BRB No. 11-0871 BLA

ROY M. VEST	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL COMPANY	)	DATE ISSUED: 09/27/2012
	)	
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 – Award of Benefits of Edward Terhune Miller, Administrative Law Judge, and the Order on Reconsideration of William S. Colwell, Associate Chief Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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: SMITH, McGRANERY and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand – Award of Benefits of Administrative Law Judge Edward Terhune Miller and the Order on Reconsideration of Associate Chief Administrative Law Judge William S. Colwell (2003-BLA-5765), rendered on a miner's claim filed on May 16, 2001, 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 a second time. The relevant procedural history of this case is as follows. In a Decision and Order dated May 26, 2006, Judge Miller (the administrative law judge) credited claimant (hereinafter referred to as "the miner") with eighteen years of coal mine employment. The administrative law judge found that employer was the responsible operator, and determined that the evidence was sufficient to establish that the miner was totally disabled due to clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, 718.204(b)(2), (c).

Upon consideration of employer's appeal, the Board vacated the award of benefits. The Board held that the administrative law judge erred in rendering his responsible operator finding because he did not adequately address evidence in the record indicating that a financially capable coal mine operator more recently employed the miner for at least one year. *Vest v. Eastern Associated Coal Corp.*, BRB No. 06-0657 BLA, slip op. at 3-5 (May 23, 2007) (unpub.). The Board also held that the administrative law judge erred in striking CT scan evidence from the record, pursuant to 20 C.F.R. §718.107, which was relevant to whether the miner had complicated pneumoconiosis. *Id*. at 5-7. The Board directed the administrative law judge to reconsider whether the miner was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. *Id*. at 7. The Board also vacated the administrative law judge's findings at 20 C.F.R. §718.202(a)(1), (4), and directed him on remand to reconsider the x-ray and medical opinion evidence relevant to the existence of clinical pneumoconiosis and legal pneumoconiosis. *Id*. at 9-10.

On October 14, 2008, while the case was pending on remand, Attorney Frederick K. Muth, counsel for the miner, informed the administrative law judge: that the miner had died on May 8, 2006; that the miner's widow had remarried and had no further interest in pursing the miner's claim; and that he had no authority to act on behalf of the miner's estate. By Order dated October 22, 2008, the administrative law judge directed the parties to give notice and show cause why the miner's claim should not be dismissed. The Director, Office of Workers' Compensation Programs (the Director), responded, asserting that, pursuant to 20 C.F.R. §725.465, the miner's claim should not be dismissed, given the Director's interest in recovering interim payments paid by the Black Lung

[1] On March 23, 2010, amendments to the Black Lung Benefits Act, affecting claims filed after January 1, 2005, that were pending on or after March 23, 2010, were enacted. Based on the May 16, 2001 filing date of this subsequent claim, the amendments are not applicable.

Disability Trust Fund (Trust Fund), from either employer or the miner's estate. Employer did not respond to the Order.

On January 27, 2009, the administrative law judge issued a Decision and Order on Remand – Award of Benefits. The administrative law judge again found that employer was the responsible operator liable for benefits and admitted the CT scan evidence into the record, finding that the requirements of 20 C.F.R. §718.107(b) were satisfied. Considering the merits of the claim, the administrative law judge determined that the miner suffered from complicated pneumoconiosis and was entitled to 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 was sufficient to establish that the miner was totally disabled due to clinical and legal pneumoconiosis arising out of coal mine employment pursuant to 20 C.F.R. §§718.202(a), 718.203, 718.204(b)(2), (c).

On January 30, 2009, employer filed a Motion to Dismiss or Deny for Lack of Jurisdiction, asserting that the Director, on behalf of the Trust Fund, lacked standing to pursue the miner's claim. Employer also noted that the miner's surviving widow filed a survivor's claim on May 31, 2006, which was denied by Administrative Law Judge Jeffrey Tureck on November 3, 2008, because the evidence was insufficient to establish that the miner suffered from pneumoconiosis. Because the denial of the survivor's claim became final prior to the issuance of the remand decision in the miner's claim, employer argued that, based on the doctrine of collateral estoppel, the issue of the existence of pneumoconiosis could not be relitigated in the deceased miner's claim. In an Order issued on February 5, 2009, the administrative law judge denied employer's motion, citing as grounds for the denial the fact that he already issued a decision in the deceased miner's claim on January 27, 2009 and lacked jurisdiction to entertain employer's motion.

On February 27, 2009, employer filed a Motion for Reconsideration. The Director responded on July 22, 2011. In an Order on Reconsideration dated September 9, 2011, Judge Colwell advised the parties that the administrative law judge had retired. Judge Colwell rejected employer's argument that the Trust Fund lacked standing to pursue the miner's claim and its argument that collateral estoppel applied under the facts of the case. In addition, Judge Colwell rejected employer's argument that the evidence was insufficient to establish complicated pneumoconiosis at 20 C.F.R. §718.304. Accordingly, Judge Colwell denied the motion and found that the miner was entitled to benefits.

In this appeal, employer argues that the absence of a real party-in-interest and the doctrine of collateral estoppel compel a denial of the miner's claim. Employer asserts that it has been improperly identified as the responsible operator liable for benefits. Employer further argues that the administrative law judge erred in finding that the miner

had complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. The Director responds, asserting that he has standing to pursue the claim and that employer's collateral estoppel argument is untimely. Alternatively, the Director maintains that it would be unfair to apply the doctrine of collateral estoppel because the miner's widow had no financial incentive to pursue her survivor's claim, given that she remarried. The Director urges the Board to affirm employer's designation as the responsible operator and to also affirm, as unchallenged by employer, the administrative law judge's finding that the miner was totally disabled due to simple clinical pneumoconiosis pursuant to 20 C.F.R. §§718.202(a)(4), 718.203, 718.204(b)(2), (c). Employer has filed a reply brief, clarifying that it challenges the administrative law judge's finding that the miner suffered from pneumoconiosis in any form, simple or complicated.

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.[2] 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).

I. Standing

Employer contends that the administrative law judge erred in allowing the Director, on behalf of the Trust Fund, to pursue this claim, arguing that there was no longer a viable claim or right to which the Trust Fund could be subrogated after the miner died. We disagree. The regulations specifically provide that the Director is a party to all black lung claims; that the Secretary of Labor may, as appropriate, exercise subrogation rights in any case where benefit payments have been made by the Trust Fund; and that a claim in which a miner has been paid interim benefits from the Trust Fund cannot be dismissed, absent the Director's motion or written agreement. *See* 20 C.F.R. §§725.360(a), 725.465(d), 725.602(b); *Boggs v. Falcon Coal Co.*, 17 BLR 1-62 (1992). In the instant case, the miner received interim benefits from the Trust Fund, and the Director did not file a motion requesting dismissal of the claim or provide his written consent for such a dismissal. Rather, the Director exercised subrogation rights on behalf of the Secretary, and the administrative law judge properly decided the case on its merits. *Id*. We therefore reject employer's arguments.

[2] Because the record indicates that the miner's last coal mine employment was in West Virginia, we will apply the law 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); Director's Exhibit 3.

II. Responsible Operator

Employer argues that the administrative law judge erred in finding that it is the responsible operator liable for benefits in this case. Employer concedes that it employed the miner from 1980 to 1984, and therefore is a potentially liable operator.[3] Employer asserts, however, that the miner was employed by at least two other employers, Challenger Mining (Challenger) from 1984 to May 1986 and Justin Construction Company (Justin) in 1996 and 1997, for more than one year after his employment with employer ended.

The Board instructed the administrative law judge on remand to address all relevant evidence, including testimony by the miner, regarding whether a more recent, financially capable, employer employed the miner for at least one year. *Vest*, BRB No. 06-0657 BLA, slip op. at 3-6. The Board specifically noted:

> [The miner] testified that he believed he had worked for Challenger at least one year, although he was not sure whether he started working for Challenger in October 1984, or October 1985, or whether his employment for Challenger was continuous. Director's Exhibit 34 at 11-17. [The miner] testified that he worked for Justin "right at a year" from March or April 1996 until February or March, 1997. Director's Exhibit 34 at 38.

Id. at 4 n. 3.

On remand, the administrative law judge considered whether the Director failed to name the most recent employer for whom the miner worked for one year. Decision and Order on Remand at 6. The administrative law judge noted that on the miner's work history form, the miner indicated that he worked for Justin from 1994 to 1996, "but with no monthly designation for starting and ending dates." *Id*.; *see* Director's Exhibit 3. The administrative law judge summarized the miner's deposition testimony of January 8, 2002 and his hearing testimony of January 12, 2005, and concluded that it was "too vague and indefinite to establish definitively [the miner's] starting and ending dates with Justin."[4] Decision and Order on Remand at 7. The administrative law judge also

[3] If a miner worked for more than one operator who meets all the requirements of a potentially liable operator, then the operator for whom the miner worked most recently will be named the responsible operator. 20 C.F.R. §725.495(a)(2)(i).

[4] The administrative law judge summarized the miner's hearing testimony, that he could not remember the exact dates he worked for Justin but that it was "right close to a year." Hearing Transcript at 19; *see* Decision and Order on Remand at 7. The miner also stated that he was "not sure" if he worked for Justin for at least one year. *Id.*

considered the miner's itemized statement of earnings from the Social Security Administration (SSA) and found that he had yearly wages with Justin in 1996, in the amount of $34,780.82, and in 1997, in the amount of $7,008.52. *Id*.; *see* Director's Exhibit 5. Relying on the yearly wage base from "Exhibit 609 of the *Office of Workers' Compensation Programs Coal Mine (BLBA) Procedure Manual, Wage Base History*," the administrative law judge found that the SSA records do not establish that the miner worked for Justin for a full calendar year. Decision and Order on Remand at 7.

With respect to Challenger, the administrative law judge found that the miner's work history form indicates employment dates from October 1984 to May 1986. Decision and Order on Remand at 8; Director's Exhibit 3. The administrative law judge noted that, while the miner testified in his deposition that he worked "a little over one year" with Challenger, the miner was uncertain about whether the work was continuous. *Id*. The administrative law judge found that SSA records "do not corroborate [the miner's] testimony," as they showed "no earnings from Challenger in either 1984 or 1985, and only $2,000.00 in 1986." Decision and Order on Remand at 8; *see* Director's Exhibit 5. The administrative law judge also noted that, according to Exhibit 609, "the average annual wages for a miner for these years was [] $37,800, $39,600, and $42,000, respectively." Decision and Order on Remand at 8. The administrative law judge, therefore, found that the record evidence was insufficient to establish that the miner worked for Challenger for at least one year subsequent to his work for employer. Thus, based on his consideration of all the evidence, the administrative law judge determined that, because the evidence does not establish a more recent and financially capable employer that employed claimant for at least one year pursuant to 20 C.F.R. §725.495(c), employer is the responsible operator liable for benefits. *Id*.

Employer argues on appeal that the administrative law judge's findings are irrational. We disagree. An administrative law judge is granted broad discretion in evaluating the credibility of the evidence of record, including witness testimony. *See Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Kuchawara v. Director, OWCP*, 7 BLR 1-167 (1984). The administrative law judge permissibly found that the miner's testimony was too vague and indefinite to support a finding that the miner worked for Justin for at least one year. Decision and Order on Remand at 7-8; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-155 (1989) (en banc). We also affirm the administrative law judge's reliance on the SSA records to conclude that the miner did not have one year of coal mine employment with either Justin or Challenger. *See Mills v. Director, OWCP*, 348 F.3d 133, 23 BLR 2-12 (6th Cir. 2003) (crediting of SSA records over claimant's testimony, where claimant's memory was unreliable, is permissible); *accord Preston v. Director, OWCP*, 6 BLR 1-1229, 1-1232 (1984); *Tackett v. Director, OWCP*, 6 BLR 1-839, 1-841 (1984).

Additionally, although employer alleges that the miner's testimony establishes that he worked for "Chris Cline Construction (Chris Cline)," a successor operator to Justin, employer does not cite to specific record evidence to support its allegation. We agree with the Director that claimant has provided consistent testimony that he last worked for Justin, owned by Chris Cline, and not a separate entity named "Chris Cline Construction."[5] Director's Letter Brief at 6; Hearing Transcript at 11, 18-19; Director's Exhibit 41. Thus, we reject employer's arguments and affirm the administrative law judge's finding that employer is the responsible operator.

III. Collateral Estoppel

We also reject employer's argument that the doctrine of collateral estoppel compels the denial of the miner's claim. Collateral estoppel forecloses "the relitigation of issues of fact or law that are identical to issues which have been actually determined and necessarily decided in prior litigation in which the party against whom [issue preclusion] is asserted had a full and fair opportunity to litigate." *See Ramsay v. INS*, 14 F.3d 206 (4th Cir. 1994); *Virginia Hosp. Ass'n v. Baliles*, 830 F.2d 1308 (4th Cir. 1987). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that there are five requirements that must be satisfied in order for collateral estoppel to apply: (1) the issue sought to be precluded is identical to the one previously litigated; (2) the issue was actually determined in the prior proceeding; (3) the issue was a critical and necessary part of the judgment in the prior proceeding; (4) the prior judgment is final and valid; and (5) the party against whom estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum. *Collins v. Pond Creek Mining Co*., 468 F.3d 213, 217, 23 BLR 2-393, 2-401 (4th Cir. 2006).

In this case, the miner is the party against whom the doctrine is being asserted, but he did not have a full and fair opportunity to litigate the issue of pneumoconiosis before Judge Tureck, as he was deceased when the survivor's claim was filed. Thus, we

[5] The Director, Office of Workers' Compensation Programs (the Director), notes that when claimant was asked to identify his last employer in the coal mine industry, his reply was recorded in the hearing transcript as "Chris Cline, - - Construction." Director's Letter Brief at 6, *quoting* Hearing Transcript at 11. The Director maintains that "the court reporter left a blank in hearing transcript for the name of the company for which the miner worked," which should have been recorded as Justin Construction. *Id*.

conclude that employer cannot meet the fifth prong of *Collins*. We therefore hold that collateral estoppel is not applicable under the facts of this case.[6]

IV. Complicated Pneumoconiosis

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is 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, 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 invoke the irrebuttable presumption found at 20 C.F.R. §718.304. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflicts, and make a finding of fact. *See Director, OWCP v. Eastern Coal Corp.* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991) (en banc); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979).

In this case, employer argues that the administrative law judge erred in finding the existence of complicated pneumoconiosis established, based solely on the medical opinion evidence. Employer, however, mischaracterizes the administrative law judge's analysis and his conclusions with respect to the evidence. The administrative law judge considered six readings of three x-rays dated January 9, 2002, January 16, 2002 and September 27, 2002.[7] The administrative law judge assigned greatest weight to the

[6] Based on our holding, it unnecessary to address the Director's argument that employer's collateral estoppel argument was untimely raised before the administrative law judge.

[7] The January 9, 2002 x-ray was read as negative for pneumoconiosis by Dr. Gayler, dually qualified as a Board-certified radiologist and B reader. Employer's Exhibit 1. Dr. Gayler identified a "density" in the right upper lung. *Id*. The January 16, 2002 x-ray was read as positive for simple and complicated pneumoconiosis, 1/1, q/s, Category A, by Dr. Forehand, a B reader, but as negative for pneumoconiosis by Dr. Wheeler, a dually qualified radiologist. Director's Exhibit 15; Employer's Exhibit 4. Dr.

readings by the dually qualified Board-certified radiologists and B readers and found that, since there were more negative readings by dually qualified radiologists, "[c]laimant has not prove[n] the existence of complicated coal workers' pneumoconiosis by a preponderance of the conflicting x-ray evidence" pursuant to 20 C.F.R. §718.304(a). Decision and Order on Remand at 12-13. The administrative law judge noted that there is no autopsy or biopsy evidence pursuant to 20 C.F.R. 718.304(b).

In accordance with the Board's remand instructions, however, the administrative law judge also considered the CT scan evidence, which showed an eight centimeter mass in the posterior right upper lobe and a six centimeter mass in the posterior left upper lobe.[8] Decision and Order on Remand at 21. The administrative law judge concluded that these abnormalities were discernable on x-ray and CT scan, and that they substantially exceeded the requirement that an opacity be larger than one centimeter in diameter pursuant to 20 C.F.R. §718.304. *Id*. In addressing the etiology of the masses, the administrative law judge noted that while Dr. Wheeler "categorically rejected the possibilities that the masses and other abnormalities were attributable to coal workers' pneumoconiosis," Dr. Wheeler "was far less definite regarding an affirmative diagnosis of the [m]iner's pulmonary disease." *Id*. The administrative law judge determined that Dr. Wheeler's opinion, that the masses could be only tuberculosis or granulomatous disease, was unpersuasive, since there was evidence in the record indicating that the miner was never treated for tuberculosis, that he "had not exhibited symptoms of the

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Wheeler identified the presence of moderate coarse fibrosis in the right upper lung and lower right apex along with pleural fibrosis near the scapula compatible with tuberculosis or granulomatous disease. Employer's Exhibit 4. The September 27, 2002 x-ray was read as positive for simple and complicated pneumoconiosis, 2/2, p/p, Category A, by Dr. Cappiello, a dually qualified radiologist, but as negative for pneumoconiosis by Dr. Scatarige, also a dually qualified radiologist. Claimant's Exhibit 1; Employer's Exhibit 3. Dr. Scatarige identified bilateral "infiltrates/fibrosis," and favored a diagnosis of tuberculosis. Employer's Exhibit 3. Dr. Robinette, a B reader, also read the September 27, 2002 x-ray as positive for simple and complicated pneumoconiosis, 2/2, q/t, Category C. Director's Exhibit 36.

[8] Dr. Cappiello interpreted a June 5, 2002 CT scan as showing complicated pneumoconiosis. Director's Exhibit 36. Dr. Wheeler interpreted CT scans taken on October 8, 1998, April 4, 2002 and September 9, 2004. Employer's Exhibits 6, 7. He identified an irregular 6 x 2.5 centimeter mass in the right upper lung and a 3.5 centimeter mass in left upper lung, which he opined were compatible with conglomerate tuberculosis, and not pneumoconiosis. *Id*.

disease, that a bronchoscopy or related biopsy had been negative for cancer or tuberculosis, and that tests for tuberculosis had been negative." *Id*.

Pursuant to 20 C.F.R. §718.304(c), the administrative law judge found that the opinions of Drs. Forehand and Robinette diagnosing complicated pneumoconiosis were reasoned and documented.[9] Decision and Order on Remand at 23. Thus, taking into consideration all of the record evidence, the administrative law judge concluded that the miner had complicated pneumoconiosis and was entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304.

We reject employer's assertion that the administrative law judge erred in crediting the diagnoses of complicated pneumoconiosis by Drs. Forehand and Robinette.[10] The administrative law judge permissibly relied on Dr. Forehand's opinion insofar as he examined the miner and identified a large opacity on claimant's chest x-ray, which was confirmed by the CT scan evidence. Decision and Order on Remand at 15; *see Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 533, 21 BLR 2-323, 2-335 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge further explained that Dr. Robinette's opinion is credible because it "was based on a variety of explicitly identified clinical evidence *in addition* to x-ray and CT scan evidence[,]" which the administrative law judge described as follows:

> Dr. Robinette recorded an impression that [c]laimant has complicated pneumoconiosis with underlying progressive massive fibrosis, very severe airflow obstruction secondary to the pneumoconiosis, and chronic bronchitis. *He observed that biopsies after a bronchoscopy by Dr. Patel were not diagnostic of tuberculosis or malignancy*. He took cognizance of Dr. Forehand's opinion "that [the miner] had evidence of coal workers' pneumoconiosis based on radiographic abnormalities *and had insufficient*

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[9] The administrative law judge correctly observed that the Board previously affirmed his rejection of Dr. Zaldivar's opinion, that the miner does not have complicated pneumoconiosis, based on Dr. Zaldivar's consideration of evidence outside of the record and because Dr. Zaldivar's opinion is "internally inconsistent." Decision and Order on Remand at 15; *see Vest v. Eastern Associated Coal Corp.*, BRB No. 06-0657 BLA, slip op. at 7-8 n.10 (May 23, 2007) (unpub.).

[10] The Board instructed the administrative law judge on remand to consider the extent to which Drs. Forehand and Robinette diagnosed pneumoconiosis based, in part, on x-ray interpretations that were re-read as negative by more qualified physicians. *Vest*, BRB No. 06-0657 BLA, slip op. at 10.

> *residual ventilatory capacity* to perform the duties of an underground coal mine and was totally disabled from working." Dr. Robinette recorded that [c]laimant's shortness of breath had progressed to such a severity that he was unable to work after 1997.

Decision and Order on Remand at 18 (emphasis added), *quoting* Director's Exhibit 36.

Because the administrative law judge considered all of the evidence in determining whether the miner had complicated pneumoconiosis, and he permissibly rejected Dr. Wheeler's opinion attributing the miner's masses to alternate conditions that are unsubstantiated in the record, we affirm the administrative law judge's finding at 20 C.F.R. §718.304, as it is supported by substantial evidence. *Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 24 BLR 2-269 (4th Cir. 2010); *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Underwood v. Elkay Mining, Inc.*, 105 F.3d 946, 949, 21 BLR 2-23, 2-28 (4th Cir. 1997). Further, because it is unchallenged on appeal, we affirm the administrative law judge's finding that the miner's complicated pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). We, therefore, affirm the award of benefits in this claim.

Accordingly, the administrative law judge's Decision and Order on Remand – Award of Benefits and Judge Colwell's Order on Reconsideration are affirmed.

SO ORDERED.

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ROY P. SMITH
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge