

BRB No. 08-0365 BLA

J.B.)	
)	
Claimant-Respondent)	
)	
v.)	
)	
C&R ENERGY, INCORPORATED)	DATE ISSUED: 02/27/2009
c/o A.T. MASSEY COAL COMPANY,)	
INCORPORATED)	
)	
Employer-Petitioner)	
)	
DIRECTOR, OFFICE OF WORKERS')	
COMPENSATION PROGRAMS, UNITED)	
STATES DEPARTMENT OF LABOR)	
)	
Party-in-Interest)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits on Remand of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

Ronald E. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Before: SMITH, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer, C&R Energy, Incorporated, and its self-insurer, A.T. Massey Coal Company, Incorporated (hereinafter, employer), appeal the Decision and Order Awarding Benefits on Remand (2003-BLA-5177) of Administrative Law Judge Thomas M. Burke 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 has been before the Board previously. In his original Decision and Order, the administrative law judge determined that employer is the responsible operator, credited claimant with 15.3 years of coal mine employment and adjudicated this subsequent claim pursuant to

the regulations contained in 20 C.F.R. Part 718.¹ The administrative law judge found that the newly submitted evidence established the presence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304 and therefore established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge further found that the evidence of record established the presence of complicated pneumoconiosis on the merits and thereby established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that the evidence established that claimant's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. Accordingly, benefits were awarded.

Pursuant to employer's appeal, the Board affirmed the administrative law judge's responsible operator determination, but vacated the administrative law judge's finding that the x-ray evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304(a) and remanded the case for further consideration of the x-ray evidence thereunder. [*J.B.*] v. *C&R Energy, Inc.*, BRB No. 05-0239 BLA (Nov. 30, 2005)(unpub.). In addition, the Board held that the administrative law judge erred in his consideration of the CT scan interpretations of Drs. Antoun and Hippensteel and the medical opinion of Dr. Forehand at 20 C.F.R. §718.304(c) and instructed the administrative law judge to reconsider this evidence on remand. *Id.* Employer's subsequent motion for reconsideration was denied. [*J.B.*] v. *C&R Energy, Inc.*, BRB No. 05-0239 BLA (Jan. 18, 2007) (Order on Reconsideration) (unpub.).

In his Decision and Order on Remand, the administrative law judge again found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 and that he established that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Accordingly, the administrative law judge awarded benefits.

Employer appeals, asserting that the administrative law judge erred in finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and erred in weighing the x-ray, CT scan and medical opinion

¹ Claimant filed his initial claim for black lung benefits on December 19, 1985. Director's Exhibit 1. This claim was denied by the district director on February 7, 1986, because the evidence did not establish any of the elements of entitlement. *Id.* Because claimant did not pursue this claim any further, the denial became final. Claimant filed the instant claim on May 3, 2001. Director's Exhibit 3.

evidence.² Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs, has declined to file a brief unless specifically requested to do so by the Board.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed.³ 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must demonstrate by a preponderance of the evidence that he suffers from pneumoconiosis, that his pneumoconiosis arose out of coal mine employment, that he is totally disabled by a respiratory or pulmonary impairment, and that his total disability is due to pneumoconiosis. 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); *Trent v. Director, OWCP*, 11 BLR 1-26, 1-27 (1987).

Additionally, when a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). In this case, because claimant's prior claim was denied for failure to establish any element of entitlement, he had to submit new evidence to prove at least one of the elements of entitlement in order to satisfy the requirements of 20 C.F.R. §725.309. *See White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004).

In the present case, the administrative law judge determined that claimant established a change in an applicable condition of entitlement by establishing invocation of the irrebuttable presumption of total disability due to pneumoconiosis. This

² For the purpose of preserving the issue for future appeal, A.T. Massey Coal Company, Incorporated, also contends that the administrative law judge erred in his responsible operator determination, and it has erroneously "been held to be the 'insurer'" of C&R Energy, Incorporated. Employer's Brief at 1 n.1, 5 n.3, 6 n.4.

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

presumption is found in Section 411(c)(3) of the Act, and is implemented by 20 C.F.R. §718.304, which provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by x-ray, yields one or more large opacities (greater than one centimeter in diameter) that would be classified in Category A, B, or C under the ILO classification system; (b) when diagnosed by biopsy or autopsy, yields massive lesions in the lung;⁴ or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c).

While 20 C.F.R. §718.304 provides an irrebuttable presumption that the miner is totally disabled due to pneumoconiosis, 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304(a)-(c), the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for invocation of the irrebuttable presumption. *Director, OWCP v. Eastern Coal Corp. [Scarbro]*, 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554(4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*). The administrative law judge must first determine whether the evidence in each category tends to establish the existence of complicated pneumoconiosis, and then must weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 has been established. See *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick at* 16 BLR 1-33-34. The United States Court of Appeals for the Fourth Circuit, has explained:

Evidence under one prong can diminish the probative force of evidence under another prong if the two forms of evidence conflict...if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows that the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256, 22 BLR at 2-101.

⁴ In this case, there was no biopsy or autopsy evidence in the record for consideration pursuant to 20 C.F.R. §718.304(b).

X-RAY EVIDENCE

On remand, pursuant to 20 C.F.R. §718.304(a), the administrative law judge considered sixteen interpretations of seven x-rays dated January 10, 1986, October 18, 2001, June 5, 2002, May 23, 2002, February 24, 2003, March 18, 2003, and May 19, 2003. While Dr. Dunic, a Board-certified radiologist, and Dr. Gaziano, a B reader, read the January 10, 1986 x-ray film as negative for pneumoconiosis, Director's Exhibit 1, the administrative law judge found that this x-ray was not probative of claimant's current condition. Decision and Order on Remand at 3. With respect to the remaining x-rays, Dr. Forehand, a B reader, found a large Category A opacity on the October 18, 2001 x-ray, Director's Exhibit 15, whereas Dr. Wheeler, dually qualified as a B reader and Board-certified radiologist, reread this x-ray as negative for pneumoconiosis, Employer's Exhibit 6. Dr. Cappiello, a dually qualified radiologist, found a large Category A opacity on the June 5, 2002 x-ray, Claimant's Exhibit 1, while Dr. Fino, a B reader, reread this x-ray as negative for pneumoconiosis, Employer's Exhibit 8. Dr. Fino also read the May 23, 2002 x-ray as negative for pneumoconiosis. Employer's Exhibit 2. Dr. Alexander, a dually qualified radiologist, found a large Category A opacity on the February 24, 2003 x-ray, while Drs. Fino and Hippensteel, B readers, reread this x-ray as negative for pneumoconiosis, Employer's Exhibits 3, 8. Additionally, Dr. Fino read the March 18, 2003 and May 19, 2003 x-rays as negative for pneumoconiosis. Employer's Exhibit 8. Dr. Hippensteel read the May 19, 2003 x-ray as negative for pneumoconiosis. Employer's Exhibit 3.

The administrative law judge found that:

The disagreement in this case centers over the nature of the mass in the upper right lobe. Dr. Fino and Dr. Hippensteel both found that the mass was due to infection or granulomatous disease . . . Dr. Wheeler referenced the mass but offered no opinion about its character other than to comment that many small calcified granulomata exist, and that no silicosis or [coal workers' pneumoconiosis] exist[s] on the x-ray. In contrast, the two Board-certified radiologists who diagnosed pneumoconiosis throughout the lungs, and who characterized the density in the right upper lung as pneumoconiosis[,] size A opacity[,] or consistent with the same, also reported finding granulomata throughout. As such they observed the granulomata, but they also observed the pneumoconiosis, and they interpreted the mass as opacities reflecting pneumoconiosis.

Decision and Order on Remand at 5. The administrative law judge credited the x-ray readings consistent with complicated pneumoconiosis of Drs. Cappiello, Alexander and

Forehand⁵ over the contrary readings of Drs. Wheeler, Fino and Hippensteel. *Id.* The administrative law judge relied on the radiological qualifications of Drs. Cappiello and Alexander, who found both simple and complicated pneumoconiosis, and the fact that these physicians, and Dr. Forehand, rendered essentially the same findings. *Id.* The administrative law judge noted that he applied a qualitative analysis based on the radiological qualifications of the physicians and indicated that while a majority of the readings were negative for pneumoconiosis, he would not base his determination on the numerical superiority of negative x-ray evidence. *Id.* at 4. In summary, the administrative law judge found that the weight of the x-ray evidence was positive for both simple and complicated pneumoconiosis and met the criteria to invoke the irrebuttable presumption pursuant to 20 C.F.R. §718.304(a). *Id.* at 5.

Employer argues that the administrative law judge failed to explain: his rejection of the uncontradicted negative x-ray evidence; his finding that the interpretations of Drs. Alexander and Cappiello outweigh Dr. Wheeler's interpretation, despite the fact that Dr. Wheeler is also a Board-certified radiologist and B reader; and his failure to determine that the consistent negative interpretations by Drs. Fino and Hippensteel, when combined with the negative reading by Dr. Wheeler, preclude a finding that the preponderance of the evidence establishes the presence of complicated pneumoconiosis. We reject employer's contentions.

Employer's suggestion that the administrative law judge should have accorded determinative weight to the readings of Drs. Fino, Hippensteel and Wheeler amounts to a request to reweigh the evidence, a function that the Board is not empowered to perform. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). Contrary to employer's arguments, the administrative law judge conducted both a qualitative and quantitative assessment of the x-ray evidence, permissibly relied on the most highly qualified readers, and explained why he found the interpretations of Drs. Alexander and Cappiello most persuasive. *Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001) (Decision and Order on Reconsideration); *see Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992); *Staton v. Norfolk & Western Ry. Co.*, 65 F.3d 55, 59, 19 BLR 2-271, 2-280 (6th Cir. 1995) ("administrative factfinders must not rely solely on the quantity of readings on one side or the other, 'without reference to a difference in the qualifications of the readers'"); *Woodward v. Director, OWCP*, 991 F.2d 314, 17 BLR 2-77 (6th Cir. 1994); *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Dixon v. North Camp Coal Co.*, 8 BLR 1-344 (1985); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); Decision and Order on Remand at 4-5; Director's Exhibits 1, 15; Claimant's Exhibits 1, 2; Employer's Exhibits 2, 4, 6, 8.

⁵ The administrative law judge's incorrect reference to Dr. "Foreman," rather than Dr. Forehand, in the decision appears to be a harmless typographical error. Decision and Order on Remand at 5.

Moreover, we reject employer's contention that "uncontradicted x-ray interpretations by Drs. Fino and Hippensteel . . . cannot properly be outweighed by evidence of other x-rays read by Drs. Alexander and Cappiello." Employer's Brief at 19 (emphasis in original). The administrative law judge was not required to consider the interpretations of each film independently, and then compare the number of films supporting a finding of complicated pneumoconiosis against the number of films weighing against such a diagnosis. *Hawker*, 22 BLR at 1-179. We therefore affirm, as supported by substantial evidence and in accordance with law, the administrative law judge's finding that claimant has established the presence of complicated pneumoconiosis pursuant to Section 718.304(a).

CT SCAN EVIDENCE

Pursuant to 20 C.F.R. §718.304(c), employer argues that Dr. Antoun's interpretation of the October 23, 2001 CT scan was "far too equivocal to support a diagnosis of either simple or complicated pneumoconiosis" and cannot refute the uncontradicted interpretations of the May 23, 2002 and May 19, 2003 CT scans by Drs. Hippensteel and Fino, which reflect the absence of pneumoconiosis. Employer's Brief at 22-24.

In its previous decision, the Board held that the administrative law judge erred in crediting Dr. Antoun's report "[s]ince the administrative law judge did not address the speculative nature of Dr. Antoun's October 23, 2001 CT scan interpretation." [*J.B.*] slip op. at 14. Dr. Antoun stated:

There are extensive calcified granulomata in the hilar and mediastinal region. Moderate diffuse interstitial lung thickening his (sic) present. There is an approximately 3 cm area of increased density in the lateral segment of the right upper lobe with neighboring calcified granulomata suggesting probable fibrotic change. No hilar or mediastinal mass or lymphadenopathy is seen. A small hiatal hernia may be present. The trachea and major bronchi are of normal caliber.

Director's Exhibit 16. In the section of his report labeled "IMPRESSION," Dr. Antoun further indicated:

Approximately 3 cm soft tissue density in the lateral segment of the right upper lobe is present. Considering the patient's history of being a miner, this density could represent fibrotic change, however, correlation with clinical presentation and follow up CT scan in six to eight weeks would be

recommended to rule out underlying infectious process and to assess stability.

Id.

On remand, the administrative law judge reconsidered Dr. Antoun's CT scan interpretation and noted that Dr. Antoun's "impression included the opinion that[,] considering the patient's history of being a miner, the density could represent fibrotic change[.]" Decision and Order on Remand at 6. The administrative law judge further acknowledged that Drs. Fino and Hippensteel, both pulmonologists, interpreted the CT scan evidence as indicating no evidence of coal worker's pneumoconiosis. *Id.* The administrative law judge found:

The CT scan evidence is not sufficient to establish the existence of complicated pneumoconiosis. However, it does not alter the finding of simple and complicated pneumoconiosis based on x-ray. Although Dr. Antoun's report is too equivocal to establish its existence, his report does support a finding that the upper right lobe lesion is consistent with pneumoconiosis as he found that it 'could represent fibrotic change' . . . Again, based on the qualification of Dr. Antoun as a radiologist, his reading is credited over those of Drs. Fino and Hippensteel . . . who are pulmonologists . . . Dr. Antoun's finding that the lesion is consistent with or compatible with complicated pneumoconiosis is credited over those physicians finding the opposite, and therefore the CT scan evidence does not alter the finding of complicated pneumoconiosis by x-ray.

Id.

We reject employer's contention that the administrative law judge erred in his consideration of the CT scan evidence. The administrative law judge correctly acknowledged that Dr. Antoun's CT report is insufficient to establish the existence of complicated pneumoconiosis. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100 (requiring an equivalency determination to establish complicated pneumoconiosis by means other than x-ray); Decision and Order on Remand at 6. However, the administrative law judge reasonably found that Dr. Antoun's report, which considered claimant's history as a miner and indicated that the upper right lobe lesion "could represent a fibrotic change," is consistent with pneumoconiosis. *Id.* The regulations describe "clinical pneumoconiosis" as "conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1). Thus, the administrative law judge reasonably concluded that Dr.

Antoun's interpretation is consistent with the definition of "clinical pneumoconiosis," although not sufficient to establish to disease.

In addition, the administrative law judge specifically explained the bases for the weight assigned to the conflicting evidence and acted within his discretion in according more weight to the CT scan reading by Dr. Antoun based on his superior radiological credentials. *See Chaffin v. Peter Cave Coal Co.*, 22 BLR 1-294, 1-302 (2003); *Worhach v. Director, OWCP*, 17 BLR 1-105, 1-108 (1993); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Trent*, 11 BLR 1-26; *Dixon v. North Camp Coal Co.*, 8 BLR 1-344, 1-345-46 (1985); *Sheckler v. Clinchfield Coal Co.*, 7 BLR 1-128 (1984). As substantial evidence supports the administrative law judge's findings, we affirm the administrative law judge's finding pursuant to 20 C.F.R. §718.304(c) that the CT scan evidence does not alter the finding of complicated pneumoconiosis by x-ray pursuant to 20 C.F.R. §718.304(a).

MEDICAL OPINION EVIDENCE

Employer also asserts that the administrative law judge erred in crediting the medical report of Dr. Forehand over the contrary opinions of Drs. Fino and Hippensteel, as Drs. Fino and Hippensteel are Board-certified pulmonary specialists who conducted complete examinations, reviewed other medical records and obtained more recent objective tests. *Id.* In his October 18, 2001 narrative report, Dr. Forehand diagnosed granulomatous disease related to an old infection and coal workers' pneumoconiosis related to coal dust exposure based on claimant's history, physical examination and chest x-ray.⁶ Director's Exhibit 11. In summarizing the results of the October 18, 2001 chest x-ray in his narrative report, Dr. Forehand noted that it demonstrated the existence of coal workers' pneumoconiosis. Director's Exhibit 11. In addition, in the impairment section of the report, Dr. Forehand stated that the "appearance of [the] chest x-ray indicates that significant lung injury has occurred." *Id.* Dr. Forehand further opined that coal workers' pneumoconiosis was the sole factor contributing to the lung injury. *Id.*

In his first decision, the administrative law judge stated that "Dr. Forehand diagnosed the presence of complicated coal workers' pneumoconiosis based on the miner's history, examination results, and chest x-ray study." 2004 Decision and Order at 10. The Board, in its 2005 Decision and Order, observed that "[a]lthough Dr. Forehand

⁶ In reading the October 18, 2001 x-ray, Dr. Forehand classified the profusion of the small opacities as 1/1 and the size of the large opacities as A. Director's Exhibit 15. Further, in a section for "other comments," Dr. Forehand identified "scattered partially calcified granulomata, partially calcified right hilar lymph nodes, 2x4 centimeter irregular density right upper peripheral zone." *Id.*

noted that his opinion is based, in part, on the October 18, 2001 x-ray, he did not then indicate in his narrative report that claimant suffers from a condition that is the equivalent to a Category A opacity on that x-ray.” [J.B.] slip op. at 13. The Board held that the administrative law judge’s reliance on Dr. Forehand’s opinion to establish the presence of complicated pneumoconiosis was erroneous since he did not explain why he found Dr. Forehand’s opinion supportive of such a finding. *Id* at 14. On remand, the administrative law judge acknowledged the Board’s holding and, upon further review of Drs. Forehand’s report, stated:

Dr. Forehand’s report referred to the x-ray in response to the question on degree of severity by answering, “appearance of chest x-ray indicates that significant lung injury has occurred. Claimant is unable to return to last coal mining job. Unable to work. Totally and permanently disabled.” In response to [the] question of the cause of impairment, Dr. Forehand answered, “coal workers’ pneumoconiosis is the sole factor contributing to lung injury.” Thus, it is clear that Dr. Forehand’s diagnosis of total and permanent disability due to pneumoconiosis was based on the chest x-ray he read as showing a size A opacity. As such, his diagnosis is equivalent to a size A opacity as required by [20 C.F.R.] §718.304(c) and *Scarbro*.

Decision and Order on Remand at 7; *see* Director’s Exhibits 11, 15.

Contrary to employer’s contention, the administrative law judge did not give greater weight to the opinion of Dr. Forehand than to the opinions of Drs. Fino and Hippensteel. Rather, the administrative law judge explained that he inferred from Dr. Forehand’s reference to his x-ray interpretation, that Dr. Forehand’s opinion supported a finding of complicated pneumoconiosis under the regulations and case law. Decision and Order on Remand at 7. The administrative law judge further acknowledged, however, that even if Dr. Forehand’s medical report was insufficient to establish the presence of complicated pneumoconiosis, the medical report evidence, as a whole, did not undermine his finding that the weight of the x-ray evidence was sufficient to establish complicated pneumoconiosis. *Id*. The administrative law judge concluded, therefore, that he would not alter his previous finding at 20 C.F.R. §718.304(a). *Id*.

The administrative law judge further reiterated that the medical reports of Drs. Fino and Hippensteel, which were based on their x-ray interpretations and CT scans, were accorded “less weight than the readings by the radiologists diagnosing pneumoconiosis, size A opacities.” *Id*. As the administrative law judge provided valid reasons for finding the opinions of Drs. Fino and Hippensteel less persuasive, their qualifications as pulmonologists did not require the administrative law judge to credit their discounted opinions. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th. Cir. 1998); *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76; *Fields v.*

Island Creek Coal Co., 10 BLR 1-19 (1987). Additionally, since the administrative law judge did not find that Dr. Forehand's opinion independently established complicated pneumoconiosis under 20 C.F.R. §718.304(c), but rather that his opinion was supportive of a finding of complicated pneumoconiosis, an equivalency determination was not required for Dr. Forehand's opinion to be found credible. *Cf. Scarbro*, 220 F.3d at 255, 22 BLR at 2-100 (requiring an equivalency determination to establish complicated pneumoconiosis by means other than x-ray). We therefore reject employer's arguments pursuant to 20 C.F.R. §718.304(c), and affirm the administrative law judge's finding that invocation of the irrebuttable presumption was established pursuant to 20 C.F.R. §718.304 and his finding that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309.

Lastly, we affirm as unchallenged on appeal the administrative law judge's finding that employer did not rebut the presumption, set forth in 20 C.F.R. §718.203(b), that claimant's complicated pneumoconiosis arose out of coal mine employment. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

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

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge