

BRB Nos. 05-0248 BLA  
and 05-0248 BLA-A

IRA E. HAGERMAN	)	
	)	
Claimant-Petitioner	)	
Cross-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 12/20/2005
	)	
Employer-Respondent	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS’ COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Cross-Petitioner	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order and Decision and Order on Reconsideration of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Vincent J. Carroll, Richlands, Virginia, for claimant.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Rita Roppolo (Howard M. Radzely, Solicitor of Labor; 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, HALL and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals and the Director, Office of Workers' Compensations Programs (the Director), cross-appeals the Decision and Order (03-BLA-0209) and Decision and Order on Reconsideration (03-BLA-0209) of Administrative Law Judge Edward Terhune Miller denying benefits 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).<sup>1</sup> This case has a protracted and complicated procedural history. Claimant initially filed a claim for benefits with the Social Security Administration.<sup>2</sup> Director's Exhibit 26. Claimant also filed a claim with the Department of Labor (DOL) on December 29, 1981. Director's Exhibit 1. In 1983, the DOL made an initial determination that claimant was entitled to benefits. Director's Exhibit 4 (BLO).<sup>3</sup> Consequently, the Black Lung Disability Trust Fund began to make payments to claimant on a temporary basis until the claim was decided. Director's Exhibit 5 (BLO).

In a Decision and Order dated January 11, 1990, Administrative Law Judge Victor Chao denied benefits, Director's Exhibit 6 (BLO), a determination that was subsequently affirmed by the Board. *See Hagerman v. Consolidation Coal Co.*, BRB No. 90-0378 BLA (Oct. 28, 1991) (unpublished). As a result, the DOL initiated proceedings to recover the overpayment of benefits. Director's Exhibit 92.

Claimant, however, filed a request for modification of his denied claim for benefits. Director's Exhibit 85. In a Decision and Order dated February 21, 1997, Administrative Law Judge Samuel J. Smith denied benefits, Director's Exhibit 127, a determination that was ultimately affirmed by the Board. *See Hagerman v. Consolidation Coal Co.*, BRB No. 97-0784 BLA (Mar. 20, 1998) (unpublished).

Claimant, however, continued to pursue his claim, filing a second motion for modification. Director's Exhibit 134. In a Decision and Order dated January 17, 2001,

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<sup>1</sup>The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

<sup>2</sup>Although the actual Social Security Administration (SSA) claim form is not contained in the record, the record reveals that the SSA denied claimant's SSA claim on July 30, 1973 and February 22, 1974. *See* Director's Exhibit 26.

<sup>3</sup>Copies of documents associated with claimant's overpayment case are included in Administrative Law Judge's Exhibit 1. They are referred to by their exhibit numbers in the overpayment case (04-BLO-0003) and have been deemed to be part of the record. *See* Decision and Order at 2 n.2.

Administrative Law Judge Linda S. Chapman found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis set forth at 20 C.F.R. §718.304. Director's Exhibit 178. Consequently, Judge Chapman awarded benefits as of May 1998, the month during which complicated pneumoconiosis was first diagnosed. *Id.* By Decision and Order dated February 6, 2002, the Board affirmed Judge Chapman's award of benefits. *Hagerman v. Consolidation Coal Co.*, BRB No. 01-0454 BLA (Feb. 6, 2002) (unpublished).

Despite the award of benefits, the DOL continued to seek recovery of the overpayment that had been paid to claimant during a period of time during which he was found not entitled to benefits. *See* Director's Exhibit 31 (BLO). By letter dated January 22, 2003, the district director informed claimant that he was not entitled to a waiver of recovery of the overpayment. *Id.* The district director, however, informed claimant that he had the right to request a formal hearing. *Id.*

In a letter dated January 24, 2003, claimant's counsel, Vincent J. Carroll, informed the district director that he had agreed to represent claimant in the matter of the alleged overpayment. Director's Exhibit 32 (BLO). Claimant's counsel requested "time to pursue some research as it pertain[ed] to [claimant's] waiver." *Id.* In a letter dated February 12, 2003, claimant's counsel noted that claimant had received a letter requesting the full amount of the overpayment within thirty days. Director's Exhibit 33 (BLO). Claimant's counsel requested "reconsideration, based on the time needed to research [claimant's] file." *Id.*

In a letter dated February 19, 2003, a district director, Charles W. Rattigan, responded to claimant's January 24, 2003 letter. Director's Exhibit 34 (BLO). The district director stated:

Regarding your request for a time extension please submit [claimant's] completed OWCP-20 along with financial documentation supporting the alleged expenses on or before March 7, 2003. In the event the requested information is not received by the date further recovery actions will commence as outlined in our January 22, 2003 letter.

Director's Exhibit 34 (BLO).

In a February 28, 2003 letter, claimant responded to Mr. Rattigan, stating:

By this letter I am requesting a hearing following your denial of February 19, 2003. We believe [claimant] was disabled during the time of his alleged overpayment, and that the decision to reclaim that money is

based on a mistake in fact. Therefore, we request a hearing before an Administrative Law Judge.

Director's Exhibit 194.

Rather than receiving a response from Mr. Rattigan, claimant received a response from a different district director, Beverly Pauley. Director's Exhibit 195. By letter dated April 17, 2003, Ms. Pauley informed claimant that the DOL had received correspondence dated February 12, 2003 and February 28, 2003 regarding his black lung claim's date of entitlement. *Id.* Ms. Pauley informed claimant that his correspondence was considered to be a request for modification of the prior decision. *Id.* Ms. Pauley further informed claimant that if he did not submit evidence or a request for additional time within thirty days, his claim would be referred to the Office of Administrative Law Judges for a decision on his modification request. *Id.*

In a May 23, 2003 letter, the DOL advised claimant:

Since you did not submit any additional evidence in the time period allowed, or indicate an intention to submit additional evidence, we can only interpret your request for modification as an [sic] contention that the previous decision from the Benefits Review Board was based on a mistake in a determination of fact. Accordingly, your claim must be returned to the Office of Administrative Law Judges for adjudication.

Shortly, we will refer your claim to the Office of Administrative Law Judges for a decision. That office will notify you of their decision in your claim.

Director's Exhibit 196.

Claimant's case was forward to the Office of Administrative Law Judges. Director's Exhibit 197. The district director's list of contested issues identified two contested issues: (1) Modification (whether the evidence established a change in conditions and/or a mistake was made in the determination of any fact in the prior denial pursuant to 20 C.F.R. §725.310) and (2) whether the onset date was December 1, 1981. *Id.*

In an Order dated December 12, 2003, Administrative Law Judge Edward Terhune Miller (the administrative law judge) sought to clarify the status of the claim before him. The administrative law judge stated, *inter alia*, that:

Within thirty (30) days of the date of this order, the interested parties

shall file written briefs in form of choice identifying the precise issues which this tribunal must resolve, the parties' respective positions with respect to those issues, and the particular relief they seek. This proceeding is understood by this tribunal to dispute the Director's right to claim and collect an overpayment of black lung benefits allegedly received by this Claimant which relates to the award of black lung benefits or denial thereof under Part 718. It does not relate to the issues of fault and entitlement to waiver of collection of the overpayment which pertain to an established claim for overpayment pursuant to §725.540 *et seq.* Among other pertinent issues, the parties shall establish that this tribunal has jurisdiction to resolve, as a request for modification under §725.310, or otherwise, any dispute related to the date of onset identified by Judge Chapman, or any earlier determination of a date of onset of total disability due to pneumoconiosis which might affect resolution of the issue of whether there is, or is not, a valid award of black lung benefits or claim for overpayment of black lung benefits to this Claimant related thereto. The parties shall address the significance, if any, of the fact that Judge Chapman's award of benefits, with its related date of onset, was based upon invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The evidentiary record pertinent to this claim is deemed to be closed as of December 17, 2003.

Administrative Law Judge's December 12, 2003 Order at 3-4.<sup>4</sup>

After receiving responses from all of the parties, the administrative law judge issued a Decision and Order on May 28, 2004. The administrative law judge initially clarified the issue properly before him, stating that:

[D]espite the apparent confusion, affirmative representations, and disclaimers by Claimant's counsel, the case pending must be held to be a request for modification of the onset date of Claimant's total disability as determined by Judge Chapman. The request for modification is ripe for decision. It was scheduled for a formal hearing on December 17, 2003.

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<sup>4</sup>On December 24, 2003, claimant's *overpayment* case was forwarded to the Office of Administrative Law Judges for a formal hearing. Director's Exhibit 36 (BLO). The list of contested issues included whether denial of waiver was against equity and good conscience and/or would defeat the purpose of the Act. *Id.* The only other listed contested issue was whether claimant had cooperated in providing the requested and needed financial evidence to establish an inability to repay. *Id.* The sheet also noted that claimant was being paid benefits by the responsible operator. *Id.* The overpayment case is not currently before the Board.

The formal hearing was waived in favor of a decision on the record because of Claimant's health. Despite more than ample time, Claimant has submitted no evidence responsive to the overpayment claim of the Director or in support of the request for modification of the onset date. Claimant's asserted defense to the claim of overpayment, that he was totally disabled during the period of alleged overpayment, despite two fully litigated determinations by Administrative Law Judges, affirmed by the Benefits Review Board, is legally irrelevant to the overpayment proceeding.

However, under settled law, Claimant's asserted defense challenges the ultimate factual determination of his black lung benefits claim, and is timely, and thus qualifies as a request for modification under §725.310. The date of onset of total disability identified by Judge Chapman in relation to her finding of complicated pneumoconiosis is implicitly challenged by Claimant to reflect a mistake in a determination of fact in relation to his black lung benefits claim because Judge Chapman did not take account of the total disability alleged by Claimant to have begun in December 1981. *See Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). Judge Chao is alleged to have erred because he rejected Claimant's claim of total disability due to pneumoconiosis beginning in December 1981. The fact that Judge Chapman's award was based upon a finding of complicated pneumoconiosis, and invocation of the irrebuttable presumption under §718.304, not a finding of a totally disabling simple pneumoconiosis, is not addressed, although simple and complicated pneumoconiosis would inevitably have had different onset dates.

Decision and Order at 10.

The administrative law judge further stated that:

In any case involving a modification petition, the fact finder should review the claim for a "mistake in a determination of fact" regardless of whether a mistake is specifically alleged. *Kingery v. Hunt Branch Coal Co.*, 19 BLR 1-6 (1994); *Jessee v. Director, OWCP*, 5 F.3d 723 (4th Cir. 1993). These premises considered, this tribunal concludes that the most reasonable determination is that Claimant has timely requested modification of an adverse decision based upon an alleged mistake in a determination of ultimate fact by Judge Chao and, subsequently, Judge Smith, and Judge Chapman, and the related determination of the onset date of total disability caused by Claimant's pneumoconiosis. It follows that a review of the record must be made by this tribunal as the current finder of fact in accordance with established legal principles with particular reference

to whether the prior determinations by Administrative Law Judges that Claimant was not totally disabled by coal workers' pneumoconiosis were wrongly decided because of erroneous factual determinations.

Decision and Order at 11.

Based upon his examination of the record, the administrative law judge initially found that Judge Chao had not made a mistake in a determination of fact in concluding that the evidence was insufficient to establish that claimant was totally disabled due to pneumoconiosis. Decision and Order at 11. The administrative law judge, therefore, found that claimant's contention that he was totally disabled during the overpayment period from December 29, 1983 to October 28, 1991 was not substantiated and was "without merit." *Id.*

The administrative law judge similarly found that there was not a mistake in a determination of fact in regard to Judge Smith's finding, in his Decision and Order dated February 21, 1997, that the evidence was insufficient to establish that claimant was totally disabled by pneumoconiosis. Decision and Order at 12.

The administrative law judge, however, found that there was a mistake in a determination of fact in connection with Judge Chapman's Decision and Order awarding benefits. The administrative law judge explained that:

Judge Chapman granted Claimant's request for modification and awarded benefits, essentially based upon Dr. Alexander's interpretations of two x-rays and the June 10, 1998, CT scan in which he found abnormalities consistent with complicated pneumoconiosis. She weighed Dr. Alexander's credentials, and found the conflicting evidence less credible than Dr. Alexander's finding of complicated pneumoconiosis. However, no party brought to Judge Chapman's attention, no reviewing physician appears to have noted, and Judge Chapman did not identify the irreconcilable inconsistency in Dr. Alexander's interpretations that this tribunal now finds discredits his conclusion.

Decision and Order at 12.

After discrediting Dr. Alexander's diagnosis of complicated pneumoconiosis, the administrative law judge concluded:

[T]his tribunal is compelled to find that the finding of complicated pneumoconiosis based on Dr. Alexander's interpretations of the Claimant's May 8, 1998, x-ray and February 28, 2000, x-ray and the CT scan of June

10, 1998, constitutes a mistake in a determination of fact, and compels this tribunal to grant the request for modification. Because Dr. Alexander's x-ray and CT scan interpretations are the only basis in the record for a finding of complicated pneumoconiosis which would invoke the irrevocable presumption under §718.304 of total disability due to pneumoconiosis, that finding of total disability due to pneumoconiosis must be vacated. No mistake in a determination of fact has been disclosed in connection with the findings of Judge Chao and Judge Smith that Claimant had not proved total disability due to pneumoconiosis. Nor is there any other mistake in a determination of fact apparent in Judge Chapman's descriptive inventory of the evidence before her, or in her conclusion that Claimant's pneumoconiosis was caused by his coal mine employment. However, because she found that the existence of complicated pneumoconiosis had been established, she did not analyze whether the evidence before her might otherwise prove that Claimant has proved a change in conditions or is totally disabled due to pneumoconiosis.

Decision and Order at 13.

The administrative law judge found that the evidence before Judge Chapman was insufficient to establish that claimant was totally disabled due to pneumoconiosis. Decision and Order at 14. The administrative law judge summarized his findings as follows:

Judge Chapman's conclusion that Claimant was totally disabled by coal workers' pneumoconiosis was wholly dependent upon Dr. Anderson's x-ray and CT scan interpretations. With those impeached because of their inconsistency and a mistake in a determination of fact in assessing them, there is not a preponderance of evidence in the record which establishes by other means Claimant's total disability due to coal workers' pneumoconiosis. Thus, Claimant has not proved a change in conditions. He has proved, regardless of intent, that there has been a substantial mistake in a determination of fact with respect to Dr. Anderson's opinion that was deemed to have established the existence of complicated pneumoconiosis and which has now been impeached. That finding entitled Claimant to a review of the entire record to determine the merits of his claim for black lung benefits. That review has not established, as it must, that he is totally disabled due to coal workers' pneumoconiosis. Consequently, he is not entitled to benefits, and the claim must be denied.

Decision and Order at 16.

After claimant filed an appeal with the Board, the Director filed a motion for reconsideration of the administrative law judge's Decision and Order. On August 20, 2004, employer filed a motion, requesting that the Board dismiss claimant's appeal as interlocutory. Employer argued that claimant's appeal should be dismissed pending resolution of the Director's motion for reconsideration. By Order dated September 2, 2004, the Board granted employer's motion and dismissed claimant's appeal as premature. *Hagerman v. Consolidation Coal Co.*, BRB No. 04-0719 BLA (Sept. 2, 2004) (Order) (unpublished).

