BRB No. 99-0158 BLA

VERNON KEITH DELUNG, SR.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MILBURN COLLIERY COMPANY	)	DATE ISSUED:
	)	
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 of Daniel F. Sutton, Administrative Law Judge, United States Department of Labor.

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

Mary Rich Maloy (Jackson & Kelly), Charleston, West Virginia, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (98-BLA-0134) of Administrative Law Judge Daniel F. Sutton 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). This case is before the Board for the second time. In the initial Decision and Order, Administrative Law Judge Sheldon R. Lipson adjudicated this claim pursuant to 20 C.F.R. Part 718 and found that claimant[1] failed to establish the existence of

[1] Claimant is Vernon Keith DeLung, Sr., who filed his first application for benefits on September 18, 1992, which was finally denied by the Benefits Review Board on February 6, 1996. Director's Exhibit 29. Claimant did not pursue this denial. Consequently, he filed a duplicate application for benefits on February 27, 1997, which is the subject of the instant

pneumoconiosis under 20 C.F.R. §718.202(a) and total disability pursuant to 20 C.F.R. §718.204(c); accordingly, benefits were denied. Director's Exhibit 29. Claimant appealed and the Board affirmed Administrative Law Judge Lipson's determination that claimant failed to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(1)-(4). Accordingly, the Board affirmed the denial of benefits. *DeLung v. Milburn Colliery Co.*, BRB No. 95-1455 BLA (Feb. 6, 1996)(unpub.); Director's Exhibit 29. Thereafter, claimant filed a duplicate claim for benefits on February 27, 1997. Director's Exhibit 1.

Adjudicating claimant's duplicate claim, Administrative Law Judge Daniel F. Sutton (administrative law judge) credited claimant with fourteen and one-quarter years of qualifying coal mine employment and found that, because claimant established the existence of pneumoconiosis on the basis of the newly submitted x-ray evidence pursuant to Section 718.202(a)(1) and on the basis of the newly submitted medical opinion evidence at Section 718.202(a)(4), claimant affirmatively demonstrated a material change in conditions pursuant to Section 725.309(d). Referring to all the evidence of record, the administrative law judge found that claimant established the existence of pneumoconiosis arising out of coal mine employment at Sections 718.202(a) and 718.203(b) and total disability due to pneumoconiosis under Section 718.204. Accordingly, the administrative law judge awarded benefits.[2]

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appeal. Director's Exhibit 1.

[2] Subsequently, the administrative law judge issued a Supplemental Decision and Order Granting Attorney Fees to claimant's counsel in the amount of $4,760.00, representing 29.75 hours of work at an hourly rate of $160.00.

On appeal, employer contests the administrative law judge's findings that claimant established the existence of pneumoconiosis at Sections 718.202(a)(1) and (a)(4) and total disability due to pneumoconiosis pursuant to Sections 718.204(b) and (c). Claimant responds, urging affirmance of the award. The Director, Office of Workers' Compensation Programs, as party-in-interest, has filed a letter indicating that he will not participate in this 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).

With respect to the administrative law judge's finding that a material change in conditions was established based on the newly submitted x-ray evidence at Section 718.202(a)(1), employer argues that the administrative law judge failed to properly weigh the x-ray evidence and abdicated his responsibility to weigh the medical evidence and to provide reasoned decision-making as required by the Administrative Procedures 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).

The administrative law judge examined the newly submitted x-ray evidence and found that, "there is no appreciable difference in the percentage of positive interpretations versus negative interpretations with respect to any one of these films as the experts' opinions fall invariably along party lines" based on the fact that, of the thirty-seven readings of three films, fifteen are positive and twenty-two are negative for the presence of pneumoconiosis. Decision and Order at 12. The administrative law judge found further that because all but three of the readers were dually qualified as Board-certified radiologists and B-readers, and the remaining three physicians were B-readers, "a comparison of qualifications provides no meaningful basis for resolving the conflicts between the interpretations." Decision and Order at 11. In addition, the administrative law judge acknowledged that the recency of the films may be a significant factor affecting the credibility of that x-ray, but in the case at bar, all of the new x-rays were contemporaneous. Decision and Order at 12. Finally, the administrative law judge discussed the deposition testimony of Dr. Wiot regarding the x-ray evidence, and

[3] We affirm the administrative law judge's findings regarding length of coal mine employment and pursuant to Sections 718.202(a)(2), (a)(3), 718.203(b), and 718.204(c)(1)-(3) inasmuch as these determinations are unchallenged on appeal. *See Coen v. Director, OWCP*, 7 BLR 1-30 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983); Decision and Order at 7, 21-24.

found that Dr. Wiot's testimony regarding the x-ray evidence did not "[compel] a finding that the new x-ray evidence falls short of establishing the presence of pneumoconiosis." Decision and Order at 12.

