BRB Nos. 06-0402 BLA
and 06-0402 BLA-A

CUBERT SPENCE	)	
	)	
Claimant-Respondent	)	
Cross-Petitioner	)	
	)	
v.	)	
	)	
WEST VIRGINIA SOLID ENERGY, INCORPORATED	)	DATE ISSUED: 02/28/2007
	)	
Employer-Petitioner	)	
Cross-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order - Granting Modification and Awarding Benefits and the Supplemental Decision and Order on Reconsideration of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonburg, Kentucky, for claimant.

Tab R. Turano (Greenberg Traurig), Washington, D.C., for employer.

Before: DOLDER, Chief Administrative Appeals Judge, McGRANERY and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals and claimant cross-appeals the Decision and Order – Granting Modification and Awarding Benefits and the Supplemental Decision and Order on Reconsideration (05-BLA-18) of Administrative Law Judge Linda S. Chapman awarding benefits on a modification of a duplicate 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] Claimant also cross-appeals from the administrative law judge's ruling, during the September 14, 2005 hearing, denying claimant's Motion to Compel Discovery. This case has been before the Board previously.[2] In the most recent appeal, the Board affirmed Administrative Law Judge Daniel J. Roketenetz's November 21, 2002 Decision and Order on Remand finding that claimant failed to establish a material change in conditions, as the evidence did not establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(b), and, therefore, affirmed the denial of benefits. *Spence v. West Virginia Solid Energy, Inc.*, BRB No. 03-0236 BLA (Oct. 20, 2003)(unpub.).

On February 19, 2004, claimant submitted additional medical evidence and requested modification of the prior denial of benefits. Following a review of the newly submitted evidence, on August 20, 2004, the district director issued a Proposed Decision and Order granting modification and awarding benefits. Employer requested a hearing, and the case was transferred to the Office of Administrative Law Judges. Prior to the hearing, on September 9, 2005, claimant filed a Motion to Compel Discovery of certain medical evidence developed by employer, and asked that the motion be addressed during the hearing. At the hearing, held on September 14, 2005, Administrative Law Judge Linda S. Chapman (the administrative law judge) denied claimant's Motion to Compel Discovery on the ground that the materials sought were privileged work product, prepared in anticipation of litigation and in anticipation of the hearing. Hearing Transcript at 7. In a Decision and Order dated December 19, 2005, the administrative law judge found that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iv), but established invocation of the irrebuttable presumption at 20 C.F.R. §718.304, and, consequently, total disability pursuant to 20 C.F.R. §718.204(b)(1). Therefore, the administrative law judge found that claimant established a change in conditions since the prior denial of benefits, pursuant to 20 C.F.R. §725.310 (2000). The administrative law judge further found, based on her

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

[2] The current claim, claimant's fourth, was filed on October 20, 1999. Director's Exhibit 1. The complete procedural history of this case, set forth in the Board's prior decisions in *Spence v. West Virginia Solid Energy, Inc.*, BRB No. 01-0724 BLA (Apr. 25, 2002)(unpub.), and *Spence v. West Virginia Solid Energy, Inc.*, BRB No. 03-0236 BLA (Oct. 20, 2003)(unpub.), is incorporated herein by reference.

determinations at Section 725.310 (2000), that claimant established a material change in conditions pursuant to 20 C.F.R. §725.309(d) (2000). Accordingly, the administrative law judge granted claimant's request for modification, and awarded benefits, beginning in October 1999.

On January 5, 2006, claimant filed a Motion for Reconsideration, requesting clarification that the basis of the administrative law judge's decision to grant modification was a finding of a mistake in a determination of fact. Claimant asserted that, by finding claimant entitled to benefits as of October 1999, when he filed his claim, rather than February 2004, when he requested modification, the administrative law judge implicitly based her determination on a mistake in fact.

In a Supplemental Decision and Order on Reconsideration issued on January 26, 2006, the administrative law judge stated that her prior determination was based on a change in conditions. Having relied upon the computerized tomography (CT) evidence establishing complicated pneumoconiosis, she modified her earlier decision to reflect an onset date of January 2004.

On appeal, employer contends that, through misapplication of *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the administrative law judge improperly shifted the burden of proof to employer. Employer further asserts that the administrative law judge erred in her analysis of the x-ray, CT scan, and medical opinion evidence relevant to the existence of complicated pneumoconiosis. Claimant responds, urging affirmance of the award of benefits. Claimant also cross-appeals, contending that the administrative law judge erred in failing to determine whether claimant was entitled to modification based on a mistake in a determination of fact. Claimant further asserts that the administrative law judge erred in denying his September 9, 2005, Motion to Compel Discovery. The Director, Office of Workers' Compensation Programs (the Director), has not filed a brief in this appeal.

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).

Claimant may establish modification by establishing either a change in conditions since the issuance of the previous denial or a mistake in a determination of fact in a previous denial. 20 C.F.R. §725.310(a) (2000). In considering whether a change in conditions has been established pursuant to Section 725.310 (2000), an administrative law judge is obligated to perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine

if the weight of the new evidence is sufficient to establish at least one element of entitlement which defeated entitlement in the prior decision. 20 C.F.R. §725.310 (2000); *see Consolidation Coal Co. v. Worrell*, 27 F.3d 227, 18 BLR 2-290 (6th Cir. 1994); *Nataloni v. Director, OWCP*, 17 BLR 1-82 (1993). In considering a request for modification of a duplicate claim (which has been denied based upon a failure to establish a material change in conditions), an administrative law judge must determine whether all of the evidence developed in the duplicate claim, including the new evidence submitted with the request for modification, is sufficient to support a material change in conditions. *See* 20 C.F.R. §725.309(d) (2000); *Hess v. Director, OWCP*, 21 BLR 1-141, 1-143 (1998); *Nataloni*, 17 BLR at 1-84. If the evidence is sufficient to establish a material change in conditions, the administrative law judge must then consider the merits of the duplicate claim. *Hess*, 21 BLR at 1-143.

Employer initially contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer's Brief at 14-16. Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.[3]

[3] Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis...if such miner is suffering...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

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. The administrative law judge must examine all the evidence on 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. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

As employer correctly asserts, in evaluating the medical evidence relevant to the existence of complicated pneumoconiosis, the administrative law judge misunderstood, and misapplied, the law as to the burden of proof. In beginning her analysis of the evidence of record relevant to the existence of complicated pneumoconiosis, the administrative law judge cited *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, and stated that "[w]hile its decision is not controlling in this case, which arises in the Sixth Circuit, the Fourth Circuit has recently provided guidance on the appropriate analysis . . . at 20 C.F.R. §718.304." Decision and Order at 9.

In *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, the United States Court of Appeals for the Fourth Circuit held that a single piece of relevant evidence could support an administrative law judge's finding that the irrebuttable presumption was successfully invoked "if that piece of evidence outweighs conflicting evidence in the record."[4] The

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> diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304(a)-(c); 30 U.S.C. §921(c)(3); *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999); *see Director, OWCP v. Eastern Coal Corp.* [*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). The administrative law judge must, however, weigh together the evidence at subsections (a), (b) and (c) before determining whether invocation of the irrebuttable presumption has been established. *Gray*, 176 F.3d at 389, 21 BLR at 2-628-629; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

[4] The Fourth Circuit further explained:

> Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (a), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (b) or prong (c), then all of the evidence must be considered and evaluated to

administrative law judge cited the holdings of the Fourth Circuit in *Scarbro*, and then summarized her understanding of the court's holding, stating:

> Thus, if the claimant meets the congressionally defined condition, that is, if he establishes that he has a condition that manifests itself on x-rays with opacities greater than one centimeter, he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, unless there is *affirmative evidence under prong A, B, or C that persuasively establishes* that either these opacities do not exist, or that they are the result of a disease process unrelated to his exposure to coal mine dust.

Decision and Order at 11 (emphasis added). She then weighed the x-ray evidence and concluded that, "[b]ased on the above, I find that employer has not introduced x-ray evidence sufficient to affirmatively show that the opacities noted by Dr. Forehand, Dr. Barrett, and Dr. Dahhan are not there, or that they are not what they seem to be." Decision and Order at 11.

The Fourth Circuit, in an unpublished decision, recently held that the exact language used by the administrative law judge in summarizing her understanding of the court's holding "misstates *Scarbro*" and appears to shift the burden of proof to employer. *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.). The Fourth Circuit explained that:

> *Scarbro* does not impose on the employer the burden to "persuasively establish" that the opacities physicians may have found do not exist or are due to a disease other than pneumoconiosis. Nor does *Scarbro* require that evidence in general "persuasively establish" (as opposed to "affirmatively

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> determine whether the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on an x-ray. Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid. Instead, the x-ray evidence can lose force only if other evidence affirmatively shows the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256, 22 BLR at 2-101 (citation omitted).

> show") that the opacities discovered in a claimant's lungs are not what they seem. *Scarbro* holds only that once the claimant presents legally sufficient evidence (here, x-ray evidence of large opacities classified as category A, B, or C in the ILO system, *see* 30 U.S.C. §921(c)(3)), he is likely to win unless there is contrary evidence (typically, but not necessarily, offered by the employer) in the record. The burden of proof remains at all times with the claimant. *See Gulf & W. Indus. v. Ling*, 176 F.3d 226, 233 ("The burden of persuading the factfinder of the validity of the claim remains at all times with the miner."); *Lester v. Dir., Office of Workers' Comp. Programs*, 993 F.2d 1143, 1146 (4th Cir. 1993) ("The claimant retains the burden of proving the existence of the disease.").

Lambert, slip op. at 2. Because the administrative law judge, in misstating *Scarbro*, appeared to shift the burden of proof to the employer in *Lambert*, the Fourth Circuit found it necessary to remand the case for reconsideration.

We similarly hold that the administrative law judge, in this case, appears to have improperly shifted the burden of proof to employer to "persuasively establish" that the opacities do not exist or that they are not what they seem to be.[5] Consequently, we vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at 20 C.F.R. §718.304 and remand the case for consideration of all relevant evidence prior to the invocation of the irrebuttable presumption at Section 718.304, as required in *Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-629 (6th Cir. 1999).

Employer also contends that in evaluating the x-ray evidence of record relevant to the existence of complicated pneumoconiosis at Section 718.304(a), the administrative

[5] We recognize that unpublished decisions are not considered binding precedent in the Sixth Circuit. 6th Cir. R. 206(c) (Reported panel opinions are binding on subsequent panels. Thus, no subsequent panel overrules a published opinion of a previous panel. Court *en banc* consideration is required to overrule a published opinion of the court.) While we agree with the Fourth Circuit court's reasoning, our holding is not based exclusively upon the Fourth Circuit's decision in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.). Rather, our holding is based upon a review of the administrative law judge's individual statements in the instant case. These statements appear to indicate that she improperly shifted the burden of proof to employer. On remand, the administrative law judge must weigh all of the relevant evidence to determine whether claimant has established the existence of complicated pneumoconiosis by a preponderance of the evidence.

law judge erred in considering Dr. Dahhan's reading of the April 3, 2004 x-ray to be positive because, in his April 12, 2004 narrative report, Dr. Dahhan indicated that his Category A reading was questionable. Director's Exhibits 93, 96; Employer's Brief at 14. We agree.

With respect to the April 3, 2004 x-ray, Dr. Dahhan indicated on his ILO classification form that the x-ray revealed both small opacities 2/2, q, q, and a Category A large opacity. Director's Exhibit 96. Dr. Dahhan left blank the comments section on the bottom of the form, which is provided for the radiologist to discuss the stated classification "particularly if some other cause is thought to be responsible for a shadow which could be thought by others to have been due to pneumoconiosis . . . ." International Labour Office, Guidelines for the Use of ILO International Classification of Radiographs of Pneumoconiosis 10 (Rev. Ed. 1980); Director's Exhibit 96. Yet, in a subsequent narrative report, Dr. Dahhan stated that the "[c]hest x-ray showed . . . a mass consistent with a large opacity in the right zone. However other etiology cannot be determined. CT of the chest is recommended for further assessment. Final ILO classification is Q/Q, 2/2, question A large opacity/question right lung mass, coalescence and post op changes in the right chest." Director's Exhibit 93.

As employer contends, in finding Dr. Dahhan's reading of the April 3, 2004 x-ray to be positive, the administrative law judge did not consider Dr. Dahhan's comments, in his accompanying April 12, 2004 narrative report. Since Dr. Dahhan's comments call into question whether his April 3, 2004 x-ray reading is, in fact, a positive diagnosis of pneumoconiosis, the administrative law judge, on remand, must consider these comments, together with his markings on the ILO form, when reevaluating the x-ray evidence pursuant to Section 718.304(a). *Gray*, 176 F.3d at 389, 21 BLR at 2-628-629; *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-4-5; (1999)(*en banc on recon*.); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*).

In addition, we find merit in employer's contention that in discrediting the medical opinion of Dr. Dahhan, as stated in his narrative reports, the administrative law judge misstated the evidence considered by Dr. Dahhan, specifically finding that the physician "did not consider the more recent x-ray or CT scan results, including his own finding of a large opacity." Employer's Brief at 19; Decision and Order at 13. A review of Dr. Dahhan's April 12, 2004 and August 8, 2005 reports reveals that he did consider the more recent CT scan results, as well as some of the newly submitted x-ray evidence, and further discussed, as set forth above, his own reading of the April 3, 2004 x-ray. Director's Exhibit 93; Employer's Exhibit 7.

Finally, there is merit to employer's contention that the administrative law judge erred in dismissing Dr. Dahhan's consideration of the pulmonary function and blood gas study evidence, showing no functional respiratory impairment, in formulating his opinion

that claimant does not suffer from complicated pneumoconiosis. Employer's Brief at 19-21; Employer's Exhibit 7; Decision and Order at 13. The Act provides 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 is diagnosed by one of the three methods set forth in the statute. 30 U.S.C. §921(c)(3); *Gray*, 176 F.3d at 388-389, 21 BLR at 2-627. Moreover, in determining whether the evidence is sufficient to establish such a diagnosis, the statute directs the administrative law judge to consider all relevant evidence. 30 U.S.C. §923(b); *Gray*, 176 F.3d at 388, 21 BLR at 2-628. The Sixth circuit has held that evidence of the presence or absence of a respiratory impairment may be relevant to a physician's diagnosis of the existence of complicated pneumoconiosis. *Gray*, 176 F.3d at 388, 21 BLR at 2-628. Accordingly, the administrative law judge erred in dismissing Dr. Dahhan's consideration of the objective test results.

Therefore, because the administrative law judge failed to apply the proper standard in weighing the evidence relevant to the existence of complicated pneumoconiosis, and further erred in her consideration of the x-ray reading and medical opinion of Dr. Dahhan, we vacate the administrative law judge's finding that claimant established a material change in conditions, and that therefore, he established a basis for modification, and established his entitlement to benefits under the Act. *Martin v. Ligon Preparation Co.*, 400 F.3d 302, 23 BLR 2-261 (6th Cir. 2005); *Gray*, 176 F.3d at 389, 21 BLR at 2-628-629.

Turning to claimant's arguments on cross-appeal, we hold that there is merit to claimant's argument that, having determined that claimant established a change in conditions, the administrative law judge did not specifically analyze the prior administrative law judge's findings to determine if claimant also established a mistake in fact. Claimant's Brief at 19. While an administrative law judge may modify a prior decision by finding either a change in conditions since the issuance of the previous denial or a mistake in a determination of fact in a previous denial, the administrative law judge has a duty to consider both grounds for modification. 20 C.F.R. §725.310 (2000); *see Worrell*, 27 F.3d at 230, 18 BLR at 2-296. Here, the basis for granting modification, whether mistake in fact or change in conditions, affects the date from which benefits commence. The applicable regulation provides that if a claim is awarded through modification based on a mistake in fact, benefits are payable beginning with the month of onset of total disability due to pneumoconiosis arising out of coal mine employment, or, if the evidence does not establish the month of onset, from the month in which claimant filed his claim. 20 C.F.R. §725.503(d)(1). While a similar method of determining the date from which benefits are payable applies when a claim is awarded through modification based on a change in conditions, the regulation contains the additional proviso that "no benefits shall be payable for any month prior to the effective date of the most recent denial," which, in this case, was the Board's Decision and Order dated

October 20, 2003. 20 C.F.R. §725.503(d)(2). Thus, if, on remand, the administrative law judge again finds entitlement to benefits established, she should further consider whether claimant has established a mistake in fact pursuant to Section 725.310 (2000).

Finally, we hold that, on remand, the administrative law judge must issue a more complete decision explaining her denial of claimant's Motion to Compel Discovery. In denying claimant's motion, the administrative law judge simply stated that she was aware of the applicable law and regulations, and held, without further explanation, that the materials sought were "covered by the work product privilege because they were in fact prepared in anticipation of this hearing, therefore, . . . fall squarely into the work product privilege . . . ." Hearing Transcript at 7. The administrative law judge did not identify the precedent on which she relied, or otherwise analyze this issue.

In order to determine whether the administrative law judge properly denied claimant's motion to compel, the Board must have before it the administrative law judge's "reasons or basis therefor . . . ." 5 U.S.C. §557(c)(3)(A); *Lane Hollow Coal Co. v. Director, OWCP [Lockhart]*, 137 F.3d 799, 803, 21 BLR 2-302, 2-311 (4th Cir. 1998)(observing that a function of Section 557(c)(3)(A) is to permit appellate review); *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162, 1-165 (1989). As the administrative law judge's ruling does not allow us to conduct a proper appellate review of her holdings, on remand, the administrative law judge must reconsider claimant's motion to compel discovery and fully explain the rationale for her findings. 5 U.S.C. §557(c)(3)(A).

Accordingly, the administrative law judge's Decision and Order - Granting Modification and Awarding Benefits and Supplemental Decision and Order on Reconsideration are vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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REGINA C. McGRANERY
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge