

BRB No. 08-0485 BLA

W.L.C.)
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 Claimant-Respondent)
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 v.)
)
 WESTMORELAND COAL COMPANY) DATE ISSUED: 03/13/2009
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 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 on Remand of Linda S. Chapman,
Administrative Law Judge, United States Department of Labor.

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for
employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and
HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (05-BLA-6260) of
Administrative Law Judge Linda S. Chapman (the administrative law judge) awarding
benefits on a subsequent claim¹ filed on July 29, 2004, pursuant to the provisions of Title

¹ Claimant filed his first claim on August 29, 1970. Director's Exhibit 1. It was
finally denied by the district director on December 9, 1980, because the evidence did not
establish that claimant was totally disabled by pneumoconiosis. *Id.* Claimant filed a
duplicate claim on March 15, 1994. *Id.* It was finally denied by the district director on
January 25, 1995, because claimant again failed to establish that he was totally disabled
by pneumoconiosis and therefore failed to establish a material change in conditions. *Id.*
Claimant filed his third claim on October 1, 1996. *Id.* It was finally denied by
Administrative Law Judge Mollie W. Neal, because the new evidence did not establish

IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This claim is before the Board for the second time. In her first Decision and Order on this claim, the administrative law judge credited claimant with forty-three years of coal mine employment and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the new 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 new evidence established the presence of complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the administrative law judge found that the new evidence established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. Hence, turning to the merits of the claim, the administrative law judge found that the evidence of record established the presence of complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Pursuant to employer's appeal, the Board affirmed, as unchallenged, the administrative law judge's finding that claimant established forty-three years of coal mine employment. *W.L.C. v. Westmoreland Coal Co.*, BRB No. 06-0927 BLA, slip op. at 3 n.2 (June 26, 2007)(unpub.). The Board, however, vacated the administrative law judge's finding that the new evidence established the presence of complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, because the administrative law judge "misunderstood and misapplied" the law as to the burden of proof. Accordingly, the Board remanded the case to the administrative law judge for further consideration of the issue, with instructions to apply the proper burden of proof. *W.L.C.*, slip op. at 7. The Board also vacated the administrative law judge's finding that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309, and her finding of entitlement on the merits. *W.L.C.*, slip op. at 7-8. The Board noted that if, on remand, the administrative law judge finds that the new evidence establishes the presence of complicated pneumoconiosis at Section 718.304, a change in an applicable condition of entitlement would be established at Section 725.309, and the administrative law judge must then consider the claim on the merits, weighing all of the evidence of record. *W.L.C.*, slip op. at 8. Further, the Board noted that if, on

total disability or total disability due to pneumoconiosis. Accordingly, Judge Neal found that claimant failed to establish a material change in conditions. *See* 20 C.F.R. §§718.204(b), (c) (2000), 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. *Id.*

remand, the administrative law judge finds that the evidence establishes the presence of complicated pneumoconiosis on the merits, claimant would be entitled to a presumption that his complicated pneumoconiosis arose out of his coal mine employment and employer would bear the burden of rebutting the presumption at 20 C.F.R. §718.203(b). The Board also instructed the administrative law judge to determine which circuit law was controlling in this case and to explain the basis for her decision in this regard, since the record was unclear as to whether claimant's last coal mine employment was in Virginia or Kentucky. *W.L.C.*, slip op. at 5 n.5.

On remand, the administrative law judge found that this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, because “[claimant] worked for 43 years for Westmoreland Coal Co. in Big Stone Gap, Virginia.” Decision and Order on Remand at 10 n.2; Director’s Exhibits 1, 5; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*). The administrative law judge again found that the evidence established the presence of complicated pneumoconiosis and, thereby, established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge again awarded benefits.

On appeal, employer challenges the administrative law judge’s finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304 and that claimant was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis thereunder. Neither claimant, nor the Director, Office of Workers’ Compensation Programs, has 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 into the Act by 30 U.S.C. §932(a); *O’Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner’s claim filed pursuant to 20 C.F.R. Part 718, claimant must establish that he is totally disabled due to pneumoconiosis arising out of coal mine employment. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any one of these elements precludes entitlement. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989).

Where 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). The “applicable conditions of entitlement” are “those conditions upon

which the prior denial was based.” 20 C.F.R. §725.309(d)(2). Claimant’s prior claim was denied because he failed to establish total disability due to pneumoconiosis. Consequently, in order to establish a change in an applicable condition of entitlement, claimant had to submit new evidence establishing this element. 20 C.F.R. §725.309(d)(2), (3); *see generally Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227, 2-235-237 (4th Cir. 1996), *rev’g en banc*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) 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, is a condition which would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. Additionally, the Fourth Circuit has held that “[b]ecause prong (A) sets out an entirely objective scientific standard” for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, in determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304, the administrative law judge must find that claimant has a “chronic dust disease of the lung,” commonly known as complicated pneumoconiosis, by weighing together all of the relevant evidence. 20 C.F.R. §718.304(a)-(c); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Employer contends that the administrative law judge again erred in finding that the new evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304 and in disregarding the Board’s instructions on remand. Specifically, employer asserts that the administrative law judge has once again erroneously shifted the burden of proof to employer to “persuasively establish” that the large opacities seen radiographically do not exist or that they are not what they seem to be. Employer’s argument has merit.

In her prior Decision and Order, the administrative law judge, citing *Scarbro*, found, after considering all of the relevant evidence, that the new x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304.

In its Decision and Order in response to employer's prior appeal, however, the Board noted that, in addition to citing *Scarbro*, the administrative law judge stated:

[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 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.

W.L.C., slip op. at 6.² Based on this language, the Board held that the administrative law judge appeared to have improperly shifted the burden of proof to employer to "persuasively establish" that the large opacities seen radiographically did not exist or that they were unrelated to coal mine dust exposure. *W.L.C.*, slip op. at 7. *Id.* Citing the Fourth Circuit's decision in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.), the Board held that *Scarbro* did not impose on employer the burden to persuasively establish that the opacities seen radiographically did not exist or were due to a disease other than pneumoconiosis. Rather, the Board held that the burden of proving that the opacities are opacities of complicated pneumoconiosis, *i.e.*, a chronic dust disease of the lung, and not the result of another disease process remains at all times with claimant. Accordingly, because it appeared that the administrative law judge shifted the burden of proof to employer, the Board vacated the administrative law judge's finding that the newly submitted evidence established complicated pneumoconiosis and her finding that claimant was, thereby, entitled to the irrebuttable presumption at Section 718.304, and remanded the case for reconsideration. The Board further noted that in

² Citing *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.), the Board noted that the United States Court of Appeals for the Fourth Circuit had held that language that was identical to the language used by the administrative law judge in this case misstated the holding in *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000), and appeared to shift the burden of proof to employer. *W.L.C. v. Westmoreland Coal Co.*, BRB No. 06-0927 BLA, slip op. at 6 (June 26, 2007) (unpub.). The Board also noted that its holding was not based exclusively on the Fourth Circuit's unpublished decision in *Lambert*, but that its holding was based on a review of the administrative law judge's specific statements in the case. *W.L.C.*, slip op. at 7 n.7.

deciding the issue on remand, the administrative law judge must consider all of the relevant x-ray and medical opinion evidence together.

On remand, in considering the new evidence under Section 718.304, the administrative law judge noted that the regulations provide for an irrebuttable presumption of total disability due to pneumoconiosis if a claimant suffers from a chronic dust disease of the lung and satisfies one of the prongs at Section 718.304(a)-(c). Decision and Order on Remand at 10. Citing *Scarbro*, the administrative law judge noted that all of the relevant medical evidence must be considered in determining the validity of claims. *Id.* However, the administrative law judge stated that “once [claimant] has provided evidence satisfying one of these prongs, if the [e]mployer can affirmatively show that the opacity is not there or is something other than pneumoconiosis, the x-ray loses force, and [claimant] is not entitled to the benefits of the presumption.” *Id.*

In addition, the administrative law judge noted that Section 718.304 requires that the opacities that show up on x-ray as one centimeter or greater in diameter be related to coal dust. *Id.* at 15. However, the administrative law judge then stated that “[u]nder *Scarbro*, once [claimant] establishes this etiology, the [e]mployer must provide evidence that affirmatively shows the opacities are not there or that they are from a disease process other than complicated pneumoconiosis.” *Id.* The administrative law judge also stated that “[t]he [e]mployer has failed to provide evidence affirmatively showing that the opacities or (sic) not there, or that they are due to a process other than pneumoconiosis.” *Id.* at 18.

Further, although the administrative law judge stated: that claimant has a chronic dust disease of the lungs; that this disease resulted in the presence of large opacities on x-ray; and that the large opacities were due to coal dust exposure, she nonetheless found that “[e]mployer has not offered affirmative evidence that this large opacity is due to something other than exposure to coal dust.” *Id.*

Claimant has the burden to establish entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). As discussed previously, the Board vacated the administrative law judge’s prior finding that the new evidence established the presence of complicated pneumoconiosis at Section 718.304, on the ground that the administrative law judge shifted the burden of proof to employer to show that the large opacities seen radiographically were not there or were unrelated to coal mine dust exposure. On remand, however, the administrative law judge has again shifted the burden of proof to employer to establish that the large opacities seen radiographically did not exist or that they were unrelated to coal mine dust exposure. *Hall v. Director, OWCP*, 12 BLR 1-80, 1-82 (1988). Consequently, we vacate the administrative law judge’s finding that the

new evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304, and remand the case for further consideration of all of the new evidence under the correct standard. *See Lambert*, No. 06-1154.

Furthermore, because we vacate the administrative law judge's finding that the new evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304, we also vacate the administrative law judge's findings that the new evidence established a change in an applicable condition of entitlement at 20 C.F.R. §725.309 and that claimant was entitled to benefits on the merits.

If, on remand, the administrative law judge finds that the new evidence establishes the presence of complicated pneumoconiosis at 20 C.F.R. §718.304 and, thereby, establishes a change in an applicable condition of entitlement at 20 C.F.R. §725.309, then the administrative law judge must consider whether all of the evidence of record establishes that claimant is entitled to benefits on the merits. *See Perry v. Mynu Coals, Inc.*, 469 F.3d 360, 23 BLR 2-374 (4th Cir. 2006); *Shupink v. LTV Steel Co.*, 17 BLR 1-24 (1992); *see also Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007) (holding that the miner must also establish that his complicated pneumoconiosis arose out of coal mine employment).

Lastly, as discussed, *supra*, the Board previously instructed the administrative law judge to consider the Fourth Circuit's opinion in *Lambert*, which explained the proper interpretation of *Scarbro*. However, on remand, the administrative law judge again applied *Scarbro* erroneously. In light of the Board's previous remand of this case, and the administrative law judge's repetition of error on remand, we conclude that "review of this claim requires a fresh look at the evidence" *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Thus, we reluctantly direct that the case be assigned to a different administrative law judge on remand.

Accordingly, the administrative law judge's Decision and Order on Remand awarding benefits is affirmed in part and vacated in part, and the case is remanded to the Office of Administrative Law Judges for reassignment and further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge