BRB Nos. 09-0864 BLA
and 09-0865 BLA

BARBARA ANN SHREWSBURY (Widow of and o/b/o WILEY BLAINE SHREWSBURY)	)	
Claimant-Respondent	)	
v.	)	
ITMANN COAL COMPANY/ CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 09/29/2010
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 Second Remand Granting Benefits of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Waseem A. Karim (Jackson Kelly PLLC), Lexington, Kentucky, for employer.

Rita Roppolo (M. Patricia Smith, Solicitor of Labor; Rae Ellen 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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Second Remand Granting Benefits (2005-BLA-05015 and 2005-BLA-05185) of Administrative Law Judge Pamela Lakes

Wood rendered on a miner's claim and a survivor's claim filed pursuant to the provisions of the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2006), *amended by* Pub. L. No. 111-148, §1556, 124 Stat. 119 (2010) (to be codified at 30 U.S.C. §§921(c)(4) and 932(*l*)) (the Act).[1] This case is before the Board for the third time.

In the most recent appeal, the Board affirmed in part, and vacated in part, the administrative law judge's findings, in both the miner's and the survivor's claims, that claimant established the existence of complicated pneumoconiosis and, thus, established invocation of the irrebuttable presumptions of total disability and death due to pneumoconiosis at 20 C.F.R. §718.304. *B.S.* [*Shrewsbury*] *v. Itmann Coal Co.*, BRB No. 08-0309 BLA (Jan. 29, 2009)(unpub.). Specifically, the Board affirmed, as unchallenged, the administrative law judge's finding, pursuant to 20 C.F.R. §718.304(a), that the analog x-ray evidence was in equipoise as to the source of the large opacities viewed on the miner's x-rays. *Shrewsbury*, 08-0309 BLA, slip op. at 5 n.7. The Board also affirmed her unchallenged findings, pursuant to 20 C.F.R. §718.304(c), that Dr. Hippensteel's opinion diagnosing no complicated pneumoconiosis was entitled to little, if any, weight, and that Dr. Shahan's computerized tomography (CT) scan reading neither supported nor undermined a finding of complicated pneumoconiosis. *Id.* The Board further affirmed the administrative law judge's determination to credit the opinion of Dr. Rasmussen, that the miner suffered from complicated pneumoconiosis. *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 8. The Board vacated, however, the administrative law judge's evaluation of the digital x-ray readings and medical treatment records, and her discrediting of the medical opinion of Dr. Crisalli in both claims, and that of Dr. Spagnolo, submitted only in the survivor's claim, pursuant to 20 C.F.R. §718.304(c). *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 6-9. Thus, the Board vacated the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c), and her finding that, when weighed together, the evidence relevant to 20 C.F.R. §718.304(a), (c) was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis.[2] Consequently, the

[1] By Order dated June 18, 2010, the Board provided the parties with the opportunity to address the impact on this case, if any, of Section 1556 of Public Law No. 111-148, which amended the Act with respect to the entitlement criteria for certain claims. Employer and the Director, Office of Workers' Compensation Programs, responded, and agree that the recent amendments to the Act, which became effective on March 23, 2010, do not apply to this case, as it involves a miner's claim and a survivor's claim filed before January 1, 2005.

[2] The administrative law judge properly found that the record does not contain any biopsy or autopsy evidence for consideration pursuant to 20 C.F.R. §718.304(b). Decision and Order at 13.

Board vacated the award of benefits in both claims, and remanded the case for further consideration.

On remand, the administrative law judge found that claimant established the existence of complicated pneumoconiosis and, thus, established invocation of the irrebuttable presumptions of total disability and death due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits in both the miner's and survivor's claims.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Specifically, employer asserts that the administrative law judge erred in weighing the digital x-ray, medical treatment, and medical opinion evidence pursuant to 20 C.F.R. §718.304(c). Employer further asserts that this case has reached the point of "administrative gridlock," necessitating reassignment to a different administrative law judge. Neither claimant, nor the Director, Office of Workers' Compensation Programs, has filed a response brief relevant to the merits of entitlement.

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).

The Miner's Claim

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that the miner was totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes a finding of entitlement. *Anderson v. Valley Camp of Utah, Inc*., 12 BLR 1-111, 1-112 (1989).

Under Section 411(c)(3) of the Act, 30 U.S.C. §923(c)(3), and its implementing regulation, 20 C.F.R. §718.304, there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter that would be classified as Category A, B, or C; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the

[3] The record indicates that the miner's coal mine employment was in West Virginia. Director's Exhibits 3, 43. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must consider all relevant evidence on this issue, *i.e.*, evidence that supports a finding of complicated pneumoconiosis, as well as evidence that does not support a finding of complicated pneumoconiosis, resolve the conflicts, and make a finding of fact. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991)(*en banc*).

Employer initially contends that, in evaluating the digital x-ray evidence under 20 C.F.R. §718.304(c), the administrative law judge erred in crediting the positive interpretations by the miner's treating physicians over the negative interpretations of Dr. Wheeler.[4] Employer's Brief at 8. Employer further contends that this error tainted the

[4] In the prior decision, the administrative law judge determined that, because the digital x-ray readings contained in the miner's treatment records were performed for diagnostic purposes, they were implicitly medically acceptable, despite the absence of ILO classifications. Decision and Order on Remand at 10. Conversely, the administrative law judge found that Dr. Wheeler's rereadings, which the physician acknowledged could not be performed in accordance with the ILO classification system, failed to satisfy the requirements of 20 C.F.R §718.107(b). Decision and Order on Remand at 10.

In vacating the administrative law judge's analysis of the digital x-ray evidence at 20 C.F.R. §718.304(c), the Board held that the administrative law judge failed to focus on the medical acceptability and relevance of digital x-ray technology as it pertains to the diagnosis of pneumoconiosis, rather than on the identity of the reader or the purpose for which the digital x-ray reading was performed. *B.S.* [*Shrewsbury*] *v. Itmann Coal Co.*, BRB No. 08-0309 BLA (Jan. 29, 2009)(unpub.), slip op. at 6. Therefore, the Board held that the administrative law judge's disparate treatment of the digital x-ray evidence did not comport with the requirements of the Administrative Procedure 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). *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 6. Relevant to both the miner's and survivor's claims, the Board instructed the administrative law judge to reconsider whether claimant's digital x-ray readings and Dr. Wheeler's rereadings are medically acceptable and relevant to establishing or refuting claimant's entitlement to benefits in accordance with 20 C.F.R. §718.107(b). *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 8-9. The Board further instructed that, after determining whether the digital x-ray evidence supports a finding of complicated

administrative law judge's determination to credit the diagnoses of complicated pneumoconiosis contained in the miner's medical treatment notes, which were based on the digital x-ray interpretations. Employer's Brief at 8. We disagree.

Contrary to employer's assertion, in considering the digital x-ray evidence on remand, the administrative law judge did not credit the interpretations of the miner's treating physicians over those of Dr. Wheeler. Rather, the administrative law judge emphasized that she did not rely on the digital x-ray interpretations, from either party, to support an award of benefits. Decision and Order on Second Remand at 3. The administrative law judge noted that she had previously found, pursuant to 20 C.F.R. §718.304(a), that the analog x-rays demonstrated the existence of large opacities that would satisfy the statutory and regulatory definition of complicated pneumoconiosis, but which were in equipoise as to the source of the large opacities. Decision and Order on Second Remand at 3. Moreover, this finding was affirmed by the Board. *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 5 n.7. Thus, the administrative law judge, on remand, explained that whether the digital x-ray evidence also showed such opacities was not relevant to, and did not help to resolve, the question before her, which was whether those opacities represented complicated pneumoconiosis. Decision and Order on Second Remand at 3.

Nor is there merit to employer's contention that the administrative law judge failed to properly consider the credibility, on remand, of the miner's treating physicians, to the extent their opinions were based on the digital x-rays. Employer's Brief at 8. The administrative law judge specifically acknowledged that the miner's treating physicians had relied, in part, on the positive digital x-ray interpretations in diagnosing complicated pneumoconiosis. Decision and Order on Second Remand at 4. Contrary to employer's argument, the administrative law judge explained that, because the miner's treating physicians based their diagnoses of complicated pneumoconiosis on a "barrage of evidence," including "analog x-rays, CT scans, physical examinations, and testing," she found no reason to discredit their opinions, as expressed in the treatment notes, simply because they had also considered digital x-rays.[5] Decisions and Order on Second

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pneumoconiosis, the administrative law judge had to reconsider, under 20 C.F.R. §718.304(c), the credibility of the diagnoses of complicated pneumoconiosis contained in the treatment records and on the miner's death certificate, to the extent that they were premised upon an x-ray reading. *Id.*

[5] Moreover, we reject employer's contention that the administrative law judge did not explain how the additional evidence relied upon by the miner's treating physicians helped them to determine that the miner suffered from complicated pneumoconiosis, rather than an inflammatory process as identified by Dr. Wheeler. Employer's Brief at 8.

Remand at 4. It is the province of the administrative law judge to evaluate the physicians' opinions. *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-174 (4th Cir. 2000). As the administrative law judge adequately explained her reason for finding that the treating physicians' partial reliance on digital x-ray evidence did not undermine their opinions, her determination is affirmed. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-336 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997). In addition, as the administrative law judge did not rely on the digital x-rays, either in isolation, or as part of the medical treatment notes, to find complicated pneumoconiosis established, any error by the administrative law judge in failing to discuss, as instructed by the Board, whether the parties had established the medical acceptability and relevancy of digital x-ray technology for the purpose of diagnosing complicated pneumoconiosis, is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984)(holding that error that does not affect the disposition of the case is harmless).

Employer next contends that, in weighing the medical opinions under 20 C.F.R. §718.304(c), the administrative law judge again erred in discrediting the opinion of Dr. Crisalli. Employer's Brief at 9. Dr. Crisalli examined the miner on May 13, 2003 and reviewed the miner's medical records. Dr. Crisalli concluded that the miner did not suffer from pneumoconiosis in any form. Director's Exhibit 31; Employer's Exhibits 2, 3, 8.

In her initial decision, the administrative law judge correctly found that Dr. Crisalli had referenced inadmissible evidence in his report and at his deposition,[6] and stated that these references would be stricken, "with the exception of the reference to Dr. Smith's reading, which bears on his credibility." Decision and Order at 18. In weighing Dr. Crisalli's opinion, the administrative law judge found that Dr. Crisalli's discussion of the x-ray evidence "undermine[d] his credibility":

In her initial decision, incorporated by reference, the administrative law judge noted that there was no evidence that the miner was ever treated for tuberculosis, histoplasmosis, sarcoidosis, or any form of granulomatous disease, and she noted that cultures taken during the miner's hospitalizations were negative. Decision and Order at 20; Decision and Order on Second Remand at 2.

[6] The administrative law judge appeared to be referring to the readings of the October 23, 2001 x-ray by Drs. Scott and Wheeler and all of the x-ray readings by Dr. Scatarige.

> Although one of the major bases for his opinion was the absence of a background of small rounded opacities on the x-rays, there is disagreement among the readers as to whether such opacities were visible on the x-rays. First, such opacities ("p") were found by Dr. Patel to coexistent [sic] with the primary irregular opacities ("t"). Second, the x-ray taken during Dr. Crisalli's examination of the Miner was interpreted by another dually qualified reader, Dr. Smith. Although that reading is not of record, Dr. Crisalli references it as showing "r/r, 1/0 changes involving the mid to upper lung zones," [sic] a large opacity type B and emphysema." (DX 31). As the standard x-ray interpretation form indicates, "r" opacities are small rounded opacities. Why was Dr. Smith's interpretation not accepted? Why was another reading sought? Dr. Crisalli indicated at his deposition that he relied upon interpretations by Drs. Scott and Wheeler because they required that any opacities found be representative of coal workers' pneumoconiosis. There is, however, nothing in the regulations that requires that the opacities be due to coal dust or coal workers' pneumoconiosis; any type of coal mine dust is sufficient, as is any type of pneumoconiosis caused by coal mine dust. In fact, Dr. Rasmussen indicated that the Miner's occupation running the continuous miner left him exposed to significant quantities of silicon dioxide as well as coal dust, both of which are liberated when the continuous miner cuts the rock seams. I find that Dr. Crisalli's actions in considering the x-ray evidence suggest bias on his part and therefore his credibility is undermined.

Id. at 20.

On appeal, the Board held that it was irrational for the administrative law judge to explicitly strike Dr. Crisalli's references to inadmissible evidence, but then consider Dr. Crisalli's reference to Dr. Smith's reading of the May 12, 2003 x-ray, which was not offered into evidence. *Shrewsbury v. Itmann Coal Co.*, BRB No. 06-0459 BLA (Jan. 30, 2007)(unpub.). As the administrative law judge, on remand, again discredited Dr. Crisalli's opinion based on the physician's rejection of Dr. Smith's positive x-ray reading for complicated pneumoconiosis, in the most recent appeal, the Board reiterated its prior holding:

> Because Dr. Smith's x-ray interpretation is not in the record, any statement that Dr. Crisalli made regarding his reasons for rejecting it has no significance. Although Dr. Crisalli's accompanying rationale for preferring the x-ray interpretations performed by Drs. Wheeler and Scott, which were admitted into the record, could be considered in assessing the credibility of Dr. Crisalli's opinion, the administrative law judge did not explicitly rely upon the latter in finding that Dr. Crisalli is biased.

Shrewsbury, BRB No. 08-0309 BLA, slip op. at 7 (footnote omitted). The Board instructed the administrative law judge to reconsider Dr. Crisalli's opinion, on remand, without reference to evidence that was not admitted into the record. *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 8.

In her Decision and Order on Second Remand, in keeping with the Board's instructions, the administrative law judge clarified that Dr. Crisalli's rationale for preferring the x-ray readings of Drs. Wheeler and Scott undermined the credibility of his opinion:

> [T]he selective reliance by Dr. Crisalli upon the interpretations by Drs. Scott and Wheeler because they required that any opacities found be representative of coal workers' pneumoconiosis (as opposed to pneumoconiosis in general, as envisioned by the statutory and regulatory scheme) reflected bias and affected Dr. Crisalli's credibility and the amount of weight to which his opinion is entitled. I now reach that conclusion without consideration of any evidence that was either not admitted into the record or stricken.

Decision and Order on Second Remand at 5.

Employer contends that the record does not support the administrative law judge's conclusion that Dr. Crisalli relied on the interpretations of Drs. Scott and Wheeler "because they required that any opacities found be representative of coal workers' pneumoconiosis." Employer's Brief at 9. Contrary to employer's assertion, during his deposition, Dr. Crisalli specifically acknowledged that he preferred the interpretations of Drs. Scott and Wheeler to interpretations of radiologists who, in contrast to the practice of Drs. Scott and Wheeler, simply complete the ILO x-ray classification form to reflect the pattern of lung changes they observe, as the form directs, regardless of whether the particular pattern could also be indicative of interstitial lung disease unrelated to coal dust exposure. Employer's Exhibit 8 at 26-27. Nor is there merit to employer's assertion that the administrative law judge failed to provide a valid basis for discrediting Dr. Crisalli's opinion. Employer's Brief at 10. As Dr. Crisalli noted, the ILO x-ray classification form utilized by the Department of Labor requires the reviewing radiologist to indicate whether the patient has any parenchymal or pleural abnormalities "consistent with pneumoconiosis," regardless of whether that pneumoconiosis is caused by coal dust exposure. Thus, while Dr. Crisalli's deposition testimony may not reflect actual bias, the administrative law judge permissibly concluded that Dr. Crisalli's stated preference for the x-ray interpretations of radiologists who additionally "consider the possibility of whether a patient has coal workers' pneumoconiosis" when completing the ILO x-ray classification form "affected Dr. Crisalli's credibility and the amount of weight to which

his opinion is entitled." *See Hicks*, 138 F.3d at 533, 21 BLR at 2-336; *Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-274 (4th Cir. 1997); Decision and Order on Second Remand at 5.

As employer raises no additional arguments regarding the administrative law judge's weighing of the evidence relevant to the miner's claim, in light of the foregoing, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c) and that, when weighed together, the evidence relevant to 20 C.F.R. §718.304(a), (c) is sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33.

The Survivor's Claim

To establish entitlement to survivor's benefits pursuant to 20 C.F.R. §718.205(c), claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.205(c); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85, 1-87-88 (1993). For survivors' claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(4). Failure to establish any one of these elements precludes entitlement. *Anderson*, 12 BLR at 1-112.

Relevant to the survivor's claim, employer asserts that the administrative law judge erred in discrediting the opinion of Dr. Spagnolo in weighing the medical opinions under 20 C.F.R. §718.304(c). We disagree.

