**U.S. Department of Labor**

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 19-0413 BLA

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| WILLIAM W. WOLFGANG | ) | |
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| Claimant-Petitioner | ) | |
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| v. | ) | |
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| BARREN COAL COMPANY, INCORPORATED | ) | |
| | ) | |
| and | ) | |
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| AMERICAN BUSINESS & MERCANTILE INSURANCE MUTUAL, INCORPORATED C/O OLD REPUBLIC INSURANCE COMPANY | ) | DATE ISSUED: 01/29/2021 |
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| Employer/Carrier-Respondents | ) | |
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| DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR | ) | |
| | ) | |
| Party-in-Interest | ) | DECISION and ORDER |

Appeal of the Decision and Order Denying Benefits of Lauren C. Boucher, Administrative Law Judge, United States Department of Labor.

Helen M. Koschoff, Wilburton, Pennsylvania, for Claimant.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for Employer and its Carrier.

Cynthia Liao (Kate S. O'Scannlain, Solicitor of Labor; Barry H. Joyner, 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: BUZZARD, GRESH, and JONES, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals Administrative Law Judge Lauren C. Boucher's Decision and Order Denying Benefits (2017-BLA-05792) rendered on a subsequent claim filed on November 3, 2016[1] pursuant to the Black Lung Benefits Act, 30 U.S.C. §§901-944 (2018) (Act).

The administrative law judge found Claimant did not establish complicated pneumoconiosis and therefore could not invoke the irrebuttable presumption of total disability at Section 411(c)(3) of the Act. 30 U.S.C. §921(c)(3) (2018); 20 C.F.R. §718.304. Although the administrative law judge credited Claimant with at least eighteen years of underground coal mine employment, she found Clamant did not establish total disability and therefore found he did not invoke the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act,[2] 30 U.S.C. §921(c)(4) (2018), or establish a change in an applicable condition of entitlement.[3] 20 C.F.R. §725.309. She therefore denied benefits.

[1] Claimant filed two previous claims. Director's Exhibits 1, 2. On May 25, 2010, the district director denied his most recent claim, filed on July 15, 2009, for failure to establish total disability. Director's Exhibit 2.

[2] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[3] When a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *see White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Because Claimant's prior claim was denied for failure to establish total

On appeal, Claimant asserts the administrative law judge erred in finding he did not establish complicated pneumoconiosis. Employer responds in support of the denial of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a motion in which she concedes the Department of Labor (DOL) failed to provide Claimant with a complete pulmonary evaluation and requests a remand to the district director for the DOL physician to clarify his opinion on the issue of total disability. Claimant and Employer respond in opposition to the Director's motion.[4]

The Benefits Review Board's scope of review is defined by statute. We must affirm the administrative law judge's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[5] 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).

**Invocation of the Section 411(c)(3) Presumption**

Section 411(c)(3) of the Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if he suffers from a chronic dust disease of the lung which: (a) when diagnosed by x-ray, yields an opacity greater than one centimeter in diameter that would be 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, would be a condition that could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304. The administrative law judge must weigh the evidence at subsections (a), (b), and (c) before determining whether Claimant has invoked the irrebuttable presumption. *See Westmoreland Coal Co. v. Cox*, 602 F.3d 276, 287 (4th Cir. 2010); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991) (en banc); *Truitt v. N. Am. Coal*

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disability, he was required to submit new evidence establishing this element in order for the subsequent claim to be considered on the merits. Director's Exhibit 2.

[4] We affirm, as unchallenged, the administrative law judge's finding of at least eighteen years of underground coal mine employment and the existence of simple clinical pneumoconiosis. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[5] This case arises within the jurisdiction of the United States Court of Appeals for the Third Circuit because Claimant's coal mine employment occurred in Pennsylvania. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4.

*Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. N. Am. Coal Corp.*, 626 F.2d 1137 (3d Cir. 1980).

The administrative law judge found the x-ray evidence supports a finding of complicated pneumoconiosis at 20 C.F.R. §718.304(a), while the biopsy, medical opinion, and CT scan evidence does not. 20 C.F.R. §718.304(b), (c). Decision and Order at 19. Weighing the evidence together, she found complicated pneumoconiosis was not established. Claimant asserts the administrative law judge did not adequately explain how she weighed the evidence together to reach this conclusion. Claimant's Brief at 8-10. In order to address Claimant's argument, we will first summarize the administrative law judge's analysis of the evidence in each category under 20 C.F.R. §718.304(a)-(c).

The administrative law judge first considered five interpretations of three x-rays dated January 22, 2013, May 26, 2016, and July 5, 2016. 20 C.F.R. §718.304(a); Decision and Order at 6-10. Two of the x-rays were read only by Dr. Meyer, a dually qualified B reader and Board-certified radiologist. He interpreted both the January 22, 2013 and July 5, 2016 x-rays as positive for simple and complicated pneumoconiosis with Category B large opacities in both lungs, while identifying "other considerations" that might account for the opacities.[6] Employer's Exhibit 4. After summarizing Dr. Meyer's x-ray interpretations and comments, the administrative law judge noted it "appears Dr. Meyer was not convinced" Claimant has complicated pneumoconiosis. Decision and Order at 10. However, she further noted that, in classifying the x-rays as positive for complicated pneumoconiosis, Dr. Meyer "simply offered other possible explanations for Claimant's lung abnormalities." *Id*. Because the administrative law judge found those "alternative explanations . . . rather speculative," and because Dr. Meyer indicated the presence of large opacities consistent with complicated pneumoconiosis, she found the January 22, 2013 and July 5, 2016 x-rays positive for complicated pneumoconiosis. *Id*.

Dr. Colella, also a dually qualified B reader and Board-certified radiologist, interpreted the May 26, 2016 x-ray as positive for simple pneumoconiosis, but not

[6] As the administrative law judge summarized, Dr. Meyer included essentially the same comments with his interpretations of the January 22, 2013 and July 5, 2016 x-rays. Decision and Order at 7, 9; Employer's Exhibit 4. He noted that each x-ray was "c/w complicated cwp," and that "[b]y ILO rules, I must classify these findings as consistent with complicated coal workers' pneumoconiosis." Employer's Exhibit 4. He also noted the findings were "not typical of granulomatosis with polyangiitis (Wegener's vasculitis)," but because Claimant had "prior bronchoscopic biopsy results revealing a granuloma and vasculitis, other considerations might include necrotizing sarcoidal angiitis or drug-induced granulomatous vasculitis . . . ." *Id*.

complicated pneumoconiosis. Director's Exhibit 10. Dr. Smith, a dually qualified B reader and Board-certified radiologist as well, read this x-ray as positive for simple and complicated pneumoconiosis with a Category A large opacity in the right lung. Claimant's Exhibit 1. Dr. Meyer also read this x-ray as positive for simple pneumoconiosis and complicated pneumoconiosis, indicating the x-ray showed a Category A large opacity in the right hilum.[7] Director's Exhibit 11. As two readings were positive for complicated pneumoconiosis and only one was negative, the administrative law judge concluded the "overall weight of Claimant's May 26, 2016, chest x-ray is positive for complicated pneumoconiosis." Decision and Order at 10.

Having found all three x-rays positive for complicated pneumoconiosis, the administrative law judge found the x-ray evidence, "when considered alone," supports a finding of complicated pneumoconiosis. Decision and Order at 10; 20 C.F.R. §718.304(a).

Turning to the biopsy evidence, the administrative law judge evaluated Dr. Stelmach's report of Claimant's June 30, 1998 right upper lung bronchoscopic biopsy. 20 C.F.R. §718.304(b); Decision and Order at 10-11; Employer's Exhibit 5. Dr. Stelmach opined that the biopsy findings "document[ed] vasculitis and the formation of one 'granulomatous focus.'" Employer's Exhibit 5. He did not mention pneumoconiosis. *Id*. The administrative law judge found Dr. Stelmach's report did not support a finding of complicated pneumoconiosis but instead "support[ed] an alternative diagnosis: that the large mass identified in Claimant's right upper lung is not associated with pneumoconiosis[,] but with granulomatous vasculitis." Decision and Order at 11. She thus found the biopsy evidence does not support the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(b).

The administrative law judge next evaluated Dr. Meyer's interpretation of a March 2, 2010 CT scan.[8] Employer's Exhibit 4; 20 C.F.R. §718.304(c). Dr. Meyer identified

[7] Dr. Meyer commented that the "findings [were] consistent with complicated coal workers' pneumoconiosis" and further noted that the "right suprahilar opacity may be a large opacity/conglomerate fibrosis or malignancy." Decision and Order at 8; Employer's Exhibit 4.

[8] Both the June 30, 1998 lung biopsy and the March 2, 2010 CT scan predate the denial of Claimant's prior claim. The administrative law judge explained that she found it appropriate to evaluate all the evidence of record to determine whether Claimant invoked the irrebuttable presumption rather than focus solely on whether new evidence established complicated pneumoconiosis and a change in an applicable condition of entitlement.

small nodules in both lungs, with a coalescent opacity in both upper lobes, the one on the right measuring 3.0 x 4.3 cm and the one on the left measuring .9 x 1.8 cm. He further indicated some calcified nodules were incorporated in the areas of coalescent opacities. Dr. Meyer concluded that "based on the imaging appearance, I must classify this as possible complicated coal workers' pneumoconiosis," but also noted that "given the previous bronchoscopic biopsy results revealing vasculitis, other considerations might include necrotizing sarcoidal angiitis or drug-induced granulomatous vasculitis . . . ." Employer's Exhibit 4. The administrative law judge noted Dr. Meyer stated he "must" classify the CT scan findings as consistent with possible complicated pneumoconiosis, but included "alternative explanations consistent with Claimant's biopsy results." Decision and Order at 13. She found these aspects of his report suggested Dr. Meyer did not believe his findings actually represent complicated pneumoconiosis. *Id*. She therefore found the CT scan does not support the existence of complicated pneumoconiosis but rather "appears to support an alternative diagnosis of vasculitis to explain the large opacities identified in Claimant's lungs." *Id*.

Turning to the medical opinions of Drs. Watson, Futerfas, and Levinson, the administrative law judge found that, while all three physicians diagnosed simple pneumoconiosis, "Dr. Futerfas did not diagnose complicated pneumoconiosis, Dr. Watson's opinion could possibly support a finding of complicated pneumoconiosis, and Dr. Levinson determined Claimant does not have complicated pneumoconiosis." Decision and Order at 17; 20 C.F.R. §718.304(c); Director's Exhibit 10; Claimant's Exhibit 3; Employer's Exhibits 1-3. More specifically, she noted Dr. Watson examined Claimant, reviewed his March 2, 2010 CT scan and, after noting a 4.3 x 2.6 cm mass, opined that Claimant "has clear evidence of coal workers' pneumoconiosis . . . ." Claimant's Exhibit 3. She further noted Dr. Levinson examined Claimant and reviewed additional evidence, including his treatment records, and opined that he does not have complicated pneumoconiosis but has vasculitis with a non-infectious granuloma. Employer's Exhibits 1-3.

The administrative law judge credited Dr. Levinson's opinion over Dr. Watson's, noting the evidence does not establish Dr. Watson has specific experience or training in the treatment of pulmonary conditions and, unlike the opinion of Dr. Levinson, there is no indication Dr. Watson was aware of Dr. Stelmach's 1998 biopsy report. Decision and Order at 17. Finding Dr. Levinson's opinion well-reasoned and documented, the

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Decision and Order at 19 n.10. No party challenges this aspect of the administrative law judge's decision.

administrative law judge concluded the medical opinions did not support the existence of complicated pneumoconiosis.[9] 20 C.F.R. §718.304(c); Decision and Order at 17.

Considering all of the evidence together, the administrative law judge concluded that, while the x-ray evidence supported a finding of complicated pneumoconiosis, Dr. Stelmach's biopsy report, supported by Dr. Meyer's CT scan report and Dr. Levinson's opinion, provided an alternative diagnosis that better explained the large opacities seen on Claimant's x-rays. *Id.* She therefore concluded the negative biopsy, CT scan, and medical opinion evidence outweighed the positive x-ray evidence and found Claimant failed to establish complicated pneumoconiosis, and thus did not invoke the irrebuttable presumption of total disability due to pneumoconiosis. 20 C.F.R. §718.304; Decision and Order at 19.

Claimant asserts the administrative law judge erred in weighing the evidence together. Specifically, Claimant asserts that, having found the x-ray evidence supported a finding of complicated pneumoconiosis, the administrative law judge "went on to, in effect, rebut her irrebuttable finding" of complicated pneumoconiosis. Claimant's Brief at 9. We disagree. An administrative law judge must examine all the evidence on the issue of complicated pneumoconiosis from each category of evidence, resolve any conflicts, and render findings of fact. *See Melnick*, 16 BLR at 1-33-34. Contrary to Claimant's contention, the administrative law judge did not find the irrebuttable presumption invoked but rather that one category of evidence—the x-rays—when considered alone, weighed in favor of a finding of complicated pneumoconiosis. Decision and Order at 10. She then considered and weighed evidence from other categories, including the biopsy evidence, medical opinion evidence, CT scans, and Claimant's treatment records. *See Melnick*, 16 BLR at 1-33-34; Decision and Order at 10-19.

Claimant further asserts that, in finding the x-ray evidence outweighed by other evidence, the administrative law judge improperly relied on Dr. Levinson's opinion that vasculitis is the sole cause of the large opacities in Claimant's lungs as that opinion was based on biopsy evidence that was twenty-one years old and concerned only a single mass in the right lung, whereas the more recent x-ray evidence demonstrated large opacities in both lungs. Claimant's Brief at 9. The Director also raises a concern with the

[9] We affirm, as unchallenged on appeal, the administrative law judge's determination that, considered as separate categories of evidence, the x-ray evidence supports a finding of complicated pneumoconiosis, while the biopsy, CT scan, medical opinions, and treatment records do not support a finding of the existence of complicated pneumoconiosis. 20 C.F.R. §718.304(a); *see Skrack*, 6 BLR at 1-711; Decision and Order at 10-11, 13, 17-19.

administrative law judge's finding, noting that, while she based her conclusion that the large opacity in Claimant's right upper lung was not complicated pneumoconiosis "on an old biopsy report and Dr. Levinson's medical opinion," "the x-ray evidence shows large opacities in both the right and left lungs," and asserts the administrative law judge did not take that fact into consideration when evaluating the weight given to the biopsy and Dr. Levinson's opinion. Director's Brief at 1 n.1, *citing* Decision and Order at 16-17, 19; Employer's Exhibit 4 (Dr. Meyer finding large, Category B opacities present in the upper zones of both lungs in January 22, 2013 and July 5, 2016 x-rays). We agree.

Weighing the evidence together, the administrative law judge concluded the preponderance of the evidence does not establish complicated pneumoconiosis because Dr. Stelmach's biopsy report, Dr. Meyer's CT scan interpretation, and Dr. Levinson's opinion provide an alternative diagnosis that better explains the large masses seen on the x-rays. *See* Decision and Order at 19.

In evaluating Dr. Levinson's opinion, the administrative law judge noted the physician "considered the 'abnormal density' (*presumably referring to the density identified in Claimant's right lung*) to be related to vasculitis and non-infectious granuloma formation (as 'indicated by biopsy evidence'), which is completely unrelated to coal mining." Decision and Order at 15 (emphasis added), *quoting* Employer's Exhibit 1 at 5. The record reflects that Dr. Levinson's deposition testimony and supplemental report likewise focus on the mass identified in Claimant's right lung without mention of the Category B opacity Dr. Meyer identified in Claimant's left lung on x-ray. *See* Employer's Exhibits 2 at 20, 46; 3; 4. He also specifically indicated there had been "no progression" in the granuloma in Claimant's right lung since it had been initially diagnosed in 1998. Employer's Exhibit 2 at 38. In crediting Dr. Levinson's opinion as well-reasoned and documented, however, the administrative law judge did not explain how she concluded his opinion, which concerned only the etiology of the mass in Claimant's right lung and specifically indicated there had been no progression in Claimant's vasculitis since it was first diagnosed, demonstrated the mass seen in Claimant's left lung was not complicated pneumoconiosis. *See Barren Creek Coal Co. v. Witmer*, 111 F.3d 352, 354 (3d Cir. 1997); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989); Decision and Order at 14-16, 17, 19.

The administrative law judge also found Dr. Meyer's interpretation of the March 2, 2010 CT scan outweighed the x-ray evidence of complicated pneumoconiosis, noting Dr. Meyer's alternative diagnosis of vasculitis was consistent with the 1998 biopsy report. Decision and Order at 13. However, she did not explain how Dr. Meyer's reasoning, based on the 1998 biopsy of a mass in Claimant's right lung, addressed the cause of the large opacities Dr. Meyer observed in Claimant's left lung on the January 22, 2013 and July 5,

2016 x-rays. *See Witmer*, 111 F.3d at 354; *Wojtowicz*, 12 BLR at 1-165; Decision and Order at 13, 19.

In sum, the administrative law judge did not explain her reasons for concluding the June 30, 1998 biopsy of Claimant's right lung, as well as the CT scan and medical opinion evidence which rely upon that biopsy, provides an alternative diagnosis for the large opacities identified in both lungs on the January 22, 2013 and July 5, 2016 x-rays. The Decision and Order thus does not comply with the Administrative Procedure Act (APA) requirement that every adjudicatory decision include a statement of "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a); *see Wojtowicz*, 12 BLR at 1-165. Consequently, we vacate the administrative law judge's finding Claimant did not establish complicated pneumoconiosis and did not invoke the irrebuttable presumption that he is totally disabled due to pneumoconiosis. 20 C.F.R. §718.304. Thus we also vacate the administrative law judge's determination that Claimant failed to establish a change in an applicable condition of entitlement. 20 C.F.R. §725.309.

On remand, the administrative law judge must reconsider whether the evidence establishes complicated pneumoconiosis under 20 C.F.R §718.304. She must evaluate the credibility of this evidence in light of the physicians' qualifications, the explanations for their medical findings, the documentation underlying their medical judgments, and the sophistication of the bases for their conclusions. *See Kertesz v. Crescent Hills Coal Co.*, 788 F.2d 158, 163 (3d Cir. 1986). She must further adequately explain her bases for resolving the conflicts in this evidence. *Wojtowicz*, 12 BLR at 1-165.

**Invocation of the Section 411(c)(4) Presumption—Total Disability**

The administrative law judge considered the pulmonary function studies, arterial blood gas studies, and medical opinions, and concluded Claimant did not establish he is totally disabled due to a pulmonary or respiratory impairment.[10] 20 C.F.R. §718.204(b)(2)(i), (ii), (iv); *see Rafferty v. Jones & Laughlin Steel Corp.*, 9 BLR 1-231, 1-232 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195, 1-198 (1986), *aff'd on recon.*, 9 BLR 1-236 (1987) (en banc); Decision and Order at 21-23. No party challenges the merits of the administrative law judge's finding that Claimant did not establish total disability. Nevertheless, the Director requests remand because she concedes the evaluation

[10] The administrative law judge found the record contains no evidence of cor pulmonale with right-sided congestive heart failure. 20 C.F.R. §718.204(b)(2)(iii); Decision and Order at 20 n.11.

Dr. Futerfas performed does not satisfy the DOL's obligation to provide a complete pulmonary evaluation sufficient to allow the administrative law judge to determine whether Claimant is totally disabled. Director's Brief at 4-5.

**Complete Pulmonary Evaluation**

The Act requires that "[e]ach miner who files a claim . . . shall upon request be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation." 30 U.S.C. §923(b), as implemented by 20 C.F.R. §§718.101(a) ("[e]ach miner who files a claim for benefits under the Act must be provided an opportunity to substantiate his or her claim by means of a complete pulmonary evaluation"), 725.406; *see Hodges v. BethEnergy Mines*, 18 BLR 1-84, 1-93 (1994). To fulfill its obligations under the Act, the DOL must "provid[e] 'a medical opinion that addresses all of the essential elements of entitlement.'" *Greene v. King James Coal Mining, Inc.*, 575 F.3d 628, 640 (6th Cir. 2009), *quoting Smith v. Martin Cnty. Coal Corp.*, 233 F. App'x 507, 512 (6th Cir. 2007).

The Director concedes the DOL failed to satisfy its obligation because Dr. Futerfas, who conducted the DOL-sponsored pulmonary evaluation, "failed to adequately address whether Claimant is totally disabled from a respiratory or pulmonary standpoint." Director's Brief at 3. The Director notes Dr. Futerfas did not provide an opinion on whether Claimant would be able to do his usual coal mine work, as his discussion focused on the severity of Claimant's overall physical disability rather than the severity of his respiratory or pulmonary impairment standing alone. *Id.* at 2-4. Thus, the Director asserts Dr. Futerfas's opinion does not satisfy the requirements of 20 C.F.R. §718.204(b) and requests the Board instruct the administrative law judge to remand the case to the district director solely to allow Dr. Futerfas to clarify his incomplete opinion regarding whether Claimant is totally disabled. *Id.* at 4. Claimant, however, objects to a remand for this specific purpose and indicates he seeks to establish entitlement by invoking the Section 411(c)(3) irrebuttable presumption. Claimant's Response to the Director's Motion to Remand at 3-4.

Under these circumstances, we decline to instruct the administrative law judge to remand for further clarification of Dr. Futerfas's opinion on total disability under 20 C.F.R. §718.204(b). On appeal, Claimant has not challenged the administrative law judge's finding that he failed to establish total disability. Even after the Director requested remand for Dr. Fuerfas to clarify his disability opinion which, in turn, would require the administrative law judge to reconsider her finding Claimant is not totally disabled, Claimant objected to a remand for that purpose. We construe this position as a concession he cannot establish total disability at 20 C.F.R. §718.204(b)(2). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); *Bucshon v. Peabody Coal Co.*, 4 BLR 1-608, 1-610 (1982). In light of this concession, any insufficiency in Dr. Futerfas's opinion with regard

to the matter of total disability is not prejudicial and therefore harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); *Matney v. J & L Coal Co.*, 3 BLR 1-332, 1-336 (1981).

Accordingly, the administrative law judge's Decision and Order Denying Benefits is affirmed in part and vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

GREG J. BUZZARD
Administrative Appeals Judge

DANIEL T. GRESH
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge