BRB No. 08-0417 BLA

F.J.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 03/26/2009
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 Reconsideration - Award of Benefits of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Wes Addington (Appalachian Citizens Law Center, Inc.), Whitesburg, Kentucky, for claimant.

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

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Reconsideration – Award of Benefits (2005-BLA-5813) of Administrative Law Judge Edward Terhune Miller rendered on a request for modification of 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).[1] On September 19, 2007, the administrative law judge issued a Decision and

[1] Claimant filed his claim on February 4, 2003. Director's Exhibit 2. The district director issued a Proposed Decision and Order denying benefits on September 4, 2003,

Order Granting Modification and Denying Benefits, finding that the evidence supported the parties' stipulation that claimant worked for eighteen years as a miner and that claimant has pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2). Based upon the parties' stipulation to the existence of pneumoconiosis, the administrative law judge determined that claimant established a change in conditions pursuant to 20 C.F.R. §725.310. On the merits, the administrative law judge found that claimant established that his pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b) and that he suffers from a totally disabling pulmonary impairment pursuant to 20 C.F.R. §718.204(b)(2). The administrative law judge denied benefits, however, based upon his finding that the preponderance of the evidence did not establish that claimant's total disability was caused, in whole or in part, by his pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

On October 23, 2007, claimant filed a timely motion for reconsideration. The administrative law judge granted claimant's motion and determined that he erred in the characterization of the medical reports of record and did not consider some treatment records. The administrative law judge concluded that the opinion of Dr. Lenkey, that pneumoconiosis caused claimant's pulmonary disability, outweighed the contrary opinion of Dr. Fino. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding disability causation established pursuant to Section 718.204(c). Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.[2]

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finding that claimant did not establish any of the elements of entitlement. Director's Exhibit 24. On August 4, 2004, claimant requested time to file additional evidence. Director's Exhibit 27. The district director treated claimant's request as a request for modification pursuant to 20 C.F.R. §725.310. Director's Exhibit 28. After considering the new evidence, the district director issued a Proposed Decision and Order on February 25, 2005, granting modification and awarding benefits. Director's Exhibit 52. Employer contested the district director's findings and requested a hearing, which was held before the administrative law judge on February 8, 2006.

[2] We affirm, as unchallenged by the parties' on appeal, the administrative law judge's length of coal mine employment determination, his determination that claimant established the prerequisites for modification under 20 C.F.R. §725.310, and his findings that claimant established that his pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b) and that he is totally disabled under 20 C.F.R. §718.204(b)(2). *See Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

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).

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

Pursuant to Section 718.204(c), the administrative law judge considered the medical opinions of Drs. Oesterling, Altmeyer, Lenkey and Fino. Dr. Oesterling reviewed some of claimant's medical records and the tissue slides and biopsy report from the lung resection that was performed on January 2, 2004. Director's Exhibit 40; Employer's Exhibit 6. In a report dated October 13, 2004, Dr. Oesterling diagnosed micronodular and macular simple coal workers' pneumoconiosis and stated that "based solely on the changes identified in this biopsy specimen[,] this gentleman would not be totally disabled due to his mine dust induced disease." Director's Exhibit 40. Dr. Oesterling indicated that "[t]he sections did show another chronic pulmonary disease" and surmised that it was moderately severe panlobular emphysema related to claimant's smoking and advanced age. *Id*. Dr. Oesterling also indicated that because the September 30, 2003 CT scan and the November 3, 2003 PET scan showed areas of malignancy, the biopsy might not have identified the most significant disease process. *Id*. At a deposition conducted on January 4, 2006, Dr. Oesterling discussed the biopsy slides and reiterated the findings set forth in his report. Employer's Exhibit 6.

Dr. Altmeyer examined claimant on December 3, 2004 and obtained a chest x-ray, a blood gas study (BGS), a pulmonary function study (PFS), and an EKG. Director's Exhibit 48; Employer's Exhibit 7. Based upon this data and a review of the biopsy report from the January 2, 2004 procedure, Dr. Altmeyer diagnosed simple coal workers' pneumoconiosis. *Id*. Dr. Altmeyer also determined that claimant is suffering from a mild to moderate pulmonary impairment that would disable him from performing heavy manual labor if left untreated. *Id*. Regarding the cause of claimant's impairment, Dr. Altmeyer indicated that because the decline in claimant's FVC and FEV1 values between the PFS performed on March 28, 2003 and the study that he obtained on December 3,

[3] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit, as claimant was employed in the coal mining industry in Ohio. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*); Director's Exhibit 2.

2004, was so significant, claimant's respiratory disability could not be due to pneumoconiosis and must be due to the removal of part of his lung in January 2004. *Id*.

The record contains Dr. Lenkey's reports of his examinations of claimant on April 24, 2003 and March 25, 2004. Director's Exhibits 16, 27, 48. Based on chest x-rays, PFSs, BGSs and EKGs, Dr. Lenkey diagnosed coal workers' pneumoconiosis and coronary artery disease. *Id*. Dr. Lenkey stated that claimant has a twenty-percent impairment due to respiratory disease and that his "functional status is greatly impaired." Director's Exhibit 27. Dr. Lenkey attributed claimant's pulmonary disability to pneumoconiosis. *Id*.; Director's Exhibits 16, 48.

Dr. Fino examined claimant on April 28, 2005 and obtained a chest x-ray, a BGS, a PFS and an EKG. Employer's Exhibits 1, 5. Based on this data and a review of claimant's medical records, Dr. Fino diagnosed mild coal workers' pneumoconiosis and a totally disabling pulmonary impairment. *Id*. Dr. Fino stated that the pneumoconiosis revealed in the x-ray and biopsy evidence was too mild to cause or contribute to claimant's disability. *Id*. Dr. Fino further noted that the rapid onset of claimant's pulmonary impairment is not consistent with coal dust related illness. *Id*. Dr. Fino also indicated that the fact that objective signs of a respiratory or pulmonary impairment did not appear until approximately twenty years after claimant's coal dust exposure ended also militated against identifying pneumoconiosis as a cause of claimant's total disability. *Id*.

The administrative law judge considered this evidence under Section 718.204(c) and determined with respect to Dr. Oesterling's opinion:

> Dr. Oesterling opined, based solely on [a] review of the biopsy slides, that [claimant] would not be totally disabled due to coal mine dust induced disease. Dr. Oesterling based his opinion on objective biopsy evidence, but was limited to the biopsy slides and reports. Thus, Dr. Oesterling's opinion was based on limited documentation and has limited probative value.

Decision and Order on Reconsideration at 7. The administrative law judge found that Dr. Altmeyer's opinion was also of "limited probative value," as Dr. Altmeyer relied upon an inaccurate understanding of the FVC and FEV1 values claimant produced on the March 28, 2003 PFS obtained by Dr. Lenkey. *Id*.

Having discredited the opinions of Drs. Oesterling and Altmeyer, the administrative law judge indicated that "the determination of whether [c]laimant's pneumoconiosis caused his disability must be made on the basis of Drs. Fino's and Lenkey's opinions." Decision and Order on Reconsideration at 7. The administrative law judge noted that although both physicians were Board-certified pulmonologists, Dr.

Lenkey's opinion, that claimant's totally disabling pulmonary impairment is caused by pneumoconiosis, "may be accredited more weight than that of Dr. Fino," based upon his status as claimant's treating physician. *Id*., *citing* 20 C.F.R. §718.104(d). The administrative law judge determined that Dr. Lenkey's opinion is "well-documented and well-reasoned and is therefore accorded substantial probative weight." Decision and Order on Reconsideration at 8. In contrast, the administrative law judge found that Dr. Fino's opinion was of reduced probative value, stating:

> Dr. Fino's opinion is in contravention with [sic] the regulations because while he acknowledges that pneumoconiosis is a latent and progressive disease, he qualifies that acknowledgement with the statements that pneumoconiosis is progressive in only a very few cases, that the progression is slow in those few cases, and that pulmonary impairments which are manifested more than ten years since the claimant was last exposed to coal dust cannot be related to pneumoconiosis. The regulations contain no such qualifying statements. Instead, [20 C.F.R.] §718.201(c) specifically recognizes that pneumoconiosis is a latent and progressive disease which may not be detectable until after the claimant has ceased to be exposed to coal dust.

Id. (footnote omitted), *citing Wetherill v. Director, OWCP*, 5 BLR 1-248 (1982). The administrative law judge also found that Dr. Fino's determination that claimant's pulmonary impairment may have been caused by sarcoidosis, was inadequately documented. Decision and Order on Reconsideration at 8. The administrative law judge concluded, therefore, that Dr. Lenkey's opinion was sufficient to establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). *Id*.

Employer argues that the administrative law judge erred in finding that Dr. Oesterling's opinion, that pneumoconiosis is not a contributing cause of claimant's totally disabling pulmonary impairment, was of diminished probative value because it was limited to the biopsy slides and reports related to claimant's lung resection. Employer maintains that there is no provision in the regulations permitting an administrative law judge to discredit an opinion for this reason. Employer also states that the administrative law judge erred in neglecting to address the deposition testimony in which Dr. Oesterling "provided object[ive] references . . . why the changes seen on the biopsy slides were unlikely to cause any pulmonary disease or disorder." Employer's Brief at 18. Employer's contentions are without merit.

Under the Act and the implementing regulations, the administrative law judge, as trier-of-fact, is responsible for the *de novo* consideration of the medical opinion evidence and is granted broad discretion in determining the probative value of each opinion. *See* 33 U.S.C. 921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R.

§§725.351(b), 725.477; *Wolf Creek Collieries v. Director, OWCP* [*Stephens*], 298 F.3d 511, 522, 22 BLR 2-494, 2-512 (6th Cir. 2002); *Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*). In this case, the administrative law judge acted within his discretion in finding that although Dr. Oesterling's opinion, that claimant is not totally disabled due to a coal mine dust induced disease, was documented by the biopsy evidence, it was of limited probative value because it was based upon a review of only part of the objective evidence relevant to the etiology of claimant's totally disabling pulmonary impairment.[4] *See Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Hall v. Director, OWCP*, 8 BLR 1-193 (1985); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986); Decision and Order on Reconsideration at 7. We affirm, therefore, the administrative law judge's finding with respect to Dr. Oesterling's opinion.

Employer also argues that the administrative law judge erred in discrediting Dr. Altmeyer's opinion that claimant's January 2, 2004 lung resection caused his pulmonary disability. Employer acknowledges that Dr. Altmeyer transposed the predicted normal values of the PFS administered on March 28, 2003, with the actual results of the study, but asserts that this "typographical error" did not detract from the credibility of his opinion. Employer's Brief at 21. Employer maintains that because Dr. Lenkey, who administered the study, described the results as within normal limits, Dr. Altmeyer's determination that, in comparison, the study that he performed during his examination of claimant on December 3, 2004 showed a "marked reduction in lung function," is adequately documented. Director's Exhibit 48. Employer's arguments are without merit.

As indicated, Dr. Altmeyer cited the sharp decline in claimant's PFS values in support of his opinion that claimant's pulmonary impairment was caused by the resection of the right upper lobe of his lungs, rather than pneumoconiosis. Director's Exhibit 48; Employer's Exhibit 7. The administrative law judge rationally determined that Dr. Altmeyer's reliance on the predicted values from the March 28, 2003 PFS, which were higher than the results actually produced by claimant, detracted from the credibility of

[4] Because employer designated Dr. Oesterling's opinion as an affirmative biopsy report pursuant to 20 C.F.R. §725.414(a)(3)(i), the administrative law judge's omission of any reference to Dr. Oesterling's discussion of data other than that contained in the biopsy slides and report, i.e., claimant's blood gas study results, a CT scan, and a PET scan, does not constitute error. Employer's Evidence Summary Form dated November 30, 2005 at 6; *see Keener v. Peerless Eagle Coal Co.*, 23 BLR 1-229, 1-239-240 (2006) (*en banc*); *Brasher v. Pleasant View Mining Co.*, 23 BLR 1-141, 1-148 (2006); *Harris v. Old Ben Coal Co.*, 23 BLR 1-98, 1-108-109 (2006)(*en banc*)(McGranery & Hall, JJ., concurring and dissenting), *aff'd on recon.*, 24 BLR 1-13 (2007)(McGranery & Hall, J.J., concurring and dissenting); *see* 20 C.F.R. §725.414(a)(3)(i).

Dr. Altmeyer's conclusion that there was a "marked reduction in lung function" between Dr. Lenkey's examination of claimant on March 28, 2003 and his examination of claimant on December 3, 2004.[5] S*ee Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Clark*, 12 BLR at 1-157; Decision and Order on Reconsideration at 7; Director's Exhibit 48. We affirm, therefore, the administrative law judge's weighing of Dr. Altmeyer's opinion pursuant to Section 718.204(c).

Employer further contends that the administrative law judge erred in discrediting Dr. Fino's opinion because it is inconsistent with Section 718.201(c). Employer maintains that Dr. Fino's opinion "cannot be deemed 'hostile to the Act,'" because Dr. Fino acknowledged that pneumoconiosis can be latent and progressive and identified objective evidence that supports his determination that the onset of claimant's pulmonary impairment was too rapid to be attributable to pneumoconiosis. Employer's Brief at 9. Employer also argues that the administrative law judge erred in relying upon the Board's decision in *Wetherill*, as Dr. Fino did not opine that simple pneumoconiosis cannot be totally disabling. Employer's contentions are without merit. In his medical report, Dr. Fino stated:

> Of more importance [than the presence of only mild simple coal workers' pneumoconiosis on biopsy] is the fact that we know that this gentleman stopped working in the mines either in 1986 or 1994. In 2003, he had absolutely normal lung function and normal room air oxygenation. He has had a progressive worsening of his lung function from 2003 until the time I evaluated him in 2005 . . . . This very rapid progression of disease over time is not consistent with a coal dust related condition.

Employer's Exhibit 1. In response to a question from claimant's counsel regarding the significance of the number of years that had elapsed since claimant retired from coal mining, Dr. Fino stated at his deposition that "even if it's like ten years out, this is still way too rapid of a progression, way too long after he left the mines." Employer's Exhibit 5 at 27.

In light of Dr. Fino's statements, the administrative law judge permissibly questioned whether his opinion reflected a personal view of pneumoconiosis that was at odds with the position of the Department of Labor, expressed in Section 718.201(c), that coal dust may be both latent and progressive in nature. *See* 20 C.F.R. §718.201(c); *National Mining Ass'n v. Dep't of Labor,* 292 F.3d 849 (D.C. Cir. 2002) (NMA); *see also*

[5] The predicted FVC value reported on the March 28, 2003 pulmonary function study was 4.04 and the predicted FEV1 value was 2.86. Director's Exhibit 18. Claimant produced an FVC of 3.52 and an FEV1 of 2.57. *Id.*

65 Fed. Reg. at 79,937-79,945, 79,968-79,977; *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22 (2004)(Decision and Order on Reconsideration *en banc*); *Parsons v. Wolf Creek Collieries*, 23 BLR 1-29 (2004)(Decision and Order on Reconsideration *en banc*)(McGranery, J., concurring and dissenting). We affirm, therefore, his determination that Dr. Fino's opinion, that pneumoconiosis is not a contributing cause of claimant's totally disabling pulmonary impairment, is entitled to little weight.

Employer further contends that the administrative law judge erred in failing to discredit Dr. Lenkey's opinion on the ground that he relied upon the same impermissible premise as Dr. Fino. In support of this argument, employer cites Dr. Lenkey's statement that "as a rule of thumb," simple pneumoconiosis does not cause totally disabling respiratory or pulmonary impairments. Director's Exhibit 48 at 11. We reject employer's allegation of error. Even assuming that Dr. Lenkey's statement is in conflict with the Act, the administrative law judge stated correctly that, "Dr. Lenkey acknowledged that it is rare for simple pneumoconiosis to cause a totally disabling pulmonary condition, *but opined that [c]laimant's is one of those rare cases*." Decision and Order on Reconsideration at 7 (emphasis added). Because Dr. Lenkey did not actually render an opinion that was based on a premise antithetical to the Act, the administrative law judge was not required to discredit Dr. Lenkey's opinion for the reason identified by employer. *See Consolidation Coal Co. v. Kramer*, 305 F.3d 203, 22 BLR 2-467 (3d Cir. 2002); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *Searls v. Southern Ohio Coal Co.*, 11 BLR 1-161 (1988).

Employer also contends that the administrative law judge erred in failing to explain his decision to credit Dr. Lenkey's opinion other than by making a bare reference to his status as claimant's treating physician. This argument is without merit. In summarizing Dr. Lenkey's opinion, the administrative law judge noted that Dr. Lenkey is a Board-certified pulmonologist who began treating claimant for his pulmonary condition after he examined claimant on April 23, 2003 at the request of the Department of Labor. Decision and Order on Reconsideration at 3; Director's Exhibit 48 at 52. The administrative law judge further noted Dr. Lenkey testified at his deposition on November 22, 2004 that he had seen claimant approximately nine times in a fourteen month period. *Id*. In rendering his findings with respect to Dr. Lenkey's opinion, the administrative law judge indicated that "[t]his tribunal has considered the factors outlined in [Section] 718.104(d) and has found that Dr. Lenkey's opinion is well-reasoned and well-documented." Decision and Order on Reconsideration at 9. The administrative law judge also stated:

> Dr. Lenkey's opinion is based on and supported by objective testing, including the results of [c]laimant's January 2004 lung biopsy and February 19, 2004 pulmonary function test. Dr. Lenkey's opinion is well-

> documented and well-reasoned and is therefore accorded substantial probative weight.

Decision and Order on Reconsideration at 8. Based upon these statements, we hold that the administrative law judge has provided an adequate explanation of his decision to credit Dr. Lenkey's opinion. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989).

Finally, employer contends that the administrative law judge did not properly weigh the opinions of Drs. Fino and Parmar on the issue of whether claimant's lung biopsy supported a diagnosis of sarcoidosis. In weighing Dr. Fino's opinion under Section 718.204(c), the administrative law judge indicated that "Dr. Fino opined that [c]laimant's pulmonary disability must have been caused by an active inflammatory disease process, specifically sarcoidosis, and not pneumoconiosis." Decision and Order on Reconsideration at 8. In a pathology report describing his examination of the tissue removed during claimant's lung resection, Dr. Parmar, the hospital pathologist, indicated that the non-caseating granulomata he observed in claimant's lung tissue were consistent with silicosis.[6] Director's Exhibit 29. In contrast, Dr. Fino indicated that the presence of non-caseating granulomata is "classic in sarcoidosis," which is unrelated to coal dust exposure, and suggested that it could be the source of claimant's pulmonary impairment. Employer's Exhibits 1, 5. The administrative law judge determined, however, that Dr. Parmar's opinion was entitled to greater weight because, "[u]nlike Dr. Fino, Dr. Parmar examined the mass and the nodule, and is [B]oard-certified in anatomic pathology and clinical pathology." *Id*.

Employer argues that the administrative law judge erred in taking judicial notice of Dr. Parmar's qualifications and in failing to apply to Dr. Parmar's opinion the standard that he applied to Dr. Oesterling's opinion, i.e., that it was entitled to little weight because it was based solely on a review of the biopsy slides. Employer's allegations of error are without merit.

An administrative law judge may take judicial notice of a fact, by reference in the administrative law judge's decision, *see* 29 C.F.R. §18.45, if substantial prejudice will not result and the parties are given an adequate opportunity to show the contrary. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 139 (1990). Because the administrative law judge indicated that he obtained the information

[6] Caseation is defined as necrotic degeneration of bodily tissue into a cheese-like substance. *Webster's II New Riverside University Dictionary* 234 (1984).

concerning Dr. Parmar's qualifications from the website maintained by the American Board of Medical Specialties, employer was apprised of the source of the noticed fact. Decision and Order on Reconsideration at 9. Although employer first became aware of the administrative law judge's use of judicial notice in his Decision and Order on Reconsideration, employer does not assert that the administrative law judge mischaracterized Dr. Parmar's credentials. Accordingly, we affirm the administrative law judge's determination that Dr. Parmar is Board-certified in anatomic and clinical pathology. *See Maddaleni*, 14 BLR at 1-139.

We also reject employer's argument, that in light of his discrediting of Dr. Oesterling's opinion at Section 718.204(c) on the ground that he reviewed only the biopsy evidence, the administrative law judge was required to discredit Dr. Parmar's opinion. When weighing Dr. Parmar's opinion, the question of fact that the administrative law judge was attempting to resolve involved the proper classification of a process observed in the tissue removed from claimant's right lung, rather than the broader question of whether claimant is totally disabled due to pneumoconiosis. Thus, it was not improper for the administrative law judge to treat Dr. Parmar's opinion as well-documented, as Dr. Parmar set forth the information relevant to the resolution of this question of fact, i.e., his microscopic and macroscopic observations of claimant's lung tissue. Director's Exhibit 29; *see Stephens*, 298 F.3d at 522, 22 BLR at 2-512; *Groves*, 277 F.3d at 836, 22 BLR at 2-330; *Clark*, 12 BLR at 1-157. We affirm, therefore, the administrative law judge's determination that Dr. Parmar's opinion, that the non-caseating granulomas are consistent with silicosis, outweighed Dr. Fino's opinion.

Because we have determined that employer's allegations of error are without merit, we affirm the administrative law judge's finding that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c). *See Tennessee Consolidated Coal Co. v. Kirk*, 264 F.3d 602, 22 BLR 2-288 (6th Cir. 2001).

Accordingly, the administrative law judge's Decision and Order on Reconsideration – Award of 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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BETTY JEAN HALL
Administrative Appeals Judge