In the last appeal, in addition to instructing the administrative law judge to reconsider the digital x-ray evidence and the other relevant evidence, as set forth above in the miner's claim, the Board additionally addressed the administrative law judge's consideration of Dr. Spagnolo's opinion under 20 C.F.R. §718.304(c) in the survivor's claim. Dr. Spagnolo reviewed the miner's medical records, including several x-ray interpretations, and concluded that the miner did not have pneumoconiosis in any form. Director's Exhibit 31; Employer's Exhibit 3. The Board noted that the administrative law judge had found that Dr. Spagnolo's opinion was entitled to little weight because he relied on Dr. Crisalli's opinion, which the administrative law judge had discredited, and further found that Dr. Spagnolo exhibited bias by indicating that he relied upon Dr.

Wheeler's negative x-ray reading due to his status as a "pre-eminent radiologist." Decision and Order on Remand at 18; Employer's Exhibit 3.

Addressing the administrative law judge's findings, the Board held that the administrative law judge did not adequately explain why Dr. Spagnolo's reference to Dr. Wheeler's credentials constituted an unfair or irrational preference for Dr. Wheeler's readings. The Board also noted that the administrative law judge did not apply the same standard in considering the opinion of Dr. Rasmussen, who similarly relied upon a single reading to the exclusion of the conflicting interpretations. *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 10. Thus, the Board vacated the administrative law judge's finding with respect to Dr. Spagnolo's opinion and instructed the administrative law judge to reconsider this opinion on remand when addressing the merits of entitlement in the survivor's claim. *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 10. The Board also instructed the administrative law judge to reconsider Dr. Spagnolo's opinion in light of her weighing of Dr. Crisalli's opinion on remand. *Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 11.

On remand, the administrative law judge initially determined that Dr. Rasmussen had not relied upon Dr. Patel's x-ray reading to the exclusion of, or in preference to, other evidence, as she previously found that Dr. Spagnolo had done. Decision and Order on Second Remand at 6. In so finding, the administrative law judge correctly noted that the Board had rejected employer's prior assertion that Dr. Rasmussen's opinion was based solely on Dr. Patel's x-ray interpretation, and had affirmed her determination to credit Dr. Rasmussen's diagnosis of complicated pneumoconiosis as "based upon 'multiple factors, including x-rays, the progression of the miner's respiratory problems, and the presence of an alveolar inflammatory process.'" Decision and Order on Second Remand at 6, *quoting Shrewsbury*, BRB No. 08-0309 BLA, slip op. at 7-8. Thus, there is no merit to employer's contention that the administrative law judge failed to reconsider the opinion of Dr. Rasmussen, as instructed by the Board. Employer's Brief at 14.

Reconsidering Dr. Spagnolo's opinion, the administrative law judge acknowledged that the physician's reference to Dr. Wheeler's radiological qualifications did not show bias, but found that Dr. Spagnolo's reliance on Dr. Crisalli's discredited opinion "somewhat undermine[s]" his conclusions. Decision and Order on Second Remand at 6. The administrative law judge additionally discredited Dr. Spagnolo's opinion because it was "inextricably intertwined with evidence that is not of record," namely, Dr. Wheeler's thoracic CT scan interpretation. Decision and Order on Second Remand at 7. A review of Dr. Spagnolo's December 1, 2004 medical report supports the administrative law judge's conclusion, as Dr. Spagnolo specifically stated that in determining that the miner did not suffer from complicated pneumoconiosis, he "placed the greatest weight on the chest x-ray or thoracic CT reports by Dr. Wheeler." Employer's Exhibit 3 at 3-4. Moreover, employer does not challenge this finding on

appeal. We, therefore, hold that the administrative law judge permissibly discredited Dr. Spagnolo's opinion based on his reliance on evidence that is not contained in the record. *See Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-241-242 (2007)(*en banc*); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108 (2006)(en banc)(McGranery and Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(en banc)(McGranery and Hall, JJ., concurring and dissenting); *Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Therefore, we decline to address employer's additional allegations of error regarding the administrative law judge's evaluation of Dr. Spagnolo's opinion. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382 n.4 (1983).

As employer raises no further arguments relevant to the survivor's claim, we affirm the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(c). We further affirm her finding that, when weighed together, the evidence relevant to 20 C.F.R. §718.304(a), (c) is sufficient to invoke the irrebuttable presumption that the miner's death was due to pneumoconiosis. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33.

Finally, employer asserts that this case has reached "administrative gridlock," warranting reassignment to a new administrative law judge. Employer's Brief at 15. In light of our determination to affirm the administrative law judge's award of benefits, we need not address employer's request for reassignment.

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

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge