U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

NOT-PUBLISHED

BRB No. 06-0900 BLA

MORELLE MULLINS

Claimant-Respondent

v.

PLOWBOY COAL COMPANY

and

CONNECTICUT INDEMNITY COMPANY

Employer/Carrier-Petitioners

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

Party-in-Interest

DATE ISSUED: AUG 30 2007

DECISION and ORDER

Appeal of the Decision and Order on Remand – Award of Benefits of Richard T. Stansell-Gamm, Administrative Law Judge, United States Department of Labor.

H. Ashby Dickerson (Penn, Stuart & Eskridge) Abingdon, Virginia, for employer.

Michelle S. Gerdano (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 McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order On Remand – Award of Benefits (03-BLA-5495) of Administrative Law Judge Richard T. Stansell-Gamm rendered on a subsequent 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).[1] In his Decision and Order dated May 17, 2004, the administrative law judge credited claimant with twenty-two years of coal mine employment, and determined that the newly submitted evidence was sufficient to establish the existence of complicated pneumoconiosis. He determined that claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, and therefore, also found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. The administrative law judge also found that claimant established total disability due to pneumoconiosis pursuant to 20 C.F.R. Part 718 based on all of the record evidence. Accordingly, benefits were awarded.

Employer appealed, and the Board vacated the administrative law judge's findings pursuant to 20 C.F.R. §718.304. The Board specifically held that the administrative law judge erred by failing to weigh the negative x-ray readings for pneumoconiosis at Section 718.304(a), and that he improperly shifted the burden to employer to disprove the existence of complicated pneumoconiosis based on the "other evidence" of record under Section 718.304(c). *Mullins v. Plowboy Coal Co.*, BRB No. 04-0716 BLA, slip op. at 5-6 (July 8, 2005) (unpub.) (McGranery, J., concurring).[2] The Board determined that the administrative law judge erred in addressing only whether the CT scan evidence called into question the x-ray evidence, and by failing to independently weigh the CT scan evidence for complicated pneumoconiosis. *Mullins*, slip op. at 6. The Board further held that the administrative law judge erred in weighing the opinions of Drs. Kanwal, Smiddy, and Castle, namely rejecting Dr. Castle's opinion for his consideration of inadmissible evidence, while ignoring that Drs. Kanwal and Smiddy similarly had based their opinions on inadmissible evidence, *Mullins*, slip op. at 7-8.

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[1] Claimant previously filed claims for benefits on November 18, 1982, June 2, 1986 and January 20, 1998, which were denied by the district director on April 12, 1983, October 20, 1986, and June 16, 1998, respectively. Director's Exhibits 1, 2, 3. In the last claim filed on January 20, 1998, claimant failed to establish a totally disabling respiratory or pulmonary impairment. Director's Exhibit 3. Claimant took no further action with respect to the denial of his January 20, 1998 claim until he filed the instant, subsequent claim on April 9, 2001. Director's Exhibit 5.

[2] The Board rejected employer's assertion that Dr. Kanwal's opinion was improperly admitted into the record as one of claimant's two medical reports under 20 C.F.R. §725.414(a)(2)(i). *Mullins v. Plowboy Coal Co.*, BRB No. 04-0716 BLA (July 8, 2005) (unpub) (McGranery, J., concurring).

On remand, the Board directed the administrative law judge to explain how he reconciled the opinions of Drs. Castle, Kanwal and Smiddy with the regulation at 20 C.F.R. §725.414(a)(4). *Mullins*, slip op. at 8. The Board directed the administrative law judge to consider whether Dr. Kanwal's opinion was documented and reasoned in light of the administrative law judge's finding that Dr. Kanwal did not specify what evidence he relied upon in diagnosing complicated pneumoconiosis. *Mullins*, slip op. at 7. Lastly, because the administrative law judge erred in discrediting Dr. Castle's opinion for having reviewed evidence from the prior claims that the administrative law judge mistakenly determined were not of record, he was instructed to reconsider the weight to accord Dr. Castle's opinion that claimant does not suffer from complicated pneumoconiosis *Id.* Thus, the Board vacated the award of benefits, and remanded the case for further consideration.

On remand, the administrative law judge determined that the Board's intervening decision in *Webber v. Peabody Coal Co.*, 23 BLR 1- 123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, --BLR--, BRB No. 05-0335 BLA (Mar. 25, 2007) (*en banc*) required that he reconsider the admissibility of the CT scan evidence. The administrative law judge noted that there were four readings of one CT scan dated April 2, 2001 from Drs. Alexander, DePonte, Wheeler and Scott. The administrative law judge admitted Dr. Alexander's positive reading of the April 2, 2001 CT scan as claimant's "one permissible case-in-chief interpretation under 20 C.F.R. §725.414(a)(2)(i)" and further found that "Dr. DePonte's [positive] interpretation of the April 2, 2001 CT study [was] admissible as a treatment record under 20 C.F.R. §725.414(a)(4)." Decision and Order on Remand at 3. He next admitted Dr. Wheeler's negative reading of the April 2, 2001 scan as evidence in rebuttal of Dr. Alexander's reading, but excluded Dr. Scott's negative reading on the grounds that it exceeded the evidentiary limitations.[3] *Id.* The administrative law judge also admitted, on remand, Dr. Smiddy's reading of the July 3, 2003 x-ray as one of claimant's affirmative x-ray readings.

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[3] The administrative law judge stated:

> In determining which interpretation to accept, I note that at the hearing Employer's counsel presented Dr. Wheeler's evaluation as the principal interpretation for the April 2, 2001 CT scan. Based on that representation, I will consider Dr. Wheeler's interpretation of the April 2, 2001 CT scan, EX 2, as the Employer's rebuttal to the Claimant's case-in-chief CT scan interpretation by Dr. Alexander. At the same time, since rebuttal to Dr. DePonte's treatment record CT scan interpretation is apparently not permitted by [the Benefits Review Board], I conclude Dr. Scott's interpretation of the April 2, 2001 CT scan, DX 24, is no longer admissible.

Decision and Order on Remand at 3.

In considering claimant's entitlement to benefits, the administrative law judge determined that the evidence was sufficient to establish the existence of complicated pneumoconiosis, that claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, and thus found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309. The administrative law judge further found that claimant was entitled to benefits based on his review of all of the evidence under Part 718. Accordingly, the administrative law judge again awarded benefits.

In the instant appeal, employer argues that the administrative law judge erred in excluding Dr. Scott's interpretation of the April 2, 2001 CT scan, and by not permitting the parties on remand to designate their evidence. Employer contends that the administrative law judge erred by not requiring the parties to submit proof that CT scan evidence was "medically acceptable" pursuant to 20 C.F.R. §718.107(b). Employer challenges the administrative law judge's admission of Dr. Smiddy's reading of the July 3, 2003 x-ray as one of claimant's affirmative x-ray readings on the grounds that Dr. Smiddy did not complete an ILO classification form for his reading, and because the administrative law judge did not give employer the opportunity to rebut that evidence. Employer argues that the administrative law judge erred in crediting the opinions of Drs. Kanwal, Smiddy, and Paranthaman, as to the presence of complicated pneumoconiosis, and by conversely discrediting Dr. Castle's opinion that claimant does not have complicated pneumoconiosis. Employer maintains that the administrative law judge failed to follow the Board's instruction to analyze all the relevant evidence prior to invocation of the irrebuttable presumption at Section 718.304, thereby improperly shifting the burden of proof to employer to disprove that claimant suffers from complicated pneumoconiosis, based on the x-ray and CT scan evidence. The Director, Office of Workers' Compensation Programs (the Director), filed a letter indicating that he will not file a substantive response on the merits of entitlement. The Director, however, agrees with employer that the administrative law judge erred in excluding Dr. Scott's April 2, 2001 CT scan reading.

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. 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).

After consideration of the administrative law judge's Decision and Order on Remand, the briefs of the parties, and the evidence of record, we vacate the award of benefits based on errors committed by the administrative law judge with respect to the admission of evidence, and his failure to weigh all of the relevant evidence under 20 C.F.R. §718.304 prior to finding invocation of the irrebuttable presumption.

A. Evidentiary Challenges:

Employer asserts that the administrative law judge erred in excluding one of its two readings of the April 2, 2001 CT scan. We agree. In *Webber*, the Board adopted the Director's position that Section 718.107[4] should be interpreted to allow each party to submit, as part of its affirmative case, only one reading of each separate test or procedure undergone by claimant. *Webber*, 23 BLR at 1-135. Moreover, as we noted in *Webber*, the revised regulation at Section 725.414 specifically references Section 718.107, providing that in any case in which a party has submitted the results of other testing pursuant to Section 718.107, the opposing party shall be entitled to submit "one physician's assessment of each piece of such evidence in rebuttal." 20 C.F.R. §725.414(a)(2)(ii), (3)(ii); *Webber*, 23 BLR at 1-135.

In this case, claimant underwent a CT scan on April 2, 2001. The administrative law judge allowed the original interpretation of that scan by Dr. De Ponte to be admitted as a treatment record,[5] and he allowed, in accordance with *Webber*, a positive reading by Dr. Alexander of the April 2, 2001 CT scan to be admitted as claimant's one "case-in-chief" CT scan. Decision and Order on Remand at 3. The administrative law judge then admitted Dr. Wheeler's negative reading of the April 2, 2001 CT scan as evidence proffered by employer in rebuttal of claimant's case-in-chief reading. The administrative

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[4] Section 718.107 provides that:

> (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.

[5] The regulations provide that "[n]otwithstanding the limitations" of Section 725.414(a)(2)-(3), "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence." 20 C.F.R. §725.414(a)(4). Dr. Shaw's CT scan interpretation was properly admitted into the record as a part of claimant's medical treatment records. *See* 20 C.F.R. §725.414(a)(4).

law judge excluded Dr. Scott's negative reading of the CT scan because he found that employer had already submitted one reading as allowed in *Webber*, and therefore, found that Dr. Scott's reading exceeded the evidentiary limitations. Contrary to the administrative law judge's ruling, however, employer was entitled to submit, in addition to its rebuttal reading, one affirmative CT scan reading. 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 one reading of each CT scan in support of its affirmative case and one reading in rebuttal. We conclude the administrative law judge erred by not allowing employer to designate, as part of its affirmative case, one interpretation of claimant's April 2, 2001 CT scan, and one reading of the April 2, 2001 CT scan as rebuttal evidence. We therefore vacate the administrative law judge's findings as to the admissibility of the CT scan evidence, and instruct him to allow employer to designate, pursuant to Section 718.107(a), one affirmative reading of the April 2, 2001 CT scan, which the administrative law judge should then consider, together with any supporting evidence submitted pursuant to Section 718.107(b), and in conjunction with any rebuttal evidence submitted by either party. 20 C.F.R. §§718.107; 725.414(a)(2)(ii), (3)(ii).

Employer also argues with respect to Section 718.107(b) that the administrative law judge erred by not requiring the parties to submit evidence to demonstrate that the CT scan evidence was "medically acceptable and reliable." On remand, the administrative law judge found that, inasmuch as the doctors had in fact rendered interpretations of the April 2, 2001 CT scan for the presence or absence of complicated pneumoconiosis, it was reasonable to conclude that they considered the scan to be medically acceptable. Employer contends that the administrative law judge's "circular reasoning" is insufficient to satisfy the requirements of Section 718.107(b). Employer asserts because "none of the doctors whose CT scan reports were designated by the parties provided any testimony or language in their respective reports demonstrating that the April 2, 2001 CT scan was medically acceptable, the parties must be given the opportunity to develop and submit evidence on remand relevant to the requirements set forth in Section 718.107(b). Contrary to employer's contention, we consider the administrative law judge's inference that the CT scan was medically acceptable, without requiring additional medical development on the issue, to be reasonable under the facts of this case. Moreover, because employer has not demonstrated how the administrative law judge's ruling was prejudicial to either party, any error committed by the administrative law judge in this regard would be harmless.[6] *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

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[6] We note that "[t]he party submitting the test or procedure . . . 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(b). In this case, because employer proffered interpretations of the CT scan to refute claimant's

However, because the administrative law judge erred in excluding one of employer's CT scan readings, we vacate his finding that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, as the CT scan evidence is relevant to the issue of whether claimant has complicated pneumoconiosis. *See* 20 C.F.R. §718.304; *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993). We therefore vacate the award of benefits and remand the case for further consideration.[7]

B. Invocation of the Irrebuttable Presumption

In the interest of judicial economy, we address employer's assertion that the administrative law judge erred in weighing the evidence he considered on remand for complicated pneumoconiosis. Employer specifically contends that the administrative law judge failed to follow the Board's instruction that he weigh all of the relevant evidence, and that he failed to determine whether claimant has a chronic dust disease of the lung prior to invocation of the irrebuttable presumption. We agree that the administrative law judge has erred in his consideration of whether claimant is entitled to invoke the irrebuttable presumption at 20 C.F.R. §718.304.

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entitlement, employer bore the burden of proving these facts. The administrative law judge's ruling merely relieved employer of its burden under Section 718.107(b).

[7] In our prior decision, we noted that the administrative law judge "may consider whether Dr. Smiddy's interpretation of the [February 3, 2003 x-ray] could be considered claimant's second [affirmative] x-ray reading in accordance with 20 C.F.R. §725.414(a)(2)(i)." *Mullins*, slip. op. at 7 n.3. On remand, the administrative law judge designated Dr. Smiddy's interpretation of a February 3, 2003 x-ray as claimant's second affirmative x-ray reading. Decision and Order on Remand at 4. We reject employer's contention that the administrative law judge erred in admitting Dr. Smiddy's classified x-ray interpretation because he did not complete an ILO form. *See* 20 C.F.R. §718.102 and Appendix A to Part 718; Claimant's Exhibit 5.

Employer also asserts that it should be given the opportunity to rebut Dr. Smiddy's reading. On remand, the administrative law judge must address employer's request to submit rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(3)(ii). *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006) (*en banc*) (Boggs, J., concurring), *aff'd on recon.*, -- BLR--, BRB No. 05-0335 BLA (Mar. 25, 2007) (*en banc*).

Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, provides:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ... if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
>
> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
>
> (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304 [emphasis in original].

We instructed the administrative law judge on remand to independently assess whether the x-ray, CT scan and medical opinion evidence were sufficient to establish the existence of pneumoconiosis (a chronic dust disease of the lung) and the presence of a large opacity greater than one centimeter in diameter that would satisfy the legal definition of complicated pneumoconiosis. On remand, the administrative law judge did not follow our prior instruction. The administrative law judge limited his analysis of the x-ray evidence to the size of the opacity without regard to whether claimant was able to establish the existence of pneumoconiosis. Decision and Order on Remand at 12-14. Instead, he found that every physician who reviewed claimant's x-rays or CT scan reported a large opacity, or a corresponding mass that measured greater than one centimeter, and therefore concluded that the evidence confirmed the presence of large opacities in the lung sufficient to establish the existence of complicated pneumoconiosis. *Id.* Having determined that claimant satisfied his burden of establishing that the CT scan and x-ray evidence demonstrated the presence of a greater than one centimeter opacity, he turned to the "other evidence" under Section 718.304(c), including the physicians' comments as to the etiology of the opacities identified on the x-rays and CT scans, and found that they did not provide "contrary evidence" that claimant did not have complicated pneumoconiosis. Decision and Order at 22. This analysis was in error as the administrative law judge improperly shifted the burden to employer to affirmatively prove that the large opacities identified by the x-ray and CT scan evidence were not complicated pneumoconiosis.

As we previously explained, the first step in determining whether clamant is entitled to invocation of the irrebuttable presumption is "not *only* to determine whether there was a large opacity greater than one centimeter in diameter, but also to address whether claimant established the existence of pneumoconiosis." *Mullins,* slip op. at 5, citing *Scarbro,* 220 F.3d at 255; 22 BLR at 2-100. The administrative law judge erred in his consideration of the x-ray evidence by failing to weigh the negative readings for pneumoconiosis by Drs. Wheeler and Scatarige. He also erred by separating the doctors' various interpretations of the x-ray and CT scan evidence from their etiological opinions. By focusing on the size of the opacity or mass, the administrative law judge has failed to consider whether claimant has satisfied his burden to establish a chronic dust disease of the lung (the existence of pneumoconiosis) under 20 C.F.R. §718.304(a)-(c). We, therefore, must vacate the administrative law judge's finding that claimant established complicated pneumoconiosis.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. The administrative law judge is required to weigh all of the evidence relevant to this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring). On remand, the administrative law judge must follow the instructions provided by the Board. *Briggs v. Pennsylvania R.R.*, 34 U.S. 304 (1948); *Muscar v. Director, OWCP*, 18 BLR 1-7 (1993). Specifically, under the first prong of his inquiry, the administrative law judge must consider each x-ray interpretation independently and determine whether or not it supports a finding of complicated pneumoconiosis, and then weigh all of the x-ray evidence together to determine whether it supports a finding of complicated pneumoconiosis pursuant to Section 718.304(a).[8] *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*). The administrative law judge must determine whether the CT scan evidence under Section 718.304(c) tends to independently establish both a chronic dust disease of the lung, and an opacity or a mass that would appear as greater than one centimeter if seen on x-ray, which would satisfy the regulatory definition of complicated pneumoconiosis. He must then weigh the entirety of the evidence at subsections (a), (b) and (c) together before determining whether claimant has complicated pneumoconiosis and before finding that claimant is entitled to invocation of the

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[8] Further, the administrative law judge is advised that under the regulations, an x-ray interpretation on an ILO form, which notes a mass that is larger than one centimeter in the "Comments" section, but which does not diagnose pneumoconiosis with an opacity size A, B, or C, is not sufficient to assist claimant in establishing complicated pneumoconiosis pursuant to Section 718.304(a). 20 C.F.R. §718.304(a).

irrebuttable presumption. *Lester*, 993 F.2d at 1143, 17 BLR at 2-114; *Melnick*, 16 BLR at 1-33.

Additionally, employer contends that the administrative law judge failed to follow the Board's directive to determine whether Dr. Kanwal provided a documented and reasoned opinion that claimant has complicated pneumoconiosis. Employer argues that, in weighing the other evidence for complicated pneumoconiosis, the administrative law judge ignored the fact that Drs. Kanwal, Smiddy and Paranthaman based their diagnoses of complicated pneumoconiosis solely on positive x-ray and CT scan evidence. Employer notes that a physician's opinion that is merely a restatement of an x-ray is insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4). Because we are remanding this case for further consideration, we direct the administrative law judge to consider whether the opinions of Drs. Kanwal, Smiddy and Paranthaman diagnosing complicated pneumoconiosis are merely restatements of the x-ray and CT scan evidence, and whether their opinions are sufficiently documented and reasoned to support claimant's burden of proof.[9] *See Worhach v. Director, OWCP*, 17 BLR 1-110 (1993).

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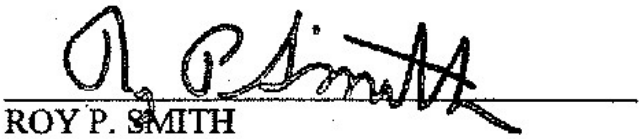
[9] Employer challenges the weight accorded Dr. Castle's opinion. The administrative law judge assigned less weight to Dr. Castle's opinion under 20 C.F.R. §718.304(c) because he found that Dr. Castle based a "significant portion of his conclusion [that claimant did not have complicated pneumoconiosis] on his two inadmissible interpretations of the August 1, 2001 chest x-ray and the April 2, 2001 CT scan, which causes his opinion to lose probative value." Decision and Order on Remand at 19. Moreover, the administrative law judge was not persuaded by Dr. Castle's suggestion that the pulmonary function study tests, demonstrating only a mild respiratory impairment, proved that claimant did not have complicated pneumoconiosis. *Id.* Contrary to employer's contention, these credibility findings were within the discretion of the administrative law judge, and are affirmed. *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149, 1-152 (1989) (*en banc*). If, however, the administrative law judge admits additional evidence on remand, he may reconsider the weight to be assigned to Dr. Castle's opinion.

Accordingly, the Decision and Order on Remand – Awarding Benefits is affirmed in part, and vacated in part, 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

REGINA C. McGRANERY
Administrative Appeals Judge