administrative law judge's decision reveals that he accorded little weight to Dr. Castle's diagnosis on the grounds that his opinion was not well reasoned, in part because the physician "offers no alternative explanation for the large body of radiographic evidence showing pneumoconiosis" and does not "explain how other objective testing supports his contrary opinion." Employer's Exhibit 9; Decision and Order on Second Remand at 8. As employer correctly asserts, however, Dr. Castle, a B-reader and Board-certified pulmonary specialist, in fact explained in detail his opinion that while the record contains many x-rays dating from 1966 to 1996 which show the existence of pneumoconiosis, these were eventually proven incorrect by the more definitive CT scan, which was not performed until six weeks prior to the miner's death, and which was read by Dr. Wiot as showing no evidence of pneumoconiosis. Employer's Exhibit 9. Dr. Castle further explained that while the CT scan showed marked lung abnormalities, he felt these were consistent with an interstitial fibrotic process called usual interstitial pneumonitis, which was unrelated to coal mine employment or coal dust exposure. Employer's Exhibit 9. Dr. Castle further stated that this diagnosis was supported by the objective testing of record, in that during his life, the miner was noted to have "significant interstitial fibrosis with little or no respiratory impairment of a mechanical nature related to that." Employer's Exhibit 9. The physician explained that "[i]f one has significant coal workers' pneumoconiosis to the degree that this gentleman's x-ray was abnormal, one would expect significant respiratory impairment related to the process including significant restrictive lung disease. It is entirely possible, however, for one to

have usual interstitial pneumonitis with primarily only a gas exchange abnormality such as occurred in this circumstance. It also appeared clear that the mild degree of obstructive disease present was indeed related to his tobacco smoking habit based upon the significant degree of reversibility present." Employer's Exhibit 9. Thus, contrary to the administrative law judge's conclusions, Dr. Castle provided both an alternative explanation for the radiographic evidence showing the existence of pneumoconiosis and explained how the objective testing supported his diagnosis. The administrative law judge, therefore, improperly discredited Dr. Castle's opinion that the miner did not have pneumoconiosis. Thus, in light of his mischaracterization of Dr. Castle's opinion, the administrative law judge must reconsider Dr. Castle's report in his weighing of all the relevant evidence at 20 C.F.R. §718.202(a)(4). *See Tackett*, 7 BLR at 1-703.

Employer's final argument with respect to the administrative law judge's evaluation of the medical evidence at 20 C.F.R. §718.202(a)(4) is that he erred in according little weight to the opinion of Dr. Repsher on the grounds that it is equivocal, vague and not well reasoned. Employer's Brief at 20. Contrary to employer's arguments, however, as Dr. Repsher diagnosed "possible, but not documented, very mild coal workers' pneumoconiosis of no clinical significance," and further stated that while "there is not significant evidence to justify a diagnosis of coal workers' pneumoconiosis" it was "possible that he did have mild and clinically insignificant simple coal workers' pneumoconiosis," we hold that the administrative law judge acted within his discretion in finding the physician's opinion equivocal and vague. *U.S. Steel Mining Co., Inc. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999); Employer's Exhibit 8; Decision and Order on Second Remand at 8. Nonetheless, as we otherwise vacate the administrative law judge's findings at 20 C.F.R. §718.202(a)(4), the administrative law judge must reconsider Dr. Repsher's opinion on remand along with the other relevant evidence in accordance with the APA. *See Wojtowicz*, 12 BLR at 1-162.

Turning to the issue of whether claimant established that pneumoconiosis hastened the miner's death, employer initially asserts that the administrative law judge erred in according less weight to the opinion of Dr. Castle that coal worker's pneumoconiosis did not contribute to the miner's death in any way. Employer's Brief at 16-18. A review of the administrative law judge's decision reveals that he accorded less weight to the opinion of Dr. Castle on the grounds that the physician did not diagnose pneumoconiosis, which the administrative law judge had found to exist. *See Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995); Decision and Order on Second Remand at 14. As the administrative law judge's evaluation of Dr. Castle's opinion is flawed in that it is based on his erroneous findings at 20 C.F.R. §718.202(a), the administrative law judge must reconsider Dr. Castle's opinion on remand at 20 C.F.R. §718.205(c) after his reevaluation of the evidence at 20 C.F.R. §718.202(a).

