BRB No. 02-0729 BLA

BERNARD B. HAPNEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 07/31/2003
	)	
PEABODY COAL COMPANY	)	
	)	
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 Remand Granting Benefits of Richard A. Morgan, Administrative Law Judge, United States Department of Labor.

Michael E. Bevers (Crandall, Pyles, Haviland & Turner, LLP), Charleston, West Virginia, for claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, Acting Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; 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: DOLDER Chief Administrative Appeals Judge, McGRANERY and HALL, Administrative Appeals Judges.

McGRANERY, J.:

Employer appeals the Decision and Order On Remand Granting Benefits (96-BLA-1824) of Administrative Law Judge Richard A. Morgan on 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] This case is before the Board for the third time. In *Hapney v. Peabody Coal Co.*, BRB No. 98-0212 BLA (June 18, 1999)(unpub.)(Nelson, J., dissenting), the Board affirmed the administrative law judge=s finding that the newly submitted evidence established a material change in conditions under 20 C.F.R. ' 725.309 (2000). The Board, however, vacated the administrative law judge=s findings that the evidence established the existence of pneumoconiosis arising out of coal mine employment at 20 C.F.R. ' ' 718.202(a)(2), (4) (2000) and 718.203 (2000), and disability causation at 20 C.F.R. ' 718.204(b) (2000).[2] The Board remanded the case with instructions to the administrative law judge to consider if the existence of pneumoconiosis was established and if reached, whether claimant had established the requisite causal connections between pneumoconiosis and his coal mine employment and between claimant=s disability and pneumoconiosis.

On remand, the administrative law judge determined that claimant established that he had coal workers= pneumoconiosis arising out of his coal mine employment as defined in the Act, and that pneumoconiosis substantially contributed to his total respiratory disability. Accordingly, benefits were awarded.

---

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

[2]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).

On appeal to the Board for the second time in *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*)(Smith and Dolder, JJ., concurring in part and dissenting in part), the Board initially addressed whether the amendment to 20 C.F.R. ' 718.202(a)(2) was implicated prior to proceeding to adjudicate the merits of the appeal. The Board noted that the findings made upon claimant=s 1972 biopsy included a diagnosis of A[b]iopsy from the right middle lobe of the lung showing subpleural fibrosis with anthracosis, perivascular anthracosis and chronic pulmonary emphysema.@ Employer=s Exhibit 22. The Board stated that these diagnoses of anthracosis, with related disease process, which the administrative law judge determined to be credible and uncontradicted, fell within the definition of Apneumoconiosis@ as defined by the Act and implementing regulations and accepted that a diagnosis of anthracosis supports a finding of pneumoconiosis.[3] 30 U.S.C. ' 902(b); 20

[3] The regulation at 20 C.F.R. ' 718.201(a)(1) regarding clinical pneumoconiosis provides:

> AClinical pneumoconiosis@ consists of those diseases recognized by the medical community as pneumoconiosis., *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. This definition includes, but is not limited to, coal workers= pneumoconiosis, anthracosilicosis, anthracosis, anthrosilicosis, massive pulmonary fibrosis, silicosis or silicotuberculosis, arising out of coal mine employment.

20 C.F.R. ' 718.201(a)(1). In addition, the Department of Labor, in promulgating the amended regulations, stated that:

> One comment suggests that the Department delete the term Aanthracosis@ from the definition of pneumoconiosis, contending that it is a term commonly used to denote anthracotic pigmentation, without associated disease process, on biopsy or autopsy of the lungs. The Department has accommodated this concern in the proposed revisions to ' 718.202(a)(2). The revised version of ' 718.202(a)(2) explicitly provides that A[a] finding in an autopsy or biopsy of anthracotic pigmentation * * * shall not be sufficient, by itself, to establish the existence of pneumoconiosis.@ 64 FR 55013 (Oct. 8, 1999). Thus, the Department does not believe that a change to the definition of pneumoconiosis is necessary.

65 Fed. Reg. 79944 (Dec. 20, 2000). The United States Court of Appeals for the Fourth

C.F.R. ''718.201(a)(1), 718.202(a)(2); 65 Fed. Reg. 79944 (2000). The Board thus affirmed the administrative law judge=s determination that the biopsy evidence supported a finding of the existence of pneumoconiosis.[4] The Board noted that this holding adopted the position of the Director, Office of Workers= Compensation Programs (the Director), that the etiology of claimant=s conditions diagnosed on biopsy was properly considered, not pursuant to the regulation at 20 C.F.R. '718.202(a), but pursuant to the regulation at 20 C.F.R. '718.203, *see Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90 (4th Cir. 1992), *cert. denied*, 113 S.Ct. 969 (1993), citing *BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (l991), *aff'g* 890 F.2d l295, 13 BLR 2-162 (3d Cir. l989) and *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989). In addition, the Board vacated the administrative law judge=s findings that the evidence established the requisite etiology of claimant=s pneumoconiosis and his totally disabling respiratory or pulmonary impairment at 20 C.F.R. ''718.203 and 718.204(c).

Circuit observed that the definition of clinical pneumoconiosis in Section 718.201 includes diseases that are or can be caused by coal dust inhalation. Any Achronic dust disease of the lung and its sequelae...arising out of coal mine employment@ will qualify. Examples include Acoal workers= pneumoconiosis@ and Aanthracosis.@ The Fourth Circuit noted that Section 718.201 nowhere requires these coal dust-specific diseases to attain the status of an Aimpairment@ to be classified as Apneumoconiosis.@ The Fourth Circuit held that the definition is satisfied whenever one of these diseases is present in the miner at a detectable level; whether the particular disease exists to such an extent as to be compensable is a separate question. *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999).

[4]While a diagnosis of anthracotic pigmentation is insufficient by itself to establish the existence of pneumoconiosis, *see* 20 C.F.R. '718.202(a)(2), both the former and the amended versions of 20 C.F.R. '718.201 identify Aanthracosis@ as a disease within the definition of Apneumoconiosis,@ and anthracosis found in lymph nodes may be sufficient to establish the existence of pneumoconiosis. *See Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *see also Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993); *Youghiogheny & Ohio Coal Co. v. Milliken*, 866 F.2d 195, 12 BLR 2-136 (6th Cir. 1989); *Lykins v. Director, OWCP*, 819 F.2d 146, 10 BLR 2-129 (6th Cir. 1987); *see also Consolidation Coal Co. v. Smith*, 837 F.2d 321, 11 BLR 2-37 (8th Cir. 1988); *Peabody Coal Co. v. Shonk*, 906 F.2d 264 (7th Cir. l990); *Bueno v. Director, OWCP*, 7 BLR 1-337, 1-340 (1984); *Dobrosky v. Director, OWCP*, 4 BLR 1-680, 1-684 (1982). It is now clear that anthracosis is clinical pneumoconiosis. *See Livermore v. Amax Coal Co.*, 297 F.3d 668, 22 BLR 2-399 (7th Cir. 2002).

The Board remanded the case with instructions to the administrative law judge to weigh the evidence with regard to employer=s burden to rebut the presumption that claimant=s pneumoconiosis arose out of his coal mine employment under 20 C.F.R. '718.203, and, if reached, to additionally weigh the evidence with regard to claimant=s burden to establish that his totally disabling respiratory or pulmonary impairment is due to his pneumoconiosis under 20 C.F.R. '718.204(c). The Board discerned no intransigence on the administrative law judge=s part in this case and declined employer=s request to order that the case be transferred on remand to another administrative law judge.

On remand for the second time, the administrative law judge reopened the record for the submission of additional evidence and held another hearing. In his Decision and Order, the administrative law judge determined that claimant established that he had coal workers= pneumoconiosis, that his pneumoconiosis arose out of his coal mine employment and that his pneumoconiosis contributed to his total respiratory disability. Accordingly, benefits were awarded.

In the instant appeal, employer contends that the diagnosis of anthracosis made on claimant=s biopsy is not included within the definition of pneumoconiosis at Section 718.201. Employer challenges the administrative law judge=s finding that claimant established the existence of pneumoconiosis arising out of coal mine employment and disability causation at Sections 718.202(a), 718.203(b) and 718.204(c). Employer also contends that the record demonstrates bias and intransigence on the part of the administrative law judge, and requests that the Board order that the case be reassigned to a different administrative law judge if the case is remanded. Claimant responds, urging affirmance of the award of benefits. Employer has filed a reply brief. The Director has filed a letter in response to employer=s appeal, addressing the issue of the inclusion of anthracosis within the definition of pneumoconiosis at Section 718.201.

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).

In order to establish entitlement to benefits in a living miner=s claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. ''718.3, 718.202, 718.203, 718.204. Failure of claimant to establish any of these requisite elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

Employer alleges reversible error in the administrative law judge=s finding that claimant established the existence of pneumoconiosis. The Board previously affirmed the administrative law judge=s finding that the biopsy evidence and Dr. Rasmussen=s medical opinion support a finding of the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(2) and (a)(4), but instructed the administrative law judge to reevaluate the evidence of record regarding the existence of pneumoconiosis in accordance with the holding in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000).[5] On remand, the administrative law judge initially noted that the Board previously affirmed his finding that the 1972 biopsy findings of anthracosis supported a finding of the existence of pneumoconiosis since the regulatory definition of pneumoconiosis provided at 20 C.F.R. '718.201(a)(1) includes anthracosis. Decision and Order on Remand at 7. In discussing the biopsy evidence, the administrative law judge stated that:

> In the instant matter, the biopsy of the middle lobe and peribronchial lymph node was taken in connection with a right throactomy (sic) and repair of the eventuation of the diaphragm conducted by Dr. Jamal Khan, a surgeon, on December 6, 1972. Dr. Khan=s gross observation included, A[T]he lungs showed evidence of anthracosis.@ One surgical pathology report revealed a peribronchial Alymph node with marked anthracosis but no tumor@ on gross examination and Alymphocytic and histiocytic cells show an abundant anthracotic pigmentation . . . (with) moderate fibrosis of interlobular connective tissue.@ The second surgical pathology report involving lung specimens revealed a Apleural surface show(ing) areas of anthracosis . . . lung parenchyma show(ing) edematous changes@ on gross examination and, on microscopic examination, A. . . lung tissue showing areas of subpleural fibrosis with anthracosis@, some alveoli containing Apigment laden macrophages@, and areas showing perivascular anthracosis.@ The pathologist who examined these samples diagnosed Aperibronchial lymph node showing marked anthracosis@ and A[B]iopsy from the right middle lobe of the lung showing subpleural fibrosis with anthracosis, perivascular anthracosis and chronic pulmonary emphysema.@ Accordingly, I find that the biopsy evidence of record affirmatively establishes the existence of anthracosis.

Decision and Order on Remand at 7-8. The administrative law judge, however, found that the x-ray evidence was equivocal and therefore failed to establish or rule out the existence of pneumoconiosis.

[5]Dr. Rasmussen diagnosed coal workers= pneumoconiosis and chronic obstructive pulmonary disease due to claimant=s coal mine employment and smoking. Director=s Exhibits 11, 27.

Decision and Order on Remand at 8.

In weighing the biopsy results, x-ray interpretations and medical opinions of record together, the administrative law judge permissibly accorded greater weight to the biopsy results and the opinion of Dr. Rasmussen regarding the contribution of claimant=s coal mine employment to his pulmonary disease and found this evidence sufficient to establish the existence of pneumoconiosis. *Barber v. U.S. Steel Mining Co., Inc.*, 43 F.3d 899, 19 BLR 2-61 (4th Cir. 1995); Decision and Order on Remand at 9-10. In so finding, the administrative law judge, within his discretion as fact-finder, permissibly accorded more weight to the biopsy evidence. Not only is biopsy evidence of anthracosis sufficient to establish the existence of pneumoconiosis, *see Daugherty v. Dean Jones Coal Co.*, 895 F.2d 130, 13 BLR 2-134 (4th Cir. 1989); *Dagnan v. Black Diamond Coal Mining Co.*, 994 F.2d 1536, 18 BLR 2-203 (11th Cir. 1993), it is particularly persuasive evidence. We note that the Board has long held that autopsy evidence is the most reliable evidence for determining the existence of pneumoconiosis. *Terlip v. Director, OWCP*, 8 BLR 1-363 (1985); *Fetterman v. Director, OWCP*, 7 BLR 1-688 (1985); *Kinnick v. National Mines Corp.*, 2 BLR 1-221 (1979). The rationale for the Board=s holding supports the administrative law judge=s credibility determination with respect to the biopsy results in the instant case since both an autopsy and a biopsy provide direct physical evidence of the existence of disease in the miner=s lung tissue. *See Terlip*, 8 BLR 1-363. In addition, the administrative law judge reasonably credited the medical opinion of Dr. Rasmussen on the basis of the documentation and reasoning contained in his report and its consistency with the biopsy evidence. *Lane v. Union Carbide Corp*., 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 10.

We disagree with employer=s contention that, in crediting Dr. Rasmussen=s opinion and in rejecting the opinions of Drs. Zaldivar and Fino, the administrative law judge violated the Administrative Procedure Act (APA), 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). In evaluating the medical opinion evidence, the administrative law judge assessed Athe qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses.@ *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269 (4th Cir. 1997); *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23 (4th Cir. 1997); *see* Decision and Order on Remand at 9-10. The administrative law judge permissibly rejected the opinion of Dr. Zaldivar because he failed to address the January 23, 2002, qualifying pulmonary function study while concluding that claimant=s January 23, 2002, lung examination was normal. Decision and Order on Remand at 9. Further, the administrative law judge rationally found Dr. Zaldivar=s opinion not well reasoned nor well documented because the

physician failed to adequately address the contradictory findings between his earlier report, wherein he concluded that claimant suffered from emphysema and asthma, and his later report, wherein he stated that claimant had not suffered from asthma or emphysema. Decision and Order on Remand at 9.

Moreover, the administrative law judge rationally found that Dr. Fino=s conclusion, that claimant suffers from an obstructive impairment unrelated to coal mine employment because there was no evidence of interstitial abnormality or fibrosis, was not supported by the objective evidence of record. Decision and Order on Remand at 9-10. The administrative law judge found that the record contains several x-ray readings revealing fibrosis and interstitial disease and similar findings on the biopsy report. Decision and Order at 9-10. Since the administrative law judge articulated valid reasons for according more weight to the report of Dr. Rasmussen and rationally discounted the opinions of Drs. Zaldivar and Fino, we affirm his credibility determinations with respect to these opinions. *See* Decision and Order at 11; *Carpeta v. Mathies Coal Co.*, 7 BLR 1-1445 (1984). The administrative law judge properly weighed all of the medical evidence and his finding that the evidence was sufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a) was rational. We, therefore, affirm his finding thereunder. *Clark*, 12 BLR 1-149; *Perry*, 9 BLR 1-1; *Lucostic*, 8 BLR 1-46

The administrative law judge next noted that once claimant meets his burden to establish the existence of pneumoconiosis at Section 718.202, he must then establish the requisite etiology of his pneumoconiosis under Section 718.203. The administrative law judge further stated that since claimant established more than ten years of coal mine employment, he was entitled to the presumption that his pneumoconiosis arose out of his coal mine employment, *see* 20 C.F.R. ' 718.203(b), and employer had the burden to rebut that presumption. Decision and Order on Remand at 10. The Board previously recognized that there is no medical evidence linking the diagnoses made on biopsy to claimant=s coal mine employment and that Dr. Zaldivar=s opinion is the only opinion of record which addresses the substance of the biopsy findings, which he attributes to claimant=s smoking. *Hapney*, 22 BLR 1-104; Employer=s Exhibits 20, 23, 28. The administrative law judge rationally determined that Dr. Zaldivar=s opinion failed to rebut the presumption, since the physician addressed the etiology of the anthracotic pigmentation, but failed to include the etiology of the anthracosis which established the basis for the presumption. Decision and Order on Remand at 11. Based on the foregoing, we affirm the administrative law judge=s finding that the presumption contained in Section 718.203 was not rebutted. *See Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999); *see also Cranor v. Peabody Coal Co.*, 21 BLR 1-201 (1999).

We also reject employer=s contention that the administrative law judge erred in finding that claimant=s total disability was due to pneumoconiosis pursuant to Section

718.204(c). The administrative law judge considered the entirety of the medical opinion evidence and acted within his discretion in concluding that claimant=s totally disabling respiratory impairment was due, at least in part, to pneumoconiosis pursuant to 20 C.F.R. '718.204(c). In weighing the medical opinions of record, the administrative law judge permissibly accorded greater weight to the opinion of Dr. Rasmussen regarding the contribution of the miner=s thirty-five years of coal mine employment to his pulmonary disease and rationally found this evidence sufficient to establish total disability due to pneumoconiosis. *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790, 15 BLR 2-225 (4th Cir. 1990); *Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990); Decision and Order on Remand at 12. The administrative law judge rationally credited the opinion of Dr. Rasmussen, who attributed the impairment to smoking and coal mine employment, as he found it to be the best reasoned opinion of record. *Clark*, 12 BLR 1-149; Decision and Order on Remand at 12.

Contrary to employer=s argument, the opinion of Dr. Rasmussen supports a finding that claimant=s pneumoconiosis is a substantially contributing factor in his totally disabling respiratory impairment, as the physician concluded that claimant=s moderate smoking history and lengthy coal mine employment history were contributing causes of his pulmonary condition. Decision and Order on Remand at 12-13. As the administrative law judge permissibly relied on the opinion of Dr. Rasmussen to find that claimant=s totally disabling pulmonary condition was due to pneumoconiosis, and his findings at Section 718.204(c) are not inherently incredible or patently unreasonable, *see Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986), we affirm his finding that claimant established he was totally disabled due to pneumoconiosis pursuant to Section 718.204(c). Consequently, we affirm the administrative law judge=s finding that the evidence was sufficient to establish entitlement to benefits pursuant to 20 C.F.R. Part 718. *See generally Trent*, 11 BLR 1-26.

Accordingly, the administrative law judge=s Decision and Order On Remand Granting Benefits is affirmed.

SO ORDERED.

REGINA C. McGRANERY
Administrative Appeals Judge

HALL, J.:

I concur.

BETTY JEAN HALL
Administrative Appeals Judge

DOLDER, J., dissenting in part:

I respectfully dissent from the majority opinion for the reasons stated in my dissent in *Hapney v. Peabody Coal Co.*, 22 BLR 1-104 (2001)(*en banc*)(Smith and Dolder, JJ., dissenting in part and concurring in part). I believe that the majority, in affirming the administrative law judge in this case, is improperly reading out of the statutory and the regulatory definition of pneumoconiosis the requirement that pneumoconiosis, legal or clinical, must arise out of coal mine employment. Consequently, I would agree with employer that the administrative law judge=s finding of pneumoconiosis cannot be affirmed and constitutes reversible error. 30 U.S.C. '902(b); 20 C.F.R. ''718.201, 718.202(a)(2) and (b.). Because the record contains no affirmative medical evidence linking the diagnoses of anthracosis made on the 1972 biopsy with claimant=s coal mine employment, they cannot constitute Apneumoconiosis@ within the meaning of the Act and regulations. The majority opinion to the contrary, holding that the biopsy findings are sufficient to establish the existence of pneumoconiosis renders meaningless the statutory and regulatory requirement that claimant=s Aanthracosis@ arise out of his coal mine employment. Given the evidence in this case, I would reverse the administrative law judge=s determination on remand that the biopsy evidence is sufficient to support a finding of the existence of pneumoconiosis, and hold that claimant cannot meet his burden to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a)(2).

I would also again hold that the administrative law judge erred in crediting Dr. Rasmussen=s report in finding that claimant established the existence of pneumoconiosis by medical opinion evidence and in finding that claimant=s totally disabling respiratory or pulmonary impairment is due to his pneumoconiosis. 20 C.F.R. ''718.202(a)(4), 718.204(c). The diagnoses on biopsy in 1972 are not indicative of the existence of Apneumoconiosis@ or of any lung disease related to claimant=s coal mine employment. The administrative law judge=s crediting of Dr. Rasmussen=s opinion is thus tainted by his erroneous determination that the diagnoses on biopsy are indicative of Apneumoconiosis.@

Accordingly, I would vacate the administrative law judge=s determination that the biopsy and medical opinion evidence in the instant case establishes the existence of pneumoconiosis and that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. ''718.202(a)(4), 718.204(c). I would remand the case for the administrative law judge to reconsider whether claimant has met his burden to establish the existence of pneumoconiosis at 20 C.F.R. '718.202(a).

If, on remand, the administrative law judge finds the existence of pneumoconiosis established at 20 C.F.R. '718.202, I would instruct him to determine the issue of the etiology of claimant=s Apneumoconiosis@ pursuant to 20 C.F.R. '718.203, and, if reached, to determine whether claimant has met his burden to establish that his total respiratory or pulmonary impairment is due to pneumoconiosis under 20 C.F.R. '718.204(c).

NANCY S. DOLDER, Chief
Administrative Appeals Judge