In a Decision and Order on Reconsideration dated November 22, 2004, the administrative law judge rejected the Director's contention that the administrative law judge was "faced only with the issue of whether Judge Chapman made a mistake in a determination of fact regarding the onset date when she awarded benefits on January 17, 2001, and not with the larger question of entitlement to benefits." The administrative law judge also rejected the Director's contention that employer conceded the existence of complicated pneumoconiosis in its closing brief and that that concession precluded a finding that claimant did not suffer from complicated pneumoconiosis. The administrative law judge, therefore, reaffirmed his denial of benefits. On appeal, claimant argues that the sole issue before the administrative law judge was whether claimant was totally disabled prior to May 1998. Claimant argues that the administrative law judge, in addressing claimant's entitlement to benefits, exceeded his scope of review. The Director has filed a cross-appeal, arguing that the administrative law judge erred in considering the issue of claimant's entitlement to benefits. Employer responds in support of the administrative law judge's denial of benefits.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are in accordance with applicable law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keefe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director contends that the administrative law judge erred in considering the issue of claimant's entitlement to benefits.<sup>5</sup> The Director argues that the only issue before the administrative law judge was whether claimant became totally disabled prior to May 1998, the commencement date of claimant's benefits set by Judge Chapman. In support of his contention, the Director relies upon the statement of contested issues forwarded to the Office of Administrative Law Judges by the district director. The district director is required to submit to the administrative law judge a statement setting forth the contested and uncontested issues in each claim. *See* 20 C.F.R. §725.421(b)(6).

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<sup>5</sup>Because claimant has adopted the brief of the Director, Office of Workers' Compensation Programs (the Director), we will focus upon the contentions of error asserted by the Director.

The hearing before the administrative law judge is confined to those contested issues which have been identified by the district director or any other issue raised in writing before the district director. 20 C.F.R. §725.463(a).

In this case, the district director's statement of contested and uncontested issues forwarded to the Office of Administrative Law Judges identifies two contested issues. Director's Exhibit 197. The first contested issue is listed as:

Modification. The evidence establishes a change in conditions and/or that a mistake was made in the determination of any fact in the prior denial per 20 C.F.R. 725.310.

Director's Exhibit 197.

The only other contested issue listed on the statement is: "ONSET DATE 12-01-81." Director's Exhibit 197.

The Director contends that the issue of entitlement, *i.e.*, whether claimant was totally disabled due to pneumoconiosis arising out of coal mine employment, was not properly before the administrative law judge. The Director contends that the only issue before the administrative law judge was whether claimant became totally disabled prior to May, 1998, the commencement date set by Judge Chapman. In support of his contention, the administrative law judge relies upon *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985).

The Director's reliance upon *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985) is misplaced. In *Thornton*, the claimant argued that the administrative law judge erred in permitting the Director to litigate the issues of whether the miner had pneumoconiosis and whether his pneumoconiosis arose out of coal mine employment. The Board noted that the district director's statement of contested issues did not identify as disputed the questions of the existence of pneumoconiosis or its relationship to coal mine employment. The Board, therefore, agreed with claimant that the administrative law judge erred in permitting the Director to litigate these issues. However, in this case, modification is listed as a contested issue. Consequently, the administrative law judge could properly consider whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000).

In support of his position, the Director also relies upon *Eastern Assoc. Coal Corp. v. Director, OWCP [Duelley]*, No. 03-1604 (4th Cir. July 29, 2004), an unpublished case

issued by the United States Court of Appeals for the Fourth Circuit.<sup>6</sup> However, the Director's reliance upon *Duelley* is also misplaced. In *Duelley*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that an employer could not use a motion for modification to circumvent the consequences of its failure to file a timely controversion. In this case, there is no indication that claimant was attempting to file his motion for modification in order to circumvent the consequences of its failure to comply with any filing requirements.

In the instant case, the district director's statement of contested issues authorized the administrative law judge to consider whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *O'Keefe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). Consequently, we hold that the administrative law judge, in this case, acted within the scope of his authority in considering whether Judge Chapman properly found that claimant was entitled to invocation of the irrebuttable presumption set out at 20 C.F.R. §718.304.

The Director also argues that employer conceded the fact that claimant was entitled to benefits. The Director relies upon employer's statement, in its closing argument, that "ALJ Chapman did not make a mistake of fact by finding the existence of complicated pneumoconiosis..." Director's Brief at 8. The administrative law judge, however, rejected this argument, stating that:

The Director's contention that Employer conceded the existence of complicated pneumoconiosis is...without merit. The alleged concession occurred in a brief responsive to an imputed request for modification. The Benefits Review Board had affirmed Judge Chapman's award of benefits on February 6, 2002, and the request for modification was timely because Employer was paying benefits pursuant to that judgment. The alleged concession in Employer's Closing Argument, was not quoted by the Director in its entirety and the Director has ignored the context in which the statement was made.

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<sup>6</sup>Unpublished decisions are not considered binding precedent in the Fourth Circuit. See Local Rule 36(c) of the Fourth Circuit ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case.").

The whole statement in Employer’s brief was, “ALJ Chapman did not make a mistake in a determination of fact by finding the existence of complicated pneumoconiosis *and setting the onset date on those reasonable grounds.*” (emphasis supplied) Empl. Closing Argument at 11. One portion of the compound sentence cannot reasonably be considered apart from the other. At the time Employer’s brief was submitted, Employer was obviously unaware of the mistake in the determination of fact by Judge Chapman, who had not been advised of the factual mistake by any party. Thus Employer was focusing exclusively, as the brief and its context clearly reveal, upon the proper onset date, which was under explicit challenge. Indeed, the Director erroneously argued that the onset date was the only issue properly under consideration. The recognition of that premise required an assumption, but not an affirmative concession, that Judge Chapman had correctly found the existence of complicated pneumoconiosis.

Fairly and properly construed, the statement does not constitute a concession as alleged, which would foreclose the issue from examination pursuant to a request for modification, and which would contradict the explicit factual finding of this tribunal to the contrary. In its brief, Employer argued that Judge Chapman correctly identified the onset date of complicated pneumoconiosis. Employer’s argument was premised upon the existence of complicated pneumoconiosis because if complicated pneumoconiosis did not exist, as found by Judge Chapman and affirmed by the Benefits Review Board, there would be no onset date. Entitlement to benefits, however, should be predicated on affirmative evidence – not on implicit concessions made *arguendo* that are contrary to the facts as found.

Decision and Order on Reconsideration at 2.

The administrative law judge’s finding is reasonable. Employer did not explicitly concede that claimant suffered from complicated pneumoconiosis or that claimant was entitled to benefits.<sup>7</sup> Moreover, the administrative law judge was authorized to consider

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<sup>7</sup>The Director contends that employer was aware that the only issue before the administrative law judge was whether the onset date of claimant’s benefits should be modified. The Director notes that employer, in its closing argument, stated that: “The current modification concerns only the onset date for the award of benefits.” *See* Employer’s Closing Argument at 1. However, employer’s statement supports the administrative law judge’s position that employer, rather than conceding claimant’s entitlement to benefits, was merely limiting its comments to whether the administrative law judge, having found the existence of complicated pneumoconiosis, properly

whether there was a mistake in a determination of fact pursuant to 20 C.F.R. §725.310 (2000). Consequently, we reject the Director's contention that employer conceded that claimant suffered from complicated pneumoconiosis.

Finally, we note that no party challenges the administrative law judge's finding that Judge Chapman erred in finding Dr. Alexander's x-ray and CT scan findings sufficient to establish the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304. Similarly, no party challenges the administrative law judge's findings that the evidence of record is insufficient to establish that claimant is totally disabled due to pneumoconiosis. 20 C.F.R. §718.204(b), (c). Consequently, we affirm these findings as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Accordingly, the administrative law judge's Decision and Order and Decision and Order on Reconsideration denying benefits are affirmed.

SO ORDERED.

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ROY P. SMITH  
Administrative Appeals Judge

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BETTY JEAN HALL  
Administrative Appeals Judge

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JUDITH S. BOGGS  
Administrative Appeals Judge

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determined the onset date of benefits. Having not understood that the administrative law judge, in considering whether there was a mistake in a determination of fact, could "correct mistakes of fact, "whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted," employer limited its comments to a single issue; the date of claimant's entitlement to benefits.