

BRB No. 10-0391 BLA

ALVIN TOLER)	
)	
Claimant-Respondent)	
)	
v.)	
)	
EASTERN ASSOCIATED COAL)	
CORPORATION)	DATE ISSUED: 03/31/2011
)	
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 – Awarding Benefits of Michael P. Lesniak, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand – Awarding Benefits (2005-BLA-05122) of Administrative Law Judge Michael P. Lesniak, with respect to a subsequent claim¹ filed on September 26, 2003, 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).² This case is before the Board for the second time. In its previous Decision and Order, the Board considered employer’s appeal of the administrative law judge’s award of benefits. The Board held that the administrative law judge rationally determined that relitigation of the issue of complicated pneumoconiosis under 20 C.F.R. §718.304 was not barred by collateral estoppel. *A.T. [Toler] v. Eastern Associated Coal Corp.*, BRB No. 08-0534 BLA, slip op. at 4 (Apr. 16, 2009)(unpub.). However, the Board vacated the administrative law judge’s determination, at 20 C.F.R. §718.304, that claimant established the existence of complicated pneumoconiosis and, therefore, a change in an applicable condition of entitlement at 20 C.F.R. §725.309. *Id.* at 7. Accordingly, the Board vacated the award of benefits and remanded the case to the administrative law judge for reconsideration of this issue and for consideration of employer’s request that the administrative law judge admit Dr. Scott’s negative rereading of an x-ray read as positive for complicated pneumoconiosis by Dr. Aycoth. *Id.* at 8-11.

¹ Claimant filed his initial claim on February 25, 1985, which was denied by Administrative Law Judge John H. Bedford in a Decision and Order Denying Benefits issued on September 30, 1988. Director’s Exhibit 1. Judge Bedford found that, although claimant established the existence of coal workers’ pneumoconiosis, he did not establish that he was totally and permanently disabled due to the disease. *Id.* Claimant appealed to the Board, which affirmed the denial of benefits. *Toler v. Eastern Associated Coal Corp.*, BRB No. 88-3970 BLA (Nov. 7, 1991)(unpub.). Claimant filed a subsequent claim for benefits on August 14, 2000, which was denied by Administrative Law Judge Daniel L. Leland in a Decision and Order dated April 15, 2002, as claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Decision and Order at 2. Claimant filed his current claim on September 26, 2003. Director’s Exhibit 4. On March 20, 2008, Administrative Law Judge Michael P. Lesniak issued a Decision and Order – Awarding Benefits. Employer appealed to the Board.

² The recent amendments to the Black Lung Benefits Act, which became effective on March 23, 2010, do not apply to the present claim, as it was filed prior to January 1, 2005. Director’s Exhibit 4.

On remand, the administrative law judge found that employer did not establish good cause for the admission of Dr. Scott's x-ray rereading. In addition, the administrative law judge determined that claimant did not establish the existence of complicated pneumoconiosis at 20 C.F.R. §718.304(a), (c). However, the administrative law judge concluded, at 20 C.F.R. §718.304(b), that the biopsy evidence was the most persuasive evidence of record and was sufficient to establish the existence of complicated pneumoconiosis. The administrative law judge further found that claimant was entitled to the presumption, set forth in 20 C.F.R. §718.203(b), that his complicated pneumoconiosis arose out of his coal mine employment. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that the administrative law judge erred in finding complicated pneumoconiosis established at 20 C.F.R. §718.304(b), as none of the biopsy reports contained a diagnosis of the disease or an equivalency determination. In addition, employer asserts that, even assuming that claimant has a condition that would appear as a large opacity on x-ray, the administrative law judge did not determine whether claimant proved that he has a chronic dust disease of the lung. Employer also maintains that, in the absence of invocation of the irrebuttable presumption of total disability due to pneumoconiosis, claimant cannot establish total disability under 20 C.F.R. §718.204(b)(2).

Claimant responds, urging affirmance of the award of benefits. In a limited response, the Director, Office of Workers' Compensation Programs (the Director), asserts that, assuming the Board affirms the administrative law judge's finding at 20 C.F.R. §718.304, claimant would be entitled to invoke the rebuttable presumption at 20 C.F.R. §718.203(b). In its reply brief, employer reiterates its previous arguments and indicates that the Director does not address issues relevant to this case.

The Board's scope of review is defined by statute. The administrative law judge's findings must be affirmed if they are 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 in a miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he has pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is

³ The record indicates that claimant's coal mine employment was in West Virginia. Director's Exhibits 1, 5. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore & Sons*, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *See Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

I. 20 C.F.R. §718.304

Pursuant to Section 411(c)(3) of the Act, as implemented by 20 C.F.R. §718.304 of the regulations, 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 or autopsy, 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(a)-(c). While subsections (a), (b), and (c) set forth three different methods by which a claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must, in every case, review all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304, however. The administrative law judge must examine all the evidence on this issue, i.e., evidence of simple and complicated pneumoconiosis, as well as evidence that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306 (2003). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that the administrative law judge should perform an equivalency determination to make certain that, regardless of which diagnostic technique is used, the same underlying condition triggers the irrebuttable presumption. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-560-61 (4th Cir. 1999). Although the court indicated in *Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006), that a diagnosis of massive lesions, standing alone, can satisfy 20 C.F.R. §718.304(b), it did not overrule its holding in *Scarbro* or *Blankenship*, that “massive lesions” are those which, when x-rayed, would appear as opacities greater than one centimeter in diameter. *Perry*, 469 F.3d at 366, 23 BLR at 2-387.

A. The Administrative Law Judge's Findings

On remand, the administrative law judge reconsidered the x-ray evidence, computerized tomography (CT) scan readings, and the biopsy reports of Drs. Rasheed and Imbing. The administrative law judge determined that the x-ray and CT scan evidence was in equipoise. Decision and Order on Remand at 3-4. Regarding the biopsy evidence, the administrative law judge indicated that he had previously found it to be inconclusive, because the biopsy reports were based on tissue taken from claimant's right lower lung, whereas an opacity had been identified in claimant's mid lung zone on CT scan and x-ray. *Id.* at 4. The administrative law judge noted that, in so doing, he had neglected the CT scan reading in which Dr. Wheeler observed a four centimeter opacity in claimant's right lower lung.⁴ *Id.* In addition, the administrative law judge referred to employer's argument in its prior appeal to the Board that, although doctors noted a mass in claimant's right lower lobe and right mid lung, "they were talking about the same mass." *Id.*, citing *Toler*, BRB No. 08-0534 BLA, slip op. at 9. The administrative law judge determined that, if the physicians referred interchangeably to the mass as being in the right lower or mid lung zones, Drs. Patel and Cruz also identified this opacity in claimant's lung on x-ray.⁵ Decision and Order on Remand at 4.

The administrative law judge found Dr. Rasheed's biopsy report to be inconclusive for pneumoconiosis pursuant to 20 C.F.R. §718.106(c), which provides that "[a] negative biopsy is not conclusive evidence that the miner does not have

⁴ Based on his review of the computerized tomography (CT) scan, dated May 24, 2004, Dr. Wheeler identified a four centimeter mass in claimant's right lower lung and lower right hilum "compatible with conglomerate granulomatous disease." Employer's Exhibit 6. Dr. Wheeler determined that, although coal workers' pneumoconiosis could have caused some of the small nodules observed in claimant's lungs, the mass in the right lung is not a large opacity of coal workers' pneumoconiosis, based on the very low profusion of background small nodules. *Id.*

⁵ Dr. Patel reviewed a chest x-ray from August 4, 2000, and observed a "developing large opacity of complicated pneumoconiosis or a developing lung neoplasm." Claimant's Exhibit 5. Dr. Patel also reviewed a chest x-ray from May 24, 2004, where he stated that he found a "[r]ight mid lung zone noncalcified mass, likely Category A large opacity of complicated pneumoconiosis." *Id.* Dr. Cruz reviewed a CT scan from May 25, 2004, and noted that "[t]he lungs again show a profusion of opacities bilaterally with some coalescence at the mid lung zones, notably at the right consistent with complicated pneumoconiosis. . . ." Claimant's Exhibit 5.

pneumoconiosis.”⁶ Decision and Order on Remand at 5. Regarding Dr. Imbing’s report, the administrative law judge determined that the identification of anthracotic pigment and fibrosis was consistent with a diagnosis of pneumoconiosis.⁷ *Id.*, citing 65 Fed. Reg. 79, 944 (Dec. 20, 2000). The administrative law judge concluded that, after further consideration of the radiological findings by Drs. Wheeler, Patel and Cruz of a large opacity in claimant’s right lung, “the biopsy evidence supports a finding of complicated pneumoconiosis.” Decision and Order on Remand at 5.

The administrative law judge further determined that Dr. Gaziano’s opinion diagnosing complicated pneumoconiosis was insufficient to establish the presence of the disease at 20 C.F.R. §718.304(c), as Dr. Gaziano did not identify the basis for his finding and did not review the biopsy evidence. Decision and Order on Remand at 5; Director’s Exhibit 15. The administrative law judge also found that the opinions in which Drs. Zaldivar and Crisalli ruled out the presence of complicated pneumoconiosis were entitled to little weight because these physicians did not review the biopsy evidence. Decision and Order on Remand at 5; Employer’s Exhibits 8, 17.

Upon weighing all of the relevant evidence together, the administrative law judge determined that the biopsy evidence “was more probative as to the existence of pneumoconiosis as suggested by Dr. Zaldivar, who recommended that a biopsy be performed to confirm his opinion that [c]laimant does not have complicated pneumoconiosis.” Decision and Order on Remand at 5-6. The administrative law judge further stated that the biopsy contradicted Dr. Zaldivar’s opinion and “confirmed that the opacity that was reported on several CT scans and x-rays as either four centimeters in diameter or Category A[,] is in fact pneumoconiosis and is classified as complicated because of the size of the opacity.” *Id.* at 6.

⁶ Dr. Rasheed prepared a report, dated May 27, 2004, based on a May 26, 2004 biopsy of claimant’s right lower lung. Claimant’s Exhibit 5. Dr. Rasheed stated that the sections showed blood clots and that no epithelial tissue was identified. *Id.*

⁷ Dr. Imbing prepared a report, dated June 2, 2004, based on a May 31, 2004 biopsy of an apical segment of claimant’s right lower lung lobe. Claimant’s Exhibit 5. Dr. Imbing stated, “[r]espiratory mucosa and adjacent lung tissue show[ed] patchy interstitial fibrosis and scattered anthracotic pigment deposits. No malignancy identified.” *Id.*

B. Arguments on Appeal

Employer asserts that the biopsy evidence cannot establish the existence of complicated pneumoconiosis under 20 C.F.R. §718.304(b), because neither pathologist diagnosed a massive lesion or complicated pneumoconiosis. Employer also argues that, although Dr. Imbing found anthracotic pigment and fibrosis, he did not associate the fibrosis with the pigment or indicate that the mass, when x-rayed, would appear as greater than one centimeter in diameter. Employer maintains that, rather than assessing whether the biopsy evidence contained the required equivalency determination, the administrative law judge substituted his own opinion by “fill[ing] in the gaps in the proof by deciding that since the radiologists found a large opacity, this crucial element was satisfied.” Employer’s Brief in Support of Petition for Review at 13. Employer also asserts that, pursuant to 20 C.F.R. §718.304, the administrative law judge was required to determine whether claimant independently established that his complicated pneumoconiosis is “a chronic dust disease of the lung.” *Id.* at 14, *quoting* 20 C.F.R. §718.304.

Employer’s arguments regarding the administrative law judge’s weighing of the evidence at 20 C.F.R. §718.304(b) have merit, in part. Contrary to employer’s assertion, the administrative law judge acted rationally in considering Dr. Imbing’s biopsy findings, together with the x-ray and CT scan evidence, to determine whether claimant established the existence of a condition that would invoke the irrebuttable presumption under 20 C.F.R. §718.304(a)-(c). *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311. Employer is correct, however, in maintaining that the administrative law judge’s resolution of this issue was flawed.

In support of the administrative law judge’s finding that Dr. Imbing’s observations of patchy fibrosis and anthracotic pigment “denote pneumoconiosis,” he cited the comments of the Department of Labor (DOL) to the revised definition of pneumoconiosis set forth in 20 C.F.R. §718.201. Decision and Order on Remand at 5, *citing* 65 Fed. Reg. 79,944 (Dec. 20, 2000). A review of these comments does not reveal language supporting the administrative law judge’s finding that Dr. Imbing essentially diagnosed pneumoconiosis. As the administrative law judge acknowledged, on the page of the Federal Register that he identified, the DOL stated that 20 C.F.R. §718.202(a)(2) bars the diagnosis of pneumoconiosis based solely on a biopsy finding of anthracotic pigmentation. *Id.* There are no comments on the cited page, or elsewhere in the section pertaining to the revised definition of pneumoconiosis, that indicate that mere findings of fibrosis and anthracotic pigment equate to a diagnosis of pneumoconiosis. In addition, when weighing Dr. Imbing’s report in conjunction with the x-ray and CT scan evidence, the administrative law judge addressed only those x-ray and CT scan interpretations in which a large opacity or lesion was detected. Decision and Order on Remand at 6. As employer further contends, the administrative law judge did not reconcile his reliance on

positive radiological interpretations with his finding that the x-ray and CT scan evidence are insufficient to establish the existence of complicated pneumoconiosis. *Id.*

Regarding employer's contention that claimant must prove that the condition established at 20 C.F.R. §718.304(b) is a chronic dust disease of the lung, we are not persuaded that claimant's burden of proof includes this as a separate element. We agree, however, that 20 C.F.R. §718.304 requires that the condition diagnosed by x-ray, biopsy or autopsy, or equivalent means, be a chronic dust disease of the lung. Support for this position is found in the Act, the implementing regulations and the decisions of the Fourth Circuit. The phrase, "a chronic dust disease of the lung," is used to define pneumoconiosis in the Act and in 20 C.F.R. §718.201(a). 30 U.S.C. §902(b); 20 C.F.R. §718.201(a). In addition, this phrase is used both in the Act, and in the preface to 20 C.F.R. §718.304(a)-(c), to identify the nature of the condition that establishes invocation of the irrebuttable presumption. 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Although neither the Act, nor 20 C.F.R. §718.304, refers to "complicated pneumoconiosis," the Fourth Circuit has recognized that the complicated form of pneumoconiosis is the disease that triggers the irrebuttable presumption. 30 U.S.C. §921(c)(3); *Perry*, 469 F.3d at 363, 23 BLR at 2-383-84; *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-99-100. The Fourth Circuit has also indicated that, in assessing whether the conditions diagnosed under 20 C.F.R. §718.304(b) and (c) are, in fact, complicated pneumoconiosis, the x-ray standards set forth in 20 C.F.R. §718.304(a) provide a benchmark. *Perry*, 469 F.3d at 363, 23 BLR at 2-384; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-100.

Thus, the court held in *Scarbro*, that the term "massive lesions," as used in 20 C.F.R. §718.304(b), describes, "the same condition that would be disclosed by application of the prong (A) standard based on the size of x-ray opacities." *Scarbro*, 220 F.3d at 255-56, 22 BLR at 2-100, *quoting Blankenship*, 177 F.3d at 243, 22 BLR at 2-560-61. The court determined, therefore, that a pathologist's observation of pneumoconiotic nodules measuring up to 1.7 centimeters in size constituted a diagnosis of complicated pneumoconiosis and, therefore, satisfied the requirements of 20 C.F.R. §718.304(b). In support of its holding, the court stated, "[w]e are given no reason to believe that nodules of 1.7 centimeters would not produce x-ray opacities greater than one centimeter." *Id.* In *Perry*, the court held that an autopsy prosector's diagnosis of nodules measuring between four and six centimeters in size was sufficient to invoke the irrebuttable presumption at 20 C.F.R. §718.304(b). *Perry*, 469 F.3d at 366, 23 BLR at 2-387. The court cited the prosector's explicit diagnosis of complicated pneumoconiosis, and his statement that the lesions would appear as greater than one centimeter in diameter on x-ray, in support of its holding. *Id.*

Under the Fourth Circuit's view then, when the standard set forth in 20 C.F.R. §718.304(b) is satisfied, the condition established is complicated pneumoconiosis, i.e., "a chronic dust disease of the lung." 30 U.S.C. §902(b); 20 C.F.R. §§718.201(a), 718.304.

Accordingly, we conclude that, contrary to employer's assertion, no separate inquiry into whether the condition established under 20 C.F.R. §718.304(a)-(c) is a chronic dust disease of the lung is required at 20 C.F.R. §718.304. Employer correctly notes, however, that in the present case, there is evidence, which the administrative law judge did not specifically address, indicating that the lesions observed on biopsy represent tuberculosis, histoplasmosis or sarcoidosis, rather than a chronic dust disease of the lung. Claimant's Exhibits 2, 5; Employer's Exhibits 5-8, 11-13, 15, 17. The Fourth Circuit's decisions in *Perry* and *Scarbro* establish that a condition that is identified as the product of a disease process unrelated to dust exposure, or that would not be classified as complicated pneumoconiosis under the x-ray standards in 20 C.F.R. §718.304(a), is not a chronic dust disease of the lung and, therefore, does not meet the requirements of 20 C.F.R. §718.304(b). *Perry*, 469 F.3d at 366, 23 BLR at 2-387; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

Because the administrative law judge omitted relevant evidence from consideration, substituted his own opinion for that of the medical experts, and did not provide a valid rationale for his finding that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304(b), we must vacate the administrative law judge's finding. See *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Marcum v. Director, OWCP*, 11 BLR 1-23 (1987); *Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). In addition, based on the administrative law judge's reliance on his findings at 20 C.F.R. §718.304(b) to discredit the medical opinion evidence, we vacate the administrative law judge's determination, at 20 C.F.R. §718.304(c), that the medical opinion evidence was insufficient to establish the presence of complicated pneumoconiosis. Because we have vacated the administrative law judge's finding that claimant was entitled to the irrebuttable presumption, we must also vacate his determination that claimant established a change in an applicable condition of entitlement under 20 C.F.R. §725.309(d).

Consequently, we remand this case to the administrative law judge for reconsideration of the newly submitted evidence relevant to 20 C.F.R. §718.304. The administrative law judge must determine whether claimant has satisfied the requirements of 20 C.F.R. §718.304(b) or (c), in accordance with the Fourth Circuit's decisions in *Perry* and *Scarbro*. The administrative law judge then must weigh together the newly submitted evidence relevant to subsections (a), (b), and (c), before determining whether invocation of the irrebuttable presumption pursuant to 20 C.F.R. §718.304 has been established. *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. In reconsidering Dr. Imbing's biopsy report on remand, the administrative law judge must make a specific finding, based on the medical evidence, as to whether Dr. Imbing's findings constitute a diagnosis of pneumoconiosis that, when considered with the x-ray and CT scan evidence, is sufficient to establish invocation of the irrebuttable presumption. In accordance with the Administrative Procedure Act (APA), incorporated

into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), the administrative law judge must set forth his findings in detail, including the underlying rationale.⁸ *See Wojtowicz*, 12 BLR at 1-165.

II. 20 C.F.R. §718.203

A. The Administrative Law Judge's Finding

After determining that claimant proved that he has complicated pneumoconiosis, the administrative law judge stated, "I find that [c]laimant worked for a sufficient number of years to invoke the rebuttable presumption that his pneumoconiosis arose out of his coal mine employment pursuant to 20 C.F.R. §718.203(b)." Decision and Order on Remand at 6.

B. Argument on Appeal

Employer asserts that, pursuant to 20 C.F.R. §718.203(b), the administrative law judge did not fully address the relevant evidence. Employer's allegation of error has merit. When considering 20 C.F.R. §718.203(b), the administrative law judge did not explicitly indicate that he had considered whether employer rebutted the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment. Rather, the administrative law judge stated, without elaboration, that claimant was entitled to the presumption. Decision and Order on Remand at 6. The administrative law judge did not comply, therefore, with the APA. *See Wojtowicz*, 12 BLR at 1-165. Accordingly, we vacate the administrative law judge's finding under 20 C.F.R. §718.203(b).

On remand, if the administrative law judge determines that the newly submitted evidence is sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis, he must then consider whether employer has established rebuttal of the presumption that claimant's complicated pneumoconiosis arose out of coal mine employment under 20 C.F.R. §718.203(b). *See Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007). If the administrative law judge finds that the presumption has not been rebutted and claimant has, therefore, demonstrated a change in an applicable condition of entitlement at 20 C.F.R. §725.309(d), he must then weigh all of the evidence of record to determine whether claimant has established entitlement to

⁸ The Administrative Procedure Act provides that every adjudicatory decision must be accompanied by a statement of "findings and conclusions and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2).

benefits on the merits under Part 718.⁹ 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1 (2004).

III. Attorney Fee Petition

On April 2, 2010, claimant's counsel submitted an attorney fee petition for services performed before the Board from April 7, 2008 to April 22, 2009, in conjunction with the prior appeal in *Toler*, BRB No. 08-0534 BLA. Counsel requested a total fee of \$3,212.50 for 18.0 total hours of legal services at an hourly rate of \$300.00 for Joseph E. Wolfe for 5.75 hours, \$250.00 for Bobby S. Belcher for .25 hours, \$175.00 for Ryan C. Gilligan for 3.00 hours, and \$100 for legal assistants for 9.00 hours. Employer has responded, urging the Board to deny the requested fees in their entirety or to reduce them.

Based upon our decision to vacate the administrative law judge's award of benefits, there has not been a successful prosecution of the claim at this time. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993); *Sosbee v. Director, OWCP*, 17 BLR 1-136 (1993)(*en banc*) (Brown, J., concurring); *Markovich v. Bethlehem Mines Corp.*, 11 BLR 1-105 (1987). Consequently, we deny counsel's fee petition. Claimant can refile his petition if the claim is successfully prosecuted on remand. 20 C.F.R. §802.203(c).

⁹ If the administrative law judge determines that claimant is not entitled to the irrebuttable presumption of total disability due to pneumoconiosis, he must consider whether claimant has established, by a preponderance of the evidence, that he is totally disabled due to pneumoconiosis under 20 C.F.R. §718.204(b), (c). Because the administrative law judge has not yet reached this issue, we decline to address, as premature, employer's arguments that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2).

Accordingly, the administrative law judge's Decision and Order on Remand – Awarding Benefits is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge