BRB No. 06-0564 BLA

KEITH R. DARAGO	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 04/26/2007
	)	
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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia for claimant.

Douglas A. Smoot and Kathy L. Synder (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 Awarding Benefits (03-BLA-6406) of Administrative Law Judge Linda S. Chapman rendered 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 is before the Board for a second time. The relevant procedural history of the case is as follows. Claimant filed his claim on February 26, 2001. Because claimant conceded that he was not totally disabled by a respiratory or pulmonary impairment, *see* Administrative Law Judge Exhibit 2, the sole issue presented to the administrative law judge was whether claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis under 20

C.F.R. §718.304. In her Decision and Order dated August 16, 2004, the administrative law judge interpreted language used by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, in *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), and determined that the x-ray interpretations of Dr. Patel and Dr. Ahmed, finding category B opacities, on two different x-ray films, constituted evidence of complicated pneumoconiosis sufficient "to trigger the irrebuttable presumption" under Section 718.304(a).[1] Decision and Order at 10, *citing Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The administrative law judge further found that the positive readings for complicated pneumoconiosis did not "lose force" because employer offered no evidence to "*affirmatively* show that the opacities are not there or are not what they seem to be [emphasis added]" due to an intervening pathology. Decision and Order at 12, *citing Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Thus, because the administrative law judge determined that claimant suffers from complicated pneumoconiosis under Section 718.304, she also found that claimant was entitled to an irrebuttable presumption of total disability due to pneumoconiosis, and awarded benefits.

Employer filed an appeal with the Board, alleging that the administrative law judge improperly shifted the burden to employer, under Section 718.304, to prove that claimant did not suffer from complicated pneumoconiosis, based solely on two positive

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[1] The United Stated Court of Appeals for the Fourth Circuit, within whose jurisdiction this claim arises, addressed the criteria for establishing "complicated pneumoconiosis" under Section 718.304, and the administrative law judge structured her analysis of the evidence on her interpretation of the following language used by the court:

> 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.

Eastern Assoc. Coal Corp. v. Director, OWCP [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).

x-ray interpretations for the disease. The Board agreed with employer that the administrative law judge's interpretation of pertinent language in *Scarbro* "appear[ed] to impose a requirement on employer's medical experts to *affirmatively* show that the opacities identified by Drs. Ahmed and Patel were not there or were not what they seemed to be, effectively requiring employer's experts to ascertain a definitive etiology for the large masses evident on x-ray notwithstanding their explicit opinions that the masses seen on claimant's x-rays were not consistent with complicated pneumoconiosis." *Darago v. Consolidation Coal Co.*, BRB No. 05-0122 BLA (Aug. 22, 2005) (unpub.) at 5. The Board noted that, contrary to the administrative law judge's finding, the "introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption set forth in Section 718.304, particularly when conflicting evidence is presented that rebuts the x-ray reading." *Darago*, BRB No. 05-0122 BLA at 3, *citing Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-626 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-1146; 17 BLR 2-114, 117-118 (4th Cir. 1993). Because the administrative law judge had erroneously required employer to "disprove the existence of complicated pneumoconiosis once claimant submitted an x-ray reading indicative of large opacities pursuant to Section 718.304(a)[,]" the Board vacated the administrative law judge's finding at Section 718.304, and remanded the case in order for the administrative law judge to conduct a qualitative and quantitative analysis of the x-ray evidence to determine whether the x-ray evidence as a whole was sufficient to establish the existence of complicated pneumoconiosis. *Darago*, BRB No. 05-0122 BLA at 5. The Board also directed the administrative law judge to weigh all of the other relevant evidence of record in determining whether claimant satisfied his burden of proving the existence of complicated pneumoconiosis.[2] *Darago*, BRB No. 05-0122 BLA at 5-6. On remand, the administrative law judge found that claimant established the existence of complicated pneumoconiosis under Section 718.304, and that claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis under Section 718.304. Accordingly, the administrative law judge awarded benefits.

[2] The Board held that the administrative law judge erred in summarily dismissing the medical opinions of Dr. Rosenberg and Dr. Hippensteel because she found that their reliance on normal pulmonary function and arterial blood gas studies to support their diagnosis of no complicated pneumoconiosis belied the statutory criteria necessary to invoke the irrebutable presumption, which does not require a showing of respiratory impairment. *Darago v. Consolidation Coal Co.*, BRB No. 05-0122 BLA (Aug. 22, 2005) (unpub.) at 6. The Board directed the administrative law judge to weigh the opinions of Dr. Rosenberg and Dr. Hippensteel along with the other relevant evidence in her consideration of whether claimant established the existence of complicated pneumoconiosis under 20 C.F.R. §718.304. *Id.*

On appeal, employer contends that the administrative law judge ignored the Board's directive to weigh all of the relevant evidence, and through misapplication of *Scarbro*, determined that claimant suffers from complicated pneumoconiosis by improperly shifting the burden of proof to employer to disprove the existence of the disease. Employer requests that the Board reverse or vacate the award of benefits, and remand the case for reassignment to a different administrative law judge for a *de novo* review of the record. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief.

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).

Pursuant to Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, 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)(A); 20 C.F.R. §718.304(a)-(c). While subsections 718.304(a), (b), and (c) set forth three different methods by which a claimant can invoke the irrebuttable presumption of total disability due to pneumoconiosis, the administrative law judge must, in every case, review all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). The Fourth Circuit has specifically held that evidence under one prong of Section 718.304 can diminish the probative value of evidence under another prong if the two forms conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117. Furthermore, the Board has recognized that, because Section 718.304 does not provide any opportunity for rebuttal, failure to require an administrative law judge to consider all relevant evidence at the invocation stage may violate an opposing party's right to due process. *See Melnick*, 16 BLR at 1-33.

In the instant appeal, employer asserts that, in reviewing the case on remand, the administrative law judge failed to comply with the Board's instruction that she weigh all of the relevant evidence for complicated pneumoconiosis, and that she merely reinstated

her prior findings based on an erroneous interpretation of *Scarbro*. We agree with employer that the administrative law judge has again misapplied *Scarbro* and improperly shifted the burden of proof to employer under Section 718.304. On remand, the administrative law judge prefaced her consideration of the evidence by stating her interpretation of *Scarbro*.

> I view the Court's decision in *Scarbro* to require that, when the Claimant presents evidence satisfying [Section] 718.304 and the Employer also presents relevant x-ray evidence or evidence relevant to prongs (A), (B), or (C), I must determine if the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on x-ray. This evidence loses force *only if* evidence is presented that affirmatively shows either that the opacities are not there, or that they are not what they seem to be. If the evidence fails to meet this burden, the claimant is entitled to the benefit of the [Section] 718.304 presumption.

Decision and Order on Remand at 9 (emphasis in the original).

The administrative law judge next explained why her approach to reviewing the evidence was consistent with applicable law:

> My analysis is consistent with the requirements of *Lester*. I agree that the evidence presented under all prongs should be considered before determining whether the clamant is entitled to the regulatory presumption. Having determined that the whole of the evidence establishes the presence of an opacity on x-ray greater than one centimeter and that [claimant] has presented evidence proving the opacity is due to dust exposure, I have followed the steps outlined in *Scarbro* by *requiring the Employer* to then provide evidence affirmatively showing that the opacities are due to a disease process other than pneumoconiosis.
>
> As instructed by the Board, I have re-evaluated the x-rays, CT scan interpretations, and medical opinion evidence. But I again find *that the [employer] has not submitted sufficient evidence*, by x-ray evidence or otherwise, establishing that the opacities on [claimant's] x-rays are not there, or that they represent something other than complicated pneumoconiosis.

Decision and Order on Remand at 10 (emphasis added).

Turning her attention to the record evidence, the administrative law judge began her analysis by considering whether claimant had established a condition of such severity

that it produced an opacity that appeared on x-ray greater than one centimeter in diameter. Reviewing the x-ray evidence under Prong A,[3] she relied on the reports of Dr. Ahmed and Dr. Patel, diagnosing Category B large opacities, along with the x-ray finding by Dr. Wheeler of a 5x3 centimeter mass, to reach her conclusion that claimant suffered from a condition of the lung that appeared either as an opacity measuring one centimeter or greater or a corresponding mass that measured greater than one centimeter.[4] Decision and Order on Remand at 11.

The administrative law judge also reviewed the CT scan evidence under Prong C, and determined that the CT scan evidence supported the x-ray evidence in showing a large mass that would be consistent with an opacity that measured more than one

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[3] The administrative law judge considered eight readings of four x-rays dated May 14, 2001, November 12, 2001, June 11, 2003, and October 23, 2003. Reviewing the x-ray evidence sequentially, she noted that Dr. Patel found Category B opacities on the May 14, 2001 x-ray while Dr. Scott read the film as showing simple pneumoconiosis but also identified "a large peripheral component typical for TB and not typical for silicosis/CWP." Decision and Order at 10-11, *citing* Employer's Exhibit 4 (emphasis in the original). She noted that the next x-ray dated November 12, 2001 was read as positive for simple pneumoconiosis by Dr. Rosenberg and Dr. Hippensteel, who were B readers but not Board-certified radiologists. Decision and Order at 11. A third x-ray dated June 11, 2003 was interpreted by Dr. Cappiello and Dr. Wheeler, both of whom are dually qualified. *Id*. Dr. Cappiello did not prepare an ILO classification but diagnosed complicated pneumoconiosis. *Id*. Dr. Wheeler indicated that the x-ray was unreadable but reported in the comments section that he saw abnormities consistent with tuberculosis. Decision and Order at 11. With respect to the most recent x-ray dated October 23, 2003, Dr. Ahmed identified a Category B large opacity, while Dr. Wheeler reported that there were no large opacities. *Id*. Dr. Wheeler also stated that there was a 5x3 centimeter mass in the lower apices and subapical upper lobes compatible with granulomatous disease and "probably tuberculosis." Decision and Order at 11, *citing* Employer's Exhibit 6.

[4] The administrative law judge also noted that while Dr. Cappeillo had not prepared an ILO classification sheet for his x-ray interpretation, Dr. Cappiello also reported a one centimeter nodule in the upper lungs. *Id*. She further noted that Dr. Scott reported the presence of "some process" in the right upper lung although he did not provide exact measurements, which was at least consistent with the opinions of Drs. Ahmed, Patel and Wheeler. Decision and Order on Remand at 11. The administrative law judge also concluded that the readings of Drs. Hippensteel and Rosenberg were less probative, given that there were not dually qualified physicians, and their opinions did not refute the existence of a large mass or opacity. Decision and Order on Remand at 12.

centimeter in diameter: "All six physicians who interpreted [claimant's] May 18, 2000 CT scan identified a mass in his upper lungs measuring between 2 and 5 centimeters. The two physicians who interpreted [claimant's] June 2003 CT scan also noted the presence of some process in his upper lungs [although they did not identify exact measurements]." Decision and Order on Remand at 12. Under Prong C, the administrative law judge further determined that the medical opinion evidence consisting of reports by Dr. Mullins, Dr. Hippensteel and Dr. Rosenberg, did not detract from the x-ray and CT scan evidence establishing that claimant had a one centimeter opacity or mass of the lung. Decision and Order on Remand at 13.

Once the administrative law judge found that claimant had established the presence of an opacity measuring at least one centimeter in diameter, she turned her attention to the etiology of the opacity and whether it was due to coal dust exposure. Decision and Order on Remand at 14. She considered only the x-ray evidence under Prong A, and found that the opinions of Drs. Ahmed and Patel diagnosing complicated pneumoconiosis were more credible than the contrary opinions of employer's experts, who opined that claimant did not have radiographic evidence for complicated pneumoconiosis.[5] Decision and Order on Remand at 14-16. The administrative law judge specifically determined that the x-ray readings of Drs. Scott, Wheeler and Hippensteel were speculative regarding the presence of tuberculosis or granulomatous disease, noting as she did in her original Decision and Order, that the record failed to show that claimant had ever been diagnosed with tuberculosis or granulomatous disease, and since claimant had submitted a negative tuberculosis test. Decision and Order on Remand at 16. She thus concluded: "Weighing the x-ray evidence of record, I find that [claimant] has satisfied his burden of establishing a greater than one centimeter opacity that is due to coal dust exposure. The burden now shifts to the [e]mployer to provide affirmative evidence showing that the opacity is not there or that it is not what it appears to be." *Id*. Thereafter, the administrative law judge weighed the CT scan and other evidence under Prong C, and found that employer had not satisfied its burden of proof. She specifically rejected the opinions of Drs. Hippensteel and Rosenberg, noting that their discussion of the absence of respiratory impairment in conjunction with their diagnoses of no complicated pneumoconiosis was contrary to the Act. Decision and Order on Remand at 17-18.

[5] The administrative law judge specifically rejected employer's argument that she weigh the x-ray evidence as either positive or negative for complicated pneumoconiosis, stating: "The fact that Dr. Scott, Dr. Wheeler and Dr. Hippensteel did not designate the presence of such opacities (Category B) on their ILO forms does not mean that they are "negative" for complicated pneumoconiosis. Indeed, each of these physicians acknowledged the presence of a mass or process in claimant's lungs, which they attributed to etiologies other than coal dust exposure or pneumoconiosis. Decision and Order on Remand at 16.

Finally, the administrative law judge indicated that she had "weighed all of the evidence together" and found that claimant satisfied his burden of proof. Decision and Order on Remand at 19. She reiterated that claimant had established by a preponderance of the evidence that he had a one centimeter opacity due to coal dust exposure, and that employer "has not offered persuasive affirmative evidence that these large opacities are due to something other than exposure to coal dust." *Id*. She provided the following summation:

> [Claimant] is not required to establish that he has the medical condition known as complicated pneumoconiosis. Rather once [claimant] shows, by a preponderance of the x-ray, autopsy or biopsy, or equivalent objective medical evidence that he has a condition that shows up on x-ray as a large opacity due to coal dust exposure, he is entitled to benefits unless the *[e]mployer affirmatively shows, by persuasive objective medical evidence*, either that the opacities are not there, or that they are due to a process other than pneumoconiosis. I again find that [claimant] has met these requirements, and that the [e]mployer has not met the burden imposed on it by the Court in *Scarbro*.

Decision and Order on Remand at 19 (emphasis added).

After reviewing the administrative law judge's Decision and Order on Remand, the briefs of the parties, and the issue raised on appeal, we agree with employer that the administrative law judge failed to follow the Board's directive on remand to weigh all of the evidence relevant to whether claimant has complicated pneumoconiosis. Because substantial evidence does not support her conclusion at Section 718.304, we must vacate her award of benefits.

Contrary to the administrative law judge's finding, employer does not have the burden of offering "persuasive affirmative evidence" to establish that a large opacity does not exist or that it was caused by something other than coal dust exposure. Decision and Order on Remand at 5-6. The particular language cited by the administrative law judge in *Scarbro* was used by the court only in reference to situations where the x-ray evidence "vividly displays opacities exceeding one centimeter." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Moreover, in a recent unpublished case issued by the Fourth Circuit, the court specifically rejected the analysis employed by the administrative law judge, stating that: "*Scarbro* only holds that once the claimant presents legally sufficient evidence of large opacities classified as category A, B, or C in the ILO system, he is likely to win unless there is contrary evidence." *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov.

17, 2006) (unpub.), slip op. at 2 (citations omitted).[6] The court emphasized that the burden of proof remains with the claimant at all times. *Id*.

We hold that the administrative law judge has failed to properly weigh all of the contrary probative evidence for complicated pneumoconiosis consistent with *Scarbro*, *Lester* and the Board's directive. Once the administrative law judge determined that claimant had established by a preponderance of the x-ray evidence that he had a one centimeter opacity or mass due to coal dust exposure, she improperly shifted the burden of proof to employer to "affirmatively establish" that claimant's x-ray findings of a one centimeter opacity was not due to complicated pneumoconiosis. Decision and Order at 12. Thus, she repeated her error of not requiring claimant to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. However, as we explained in our prior decision, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. *Darago*, BRB No. 05-0122 BLA at 5. The administrative law judge is required to weigh all of the evidence relevant to this issue, *i.e.*, evidence of simple and complicated pneumoconiosis, as well as evidence of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Melnick*, 16 BLR at 1-31; *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).

Furthermore, the administrative law judge erred in dividing her analysis of the evidence into two categories, *i.e.*, the size of the opacity and the etiology of the opacity. In performing her piecemeal analysis, the administrative law judge found that claimant established that he has a condition "that shows up on x-ray as a one centimeter or greater opacity in his lungs, and that Drs. Ahmed, Patel, Scott and Wheeler had specifically noted either a category B opacity, or a corresponding mass that measured greater than one centimeter." Decision and Order on Remand at 11. Therefore, the administrative

[6] We recognize that unpublished decisions are not considered binding precedent in the Fourth Circuit. *See* Local Rule 36(c) of the Fourth Circuit ("Citation of the Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."). 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 individual statements in this case. These statements indicate that she improperly shifted the burden of proof to employer in her consideration of the evidence under Section 718.304.

law judge found that claimant established the presence of an opacity measuring at least one centimeter in diameter. Contrary to the administrative law judge's finding, however, Dr. Scott interpreted the May 14, 2001 x-ray and Dr. Wheeler interpreted the October 23, 2003 x-ray as showing no Category A, B or C opacities. Employer's Exhibits 4, 6. Under the regulations, an x-ray interpretation on an ILO form, which notes a mass that is larger than one centimeter in the "Comments" section of the form, but which does not diagnose pneumoconiosis with an opacity size A, B, or C, is not sufficient to assist claimant in establishing complicated pneumoconiosis under Prong A of Section 718.304. *See* 20 C.F.R. §718.304(a). The administrative law judge erred by failing to consider each x-ray interpretation independently in order to determine whether it supported a finding of complicated pneumoconiosis pursuant to Section 718.304(a).

The administrative law judge also erred when she stated the opinions of Dr. Rosenberg and Dr. Hippensteel were not probative as to the existence of complicated pneumoconiosis because they "relied on [claimant's] normal pulmonary function tests and arterial blood gas study evidence to conclude that he does not have complicated pneumoconiosis, in contradiction to the Act…" Decision and Order on Remand at 18. This finding ignores our instruction that she weigh the opinions of Dr. Rosenberg and Dr. Hippensteel relevant to whether the abnormality seen on claimant's x-ray and CT scan evidence is complicated pneumoconiosis. *Darago*, BRB No. 05-0122 BLA at 6.

Consequently, because the administrative law judge ignored the Board's remand instructions, erroneously interpreted *Scarbro* in shifting the burden of proof to employer, and failed to weigh all of the evidence relevant to whether claimant has met his burden of proof under Section 718.304, we vacate the administrative law judge's determination that claimant is entitled to invoke the irrebutable presumption of total disability due to pneumoconiosis. Therefore, we vacate the administrative law judge's award of benefits.

We have also considered employer's request to assign this case to another administrative law judge on remand. Reluctantly, and in view of the administrative law judge's response to the Board's prior remand instructions, we hold that it is in the interest of justice and judicial economy to grant employer's request to remand this case for assignment to a new administrative law judge, for a *de novo* review of the record and proper application of the law in light of the evidence. *See Milburn Colliery v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

Accordingly, the Decision and Order Awarding Benefits on Remand is vacated and the case is remanded for reassignment to a different administrative law judge and further consideration consistent with our prior holding in *Darago*, BRB No. 05-0122 BLA, and this opinion.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge