BRB No. 09-0153 BLA

CHARLES F. LONG	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
MARSON COAL COMPANY, INCORPORATED	)	
	)	
and	)	
	)	
WEST VIRGINIA COAL WORKERS' PNEUMOCONIOSIS FUND	)	DATE ISSUED: 11/16/2009
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order on Remand – Awarding Benefits of Daniel L. Leland, Administrative Law Judge, United States Department of Labor.

Timothy C. MacDonald (Legal Clinic, Washington and Lee University School of Law), Lexington, Virginia, for claimant.

William S. Mattingly (Jackson Kelly PLLC), Morgantown, West Virginia, for employer/carrier.

Rita Roppolo (Deborah Greenfield, Acting Deputy Solicitor; Rae Ellen Frank James, Associate Solicitor; 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, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (05-BLA-5633) of Administrative Law Judge Daniel L. Leland 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 with respect to this subsequent claim filed on January 16, 2003.[1] In his original Decision and Order, the administrative law judge credited claimant with twelve years and seven months of qualifying coal mine employment, and determined that this claim was subject to the regulatory provision at 20 C.F.R. §725.309(d). The administrative law judge found that the newly submitted evidence was insufficient to establish the existence of clinical pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), but sufficient to establish the existence of legal pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), thereby demonstrating that one of the applicable conditions of entitlement had changed pursuant to 20 C.F.R. §725.309 since the denial of the prior claim. Consequently, the administrative law judge adjudicated the claim on the merits and, after noting that employer stipulated that claimant was totally disabled pursuant to 20 C.F.R. §718.204(b), found that the evidence established that claimant's disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Accordingly, benefits were awarded as of January 2003, the month in which the pending subsequent claim was filed.

On appeal, the Board modified the administrative law judge's length of coal mine employment determination to reflect twelve years and four months of qualifying coal mine employment. The Board held that the administrative law judge correctly identified the existence of pneumoconiosis as one of the applicable conditions of entitlement under Section 725.309(d), but vacated his findings thereunder because the administrative law judge failed to sufficiently explain his credibility determinations, in finding that the

[1] Claimant filed three previous claims. Director's Exhibits 1-3. The first claim, filed on January 19, 1981, was denied by the district director on June 18, 1981, because claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 1. The second claim, filed on June 22, 1987, was denied by the district director on November 24, 1987, because claimant did not establish the existence of pneumoconiosis or total disability due to pneumoconiosis. Director's Exhibit 2. The third claim, filed on April 9, 1992, was denied by Administrative Law Judge John C. Holmes on February 28, 1995, because claimant did not establish the existence of pneumoconiosis or that his total disability was due to pneumoconiosis. Director's Exhibit 3.

weight of the newly submitted medical opinions established the existence of legal pneumoconiosis under Section 718.202(a)(4). Specifically, the Board held that the administrative law judge failed to: (1) explain why Dr. Parker's additional professional qualifications were more significant than the additional qualifications of Drs. Renn and Rosenberg; (2) adequately address whether Dr. Parker's opinion was sufficiently reasoned; (3) adequately address the explanations provided by Drs. Renn and Rosenberg for opining that claimant's chronic obstructive pulmonary disease was not attributable to coal dust exposure; (4) explain his basis for crediting Dr. Parker's assessment of the opinions of Drs. Renn and Rosenberg; and (5) address the weight that he accorded to the opinion of Dr. Rasmussen. Consequently, the Board vacated the administrative law judge's findings pursuant to Sections 725.309(d), 718.202(a)(4) and 718.204(c), and remanded the case for further findings.[2] *C. L.* [*Long*] *v. Marson Coal Co., Inc.*, BRB No. 07-0658 BLA (Apr. 30, 2008) (unpub.).

On remand, the administrative law judge again found that claimant had established the existence of legal pneumoconiosis pursuant to Section 718.202(a)(4), a change in an applicable condition of entitlement under Section 725.309(d), and disability causation under Section 718.204(c). Accordingly, benefits were awarded.

In the present appeal, employer contends that the administrative law judge erred in finding the weight of the evidence sufficient to establish the existence of legal pneumoconiosis arising out of coal mine employment and total disability due to pneumoconiosis. Claimant has filed a response brief, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has

[2] With respect to the evidentiary issues raised on first appeal, the Board declined to address employer's challenge to the administrative law judge's exclusion of Dr. Wiot's interpretations of x-rays dated February 24, 1981, July 21, 1987, and May 21, 1992, and a CT scan dated June 1, 2006. Since the administrative law judge found that the evidence was insufficient to establish the existence of clinical pneumoconiosis, the excluded evidence would only serve to support the administrative law judge's uncontested finding. Thus, the Board held that any error the administrative law judge may have committed in excluding this evidence was harmless. Further, the Board rejected employer's argument that the administrative law judge erred in not allowing employer an opportunity to adequately respond to Dr. Parker's September 13, 2006 report, since employer was permitted, post-hearing, to depose Dr. Parker, and the administrative law judge admitted this evidence into the record. As employer, in its post-hearing brief, did not contend that it needed to develop any further post-hearing evidence, the Board declined to address employer's argument that Drs. Renn and Rosenberg should be allowed to respond to Dr. Parker's examination and deposition.

filed a limited response letter, urging the Board to reject employer's attempts to discredit Dr. Parker's opinion through the physician's supporting medical literature.

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

Challenging the administrative law judge's weighing of the conflicting medical opinions of record at Sections 718.202(a)(4) and 718.204(c), employer asserts that the opinion of Dr. Parker is not well-reasoned, and that the administrative law judge erred in crediting it over the contrary opinions of Drs. Renn and Rosenberg, that claimant's respiratory impairment is unrelated to coal dust exposure. Employer contends that the administrative law judge erred in focusing on Dr. Parker's credentials, rather than analyzing Dr. Parker's deposition testimony and the medical rationale supporting his opinion, that claimant's disabling chronic obstructive pulmonary disease (COPD) was attributable, in part, to coal dust exposure. As a history of coal dust exposure is insufficient to support a diagnosis of legal pneumoconiosis, employer avers that the administrative law judge improperly credited Dr. Parker's attribution of claimant's impairment to both coal dust exposure and smoking on the ground that it was "logical and supported by claimant's exposure histories," Decision and Order on Remand at 6. Employer also maintains that Dr. Parker's opinion is undermined by faulty assumptions as to the length and level of claimant's coal dust exposure. Specifically, Dr. Parker concluded that claimant's disabling COPD was related to coal dust exposure because, despite employment in underground coal mining for a relatively short period of time, "probably less than 20 years," claimant's dust exposure was substantial because he was employed at a time when dust was not as successfully controlled as it is today. Employer's Brief at 15, *citing* Employer's Exhibit 8 at 5-6. Employer notes, however, that claimant was only credited with twelve years of coal mine employment, and that Dr. Parker did not know the precise levels of claimant's dust exposure. Further, despite the fact that a video disc was made of Dr. Parker's deposition, allowing the viewer to observe the physician's demeanor and tone as he discussed claimant's condition and the general concepts in medical literature relied upon, employer avers that the administrative law judge made no finding concerning Dr. Parker's demeanor, and should have addressed his credibility. Lastly, employer contends that the administrative law judge irrationally found that Dr. Parker was the most qualified physician to render an opinion on claimant's

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit because claimant's coal mine employment occurred in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 5.

pulmonary condition because he contributed to the development of the National Institute for Occupational Safety and Health (NIOSH) publication, *Criteria for a Recommended Standard – Occupational Exposure to Respirable Coal Mine Dust (NIOSH Criteria Document)*, when employer asserts that, in fact, Dr. Parker not only offered conclusions that were unsupported by that document, but also referenced additional medical literature and textbooks that contradicted his conclusions. Specifically, employer maintains that the *NIOSH Criteria Document*, an exhibit attached to Dr. Parker's deposition, "indicates that the FEV_1/FVC ratio is not severely affected by coal dust exposure and that smoking caused a drop in the FEV_1/FVC ratio while coal mine dust exposure does not." Employer's Brief at 16. Likewise, employer avers that Dr. Parker's opinion is further undermined by the contents of *Occupational Lung Disease*, a 1998 textbook that he edited, illustrating "that there was **not** a statistically significant loss of FEV_1 attributable to coal dust exposure," but rather, there was a significant effect caused by cigarette smoking. Employer's Brief at 17 [emphasis in original].

In response, the Director counters that employer's argument regarding the *NIOSH Criteria Document* "fails to acknowledge that, while a referenced 1986 study is arguably consistent with [employer's] statement, a referenced 1992 study is not, for it provides that the effect from dust exposure, while small, was found to be 'statistically significant'." Director's Response Letter at 1. Similarly, the Director argues that the significance of Dr. Parker's opinion "is not what may have been stated [in a textbook he edited] in 1998, but what the doctor states now and whether it is supported by the understanding of the medical community." Director's Response Letter at 1-2. Moreover, the Director contends that the administrative law judge properly relied on the preamble to the regulations to find that, consistent with Dr. Parker's opinion, the medical community has determined that the relationship between the FEV_1 value and coal mine dust exposure is clinically significant. Director's Response Letter at 1, *citing* 65 Fed. Reg. 79939 (Dec. 20, 2000).

A review of the administrative law judge's Decision and Order belies employer's argument that the administrative law judge erred in crediting the opinion of Dr. Parker to find the existence of legal pneumoconiosis and total disability due to pneumoconiosis established.[4] Contrary to employer's assertions, Dr. Parker did not rely solely on claimant's history of coal dust exposure to support his diagnosis of legal pneumoconiosis, but rather, as the administrative law judge properly found, the diagnosis was based on Dr. Parker's observations of claimant during the physical examination, claimant's "minimal and remote" cigarette smoking history, the objective tests conducted, and supportive

[4] In both his report dated September 13, 2006, and at his deposition held on November 22, 2006, Dr. Parker diagnosed severe, disabling obstructive lung disease attributable to coal dust exposure and cigarette smoking. Claimant's Exhibits 7, 8.

medical literature. *See Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (*en banc*). The administrative law judge also found that Dr. Parker's opinion was supported by the diagnostic studies he administered, including claimant's lung volumes, which demonstrated airflow obstruction and air trapping; claimant's diffusing capacity, which exhibited a pattern consistent with coal mine dust induced disease; and a pulmonary function study with an FEV_1 value that Dr. Parker considered to be "too low to have been caused by smoking alone." *See Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *King v. Consolidation Coal Co.*, 8 BLR 1-262, 1-265 (1985); *Hess v. Clinchfield Coal Co.*, 7 BLR 1-295, 1-296 (1984); Decision and Order on Remand at 4. While Dr. Parker testified that claimant "probably has less than twenty years of exposure," he stated, in the same sentence, that claimant "worked in coal mining for a relatively short length of time," as compared to other coal miners who "work twenty years or more." Employer's Exhibit 8 at 5. Further, in his September 13, 2006 narrative report, Dr. Parker listed claimant's coal mine employment as running from 1943 to 1956, excluding time he served in the Army from 1945 to 1947, and from 1970 to 1973, a length of time consistent with that credited by the administrative law judge. Claimant's Exhibit 7. Dr. Parker indicated that claimant, who performed numerous deep coal and surface coal mine jobs, was last employed in underground employment as a general inside laborer at a time when "coal mine dust levels often exceeded 3 to 5 milligrams per cubic meter," based on claimant's description of his work conditions and the levels of dust. Claimant's Exhibit 7. Hence, the administrative law judge could rationally rely on Dr. Parker's conclusion that claimant's coal dust exposure was "substantial," given that "dust controls [during claimant's employment] were not as successful and rigorous as the present day regulations," Claimant's Exhibit 7, and could find persuasive Dr. Parker's opinion that claimant's severe airflow obstruction was due to both smoking and coal dust exposure, in view of the dust conditions of the jobs claimant performed, and claimant's relatively modest smoking history. *See Nance v. Benefits Review Board*, 861 F.2d 68, 71, 12 BLR 2-31, 2-36 (4th Cir. 1988); *Gorzalka v. Big Horn Coal Co.*, 16 BLR 1-48, 1-52 (1990) ("all claimant has to demonstrate is that coal dust exposure was a significant causative factor" in his lung disease); Decision and Order on Remand at 4; Claimant's Exhibit 8. Likewise, employer's assertion, that the probative value of Dr. Parker's opinion was undermined by his reliance on medical literature that contradicted his conclusions, lacks merit. The administrative law judge determined that, when questioned by employer's counsel during his deposition about specific details contained in various epidemiologic studies, articles, and references, Dr. Parker maintained his position that "[t]his article, along with many articles, have supported the concept that exposure to dust provokes an injury quite analogous to tobacco smoke and many people can have a clinically-significant loss as a result of those exposures." Claimant's Exhibit 8 at 29-30. Dr. Parker also testified that "There's even further work by Dr. Wagner, Dr. Petsonk, [Dr.] Mei-lin Wang, who is referenced in the Banks/Parker book chapter, that continue[s] to document the accelerated loss of FEV_1 in workers exposed to dust, especially coal mine dust, and

silica dust." Claimant's Exhibit 8 at 30-31; *see* Decision and Order on Remand at 4. Lastly, the administrative law judge found that Dr. Parker's opinion was bolstered by the physician's consideration of the latent nature of pneumoconiosis and his explanation that, notwithstanding claimant's cessation of coal mine employment over thirty years ago, claimant's "lung injury does not end when exposure ceases because the accumulated dust deposits and the inflammatory process continue to cause damage." *See* 20 C.F.R. §718.201(c); *Mullins Coal Co., Inc. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Peabody Coal Co. v. Odom*, 342 F.3d 486, 491, 22 BLR 2-612, 2-621 (6th Cir. 2003); *Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 20 BLR 2-246 (4th Cir. 1996); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 20 BLR 2-76 (3d Cir. 1995); Decision and Order on Remand at 4; Claimant's Exhibit 8 at 70. Accordingly, because the administrative law judge critically examined the various bases supporting Dr. Parker's opinion that claimant's obstructive lung disease was attributable to coal dust exposure, and adequately explained his reasons for finding that Dr. Parker's opinion outweighed the contrary opinions of Drs. Renn and Rosenberg, employer's contention that the administrative law judge erred in according determinative weight to the opinion of Dr. Parker is rejected.[5]

Employer argues next that the administrative law judge erred in discrediting the opinions of Drs. Renn and Rosenberg on the ground that neither physician explained precisely how cigarette smoking, as opposed to coal dust exposure, caused claimant's pulmonary impairment. Citing to a footnote in the Board's prior decision, employer argues that the physicians' reports contradict the administrative law judge's determination, since both Drs. Renn and Rosenberg adequately explained why they concluded that claimant's impairment was not related to coal dust exposure. In addition, employer avers that the administrative law judge erred in relying on the opinion of Dr. Rasmussen to buttress Dr. Parker's conclusions and discredit the contrary opinions of Drs. Renn and Rosenberg, when the administrative law judge found that Dr. Rasmussen's opinion was worthy of little weight. Employer's arguments lack merit.

[5] Pursuant to the Board's remand instructions, the administrative law judge initially found that Dr. Parker's medical credentials surpassed those of Drs. Renn and Rosenberg because, in addition to being a Board-certified pulmonologist, Dr. Parker's academic credentials were distinguished, his extensive research background was germane to the issue to be decided, and his experience with NIOSH and contributions to the *NIOSH Criteria Document* rendered him "exceptionally well qualified" to render an opinion as to the cause of claimant's chronic obstructive pulmonary disease. *See 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, 21 BLR 2-269 (4th Cir. 1997); Decision and Order on Remand at 3-4, 6.

In our previous decision, the Board summarized the bases for the opinions of Drs. Renn and Rosenberg, that claimant's pulmonary impairment was attributable to cigarette smoking, but did not hold that the physicians provided an adequate rationale for their respective conclusions. *C.L.* [*Long*], BRB No. 07-0658 BLA, *slip op*. at 9, 10, nn.9-10; Director's Exhibit 32; Employer's Exhibit 1. In assessing the probative value of each opinion on remand, the administrative law judge, within a permissible exercise of his discretion, found that the opinions of Drs. Renn and Rosenberg were entitled to diminished weight based on multiple factors. The administrative law judge rationally found that Dr. Renn's attribution of claimant's pulmonary impairment "exclusively to smoking" was unpersuasive because Dr. Renn, who relied on a cigarette smoking history of six pack-years and noted a history as low as three and one-quarter pack-years, failed to explain precisely how smoking could be the sole cause of claimant's severe respiratory impairment, in light of claimant's "minor and remote smoking history," and failed to indicate whether claimant "was a particularly susceptible individual to account for the effects of such a minor smoking history." *See Zbosnik v. Badger Coal Co.*, 759 F.2d 1187, 1189, 7 BLR 2-202, 2-207 (4th Cir. 1985); *Stark v. Director, OWCP*, 9 BLR 1-36, 1-37 (1986); Decision and Order on Remand at 6. Further, the administrative law judge found that Dr. Renn's opinion was devoid of a "rationale as to how he was able to completely rule out Claimant's twelve years and four months of coal mine employment," an employment history that is twice as long as Dr. Renn's estimate of claimant's smoking history. *See generally Long v. Director, OWCP*, 7 BLR 1-254, 1-257 (1984) (physician should discuss other potential causative factors suggested in the record when determining etiology of pulmonary disease); Decision and Order on Remand at 6. Finally, the administrative law judge observed that, while Dr. Renn based his opinion, that claimant's lung disease was caused by cigarette smoking, on a reduction in claimant's total lung capacity as well as in his diffusion capacity, Dr. Renn's report lacked supporting medical literature and failed to indicate the actual source for the percentages and values upon which Dr. Renn relied. Because the administrative law judge's determination that Dr. Renn's opinion was unreasoned and undocumented is rational and supported by substantial evidence, we affirm the administrative law judge's finding that Dr. Renn's opinion merited less weight. *See Clark*, 12 BLR at 1-149; *King*, 8 BLR at 1-262; *Lucostic v. U.S. Steel Corp.*, 8 BLR 1-46 (1985); Decision and Order on Remand at 6.

Employer's challenge to the administrative law judge's weighing of Dr. Rosenberg's opinion is similarly unfounded. The administrative law judge reasonably discounted the opinion because Dr. Rosenberg, like Dr. Renn, failed to discuss how claimant's minor and remote smoking history was the sole cause of his severe pulmonary impairment. *See Zbosnik*, 759 F.2d at 1189, 7 BLR at 2-207; *Stark*, 9 BLR at 1-37; Decision and Order on Remand at 6. The administrative law judge found that the probative value of Dr. Rosenberg's opinion was further diminished by the absence of a citation to any medical literature documenting his conclusion that the prevailing medical literature did not support the theory that coal dust exposure causes a significant decrease

in FEV_1. To the contrary, the administrative law judge noted that Dr. Rosenberg's opinion was "called into question by the preamble to the revised regulations," which provides, in pertinent part, that "…epidemiological studies have shown that coal miners have an increased risk of developing [chronic obstructive pulmonary disease]," and that "[chronic obstructive pulmonary disease] may be detected from decrements in certain measures of lung function, especially FEV_1 and the ratio of FEV_1/FVC." Decision and Order on Remand at 7 n.3, *citing* 65 Fed. Reg. at 79,943. Further, as Drs. Parker and Rasmussen both disputed Dr. Rosenberg's conclusions, noting that reversibility can occur in chronic obstructive pulmonary disease caused by coal dust, and citing a 1992 Attfield and Hodous study that found a significant decline in FEV_1 as a result of coal dust exposure, the administrative law judge could properly conclude that Dr. Rosenberg's opinion was not well-reasoned and was entitled to little weight. Because the administrative law judge found Dr. Parker's conclusions more persuasive than those of Drs. Renn and Rosenberg, he rationally accorded dispositive weight to Dr. Parker's opinion. *See generally Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-513 (6th Cir. 2002) (employer is asking the Board to overturn the administrative law judge's credibility determinations, which exceeds the Board's limited scope of review); *Fagg v. Amax Coal Co.*, 12 BLR 1-77 (1988); *Calfee v. Director, OWCP*, 8 BLR 1-7, 1-10 (1985).[6] As substantial evidence supports the administrative law judge's findings that claimant established the existence of legal pneumoconiosis under Section 718.202(a)(4), a change in an applicable condition of entitlement pursuant to Section 725.309(d), and disability causation at Section 718.204(c), they are affirmed.

Finally, employer contends that the administrative law judge erred in not providing it with an opportunity to adequately respond to Dr. Parker's "surprise" September 13, 2006 report, offered by claimant and exchanged on September 22, 2006, just before the formal hearing on October 19, 2006. Employer's Brief at 21. In our prior decision, we considered and rejected this argument, and our holding constitutes the law of the case on this issue, for which no exception has been demonstrated. *C. L.* [*Long*], BRB No. 07-0658 BLA, *slip op.* at 11-12; *see Gillen v. Peabody Coal Co.*, 16 BLR 1-22,

[6] Employer additionally argues that claimant is not entitled to the presumption set forth in 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, because claimant has less than ten years of coal mine employment. Employer's Brief at 8. In our prior decision, the Board modified the administrative law judge's decision to reflect twelve years and four months of qualifying coal mine employment. *C. L.* [*Long*] *v. Marson Coal Co., Inc.*, BRB No. 07-0658 BLA, *slip op.* at 5-7 (Apr. 30, 2008) (unpub.). As the etiology of the miner's pneumoconiosis is subsumed within a finding of legal pneumoconiosis, however, claimant need not rely on the rebuttable presumption that his pneumoconiosis arose out of coal mine employment pursuant to Section 718.203(b). *See* 20 C.F.R. §718.201(a)(2).

1-25 (1991); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990), *overruled on other grounds, Peabody Coal Co. v. Director, OWCP* [*Brinkley*], 972 F.2d 880, 16 BLR 2-129 (7th Cir. 1992).[7] Consequently, we affirm the administrative law judge's finding that claimant is 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 on Remand – Awarding Benefits of the administrative law judge is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[7] In addition, employer argues that, under 20 C.F.R. §725.309, employer should be granted the right to estop needless litigation. Specifically, employer contends that because claimant established total disability but not the presence of pneumoconiosis in his prior claim, he must now show that pneumoconiosis is a necessary part of his disability to demonstrate a change in condition. Employer acknowledges that the Board previously considered and rejected this argument, but requests that the Board reconsider its prior holding. Because employer has not advanced a compelling argument for altering the Board's prior determination, we decline to revisit this issue. *See Gillen v. Peabody Coal Co.*, 16 BLR 1-22, 1-25 (1991).