BRB No. 06-0657 BLA

ROY MICHAEL VEST	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
EASTERN ASSOCIATED COAL CORPORATION	)	DATE ISSUED: 05/23/2007
	)	
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 of Edward Terhune Miller, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia, for claimant.

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

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; Rae Ellen Frank James, Deputy 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 Awarding Benefits (03-BLA-5765) of Administrative Law Judge Edward Terhune Miller 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). The administrative law judge found approximately eighteen years of coal mine employment established and that employer was the responsible operator. Decision and Order at 2, 9-10; Director's Exhibit 5. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718.[1] Decision and Order at 2, 9. Considering the evidence of record, the administrative law judge concluded that it was sufficient to establish the existence of totally disabling pneumoconiosis due to coal mine employment pursuant to 20 C.F.R. §§718.202(a)(4), 718.203(b) and 718.204(b), (c). Decision and Order at 11-16. Accordingly, benefits were awarded.

On appeal, employer contends that the administrative law judge erred in his responsible operator finding, erred in failing to admit CT scan evidence, and erred in his weighing of the medical opinion evidence. Claimant responds, asserting that substantial evidence supports the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds, asserting that the decision awarding benefits must be vacated and the case remanded for the administrative law judge to reconsider whether employer was properly found to be the responsible operator, whether the CT scan evidence should have been admitted, and whether there was evidence of complicated pneumoconiosis.

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. 33 U.S.C. §921(b)(3), as incorporated into the Act 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 living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).[2]

[1] The claim for benefits was filed on May 16, 2001.

[2] The record indicates that claimant was employed in the coal mine industry in Virginia and West Virginia. Director's Exhibit 3. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

Employer first contends that the administrative law judge erred in finding it to be the properly identified operator responsible for benefits in this case. Employer concedes that it employed claimant for at least one year, but contends that it should not have been designated as the responsible operator liable for the payment of benefits since claimant was employed by at least two other employers, Justin Construction Company (Justin) and Challenger Mining (Challenger), for more than one year after his employment with employer ended.[3] Employer contends that the Director failed to adequately investigate claimant's employment with these subsequent employers. Specifically, employer contends that the Director never ascertained the exact dates of claimant's employment with Justin, but simply accepted the letter of the West Virginia Coal Workers' Pneumoconiosis Fund suggesting that claimant was not employed by Justin. Employer contends, however, that the record, including claimant's testimony and Social Security records, refutes that letter. Employer also contends that the Director never investigated claimant's employment with Challenger, despite claimant's testimony and written history of having worked for the company for more than one year. Thus, employer contends that, contrary to the administrative law judge's finding, this is not a case where employer failed to provide sufficient information that subsequent employers could pay, *see* 20 C.F.R. §725.495(c), but rather this is a case where the Director failed to fulfill his responsibility to name the most recent employer for whom claimant worked for at least one year. Employer contends, therefore, that the administrative law judge may not remand the case for consideration of a new responsible operator, but must impose liability for the claim with the Black Lung Disability Trust Fund.

In response, the Director asserts that, generally, the responsible operator liable for benefits is the miner's last coal mine employer of at least one year's duration capable of assuming liability for the payment of benefits. 20 C.F.R. §725.494(a)(2), (c), (e). Further, the Director acknowledges that he bears the burden of proving that the designated responsible operator is a "potentially liable operator" but the Director contends that, once he has done that, in order to escape liability, the designated responsible operator bears the burden of proving that another operator more recently employed the miner. 20 C.F.R. §725.495(b), (c)(2).

In this case, the Director contends that he adequately shouldered his burden of investigating potentially liable operators and properly found employer to be the

[3] Employer contends that claimant worked for it between 1980 and 1984, Director's Exhibit 3, Director's Exhibit 26, but that employer also worked for numerous coal mine employers subsequent to his coal mine employment with employer, including Challenger Mining (Challenger) from 1984 until May 1986, Director's Exhibit 34 at 11-12, 15-16, and Justin Construction Company (Justin) in 1996 and 1997. Director's Exhibit 5.

responsible operator.[4] The Director contends, however, that because there is evidence supporting employer's assertion that the administrative law judge did not adequately address evidence in the record that it was not the last employer to employ the miner for at least one year, the administrative law judge's finding that employer was the properly designated operator must be vacated and the case must be remanded for the administrative law judge to determine whether another, more recent and financially capable employer employed claimant for over one year.[5]

In finding that employer was properly designated as the responsible operator, the administrative law judge found that it had employed claimant for more than a year. *See* Director's Exhibit 5. The administrative law judge also found that employer failed to prove that a more recent employer, who had employed claimant for more than a year, was able to pay benefits pursuant to 20 C.F.R. §725.495(c). Decision and Order at 10.

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[4] Relying on claimant's employment history form, Director's Exhibit 3, and Social Security earnings records, Director's Exhibit 5, the district director notified both employer and Justin of their potential liability for the claim. Director's Exhibits 18, 21. Both employers controverted liability. Director's Exhibit 19, 22. The district director then designated Justin as the responsible operator based on evidence indicating that it employed claimant from 1996 to 1997. Director's Exhibit 25. Justin disputed this designation, arguing that the evidence showed that it had not employed claimant for at least one year. The district director then released Justin from liability and designated employer as the responsible operator. Employer contested this designation, and deposed claimant. Claimant 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. Claimant 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. The district director awarded benefits and assigned liability to employer on the basis that it was the last employer for which claimant worked for one year. Director's Exhibit 37.

[5] The Director asserts that while he believes claimant's testimony that he worked for Challenger for at least one year is too vague to be credited and is belied by claimant's Social Security earnings records, the case should nonetheless be remanded as it is within the province of the administrative law judge to evaluate the credibility of the evidence. Director's Brief at 4. The Director asserts, however, that the administrative law judge's error in failing to consider whether Justin could be the responsible operator is harmless, since the evidence clearly establishes that claimant worked for Justin for less than a year. Director's Brief at 4, n.5.

We agree with employer and the Director that there is evidence which may, if credited, show that a more recent, financially capable, employer employed claimant. Accordingly, we vacate the administrative law judge's responsible operator determination and remand the case for further consideration on this issue.

Employer next contends that the administrative law judge erred in striking CT scan evidence from the record because employer never put forth evidence establishing its admissibility. Employer contends that the administrative law judge erred in failing to consider Dr. Wheeler's uncontradicted opinion that CT scans are accepted by the medical community as reliable diagnostic tools, which assist physicians in reaching a more accurate result. Thus, employer contends that the administrative law judge impermissibly dismissed the CT scan evidence as inadmissible under Section 718.107, when such evidence was clearly admissible and reliable. 30 U.S.C. 923(b); 20 C.F.R. 718.107.[6] Employer further contends that the administrative law judge's striking of the CT scan evidence violates the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000), mandating that all relevant evidence be considered together in determining whether claimant has established the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202. Accordingly, employer contends that the administrative law judge's failure to consider the CT scan evidence requires remand.

The administrative law judge noted that Section 718.107(a) allows any medically acceptable test or procedure reported by a physician and not addressed in Part 718, such as a CT scan, to be submitted in connection with a claim. The administrative law judge noted, however, that Section 718.107(b) places the burden on the party submitting the test to demonstrate that the test or procedure is medically acceptable and relevant to establishing, or refuting a claimant's entitlement to benefits.

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[6] Section 718.107 provides:

> (a) The results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis, the sequelae of pneumoconiosis or a respiratory or pulmonary impairment, may be submitted in connection with a claim and shall be given appropriate consideration.
>
> (b) The party submitting the test or procedure pursuant to this section bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits.

20 C.F.R. §718.107.

In this case, the administrative law judge concluded that because claimant failed to submit any evidence demonstrating that CT scans were medically acceptable or relevant to establishing entitlement to benefits, they were inadmissible under Section 718.107. Thus, the administrative law judge found that because neither Dr. Patel[7] nor claimant submitted evidence that CT scans are medically acceptable and relevant to establishing or refuting the existence of pneumoconiosis, any references to CT scan evidence in Dr. Patel's opinion were inadmissible. Further, the administrative law judge found that because Dr. Patel's diagnosis of pneumoconiosis relied heavily on CT scan evidence, which was inadmissible, and did not refer to other admissible objective testing in support of a finding of complicated pneumoconiosis, Dr. Patel's opinion was inadmissible on the issue of pneumoconiosis.

Regarding the opinion of Dr. Wheeler, who relied on numerous CT scans to find that claimant's lung masses were attributable to TB, histoplasmosis, or emphysema,[8] the administrative law judge found that because neither employer nor Dr. Wheeler put forth evidence that CT scans are medically acceptable, any references to CT scan evidence in Dr. Wheeler's opinion were inadmissible. The administrative law judge further found, *citing* 65 Fed. Reg. 79,920, 79,945 (Dec. 20, 2000), that the Department of Labor, although noting that CT scans are probative, nonetheless rejected the view that they were sufficiently reliable to rule out the existence of pneumoconiosis, since they do not address the existence of legal pneumoconiosis. Decision and Order at 15.

Employer and the Director both assert, however, that the testimony of Dr. Wheeler may establish that CT scans are medically acceptable as Dr. Wheeler testified that the CT scan is now the gold standard for detecting the earliest interstitial lung disease. Employer's Exhibit 7 at 10-11. Because the administrative law judge did not discuss the testimony by Dr. Wheeler addressing the medical acceptability and relevance of CT scan evidence, we vacate the administrative law judge's finding that the CT scan evidence is inadmissible in this case. We instruct the administrative law judge to reconsider the admissibility of the CT scan evidence on remand in light of the Board's decisions in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring) (*aff'd on recon.*) and *Harris v. Old Ben Coal Co.*, 23 BLR 1-98 (2006)(*en banc*) (McGranery and Hall, JJ., concurring and dissenting)(recon. pending). Pursuant to 20 C.F.R. §718.107(a) and 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii), each party may proffer only one reading of each CT scan in support of its affirmative case and one reading in

[7] Dr. Patel found a CT scan to be highly suggestive of progressive massive fibrosis, consistent with complicated pneumoconiosis. Director's Exhibit 35.

[8] Dr. Wheeler opined that CT scans were superior to chest x-rays because they give cross-sectional views of the lungs, as opposed to frontal views, lateral views, or oblique views. Employer's Exhibit 7.

rebuttal. *Webber*, 23 BLR at 1-135; *Harris*, 23 BLR at 1-118. The current record contains four readings of three different CT scans. Employer's Exhibit 6. On remand, the administrative law judge must order the parties to select and designate their CT scan readings and the administrative law judge must render a decision as to their admissibility.

As we have vacated the administrative law judge's finding with respect to the admissibility of the CT scan evidence, and remanded the case for the administrative law judge to consider the appropriate CT scan evidence, we also vacate his finding that the evidence failed to establish the existence of complicated pneumoconiosis, and that claimant is not entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, as there is CT scan evidence relevant to the existence of complicated pneumoconiosis. On remand, if reached, the administrative law judge must consider all the evidence relevant to the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304; *Eastern Associated Coal Corp. v. Director, OWCP* [*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 (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*); Director's Exhibits 15, 35, 36; Claimant's Exhibit 1; Employer's Exhibit 7.

Employer also argues that the administrative law judge erred in according little weight to Dr. Zaldivar's opinion because the physician improperly relied upon the decision of the West Virginia Occupational Pneumoconiosis Board (OPB). Employer contends that the administrative law judge erred in excluding the OPB report from the record pursuant to Section 725.414 on the basis that the report constitutes a medical opinion, and has not been designated as such. Employer contends that Section 725.414 does not authorize the exclusion of the OPB report, since the report was already part of the record, Director's Exhibit 8, and was acknowledged as such by the administrative law judge. Moreover, employer contends that claimant never objected to the inclusion of the report in the record, nor to Dr. Zaldivar's discussion of the report in his opinion.[9] In conclusion, employer contends that, even if the OPB report were inadmissible, the reasonable remedy would have been for the administrative law judge to allow Dr. Zaldivar to cure defects in his opinion rendered by his consideration of the report, or to strike those portions of Dr. Zaldivar's opinion that were inadmissible. *See Webber*, 23 BLR at 1-108-109 (recognizing that "exclusion is not a favored opinion, as it would

[9] Employer contends that Dr. Zaldivar discussed the decision of the West Virginia Occupational Pneumoconiosis Board in order to assess the changes seen on claimant's x-rays over the years and to conclude that the development of large masses was not consistent with pneumoconiosis, but was consistent with cancer or infection.

result in the loss of probative evidence developed in compliance with evidentiary limitations").

Alternatively, employer contends that if the administrative law judge correctly found the OPB report to be inadmissible, then Section 725.414 is invalid as applied, because it is at odds with both the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 5 U.S.C. §932(a), which requires the administrative law judge to make findings on all issues of fact and law, and with the Act, which requires that all relevant evidence be considered. This argument, however, has been previously rejected, and Section 725.414 has been held to be valid. *See Elm Grove Coal Co. v. Director, OWCP* [*Blake*], 480 F.3d 278, 23 BLR 2- (4th Cir. 2007); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004)(*en banc*).

Contrary to employer's suggestion, the OPB report does not fall within the exception for hospitalization or treatment records, *see* 20 C.F.R. §725.414(a)(4), nor is it covered by the exception for prior federal black lung claim evidence. *See* 20 C.F.R. §725.309(d)(1). The administrative law judge, therefore, properly concluded, within his discretion as fact-finder, that since Dr. Zaldivar relied upon it and it was inadmissible, Dr. Zaldivar's opinion was entitled less weight. *See Harris*, 23 BLR at 1-108-109; *Dempsey*, 23 BLR at 1-57; Decision and Order at 14.[10]

Finally, with respect to the merits of the claim, employer contends that the administrative law judge erred in finding that the x-ray evidence was in equipoise as to the existence of pneumoconiosis. Employer contends that the administrative law judge should have accorded greater weight to the negative readings of Drs. Gaylor, Wheeler, and Scatarige since they are dually qualified readers. Additionally, employer contends that the administrative law judge erred in ignoring the negative x-ray interpretation of Dr. Scott, a dually qualified reader. *See* 20 C.F.R. §718.202(a)(1). Employer contends that the administrative law judge failed to sufficiently consider the quality and quantity of the x-ray evidence in finding that it was in equipoise as to the existence of pneumoconiosis. Employer's Brief at 20-21.

[10] The administrative law judge further accorded little weight to the opinion of Dr. Zaldivar as the opinion was internally inconsistent and the physician relied on an inaccurate smoking history. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985); Employer's Exhibit 5; Decision and Order at 12. Employer does not challenge these alternative findings by the administrative law judge and therefore they are affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

The record reflects that the January 9, 2002 x-ray was read as negative for pneumoconiosis by Dr. Gaylor, a Board-certified, B reader. Employer's Exhibit 1. The January 16, 2002 x-ray was read as positive by Dr. Forehand, a B reader, and as negative by Dr. Wheeler, a Board-certified, B reader. Director's Exhibit 15; Employer's Exhibit 4. The September 27, 2002 x-ray was read as positive by Dr. Robinette, a B reader, and by Dr. Cappiello, a Board-certified, B reader. It was read as negative by Dr. Scatarige, a Board-certified, B reader. Director's Exhibit 31; Claimant's Exhibit 1; Employer's Exhibit 3. Based on this evidence, the administrative law judge concluded that the x-ray readings were in equipoise as the doctors who interpreted x-rays as negative were only "slightly more qualified" than those interpreting x-rays as positive, and there was "strong positive evidence." Decision and Order at 11.

As employer contends, however, the administrative law judge did not properly consider the qualitative and quantitative aspects of the x-ray evidence. As employer contends, there was only one positive interpretation by a dually qualified reader. Other readings by dually qualified readers were negative. The only positive readings of those x-rays were by physicians who were only B readers. Further, although the administrative law judge stated that there was strong positive x-ray evidence, he did not explain the basis for this statement. Accordingly, we vacate the administrative law judge's finding that the x-ray evidence was in equipoise and we remand the case for further consideration at 20 C.F.R. §718.202(a)(1).[11] *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).[12]

Employer also asserts that the administrative law judge erred in relying almost exclusively on the opinions of Drs. Forehand and Robinette to find the existence of pneumoconiosis established pursuant to Section 718.202(a)(4). Employer contends that

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[11] Section 718.202(a)(1) provides, in pertinent part, that

> where two or more X-ray reports are in conflict, in evaluating such X-ray report, consideration shall be given to the radiological qualifications of the physicians interpreting such X-rays.

20 C.F.R. §718.201(a)(1).

[12] We reject employer's contention that the administrative law judge erred in failing to consider the x-ray interpretation by Dr. Scott. The record clearly indicates that employer did not submit the x-ray reading of Dr. Scott in support of its affirmative case or as rebuttal evidence to the readings submitted by claimant or the Director. *See* 20 C.F.R. §725.414(a)(3)(i), (ii); Employer's Exhibit A; Decision and Order at 3, 10-11.

the opinions were not sufficiently documented and reasoned and the administrative law judge failed to sufficiently analyze them.

In addressing the medical opinions of record pursuant to 20 C.F.R. §718.202(a)(4), the administrative law judge gave less weight to the opinions of Drs. Wheeler and Patel, as he found that the physicians relied upon inadmissible CT scans. Decision and Order at 13-15. The administrative law judge found the opinions of Drs. Forehand and Robinette, finding that claimant suffered from pneumoconiosis, were more persuasive as they offered reasoned conclusions based on the available, admissible objective evidence. Decision and Order at 14.

As employer contends, however, in crediting the opinions of Drs. Forehand and Robinette, the administrative law judge failed to discuss the fact that these physicians diagnosed pneumoconiosis based, in part, on x-ray interpretations that were re-read as negative by physicians with superior credentials, and that were not supported by the x-ray evidence as a whole. *See Compton*, 211 F.3d at 211, 22 BLR at 2-171; *Winters v. Director, OWCP*, 6 BLR 1-877, 1-881 n.4 (1984). We, therefore, vacate the administrative law judge's credibility determination with respect to the opinions of Drs. Forehand and Robinette. We further vacate the administrative law judge's credibility determination with respect to the opinions of Drs. Patel and Wheeler, on the basis that the doctors relied on inadmissible CT scan evidence, since we are remanding the case for the administrative law judge to reconsider the admissibility of the CT scan evidence. Consequently, we vacate the administrative law judge's finding that the existence of pneumoconiosis was established by the medical opinion evidence, and remand this case to the administrative law judge to consider all factors relevant to the quality of the evidence in determining whether the opinions are supported by underlying documentation and are adequately explained. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Collins v. J & L Steel*, 21 BLR 1-181 (1999); *Trumbo v. Director, OWCP*, 17 BLR 1-85 (1993); *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

On remand, should the administrative law judge find the medical opinion evidence sufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), he must consider it along with all the other relevant evidence in determining whether claimant suffers from the disease in accordance with *Compton*, 211 F.3d at 211, 22 BLR at 2-171.

In addition, since we vacate the administrative law judge's Section 718.202(a)(4) determination, we must also vacate the administrative law judge's finding that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *See* 20 C.F.R. §718.204(c); Decision and Order at 16. Should the administrative law judge find

the evidence sufficient to establish pneumoconiosis pursuant to 20 C.F.R. §718.202(a), he must weigh all the relevant evidence to determine if claimant has established by a preponderance of the evidence that his pneumoconiosis was a substantially contributing cause of his totally disabling respiratory impairment. 20 C.F.R. §718.204(c); *see Robinson v. Pickands Mather & Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and the case is remanded to the administrative law judge 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