Employer also asserts that the administrative law judge similarly erred in according less weight to Dr. Repsher's opinion, that pneumoconiosis did not hasten the miner's death, on the grounds that he did not diagnose the disease, and further mischaracterized the physician's credentials. Employer's Brief at 19-21. Employer's arguments have merit. Dr. Repsher opined that the miner had "possible, but not documented, very mild coal workers' pneumoconiosis" and that if present, it was "insignificant" and did not hasten the miner's death." Employer's Exhibit 8. The administrative law judge stated that in addition to being equivocal and vague as to the existence of pneumoconiosis, as "Dr. Repsher is not a Board-certified Pulmonologist or Internist, as he did not diagnose clinically significant pneumoconiosis, and as his opinion is not corroborated by the evidence as a whole or by the well-reasoned opinions of the examining physicians, I afford his opinion less weight." Decision and Order on Second Remand at 13-14. As employer correctly points out, Dr. Repsher is Board-certified in both Internal Medicine and Pulmonary Disease. Employer's Exhibit 8. In addition, Dr. Repsher's opinion as to the cause of the miner's death, the relevant issue at 20 C.F.R. §718.205(c), is neither vague nor equivocal. Rather, Dr. Repsher clearly opined that the miner's death was due to "congestive heart failure and bilateral pneumonia, superimposed on chronic lymphatic leukemia," and added that, even if present, pneumoconiosis did not contribute to the miner's death. Employer's Exhibit 8. Thus, in light of the administrative law judge's mischaracterization of Dr. Repsher's report, the administrative law judge must reconsider the opinion of Dr. Repsher, together with the other relevant evidence of record, at 20 C.F.R. §718.205(c). *See Tackett*, 7 BLR at 1-703.

Employer next asserts that the administrative law judge erred in mechanically crediting as a treating physician the opinion of Dr. Bhasin, that the miner's death was due to "acute respiratory insufficiencies secondary to COPD, extensive pulmonary fibrosis, and pneumoconiosis and then super added infection with bilateral pneumonia….", and further erred in failing to note her lack of qualifications. Claimant's Exhibit 3; Employer's Brief at 9, 12. Employer also asserts that because Dr. Bhasin's opinion as to the cause of the miner's pneumoconiosis is equivocal, and, because she failed to give a thorough explanation for her conclusions, the administrative law judge erred in finding her opinion as to the cause of the miner's death to be well reasoned. Employer's Brief at 12. Employer's arguments lack merit.

In his initial discussion of Dr. Bhasin's opinion at 20 C.F.R. §718.202(a)(4), the administrative law judge specifically noted that the physician does not possess any specialized qualifications. Decision and Order on Second Remand at 6. In addition, the administrative law judge did not mechanically credit Dr. Bhasin based on her status as a treating physician, but rather permissibly credited Dr. Bhasin because in addition to having visited the miner daily during the last two months of his life, seeing first hand his steady decline in health through "almost daily examinations and objective testing," and

her "being in a unique position to monitor daily changes and to make an informed diagnosis as to cause of death based upon the information collected," he found her opinion well reasoned and supported by the evidence. Claimant's Exhibit 3; Decision and Order on Second Remand at 11. Further, contrary to employer's arguments, Dr. Bhasin was not equivocal as to the cause of the miner's pneumoconiosis. Although when asked the source of the miner's pneumoconiosis she first responded: "It could be coal miner's disease. He was working there for many, many years," Claimant's Exhibit 3 at 9, when asked whether she meant "coal mine dust exposure?" she responded "yes." Claimant's Exhibit 3 at 9. Whether a physician's opinion is sufficiently reasoned and documented is within the discretion of the administrative law judge. *Compton*, 211 F.3d at 211, 22 BLR 2-175; *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 21 BLR 2-587 (4th Cir. 1999). Thus, we reject employer's arguments regarding the administrative law judge's crediting of Dr. Bhasin's opinion at 20 C.F.R. §718.205(c). Nonetheless, the administrative law judge should reconsider Dr. Bhasin's opinion, on remand, together with the other relevant evidence 20 C.F.R. §718.205(c).

Employer similarly asserts that the administrative law judge erred in mechanically crediting the opinion of Dr. Hatahet as a treating physician based on his "almost constant monitoring" of the miner and his consideration of the objective evidence. Employer's Brief at 13. Employer specifically asserts that the administrative law judge's findings are unsupported by the evidence of record as Dr. Hatahet in fact testified that he could not recall how many times he saw the miner or whether he reviewed any pulmonary function studies, and further testified that he only reviewed one blood gas study. Claimant's Exhibit 1 at 8, 22; Employer's Brief at 13. Employer also asserts that the administrative law judge erred in according more weight to Dr. Hatahet than to Drs. Dahhan, Repsher, Castle and Chillag, based on his superior qualifications, as Dr. Hatahet actually possesses lesser qualifications than these physicians. Employer's Brief at 13-14. Employer's arguments lack merit.

In his deposition, Dr. Hatahet testified that while the miner's death was due to acute infectious pneumonia, he believed that the miner's underlying chronic lung disease, namely interstitial lung disease due to coal dust exposure, played a significant role in the miner's death by reducing his lung reserves. Claimant's Exhibit 1 at 15-17. Dr. Hatahet explained that had the miner's lung reserves been normal, he probably would have survived his acute pneumonia. Claimant's Exhibit 1 at 15. In crediting Dr. Hatahet's opinion, the administrative law judge stated: "… Dr. Hatahet had almost daily access to the miner and could see the steady decline in his health and the associated causes first hand. As a Board-certified Internist, his superior qualifications further strengthen his opinion. I find the opinion of Dr. Hatahet to be well reasoned based upon both objective evidence and on the multiple physical examinations and almost constant monitoring of the Miner during the last two months of his life." Decision and Order on Second Remand at 12. While Dr. Hatahet did state that without reviewing his progress notes he could not

recall exactly how many times he had seen the miner, or how many objective studies he had reviewed, he also testified that it was his practice to see his consulting patients every other day. Claimant's Exhibit 1 at 8, 22. The record also contains a notation by Dr. Bhasin that she was consulting with Dr. Hatahet, and that he had ordered additional testing, and a notation by Dr. Khokar that the miner was being treated by Dr. Hatahet. Director's Exhibit 5. In addition, the record contains a hospital admission report signed by Dr. Hatahet, in which he stated that the miner was already known to him from his recent evaluation at the rehabilitation center, and in which he summarized the results of his examination, blood gas studies, x-ray and pulmonary function studies. Director's Exhibit 5. Thus, the record supports the administrative law judge's crediting of Dr. Hatahet based in part on his "almost daily access" to the miner and his review of objective studies. Finally, contrary to employer's argument, the administrative law judge did not accord greater weight to the opinion of Dr. Hatahet than to the opinions of Drs. Dahhan, Repsher, Castle and Chillag based on his qualifications, but simply found that his qualifications added additional strength to his opinion. Decision and Order on Second Remand at 12. Thus, we reject employer's arguments concerning the administrative law judge's weighing of Dr. Hatahet's report, but again instruct the administrative law judge to reconsider Dr. Hatahet's report on remand at 20 C.F.R. §718.205(c).

Finally, employer asserts that the administrative law judge erred in finding the opinion of Dr. Chillag, that while the miner had pneumoconiosis it did not play any role in his death, to be supportive of the opinions of Drs. Hatahet and Bhasin. Employer's Brief at 22. Employer also asserts that the administrative law judge erred in failing to explain why he credited Dr. Chillag's opinion, but did not credit the similar opinions of Drs. Dahhan, Castle and Repsher. Employer's Brief at 23. Employer's arguments lack merit, in that the administrative law judge found Dr. Chillag's opinion "generally supported by," not "supportive of," the evidence as a whole and the opinions of Drs. Bhasin and Hatahet, and further gave specific reasons why he did not similarly credit the opinions of Drs. Dahhan, Castle and Repsher. Decision and Order on Second Remand at 13-14. We, therefore, reject employer's arguments regarding the administrative law judge's evaluation of Dr. Chillag's report. Nonetheless, we again instruct the administrative law judge to reconsider Dr. Chillag's report on remand together with all the relevant evidence at 20 C.F.R. §718.205(c).

If, on remand, the administrative law judge finds that claimant has failed to establish that the miner suffered from pneumoconiosis arising out of coal mine employment at 20 C.F.R. §§718.202(a) and 718.203, and further failed to establish that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.205(c), he must consider whether the evidence is sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis at 20 C.F.R. §718.304, in accordance with the Board's

prior decision.[4] *See Handy v. Director, OWCP*, 16 BLR 1-73 (1990); *Sumner v. Blue Diamond Coal Co.*, 12 BLR 1-74 (1988); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Mabe v. Consolidation Coal Co.*, BRB No. 02-0370 BLA (Nov. 20, 2002)(unpub.).

Accordingly, the administrative law judge's Decision and Order on Second Remand awarding benefits is vacated and the case is remanded to the administrative law judge for further proceedings 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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JUDITH S. BOGGS
Administrative Appeals Judge

[4] We note that in his Decision and Order on Second Remand, the administrative law judge stated that the irrebuttable presumption at 20 C.F.R. §718.304 does not apply to the instant case because there is no x-ray, biopsy, autopsy, or other evidence of large opacities or massive lesions in the lungs. Decision and Order on Second Remand at 4. In light of the administrative law judge's prior decisions finding the evidence of record sufficient to establish invocation of the irrebuttable presumption of death due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and the Board's prior remand of this case for further consideration of this issue, we again remand the case for reconsideration at Section 718.304, if necessary.