Employer specifically argues that the administrative law judge impermissibly failed to accord greater weight to Dr. Wiot's testimony that the x-ray evidence is negative for pneumoconiosis because Dr. Wiot not only possesses dual radiological qualifications but also is a professor of radiology. While an administrative law judge may, in his or her discretion, assign more weight to a physician's report based on that physician's superior qualifications, he or she is not required to do so. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988). In the instant case, the administrative law judge properly considered Dr. Wiot's "superior education, training and experience" and, although Dr. Wiot had "impressive qualifications," permissibly found that Dr. Wiot's testimony was not persuasive. *See Worhach*, 17 BLR at 1-108; Decision and Order at 12. We, therefore, reject employer's argument.

Employer also asserts that the administrative law judge impermissibly rejected Dr. Wiot's characterization of the positive readings in this case as "over-readings." During his deposition on July 5, 1998, Dr. Wiot testified that the problem of "over-reading" x-rays arises when "those who fail the examination, the B-reader's exam, tend to over-read rather than under-read, and that's because [they] are looking for the most minor of changes. ...And what you have to do is have a lot of experience as to what the normal chest x-ray looks like in relation to the technique that the film was taken." Employer's Exhibit 8 at 28. The administrative law judge found that, contrary to Dr. Wiot's characterization, "this is not a case where positive interpretations can be ascribed to 'over-reading' by inexperienced physicians" because all of the positive readings were provided by Board-certified radiologists who are also B-readers, and have "passed the B-reader examination, thereby demonstrating, according to Dr. Wiot's testimony, at least passable ability to avoid the mistake of over-reading films as positive for pneumoconiosis." Decision and Order at 12. Therefore, the administrative law judge, within a proper exercise of his discretion, found that Dr. Wiot's testimony regarding the over-reading of x-rays was inapposite to the facts of this case. *See* 20 C.F.R. §§718.102(c), 718.202(a)(1); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211(1985).

Employer further contends that the administrative law judge irrationally found that Dr. Wiot had a predisposition to interpret the 1997 x-ray films as negative and that Dr. Wiot's reading was therefore undermined. Employer's arguments lack merit. Inasmuch as the administrative law judge discounted Dr. Wiot's negative reading of the 1997 x-rays because the doctor opined that claimant could not have developed pneumoconiosis by 1997 because his 1992 and 1993 x-rays were read negative for the existence of coal workers' pneumoconiosis, the administrative law judge reasonably concluded that Dr. Wiot had an

irrational predisposition to reading claimant's 1997 x-rays as negative. *See Usery v. Turner-Elkhorn Mining Co.*, 428 U.S. 1, 3 BLR 2-36 (1976); *Thorn v. Itmann Coal Co.*, 3 F.3d 713, 18 BLR 2-16 (4th Cir. 1993); *see also Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); Decision and Order at 12; Employer's Exhibit 8 at 21. Similarly, the administrative law judge rationally found that although Dr. Wiot stated that his interpretation was based on statistics and personal experience, he was unable to determine whether the doctor's opinion was objectively supported by the record as these "statistics" were not in the record. *See Duke v. Director, OWCP*, 6 BLR 1-673, 1-675 (1983).

Employer next avers that the administrative law judge erred by crediting the two positive interpretations by Drs. Ranavaya and Patel because these physicians were "not aligned with either of the parties," therefore, their readings are not biased. Employer's argument has merit. The administrative law judge stated, "Although this record contains no basis ... for rejecting any interpretations as the product of bias, it would be myopic to ignore the fact that both unaligned experts provided positive interpretations." Decision and Order at 12. The Board has consistently held that, "unless the opinions of physicians retained by the parties are properly held to be biased, based on evidence in the record, the opinions of Department of Labor physicians should not be accorded greater weight due to their impartiality, and ... the administrative law judge may not accord the Department of Labor's expert greater weight on this basis alone." *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-36 (1991). Although the administrative law judge admittedly found that there was no evidence of record demonstrating that any of the physicians were biased, he apparently credited the positive readings of Drs. Ranavaya and Patel on the sole basis that both physicians were "unaligned." Decision and Order at 12. Consequently, we must vacate the administrative law judge's determination that the preponderance of the newly submitted x-ray evidence is positive for the presence of pneumoconiosis pursuant to Section 718.202(a)(1), *see Melnick*, *supra*, and remand this case for the administrative law judge to reconsider the newly submitted x-ray evidence to determine whether claimant has established the existence of pneumoconiosis and a material change in conditions. *See Mullins*, *supra*.

Relevant to the administrative law judge's consideration of the newly submitted medical opinion evidence at Section 718.202(a)(4), employer asserts that the administrative law judge failed to explain why he found that Dr. Rasmussen's opinion was better reasoned and supported by objective medical evidence than the opinions of employer's physicians. Employer argues that in crediting Dr. Rasmussen's opinion, the administrative law judge did not explain why this report is comprehensive, well-reasoned, and supported by the substantial objective evidence. We agree. The administrative law judge has not provided any rationale for this determination. *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-88-89 (1993); *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-465 (1985); *King v. Consolidation Coal Co.*, 8 BLR 1-262 (1985). Consequently, we vacate the administrative law judge's finding that the newly submitted medical opinion evidence establishes the existence or pneumoconiosis, and

therefore, a material change in conditions, and remand this case for the administrative law judge to fully explain his determination. *See Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 951, 21 BLR 2-23, 2-32 (4th Cir. 1997)(when analyzing cumulative, medical opinion evidence, administrative law judge must consider experts' qualifications and their reasoning of opinions, reliance on objectively determinable symptoms, detail of analysis, and freedom from irrelevant distractions and prejudices); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997)(administrative law judge need not accept opinion of any particular medical expert, but must weigh all evidence and draw his own conclusions and inferences); Decision and Order at 21.

In addition, we agree with employer that the administrative law judge has not provided an adequate explanation for crediting Dr. Doyle's opinion because of his status as a treating physician. The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has recognized that while as a general rule, the opinions of treating and examining physicians deserve special consideration, there is no requirement or presumption that these physicians be given greater weight than the opinions of other expert physicians. *See Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275 (4th Cir. 1998); *Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Grizzle v. Pickland Mather and Co.*, 994 F.2d 1093, 17 BLR 2-123 (4th Cir. 1993); Decision and Order at 21. In the instant case, while indicating that Dr. Doyle's status as a treating physician entitles his opinion to "great, though not necessarily dispositive weight," the administrative law judge offered no reason for giving more weight to the opinion of the treating physician. *See Akers, supra*; *Grigg, supra*. Thus, on remand, the administrative law judge should provide an explanation, if he decides to give more weight to Dr. Doyle because of his status.

Moreover, in light of our decision herein, the administrative law judge should reconsider his decision to discredit the opinions of Drs. Castle, Bellotte, Morgan, Fino and Jarboe. Using Dr. Castle's opinion as an example, the administrative law judge held that employer's physicians "[h]aving decided that there was no radiographic evidence of pneumoconiosis...dismissed coal mine dust exposure as a possible causative factor, and were compelled to search for other explanations for the Claimant's documented respiratory abnormalities." Decision and Order at 21. In light of our decision to vacate the finding that the x-ray evidence establishes the existence of pneumoconiosis, we also vacate the rejection of the opinions of Drs. Castle, Bellotte, Morgan, Fino and Jarboe and we remand this case for further consideration of these opinions.[4]

[4] Employer contends that the administrative law judge erred in concluding that Drs. Castle, Bellotte, Morgan, Fino and Jarboe all premised their opinions primarily on the conclusion that there was no radiographic evidence of pneumoconiosis. As already noted, because this case must be remanded for reconsideration of the x-ray evidence, the weighing

If the administrative law judge determines, on remand, that a material change in conditions is established, he must then consider all the relevant evidence, both old and new, to determine whether claimant has established the existence of pneumoconiosis. *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996). Although the administrative law judge states that he has considered "all the evidence of record" in making his finding that claimant has established the existence of pneumoconiosis at Section 718.202(a)(1) and (4), Decision and Order at 21, the only evidence he has discussed fully is the newly submitted evidence. The administrative law judge's findings at Sections 718.202(a)(1) and (4) must therefore be vacated and the case remanded for full consideration of all relevant evidence, both old and new.

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of these medical reports must also be reconsidered. On remand, the administrative law judge should address employer's contention that these reports are not premised on the belief that there is no radiographic evidence of pneumoconiosis. In addition, the administrative law judge discredits employer's physicians on the ground that they speculate as to other causes of claimant's respiratory abnormalities, and this speculation is less reliable especially since claimant did not begin to use beta-blocker until after his heart attack in 1996, yet his performance on pulmonary function and arterial blood gas studies did not appreciably change from 1993 to 1997. While an administrative law judge can permissibly give less weight to those opinions that he concludes are not well reasoned and/or well documented, an administrative law judge cannot substitute his opinion for that of the medical expert. *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295 (1984). Since all of employer's physicians did not attribute claimant's respiratory abnormalities to beta blocker, and since Dr. Castle was aware that claimant did not begin to use beta blocker until after his heart attack, the administrative law judge should clearly explain his basis for discrediting these opinions.

Moreover, subsequent to the administrative law judge's decision in this case, the Fourth Circuit court issued its decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, BLR (4th Cir. 2000), which requires the administrative law judge to weigh all of the evidence relevant to the existence of pneumoconiosis together to determine whether the evidence, as a whole, establishes the presence of this disease under Section 718.202(a). *See* 30 U.S.C. §923(b); *Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 21 BLR 2-104 (3d Cir. 1997). On remand, therefore, the administrative law judge must weigh all the x-ray evidence together with all the medical opinion evidence of record to determine whether claimant has established the existence of pneumoconiosis by a preponderance of all of the evidence. *Compton*, 211 F.3d at 211, BLR .

In light of the fact that the administrative law judge may determine on remand that a material change in conditions and the existence of pneumoconiosis are established, we will address employer's challenge to the administrative law judge's determination under Section 718.204(c)(4). Employer contends that the administrative law judge improperly found Dr. Rasmussen's opinion entitled to dispositive weight because Dr. Rasmussen was aware of the exertional requirements of claimant's last coal mine job when Drs. Castle, Fino, Bellotte, Morgan, and Jarboe were similarly aware of claimant's duties. Contrary to employer's contention, however, the administrative law judge found that Dr. Rasmussen's opinion, that claimant has a totally disabling respiratory impairment, was more persuasive because he not only detailed the exertional requirements of claimant's last coal mine employment as a roof bolter, but also "discussed those requirements in terms of oxygen consumption, concluding with a logical and cogent explanation as to how the Claimant's measured oxygen consumption on both the 1993 and 1997 exercise studies confirmed the presence of respiratory or pulmonary impairment that would prevent him from performing his last coal mine job or comparable work." Decision and Order at 28. Inasmuch as the administrative law judge, within his purview as the finder-of-fact, found the disability assessments of Drs. Castle, Fino, Bellotte, Morgan, and Jarboe significantly less precise, reliable, and persuasive, and found Dr. Rasmussen's opinion concerning claimant's inability to perform his usual coal mine employment entitled to determinative weight, we affirm the administrative law judge's credibility determinations as supported by the record. *See Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991); *Eagle v. Armco Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991); *Onderko v. Director, OWCP*, 14 BLR 1-2, 1-4 (1989); Decision and Order at 27-28; Claimant's Exhibit 4.[5]

[5] We likewise reject employer's argument that the administrative law judge substituted his opinion for that of the physicians by concluding that claimant's treadmill test indicated that he could perform the daily and weekly work of a roof bolter because the administrative law judge specifically found that this was the basic premise of the medical opinions of Drs. Castle and Bellotte. Decision and Order at 28; Director's Exhibits 22; 29; Employer's

Exhibit 7.

Citing *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*, 9 BLR 1-236 (1987)(*en banc*), employer contends that the administrative law judge irrationally credited Dr. Rasmussen's opinion which was based on an exercise blood gas study while irrationally rejecting Dr. Castle's opinion which was based on the results of an exercise study considered in context with the normal results of other objective testing. Employer argues that Dr. Castle's opinion is in compliance with the requirement at Section 718.204(c) that all indicators of pulmonary impairment must be weighed together because he relied upon both the resting and exercise blood gas studies in conjunction with the pulmonary function and diffusing capacity studies in determining that claimant was not totally disabled. Employer's argument is misplaced. In determining whether claimant has demonstrated total disability pursuant to Section 718.204(c), the administrative law judge must weigh all of the relevant, probative evidence together, both like and unlike, with the burden of proof on claimant, to establish total respiratory disability by a preponderance of the evidence. *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231 (1987). Here, the administrative law judge acted within his discretion in determining that Dr. Rasmussen's opinion, based on the testing he performed, logically led to an assessment that claimant was totally disabled by a respiratory impairment, and was therefore a reasoned opinion. Accordingly, we affirm the administrative law judge's determination that claimant has demonstrated total disability pursuant to Section 718.204(c)(4). *See Budash v. Bethlehem Mines Corp.*, 16 BLR 1-27 (1991); *Fields*, *supra*; *Clark*, *supra*.[6] Inasmuch as it is the role of the administrative law judge, as the finder-of-fact, to determine both the credibility of the evidence and the inferences to be drawn from it and such determinations must be upheld unless they are unreasonable or unsupported by the record, we reject employer's arguments, *see Lafferty v. Cannelton Industries, Inc.*, 12 BLR 1-190 (1989); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985), and affirm the administrative law judge's finding at Section 718.204(c).

[6] Because the administrative law judge found that Dr. Rasmussen possessed superior pulmonary qualifications than Dr. Jarboe, employer asserts that the administrative law judge ignored the demonstrated pulmonary expertise of Drs. Castle, Fino, Bellotte, and Morgan. Inasmuch as there is no indication, nor has employer proffered any proof, that the administrative law judge "ignored" the pulmonary expertise of the latter physicians, we reject this contention.

Employer next urges that the court has held that the administrative law judge is not barred from crediting opinions under Section 718.204(b) where the physician's failure to diagnose total disability due to pneumoconiosis is not based solely upon the physician's belief that pneumoconiosis is absent. Employer argues therefore that the administrative law judge unreasonably rejected the opinions of Drs. Castle, Fino, Bellotte, Jarboe, and Morgan because each physician stated that he would not change his opinion even if claimant were found to suffer from pneumoconiosis. The court held that "a medical opinion that acknowledges the miner's respiratory or pulmonary impairment, but nevertheless concludes that an ailment other than pneumoconiosis caused the miner's total disability, is relevant because it directly rebuts the miner's evidence that pneumoconiosis contributed to his disability." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 535, 21 BLR 2-323, 2-340 (4th Cir. 1998), *citing Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Hobbs v. Clinchfield Coal Co.*, 45 F.3d 819, 19 BLR 2-86 (4th Cir. 1995). Although the administrative law judge determined that the opinions of Drs. Bellotte, Castle, Jarboe, Fino and Morgan were worthy of little weight because none of the doctors diagnosed pneumoconiosis, he also found their assumptions that if claimant had pneumoconiosis, it would not be totally disabling, to be unpersuasive because they were accompanied by little or no rationale. *See Carpeta*, *supra*; Decision and Order at 28-29. Inasmuch as the administrative law judge permissibly accorded greater weight to the opinions of Drs. Rasmussen and Doyle that claimant's occupational lung disease is at least a major contributing factor to his total disability, should the administrative law judge again find on remand that the existence of pneumoconiosis is established, his Section 718.204(b) finding would be rational and supported by substantial evidence. *See Hicks*, *supra*; *Hobbs*, *supra*.

Accordingly, we vacate the administrative law judge's findings pursuant to Section 725.309(d) and Section 718.202(a)(1) and (4). On remand, the administrative law judge must first determine whether the newly submitted evidence establishes the existence of pneumoconiosis, and then, if reached, must consider and weigh together all of the x-ray evidence of record pneumoconiosis at Section 718.202(a)(1) and all of the medical opinion evidence under Section 718.202(a)(4) to determine whether claimant has established the existence of pneumoconiosis, pursuant to *Compton*. If claimant affirmatively establishes the existence of pneumoconiosis pursuant to Section 718.202(a), the administrative law judge must find claimant entitled to benefits. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Accordingly, the Decision and Order Awarding Benefits of the administrative law judge is affirmed in part, vacated in part, and the case is remanded for proceedings consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge