BRB No. 00-1000 BLA

EMERSON CHESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED:
	)	
HI-TOP COAL COMPANY; MULLINS COAL COMPANY OF VIRGINIA, MULLINS #3, INCORPORATED	)	
	)	
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 Awarding Benefits on Remand of Joan Huddy Rosenzweig, Administrative Law Judge, United States Department of Labor.

Bobby S. Belcher, Jr. (Wolfe & Farmer), Norton, Virginia, for claimant.

H. Ashby Dickerson (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: SMITH and DOLDER, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand (96-BLA-1075) of Administrative Law Judge Joan Huddy Rosenzweig (the administrative law judge) awarding benefits in a duplicate 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] The Board, in *Chester v. Hi-Top Coal Company; Mullins Coal Company of Virginia, Mullins #3, Inc.*, BRB No. 98-1266 BLA (Sept. 30, 1999)(unpublished), addressed claimant's appeal of the administrative law judge's denial of claimant's request for modification in the instant duplicate claim. The Board held that the administrative law judge erred in applying the doctrine of *res judicata* to this modification proceeding and in not considering all the evidence of record to determine if claimant established a mistake in a determination of fact under 20 C.F.R. §725.310 (2000).[2] The Board noted that in reconsidering whether claimant established a change in conditions on remand under 20 C.F.R. §725.310 (2000), the administrative law judge incorrectly found that none of the blood gas studies produced qualifying values[3] inasmuch as Dr. Forehand's resting study yielded qualifying results and was deemed acceptable by Dr. Michos. Board's Decision and Order at 5; *see* Director's Exhibits 60, 64. The Board thus vacated the administrative law judge's determination at 20 C.F.R. §725.310 (2000) and remanded the case. In this regard, the Board noted that Administrative Law Judge Paul H. Teitler previously had denied the claim on its merits based on claimant's failure to establish total respiratory or pulmonary disability pursuant to 20 C.F.R. §718.204(c) (2000),[4] and thus, that in order to establish a change in conditions under 20 C.F.R. §725.310 (2000) on remand, the newly submitted evidence, considered in conjunction with the previously submitted evidence, must support a finding of total disability

[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 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725 and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The amendments to the regulations at 20 C.F.R. §§725.309 and 725.310, regarding duplicate claims and modification respectively, do not apply to claims, such as the instant claim, which were pending on January 19, 2001. *See* 20 C.F.R. §725.2, 65 Fed. Reg. 80,057.

[3]A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B, C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(c)(1), (c)(2) (2000); 20 C.F.R. §718.204(b)(2)(i), (b)(2)(ii).

[4]The provision pertaining to total disability, previously set out at 20 C.F.R. §718.204(c), is now found at 20 C.F.R. §718.204(b), while the provision pertaining to disability causation, previously set out at 20 C.F.R. §718.204(b), is now found at 20 C.F.R. §718.204(c).

pursuant to 20 C.F.R. §718.204(c) (2000). The Board also instructed the administrative law judge that if she were to find on remand that claimant established modification under 20 C.F.R. §725.310 (2000), then she must determine whether claimant established a material change in conditions at 20 C.F.R. §725.309 (2000) pursuant to *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).[5]

In her Decision and Order Awarding Benefits on Remand, which is the subject of the instant appeal, the administrative law judge determined that claimant established a change in conditions on modification under 20 C.F.R. §725.310 (2000) by establishing total respiratory or pulmonary disability under 20 C.F.R. §718.204(c) (2000). The administrative law judge also found that claimant established a mistake in a determination of fact based on the administrative law judge's prior erroneous weighing of the reports of Drs. Forehand and Sargent, as well as her mischaracterization of the results of Dr. Forehand's blood gas study. The administrative law judge further found that claimant established a material change in conditions under 20 C.F.R. §725.309 (2000) based on Dr. Forehand's opinion. Accordingly, benefits were awarded.

On appeal, employer challenges the administrative law judge's findings of a change in conditions and mistake in a determination of fact under 20 C.F.R. §725.310 (2000). Employer also challenges the administrative law judge's findings of (1) a material change in conditions under 20 C.F.R. §725.309(d) (2000); (2) the existence of pneumoconiosis under 20 C.F.R. §718.202(a) (2000); and (3) total disability due to pneumoconiosis. Claimant

[5]In *Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996), *rev'g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995), the United States Court of Appeals for the Fourth Circuit held that in assessing whether a material change in conditions has been established under 20 C.F.R. §725.309 (2000), an administrative law judge must consider all of the new evidence, favorable and unfavorable to claimant, and determine whether claimant has proven at least one of the elements of entitlement previously adjudicated against him. Claimant's previous claim was denied due to his failure to establish that he was totally disabled due to pneumoconiosis. Director's Exhibit 26.

responds, and seeks affirmance of the decision below. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in the appeal.

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). In the present case, the Board established a briefing schedule by order issued on April 20, 2001, to which claimant and the Director have responded.[6] Claimant and the Director assert that application of the revised regulations at issue in the litigation will not alter the outcome of the case. Based on the briefs submitted by employer and the Director, and our review, we hold that the disposition of this case is not impacted by the challenged regulations. Therefore, the Board will proceed to adjudicate the merits of 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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Employer contends that the administrative law judge committed several errors in finding a change in conditions under 20 C.F.R. §725.310 (2000). Employer first argues that the administrative law judge ignored the fact that the exercise portion of the March 1995 blood gas study underlying Dr. Forehand's opinion produced non-qualifying results. Employer also argues that the administrative law judge failed to explain why the at rest portion of Dr. Forehand's 1995 blood gas study, which produced qualifying results, should be given more weight than Dr. Sargent's later, September 1995, at rest blood gas study which produced non-qualifying results. Employer further contends that the administrative law judge failed to discuss the earlier blood gas studies of record.

[6]Pursuant to the Board's instructions, the failure of a party to submit a brief within 20 days following receipt of the Board's Order issued on April 20, 2001, is construed as a position that the challenged regulations will not affect the outcome of the case.

Employer's contentions lack merit. The administrative law judge properly characterized Dr. Forehand's "resting" blood gas study as producing qualifying results. Decision and Order Awarding Benefits on Remand at 5, 6. The administrative law judge properly relied on the recency of Dr. Forehand's March 1995 medical opinion, including its underlying supporting objective evidence, in finding that the claimant has established on modification that he is now totally disabled due to a respiratory or pulmonary impairment. 20 C.F.R. §725.310 (2000); *see generally Adkins v. Director, OWCP,* 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). In this regard, the administrative law judge determined that the fact that Dr. Sargent examined claimant six months after Dr. Forehand examined claimant did not render Dr. Sargent's opinion more recent as these examinations were close in time and thus contemporaneous. In crediting Dr. Forehand's opinion, the administrative law judge properly accorded less weight to the older evidence of record which she found was generated a significant number of years prior to Dr. Forehand's report and prior to claimant's retirement from the coal mines in July 1990.[7] *Id.*

[7]The old evidence includes seven arterial blood gas studies dating from November 28, 1979 to August 15, 1990. Director's Exhibits 12, 13, 15, 26, 27, 33. Employer asserts that claimant left the mines on July 30, 1990, and that since Dr. Paranthaman conducted his blood gas study on August 15, 1990, the administrative law judge erred in characterizing the old evidence as having been generated before claimant's retirement from the mines. Employer argues that Dr. Nash's blood gas study, conducted on July 17, 1990 was "quite close in time to the claimant's last date of employment." Employer's Brief at 11. We hold that any error on the administrative law judge's part in this regard is harmless and cannot affect the outcome of the case. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). The fact remains that the administrative law judge properly determined that these older objective tests, including the blood gas studies cited by employer, were conducted a significant number of years prior to Dr. Forehand's 1995 report.

Employer next asserts that Dr. Michos did not provide any meaningful analysis or reasoning as to why he found Dr. Forehand's March 1995 blood gas study to be acceptable. Employer also contends that the administrative law judge erred in her analysis of "the importance and meaning" of Dr. Forehand's narrative report. Specifically, employer submits that the administrative law judge "got it right the first time" when, in her May 1998 Decision and Order, she discredited Dr. Forehand's opinion. Employer offers several reasons in support of its position that Dr. Forehand's opinion is not credible and is not sufficient to establish that claimant is totally disabled due to pneumoconiosis. Employer's Brief at 12- 14.

It is within the province of the administrative law judge as factfinder to determine the credibility of the medical evidence. *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In the instant case, the administrative law judge acted within her discretion in according great weight to Dr. Forehand's opinion based on her finding that Dr. Forehand provided a thorough examination of claimant, including work, family and medical histories in analyzing claimant's medical status. Decision and Order at 5; *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987). Further, employer cites no medical evidence in support of its argument that Dr. Michos' validation of the March 22, 1995 blood gas study conducted by Dr. Forehand is not reasoned and should not have been credited by the administrative law judge. *See* Director's Exhibit 64; Employer's Brief at 12.

Employer further contends that the administrative law judge dismissed Dr. Fino's "extensive opinion" without providing any meaningful analysis. Employer's Brief at 15. We agree. The administrative law judge indicated that she found no reason to alter her view of Dr. Fino's report expressed in her 1998 Decision and Order. In her 1988 Decision and Order, the administrative law judge found, without more, that Dr. Fino's opinion was "lacking in substance, generally unhelpful and I do not rely on it." 1998 Decision and Order at 12. In a footnote in her Decision and Order in the instant case, the administrative law judge indicated, "Further, and because Dr. Fino did not examine Claimant, I find his report less helpful than Dr. Forehand's and for that additional reason entitled to less weight." Decision and Order at 6 n.4. The United States Court of Appeals for the Fourth Circuit, in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998) and *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), held that an administrative law judge may not discredit a medical opinion solely because the physician did not examine the claimant. Because the administrative law judge did not provide any explanation or rationale as to why the fact that Dr. Fino did not examine claimant adversely affected the credibility of his opinion, the administrative law judge's weighing of Dr. Fino's report cannot stand. Accordingly, we vacate the administrative law judge's finding that claimant established a change in conditions under 20 C.F.R. §725.310 (2000). On remand, the administrative law judge must reconsider the credibility of Dr. Fino's report and explain

what importance, if any, the fact that he did not examine the claimant has on the credibility of his consulting opinion.

Employer next contends that the administrative law judge's determination that Dr. Sargent did not sufficiently or credibly explain why the moderate impairment he diagnosed was non-disabling and unrelated to claimant's Category I pneumoconiosis is erroneous when, employer asserts, "Dr. Sargent clearly explains why this is the case." Employer's Brief at 15. Employer also argues that, contrary to the administrative law judge's finding, Dr. Sargent's statement that "it would be highly unusual for simple coal worker's (sic) pneumoconiosis of major category I to cause a measurable ventilatory impairment," Director's Exhibit 72, is hostile to the Act where Dr. Sargent "is simply stating, in effect, that x-rays are not diagnostic of impairment." Employer's Brief at 16. Employer further contends that the administrative law judge provided no explanation for her finding that Dr. Sargent's analysis regarding obstructive and restrictive disease is "lacking in credibility" and "internally inconsistent." Employer submits that, contrary to the administrative law judge's determination, Dr. Sargent's analysis in this regard is internally consistent and comports with the decision of the United States Court of Appeals for the Fourth Circuit in *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995)(chronic obstructive lung disease is encompassed with the definition of "pneumoconiosis" under the Act.) Employer argues that the administrative law judge substituted her opinion for Dr. Sargent's opinion and did not properly analyze the meaning of Dr. Sargent's findings.

We find error in the administrative law judge's weighing of Dr. Sargent's opinion. The administrative law judge found that the only explanation offered by Dr. Sargent for his conclusion that claimant's moderate impairment is due to his asthma, rather than to his pneumoconiosis arising out of his coal mine employment, is that, given the Category I pneumoconiosis found on x-ray, "it would be highly unusual for simple coal worker's (sic) pneumoconiosis of major category I to cause a measurable ventilatory impairment." Decision and Order Awarding Benefits on Remand at 6; *see* Director's Exhibit 72. The administrative law judge found that Dr. Sargent's statement was tantamount to a finding that simple pneumoconiosis can never be disabling and thus, the statement was hostile to the Act and detracted from the credibility of Dr. Sargent's opinion. Contrary to the administrative law judge's finding, since Dr. Sargent did not foreclose all possibility that simple pneumoconiosis can be totally disabling, his opinion is not "hostile to the Act." *See Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988). The administrative law judge's finding that Dr. Sargent's statement was hostile to the Act thus cannot be upheld.

Further, the administrative law judge's alternative finding, that "even if Dr. Sargent's wording in this regard falls short of meeting the "hostile to the Act" standard, his analysis is nonetheless strained and therefore not credible," Decision and Order Awarding Benefits on Remand at 7, likewise cannot be upheld. Specifically, the administrative law judge made a

medical determination in finding that Dr. Sargent, in reaching his opinion that claimant's impairment was not disabling and was unrelated to his pneumoconiosis arising out of coal mine employment, was not credible because the physician "neither mentions nor explains away" claimant's many years of exposure to coal mine dust. Decision and Order Awarding Benefits on Remand at 7; *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987).

Additionally, we find merit in employer's challenge to the administrative law judge's determination that Dr. Sargent's opinion is internally inconsistent. The administrative law judge determined that Dr. Sargent's opinion that claimant's impairment was purely obstructive and was unrelated to his pneumoconiosis arising out of coal mine employment, was inconsistent with the physician's opinion that any impairment caused by pneumoconiosis would not improve "with [a] bronchodilator and it would be a mixed obstructive and restrictive impairment." *See* Director's Exhibit 72; Decision and Order Awarding Benefits on Remand at 7. The administrative law judge stated:

> I find Dr. Sargent's statement in this regard to be internally inconsistent in that it reflects a hostility to the Act. *See generally Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, [19 BLR 2-265] (4th Cir. 1995). Thus, and contrary to Dr. Sargent's statements in this regard, if an impairment due to pneumoconiosis does not improve with administration of [a] bronchodilator, then it cannot be, as he also states, both restrictive and obstructive." I therefore find his conclusion that Claimant is not disabled and that his moderate impairment is due to asthma and not pneumoconiosis to be not credible and entitled to no weight.

Decision and Order Awarding Benefits on Remand at 7. It is not apparent from our review of the administrative law judge's analysis where she found an inconsistency in Dr. Sargent's opinion. Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §§919(d) and 30 U.S.C. §932(a). Moreover, given Dr. Sargent's recognition that pneumoconiosis can produce obstructive impairments, his opinion is consistent with the decision of the Fourth Circuit in *Warth*. On remand, the administrative law judge must reconsider the totality of Dr. Sargent's findings and identify, with specificity, any inconsistency she finds therein and its bearing on the issue of claimant's burden to establish a change in conditions on modification at 20 C.F.R. §725.310 (2000).

Employer next contends that the administrative law judge erred in finding that Dr. Michos' opinion that claimant is not totally disabled was unreliable in that Dr. Michos did not fully identify the evidence upon which he relied. Employer argues that although Dr. Michos did not provide a lengthy opinion, he does state that claimant's objective test results are consistent with asthma and not coal workers' pneumoconiosis and further states that the improvement in oxygenation seen on numerous blood gas studies, as well as the pulmonary

function study dated September 6, 1995, speaks against a finding of total respiratory disability. Employer's's Brief at 17.

We disagree with employer's contention. The administrative law judge, within her discretion, found that

> other than his sole reference to a "9/6/95" pulmonary function study, Dr. Michos's report states only that he based his conclusions "on the extensive medical evidence provided." I find that this failure of omission renders Dr. Michos's blanket statement that such unnamed studies and other evidence "speak against a total respiratory disability," unreliable and I accord his conclusions in this regard no weight.

Decision and Order Awarding Benefits on Remand at 7, 8. The administrative law judge thus properly accorded no weight to Dr. Michos's opinion based on Dr. Michos's failure to fully identify the evidence he relied upon in reaching his conclusions regarding the validity of this pulmonary function study. *See Fields, supra*.

Based on the foregoing, we vacate the administrative law judge's finding that claimant established a change in conditions under 20 C.F.R. §725.310 (2000) and remand the case for reconsideration of the relevant evidence.[8] In this regard, we note that employer correctly contends that the administrative law judge erroneously found a mistake in a determination of fact based on her previous consideration of the evidence when she should have determined whether a mistake in a determination of fact existed in Judge Teitler's denial of the instant claim pursuant to claimant's April 23, 1995 request for modification. The administrative law judge found that her previous discrediting of Dr. Forehand's report which she credited on remand, her previous crediting of Dr. Sargent's report which she discredited on remand, and her prior mischaracterization of the results of Dr. Forehand's blood gas study at rest, together constituted a mistake in a determination of fact within the meaning of 20 C.F.R. §725.310 (2000). Decision and Order Awarding Benefits on Remand at 8. Employer correctly argues that it is claimant's burden to establish a mistake in a determination of fact in the prior denial of the claim, namely Judge Teitler's Decision and Order denying benefits dated June 14, 1994, Director's Exhibit 58, not in the administrative law judge's May 19, 1998 Decision and Order on modification. *See* 20 C.F.R. §725.310 (2000); *Jessee v.*

[8]Employer's contention that the administrative law judge failed to consider the old evidence, in conjunction with the new evidence, in finding that claimant established a change in conditions under 20 C.F.R. §725.310 (2000), is refuted by the record. *See* Decision and Order Awarding Benefits on Remand at 8. In redetermining the modification issue on remand, the administrative law judge must reconsider all of the relevant evidence.

Director, OWCP, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993); *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). If, on remand, the administrative law judge finds that claimant fails to establish a change in conditions at 20 C.F.R. §725.310 (2000), she must then consider whether claimant has established a mistake in a determination of fact in Judge Teitler's Decision and Order dated June 14, 1994, which is the alternate means of establishing modification. *See* 20 C.F.R. §725.310 (2000).

Employer next challenges the administrative law judge's finding that claimant established a material change in conditions under 20 C.F.R. §725.309 (2000). Employer generally argues that the administrative law judge failed to discuss the pulmonary function study evidence and the non-qualifying exercise blood gas study conducted by Dr. Forehand, and erred, for the reasons previously stated by employer, in his consideration of the reports of Drs. Forehand, Fino, Sargent and Michos.

The administrative law judge's Decision and Order Awarding Benefits on Remand, considered in its entirety, shows that she considered the evidence in a manner consistent with *Rutter*, as directed by the Board. Specifically, the prior claim was denied based on the district director's finding that the evidence showed that claimant was not totally disabled due to pneumoconiosis and was thus able to perform his usual coal mine work. Director's Exhibit 26. The administrative law judge in the instant case, as previously discussed, properly credited Dr. Forehand's opinion in finding that claimant established total disability and total disability due to pneumoconiosis. *See* discussion, *supra* at 4, 5. However, given the administrative law judge's errors in the weighing of the medical reports of Drs. Fino and Sargent, and our consequent remand of the case, we further vacate her finding that claimant established a material change in conditions since the prior denial. 20 C.F.R. §725.309 (2000). On remand, the administrative law judge must reassess the evidence and redetermine whether claimant has established a material change in conditions under 20 C.F.R. §725.309 (2000) pursuant to *Rutter*.

Employer next contends that the administrative law judge's determination that claimant established the existence of pneumoconiosis in the instant case was simply based on the fact that Judge Teitler's previous finding of the existence of pneumoconiosis related to claimant's coal mine employment had been affirmed by the Board as unchallenged on appeal. Employer explains that it had not challenged Judge Teitler's pertinent finding because Judge Teitler had denied benefits and, thus, the overall decision had been favorable to employer. Employer further refers to the fact that it contested the issues of the existence of pneumoconiosis and its relation to claimant's coal mine employment in connection with claimant's request for modification in the instant case. *See* Director's Exhibit 80. Employer also argues that there has been a change in relevant law, citing *Island Creek Coal Co. v. Compton*, 211 F.3d 203, BLR (4th Cir. 2000)(all types of relevant evidence must be

considered together by the administrative law judge in determining whether claimant established the existence of pneumoconiosis under 20 C.F.R. §718.202(a)). Employer provides several arguments in support of its contention that Judge Teitler failed to weigh the medical opinion evidence under 20 C.F.R. §718.202(a)(4) in violation of *Compton* and committed several errors in finding that the weight of the x-ray evidence established the existence of pneumoconiosis at 20 C.F.R. §718.202(a)(1).

Employer's contentions have merit. The decision in *Compton* mandates a remand of the case for the administrative law judge to determine whether claimant has met her burden to establish the existence of pneumoconiosis at 20 C.F.R. §718.202(a) based on all the types of relevant evidence of record.

Based on the foregoing, we vacate the administrative law judge's findings on remand.

The administrative law judge's Decision and Order Awarding Benefits on Remand is vacated and the case is remanded for further consideration not inconsistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge