BRB No. 09-0133 BLA

S.P.W.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PEABODY COAL COMPANY	)	DATE ISSUED: 10/30/2009
	)	
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 – Awarding Benefits of Stephen L. Purcell, Associate Chief Administrative Law Judge, United States Department of Labor.

Larry L. Rowe, Charleston, West Virginia, for claimant.

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

Jeffrey Goldberg (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 (2004-BLA-5720) of Associate Chief Administrative Law Judge Stephen L. Purcell with respect to 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 his first Decision and Order, the administrative law judge noted that the claim before him, filed on May 16, 2002, was a subsequent claim pursuant to 20 C.F.R. §725.309(d).[1] The administrative law judge credited claimant with thirty-three years of coal mine employment and considered the newly submitted evidence pursuant to the regulations set forth in 20 C.F.R. Part 718. The administrative law judge found that, although the x-ray evidence did not establish the presence of large opacities as required under 20 C.F.R. §718.304(a), the medical opinion evidence was sufficient to establish complicated pneumoconiosis and was, therefore, sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(c). 30 U.S.C. §921(c)(3). The administrative law judge further found that the presumption, set forth in 20 C.F.R. §718.203(b), that claimant's pneumoconiosis arose out of coal mine employment, was invoked and was not rebutted. Based upon these findings, the administrative law judge determined that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d) and entitlement to benefits on the merits.

Employer appealed the award of benefits to the Board. Pursuant to employer's appeal, the Board vacated the administrative law judge's findings and remanded the case to the administrative law judge for further proceedings. *S.P.W. v. Peabody Coal Co.*, BRB No. 07-0278 BLA (Dec. 27, 2007)(unpub.). The Board vacated the administrative law judge's finding that the newly submitted evidence established the presence of complicated pneumoconiosis pursuant to Section 718.304(c), holding that, because the medical opinions of Drs. Gaziano and Smith addressed, in fact, only their x-ray interpretations, they should have been considered pursuant to Section 718.304(a), and not Section 718.304(c).[2] *S.P.W.*, slip op. at 5. Therefore, the Board remanded the case for

[1] Claimant filed claims on January 18, 1980, December 2, 1991, and March 1, 2000. Director's Exhibits 1-3. The claims were denied on the ground that claimant failed to establish total respiratory or pulmonary disability. *Id.* Claimant filed his most recent claim on May 16, 2002. Director's Exhibit 5.

[2] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the opinions of Drs. Porterfield and Zaldivar were entitled to little, if any, weight on the issue of complicated pneumoconiosis, as they were poorly reasoned and/or poorly documented. In addition, the Board affirmed the administrative law judge's finding that Dr. Rasmussen's opinion was not entitled to full weight because Dr. Rasmussen did not explain how the objective test results supported his diagnosis. *S.P.W. v. Peabody Coal Co.*, BRB No. 07-0278 BLA, slip op. at 3 n.3 (Dec. 27, 2007)(unpub.).

the administrative law judge to reconsider the pertinent medical evidence separately pursuant to Section 718.304(a) and (c), and then, if reached, consider the evidence together to determine if complicated pneumoconiosis was established and claimant was, therefore, entitled to invocation of irrebuttable presumption. *Id*. In addition, the Board instructed the administrative law judge to determine whether Dr. Scott's deposition testimony was admissible pursuant to the evidentiary limitations set forth at 20 C.F.R. §725.414(a)(1), (3)(i), (ii), and (c), regarding the number of medical reports allowable. *S.P.W.*, slip op. at 6.

On remand, the administrative law judge set forth the Board's remand instructions and reconsidered the relevant evidence. Initially, the administrative law judge considered the admissibility of Dr. Scott's deposition testimony and found that it constituted a medical report pursuant to Section 725.414(a)(1). He, therefore, excluded Dr. Scott's deposition testimony because it exceeded the evidentiary limitations for the number of medical reports allowable at 20 C.F.R. §725.414(a)(3)(i).[3] Considering the evidence submitted since the prior denial, the administrative law judge found that the x-ray evidence, when weighed together with the medical reports of Drs. Gaziano and Smith, was sufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(a). Weighing the newly submitted CT scan and medical opinion evidence together at Section 718.304(c), the administrative law judge found that it was insufficient to establish the presence of complicated pneumoconiosis thereunder. However, on weighing all of the relevant newly submitted evidence, the administrative law judge found that it was sufficient to establish the presence of complicated pneumoconiosis at Section 718.304(a), and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis. The administrative law judge, therefore, found that claimant established one of the applicable conditions of entitlement pursuant to 20 C.F.R. §725.309(d), *i.e.*, total respiratory disability due to pneumoconiosis. Turning to the merits, the administrative law judge found, based on a review of the entire record, that all of the elements of entitlement were established, *i.e.*, pneumoconiosis, that pneumoconiosis arose out of coal mine employment, and that claimant was totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer initially contends that the administrative law judge erred in excluding Dr. Scott's deposition testimony, arguing that the administrative law judge erred in finding that Dr. Scott's deposition was a medical report, which exceeded the evidentiary limitations set forth at Section 725.414(a). Employer further argues: that the

[3] The administrative law judge noted that employer submitted the medical report of Dr. Zaldivar and the deposition of Dr. Wheeler as its two affirmative medical reports as allowed by 20 C.F.R. §725.414(a)(3)(i).

administrative law judge erred in failing to find that employer established good cause for the admission of the excess evidence or, in the alternative, that the administrative law judge should have notified the parties of his intention to exclude Dr. Scott's deposition testimony and afforded employer the opportunity to substitute the report for one of its other medical reports. In addition, employer contends that the administrative law judge erred in finding that the new medical evidence was sufficient, as a whole, to establish complicated pneumoconiosis at Section 718.304(a). Employer also contends that the administrative law judge erred in finding that the CT scan evidence was not probative at Section 718.304(c).

Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), in a limited response, urges affirmance of the administrative law judge's finding that Dr. Scott's deposition testimony was a medical report and not the interpretation of a single objective test. Consequently, the Director contends that the administrative law judge properly excluded Dr. Scott's deposition as exceeding the evidentiary limitations set forth at Section 725.414. The Director states, however, that he is not addressing employer's additional arguments, that the administrative law judge erred in failing to consider whether employer established good cause to submit excess evidence or to provide employer the opportunity to substitute Dr. Scott's deposition for one of its admitted affirmative medical reports.

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.[4] 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).

Initially, we address employer's contention that the administrative law judge erred in excluding the deposition testimony of Dr. Scott. Pursuant to the Board's remand instructions, the administrative law judge reevaluated the admissibility of Dr. Scott's deposition testimony and again found that Dr. Scott's deposition constituted a medical report pursuant to Section 725.414(a)(1) and, therefore, exceeded the evidentiary limitations regarding the allowable number of medical reports set forth at Section 725.414(a)(3)(i), as employer had already submitted the opinions of Drs. Zaldivar and Wheeler as its two affirmative medical opinions. Specifically, the administrative law judge rejected employer's contention: that because Dr. Scott only commented on his

[4] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mining employment was in West Virginia. *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*); Director's Exhibits 4, 6.

reading of x-rays and CT scans, his testimony should not be considered a medical report and should be admissible under Section 725.414(a)(1).[5] The administrative law judge found that Dr. Scott's deposition testimony "far exceeds" commentary on a single objective test. Decision and Order on Remand at 4. Rather, the administrative law judge found that Dr. Scott's deposition testimony encompassed eleven separate x-ray interpretations and three CT scans, which were provided over time and not in one sitting. *Id*. Therefore, the administrative law judge found that the deposition testimony did not amount to a "written assessment of a single objective test" but rather constituted a medical report subject to the evidentiary limitations. *Id*. Accordingly, the administrative law judge properly found that, because employer submitted two affirmative medical opinions, Dr. Scott's deposition testimony exceeded the evidentiary limitations and the administrative law judge properly excluded it from admission into the record. 20 C.F.R. §725.414(a)(3)(i); *Dempsey v. Sewell Coal Corp*., 23 BLR 1-47 (2004)(*en banc*).

In addition, employer contends that the administrative law judge erred in failing to consider its good cause argument for the submission of excess evidence or, in the alternative, erred in failing to notify the parties of his decision to exclude Dr. Scott's deposition testimony and provide employer with the opportunity to submit Dr. Scott's deposition testimony in lieu of one of its two affirmative medical reports.

A showing of "good cause" is necessary only in the event that a party seeks to convince the administrative law judge that the particular facts of a case justify the submission of additional medical evidence, either in the form of a documentary report or testimony. 65 Fed. Reg. 80000 (Dec. 20, 2000). Thus, if employer wanted to submit evidence in excess of the evidentiary limitations set forth at Section 725.414, it was required to make a showing of "good cause" for its submission. However, there is no indication in this case that employer attempted to demonstrate "good cause" for the submission of the excess medical report of Dr. Scott, in the form of deposition testimony, even though the administrative law judge ruled on the admissibility of Dr. Scott's deposition testimony at the hearing, finding that Dr. Scott's deposition was a medical report and excluding it as excess medical evidence. Hearing Testimony at 45-46. Employer's "good cause" argument is, accordingly, rejected.

---

[5] Section 725.414(a)(1) states, in pertinent part:

> A physician's written assessment of a single objective test, such as a chest x-ray or a pulmonary function test shall not be considered a medical report for purposes of this section.

20 C.F.R. §725.414(a)(1).

Similarly, we reject employer's contention that because the administrative law judge failed to notify the parties that he was excluding Dr. Scott's deposition testimony as excess medical evidence, the case should have been remanded to afford employer the opportunity to substitute Dr. Scott's deposition testimony for one of its previously admitted affirmative medical reports. Contrary to employer's contention, the administrative law judge ruled on the admissibility of Dr. Scott's deposition testimony at the formal hearing, and not for the first time in his Decision and Order. Hearing Transcript at 45-46. Thus, because the administrative law judge ruled on the admissibility of Dr. Scott's deposition at the formal hearing and employer did not attempt to establish good cause for the admission of the report at that time, or to request the opportunity to substitute this report for one of its two affirmative medical reports, we reject employer's contention. *Brasher v. Pleasant View Mining Co*., 23 BLR 1-141, 1-145-6 n.3 (2005); *Smith v. Martin County Coal Corp*., 23 BLR 1-169 (2004).

Employer also argues that the administrative law judge erred in finding that the new evidence established complicated pneumoconiosis pursuant to Section 718.304, in considering the claim pursuant to Section 725.309(d). Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304 of the regulations, provides an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy or autopsy, yields massive lesions in the lung; or (C) when diagnosed by other means, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, the administrative law judge must examine all of the relevant evidence, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*). Further, the United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999).

Pursuant to Section 718.304(a), the administrative law judge set forth the Board's remand instructions regarding the evidence to be considered on remand; notably, that in addition to the relevant x-ray readings of record, he must also consider the medical reports of Drs. Gaziano and Smith, because their diagnoses of complicated pneumoconiosis were based on their x-ray interpretations. Decision and Order on Remand at 6; *S.P.W.*, slip op. at 5. Pursuant to these instructions, the administrative law judge reevaluated the medical evidence at Section 718.304(a) and noted that all of the physicians, with the exception of Dr. Porterfield, found evidence of large opacities in claimant's lungs on x-ray, the only question being whether the cause of the large opacities was complicated pneumoconiosis or healed tuberculosis. Decision and Order on Remand at 4. Weighing the newly submitted x-ray evidence, dated May 30, 2002, March 13, 2003, June 17, 2003 and May 14, 2004, the administrative law judge found that if he were to consider only the x-ray readings, then he would find that the x-ray evidence did not establish complicated pneumoconiosis. *Id*. at 6. However, noting the Board's remand instructions that the opinions of Drs. Gaziano and Smith, which relied on x-ray findings to diagnose complicated pneumoconiosis, be considered under Section 718.304(a), the administrative law judge considered that evidence along with the x-ray evidence.

Initially at Section 718.304(a), the administrative law judge again rejected the opinion of Dr. Porterfield, concerning the x-ray findings. The administrative law judge found that Dr. Porterfield's opinion was not probative on the issue of complicated pneumoconiosis, because the doctor did not diagnose simple pneumoconiosis, and did not discuss Dr. Patel's positive x-ray interpretation for complicated pneumoconiosis, which was contained in Dr. Porterfield's report. Decision and Order Remand at 6. With respect to the remaining medical opinions, the administrative law judge found that the opinions of Drs. Gaziano, Smith and Rasmussen supported a finding of complicated pneumoconiosis, whereas the opinions of Drs. Zaldivar and Wheeler did not. *Id*. at 7. Weighing these opinions, the administrative law judge found that the opinions of Drs. Gaziano and Smith,[6] which were well-documented and well-reasoned, outweighed the contrary opinions of Drs. Zaldivar and Wheeler, which were not as well-documented and well-reasoned. *Id*. at 7, 14. Consequently, the administrative law judge found that the x-ray and medical opinion evidence addressing the x-ray findings, was sufficient to establish the presence of complicated pneumoconiosis at Section 718.304(a). *Id*.

[6] The administrative law judge found that Dr. Rasmussen's opinion, which supported the opinions of Drs. Gaziano and Smith, was entitled to less weight because it was less reasoned than the opinions of Drs. Gaziano and Smith. Decision and Order on Remand at 7.

In challenging this finding, employer contends that the administrative law judge erred in failing to consider all of the relevant evidence. In addition, employer contends that the administrative law judge relied on impermissible reasons for discrediting Dr. Wheeler's opinion, as the administrative law judge reiterated his prior findings. Employer also contends that the administrative law judge erred in crediting the opinion of Dr. Gaziano regarding the x-ray readings, as he was the physician with the least radiological qualifications. There is no merit to employer's contentions.

Employer challenges the administrative law judge's crediting of the opinion of Dr. Gaziano, that the large opacities seen on x-ray were a manifestation of complicated pneumoconiosis, over the contrary opinion of Dr. Wheeler, that the abnormalities seen on the x-ray were compatible with tuberculosis. However, employer's contentions are, in effect, merely a request that the Board reweigh the medical evidence, a function that the Board is not empowered to perform. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In weighing the relevant medical opinion evidence at Section 718.304(a), the administrative law judge reasonably exercised his discretion in according greater weight to Dr. Gaziano's opinion, finding that it was well-documented and well-reasoned, and better supported by its underlying documentation. Specifically, the administrative law judge compared the opinion of Drs. Gaziano, that complicated pneumoconiosis was present, with the contrary opinion of Dr. Wheeler, that the abnormalities seen were compatible with healed tuberculosis. Decision and Order on Remand at 7-9, 11-13; Director's Exhibit 12, Claimant's Exhibits 5, 7; Employer's Exhibit 13. Noting that Dr. Wheeler consistently characterized his findings in equivocal terms, *e.g.*, "compatible with TB," "compatible with granulomatous disease," "probably healed TB" and "most likely TB," the administrative law judge acted within his discretion in finding that Dr. Wheeler's equivocal identification of tuberculosis as the disease process that accounts for the markings that other physicians have identified as complicated pneumoconiosis, diminishes his credibility. Decision and Order on Remand at 12. Moreover, the administrative law judge rationally determined that the probative value of Dr. Wheeler's diagnosis of tuberculosis was undermined by the opinion of Dr. Gaziano, as supported by the opinion of Dr. Smith, where Dr. Gaziano explicitly discussed why tuberculosis, either healed or active, was not present, and the abnormalities seen were those of complicated pneumoconiosis. *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). Because the administrative law judge fully discussed the conflicting medical opinions in conjunction with the x-ray evidence, and provided valid bases for according determinative weight to the opinions of Drs. Gaziano and Smith, we affirm his finding that the weight of the newly submitted evidence was sufficient to establish the presence of complicated pneumoconiosis pursuant to Section 718.304(a).

Pursuant to Section 718.304(c), the administrative law judge considered the newly submitted CT scan evidence and the medical opinions of Drs. Rasmussen and Zaldivar.

The administrative law judge found that the record contained two CT scans read by Dr. Wheeler, which were taken on August 17, 2000 and on March 19, 2003, and a May 12, 2004 CT scan read by Dr. Scott. Decision and Order on Remand at 14; Employer's Exhibits 7, 8, 13. The administrative law judge, however, found that this evidence was not probative because employer, as the party submitting the CT scans, did not establish that the CT scans were "medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b); Decision and Order on Remand at 14-15. Regarding the medical opinion evidence, the administrative law judge found that only the opinions of Drs. Rasmussen and Zaldivar were relevant to the inquiry at Section 718.304(c), because they were based on evidence "other than x-rays." Decision and Order on Remand at 15. However, he found that those opinions were not sufficient to establish the presence of complicated pneumoconiosis, because Dr. Rasmussen did not adequately explain his diagnosis and Dr. Zaldivar did not address the issue of complicated pneumoconiosis. As a result, the administrative law judge found that complicated pneumoconiosis was not established by the "other evidence of record" pursuant to Section 718.304(c). *Id*. at 16.

Employer contends that the administrative law judge erred in finding that it failed to establish that the CT scans were medically acceptable and relevant. Specifically, employer contends that Dr. Wheeler testified to his expertise in the reading of CT scans, noting that CT scans are particularly helpful, since they avoid problems found on x-rays. Employer's Brief at 20. Likewise, employer contends that Dr. Scott testified that the serial reading of x-rays and CT scans are helpful and that CT scans have an advantage because they don't have overlying objects obscuring the view of the lungs. *Id*. These contentions are not meritorious.

Contrary to employer's contentions, the administrative law judge rationally found that employer failed to satisfy its burdening of establishing that the CT scan evidence in this case was medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits. 20 C.F.R. §718.107(b). Under Section 718.107(b), the party submitting the test or procedure must demonstrate that "the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." *Id*. Thus, when a party seeks to admit a CT scan, the issue for an administrative law judge to consider, on a case-by-case basis, is whether that party has met these requirements. Herein, the administrative law judge reasonably found: that employer has not submitted specific evidence to satisfy these requirements; and that Dr. Wheeler, in discussing the CT scan evidence, stated that they were non-standard in nature. Further, in light of our affirmance of the administrative law judge's exclusion of Dr. Scott's deposition testimony, we reject employer's contention, that Dr. Scott's testimony that the serial reading of x-rays and CT scans are helpful and that CT scans have an advantage because they don't have overlying objects obscuring the view of the lungs, was sufficient to establish that the CT scans are medically acceptable. Consequently, we affirm the

administrative law judge's finding that the CT scans are not probative of complicated pneumoconiosis in this case. 20 C.F.R. §718.107(b); *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007) (*en banc*)(McGranery & Hall, JJ., concurring and dissenting). In addition, we note that employer does not challenge the administrative law judge's finding that the medical opinion evidence is insufficient to establish the presence of complicated pneumoconiosis at Section 718.304(c). We, therefore, affirm the administrative law judge's finding that the CT scan and medical opinion evidence was insufficient to establish the presence of complicated pneumoconiosis at Section 718.304(c). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

We affirm, however, the administrative law judge's finding that the weight of the new evidence, as a whole, was sufficient to establish the presence of complicated pneumoconiosis at Section 718.304(a) and, was therefore, sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis. Contrary to employer's contention, the administrative law judge, in light of his extensive findings at Section 718.304(a) and his finding that the evidence at Section 718.304(c) was not probative, has provided an adequate basis for finding that the presence of complicated pneumoconiosis was established, as the x-ray evidence and pertinent medical opinions at Section 718.304(a) outweighed the "other evidence" at Section 718.304(c).[7] *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311; *Melnick*, 16 BLR at 1-33-34; Decision and Order on Remand at 16.

Accordingly, based on his determination that the newly submitted evidence established the presence of complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge properly found that claimant established that one of the applicable conditions of entitlement, *i.e.*, total respiratory disability due to pneumoconiosis, was established at Section 725.309(d). Decision and Order on Remand at 17. Moreover, on weighing the entire record, the administrative law judge found that claimant was entitled to benefits, as the evidence established pneumoconiosis arising out of coal mine employment and that claimant was totally disabled thereby. *Id*. Employer does not challenge these findings on appeal. Consequently, they are affirmed. *See Skrack*, 6 BLR at 1-711.

[7] The administrative law judge reiterated his prior finding that the presence of complicated pneumoconiosis could not be established at 20 C.F.R. §718.304(b), because there was no biopsy evidence in the record. Decision and Order on Remand at 14.

Accordingly, the administrative law judge's Decision and Order on Remand - Awarding Benefits is affirmed.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge