BRB No. 06-0927 BLA

W. L. C.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 06/26/2007
	)	
WESTMORELAND COAL COMPANY	)	
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Douglas A. Smoot and Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Barry H. Joyner (Jonathan L. Snare, Acting Solicitor of Labor; 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 (05-BLA-6260) of Administrative Law Judge Linda S. Chapman awarding benefits 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). This case involves a subsequent claim filed on July 29, 2004.[1] After crediting claimant with forty-three years of coal mine employment, 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). However, the administrative law judge found that the newly submitted evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304, and consequently, total disability pursuant to 20 C.F.R. §718.204(b)(1). Thus, the administrative law judge found that claimant established a "change in conditions" since the prior denial of benefits. In her consideration of the merits of claimant's 2004 claim, the administrative law judge found that the evidence established the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Employer also argues that the administrative law judge erred in finding that claimant's complicated pneumoconiosis arose out of his coal mine employment. The Director, Office of Workers' Compensation Programs (the Director), responds, noting his

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[1] Claimant initially filed a claim for benefits on August 29, 1970. Director's Exhibit 1. On December 9, 1980, the district director found that the evidence did not establish that claimant suffered from a totally disabling respiratory impairment due to pneumoconiosis. *Id.* The district director therefore denied benefits. *Id.*

Claimant filed a duplicate claim on March 15, 1994. Director's Exhibit 1. On January 25, 1995, the district director found that the evidence did not establish that claimant was totally disabled due to pneumoconiosis. *Id.* The district director also found that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). *Id.* The district director therefore denied benefits. *Id.*

Claimant filed a third claim on October 1, 1996. In a Decision and Order dated September 23, 1998, Administrative Law Judge Mollie W. Neal found that the newly submitted evidence did not establish total disability pursuant to 20 C.F.R. §718.204(c)(1)-(4) (2000) or total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b) (2000). Director's Exhibit 1. Judge Neal therefore determined that claimant did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000). Claimant's subsequent requests for modification were denied by the district director on September 29, 1999, November 21, 2000, and December 4, 2001.

Claimant filed a fourth claim for benefits on July 29, 2004. Director's Exhibit 3.

agreement with employer's contention that the administrative law judge erred by improperly shifting the burden of proof to employer in her analysis of the evidence pursuant to 20 C.F.R. §718.304. However, the Director disagrees with employer's allegations of error regarding the cause of claimant's pneumoconiosis. Claimant has not filed a response brief.[2]

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's 2004 claim is considered a "subsequent" claim because it was filed more than one year after the date that claimant's prior 1996 claim was finally denied. 20 C.F.R. §725.309(d). The regulations provide that a subsequent claim shall be denied unless the claimant demonstrates that one of the applicable conditions of entitlement[3] has changed since the date upon which the order denying the prior claim became final. *Id.* Administrative Law Judge Mollie W. Neal denied claimant's 1996 claim because she found that the evidence did not establish a material change in conditions pursuant to 20 C.F.R. §725.309 (2000).

Employer 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. 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.[4]

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[2] Because no party challenges the administrative law judge's length of coal mine employment finding, this finding is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The regulations provide that a miner, in order to satisfy the requirements for entitlement to benefits, must establish the existence of pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; that he is totally disabled; and that pneumoconiosis contributed to his total disability. 20 C.F.R. §725.202(d). The applicable conditions of entitlement are limited to those conditions upon which the prior denial was based. *See* 20 C.F.R. §725.309(d)(2).

[4] Section 718.304 provides in relevant part:

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, the administrative law judge stated that the decision of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220

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

20 C.F.R. §718.304. 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. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*).

F.3d 250, 22 BLR 2-93 (4th Cir. 2000), "while not binding in this case, is very helpful in providing guidance on this issue."[5] Decision and Order at 13.

In *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, 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."[6] *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

In this case, the administrative law judge cited the holdings of the Fourth Circuit in *Scarbro*. *See* Decision and Order at 13-14. However, the administrative law judge also stated that:

> [I]f [the claimant] meets the congressionally defined condition, that is, if he establishes that he has a condition that manifests itself on x-rays with

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[5] As noted by the Director, Office of Workers' Compensation Programs, the administrative law judge did not explain the basis for her statement that the law of the United States Court of Appeals for the Fourth Circuit is not binding in this case. Director's Brief at 1 n.1. In addition, the administrative law judge did not make a determination, and the record is unclear, as to whether claimant's last coal mine employment occurred in Virginia or Kentucky. *See* Director's Exhibits 1, 2. Thus, on remand, the administrative law judge is instructed to explain the basis for her decision regarding which circuit law is controlling in this case. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989).

[6] 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 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).

> 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* either that 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 14 (emphasis added).

The Fourth Circuit, in an unpublished decision, recently held that this *identical language* "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 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.[7] Consequently, we

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[7] We recognize that unpublished decisions are not considered binding precedent in either the Fourth or the Sixth Circuit. *See* 4th Cir. R. 36(c); 6th Cir. R. 206(c). While we agree with its 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

vacate the administrative law judge's finding that the newly submitted evidence establishes that claimant is entitled to the irrebuttable presumption at 20 C.F.R. §718.304 and remand the case for reconsideration.[8] In light of this decision, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §725.309 and her finding of entitlement on the merits.

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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 should weigh all of the relevant evidence together to determine whether claimant has established the existence of complicated pneumoconiosis by a preponderance of the evidence.

[8] Employer argues that the administrative law judge erred in discrediting the interpretations of physicians who found abnormalities consistent with tuberculosis or other diseases because she found no evidence in the record to support a finding that tuberculosis or another disease process could be responsible for these findings. Decision and Order at 19-20. The Board has long held that the interpretation of the objective data is a medical determination for which an administrative law judge cannot substitute her own opinion. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Many of the physicians interpreted claimant's x-rays as revealing other abnormalities. The fact that the record does not reveal that claimant suffered from tuberculosis does not undermine the interpretations of those physicians who found that claimant's x-rays revealed abnormalities consistent with that disease.

Employer also contends that the administrative law judge, in addressing whether the evidence was sufficient to establish the existence of complicated pneumoconiosis, erred in discrediting the opinions of physicians who found the absence of a pulmonary impairment. The Act provides an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis, "if such miner is suffering from 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). 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); *see Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-628 (6th Cir. 1999)(holding 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). Therefore, on remand, the administrative law judge must consider all of the relevant x-ray and medical opinion evidence to determine whether claimant has established the existence of complicated pneumoconiosis. *See* 20 C.F.R. §718.304; *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).

On remand, should the administrative law judge find the newly submitted evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, claimant will have established a change in an applicable condition of entitlement under 20 C.F.R. §725.309. Under these circumstances, the administrative law judge is required to consider claimant's 2004 claim on the merits, based on a weighing of all of the evidence of record. *See Shupink v. LTV Steel Corp.*, 17 BLR 1-24 (1992).

Employer finally argues that the administrative law judge failed to properly consider the etiology of claimant's large opacities. *See* Employer's Brief at 14. The Director maintains that disease causation is governed by 30 U.S.C. §921(c)(1) and 20 C.F.R. §718.203, which provide that a claimant with more than ten years of coal mine employment is entitled to a rebuttable presumption that his pneumoconiosis arose out of his coal mine employment. The United States Court of Appeals for the Fourth Circuit recently held that:

> The presumption of §718.304 only establishes the third requisite element of proving total disability. The miner must also independently establish the second element -- that his "pneumoconiosis arose at least in part out of coal mine employment." 20 C.F.R. §718.203(a) (2006).

The Daniels Co. v. Mitchell, 479 F.3d 321, 337, BLR (4th Cir. 2007). On remand, if the administrative law judge finds the evidence sufficient to establish the existence of complicated pneumoconiosis, claimant is entitled to a rebuttable presumption that his complicated pneumoconiosis arose out of his coal mine employment. Employer would have the burden of producing sufficient evidence to rebut this presumption.[9] 20 C.F.R. §718.203(b).

Accordingly the administrative law judge's Decision and Order awarding 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.

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[9] Employer requests that the case be remanded to a different administrative law judge. However, because employer has not demonstrated any bias or prejudice on the part of the administrative law judge, employer's request is denied. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge