BRB No. 06-0761 BLA

ELDEN PRESLEY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 04/30/2007
	)	
CLINCHFIELD 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 Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe (Wolfe Williams & Rutherford), Norton, Virginia, for claimant.

Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia, for employer.

Helen H. Cox (Jonathan L. Snare, Acting Solicitor of Labor; Allen H. Feldman, Associate Solicitor; 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 Awarding Benefits (05-BLA-6160) of Administrative Law Judge Linda S. Chapman rendered on a subsequent 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). Claimant filed this claim on May 10, 2004.[1] Director's Exhibit 3. At the hearing, the administrative law judge admitted Dr. Robinette's January 10, 2005 letter as a treatment note pursuant to 20 C.F.R. §725.414. The administrative law judge found that claimant established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d) by establishing total disability due to pneumoconiosis at 20 C.F.R. §718.204(c), the element of entitlement that was previously adjudicated against him. The administrative law judge also found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d) by establishing that he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Considering the claim on the merits, the administrative law judge found that claimant established that he is totally disabled due to pneumoconiosis pursuant to Sections 718.204(c) and 718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer challenges the administrative law judge's admission of Dr. Robinette's January 10, 2005 letter as a treatment note pursuant to Section 725.414. Employer additionally contends that the administrative law judge erred in evaluating the evidence pursuant to Sections 718.204(c) and 718.304, in considering the claim pursuant to Section 725.309(d) and on the merits. Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs (the Director), responds that the administrative law judge erred in admitting Dr. Robinette's January 10, 2005 letter as a treatment note, and erred in her findings pursuant to Section 718.304. Employer has filed a reply brief. After filing its reply brief, employer filed a notice of supplemental authority, which we accept.

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

[1] Claimant filed a claim on June 10, 1983, that was denied by Administrative Law Judge John J. Forbes, Jr. on February 8, 1989. Director's Exhibit 1. Judge Forbes found that while claimant established the existence of pneumoconiosis arising out of his coal mine employment pursuant to 20 C.F.R. §§718.202 and 718.203, claimant failed to establish total disability under 20 C.F.R. §718.204. *Id.* Claimant filed his second claim on December 5, 1994, that was denied on March 31, 2003, when the Board affirmed Administrative Law Judge Edward Terhune Miller's finding that claimant did not establish that his totally disabling respiratory impairment was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). *Id.; see Presley v. Clinchfield Coal Co.*, BRB No. 02-0589 BLA (Mar. 31, 2003)(unpub.); *see also Presley v. Clinchfield Coal Co.*, BRB Nos. 99-0677 BLA, 99-0677 BLA-A, and 97-1502 BLA (Sept. 29, 2000)(unpub.); *Presley v. Clinchfield Coal Co.*, BRB No. 97-1502 BLA (July 28, 1998)(unpub.).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Section 725.414-Evidentiary Limitations

Employer first argues that the administrative law judge erred in admitting Dr. Robinette's January 10, 2005 letter as a treatment note. The Director responds that Dr. Robinette's January 10, 2005 letter does not meet the requirements of a treatment note pursuant to 20 C.F.R. §725.414(a)(4), and is a medical report subject to the evidentiary limitations at 20 C.F.R. §725.414(a)(2)(i). The Director asserts that Dr. Robinette's 2005 letter is a medical report because Dr. Robinette provided claimant's counsel, in anticipation of litigation, a written assessment of claimant's respiratory condition based on a review of his treatment records and test results. Thus, the Director asserts, Dr. Robinette's 2005 letter is a medical report pursuant to 20 C.F.R. §725.414(a)(1), and therefore is subject to the evidentiary limitations at Section 725.414(a)(2)(i).

Employer objected, at the hearing, to the admission of Dr. Robinette's January 10, 2005 letter as a treatment note, arguing that Dr. Robinette's letter was a medical report pursuant to the definition of a medical report found at 20 C.F.R. §725.414(a)(1), and subject to the evidentiary limitations. Transcript at 27-29.

Section 725.414(a)(1) defines a medical report, by providing:

> (1) For purposes of this section, a medical report shall consist of a physician's written assessment of the miner's respiratory or pulmonary condition. A medical report may be prepared by a physician who examined the miner and/or reviewed the available admissible evidence.

20 C.F.R. §725.414(a)(1). Medical reports are subject to the evidentiary limitations found at Section 725.414(a)(2)(i). Section 725.414(a)(4) provides:

> (4) Notwithstanding the limitations in paragraphs (a)(2) and (a)(3) of this section, any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence.

20 C.F.R. §725.414(a)(4).

We agree with employer and the Director that the administrative law judge erred in admitting Dr. Robinette's January 10, 2005 letter as a treatment note. In his January 10, 2005 letter to claimant's attorney, Dr. Robinette stated that he had been claimant's treating physician for several years, and reported claimant's symptoms, the medications

he was taking, and the results from a chest x-ray and CAT scan. Director's Exhibit 13; *see also* Decision and Order at 7-8. Dr. Robinette concluded that claimant is disabled from his usual coal mine employment, and has complicated coal workers' pneumoconiosis based on his chest x-ray abnormalities and CAT scan findings. *Id.*

As such, Dr. Robinette's January 10, 2005 letter constitutes a "physician's written assessment of the miner's respiratory or pulmonary condition," and not a record of the miner's "medical treatment for a respiratory or pulmonary or related disease," as contemplated by Section 725.414(a)(4). The administrative law judge therefore erred in admitting and considering Dr. Robinette's January 10, 2005 letter as a treatment note exempt from the evidentiary limitations. We cannot say that the error is harmless, as the administrative law judge considered Dr. Robinette's January 10, 2005 letter in finding claimant entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Consequently, we vacate the administrative law judge's determination that Dr. Robinette's January 10, 2005 letter is a treatment note, to be considered on remand pursuant to the evidentiary limitations at Section 725.414.

Section 718.304-Complicated Pneumoconiosis

Employer also argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304 in considering the claim pursuant to Section 725.309(d) and on the merits. Section 411(c)(3) of the Act, as implemented by Section 718.304, 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.[2]

[2] 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

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at Section 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 Am. Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North Am. Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

In *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, 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." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. 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. [Citation omitted]. 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

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> (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
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> (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.

> affirmatively shows that 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.

In this case, the administrative law judge cited the holdings of the Fourth Circuit in *Scarbro*. *See* Decision and Order at 15-16, 20. However, the administrative law judge also stated that:

> 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* 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 16 (emphasis added).

The Fourth Circuit, in an unpublished decision which employer attached to its reply brief, recently held that this *identical language* "misstates *Scarbro*" and appears to shift the burden of proof to employer. *Clinchfield Coal Co. v. Lambert*, No. 06-01154 (4th Cir. Nov. 17, 2006)(unpub.). The Fourth Circuit explained that:

> This portion of the ALJ's decision and order misstates *Scarbro* and appears to shift the burden of proof to Clinchfield. *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 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 (4th Cir. 1999)("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, as both employer and the Director assert, 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.[3] Consequently, we vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at Section 718.304, and remand the case for reconsideration. On remand, the administrative law judge must discuss and weigh all relevant newly submitted evidence identified as the affirmative-case and rebuttal evidence of claimant and the employer in determining whether claimant established a change in an applicable condition of entitlement pursuant to Section 725.309(d) by means of establishing complicated pneumoconiosis at Section 718.304.[4]

[3] 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 this 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 this administrative law judge's decision, wherein she appears to improperly shift the burden of proof to employer.

[4] The administrative law judge identified the newly submitted x-ray evidence in her decision at pages 3-4, and, as employer correctly contends, improperly included newly submitted x-rays that were not designated as part of claimant's or employer's affirmative-case or as rebuttal evidence under 20 C.F.R. §725.414. *See* Transcript at 10-15, 19-22. Moreover, as employer argues, the administrative law judge erred in not considering certain evidence that was properly before her: the April 26, 2004 x-ray read by Dr. Scott on January 11, 2005 as negative for pneumoconiosis, Employer's Exhibit 5, and Dr. Rasmussen's reading of the September 20, 2005 x-ray, interpreted as positive for simple and complicated pneumoconiosis. Claimant's Exhibit 1. On remand, the administrative law judge must consider all evidence properly designated as claimant's and employer's affirmative-case and rebuttal evidence. Additionally, the administrative law judge erred in characterizing the newly submitted x-ray readings by Drs. Scatarige and Wheeler of the May 12, 2005, September 20, 2005, and November 22, 2005 x-rays, Employer's Exhibits 4, 6, 7, as speculative or equivocal because they do not provide a definitive cause for the greater than one centimeter opacity they report, as employer asserts. *See* Decision and Order at 17-18. They were interpreted as negative for pneumoconiosis, and thus are not speculative or equivocal. Lastly, the administrative law

Finally, we reject employer's request to have the case reassigned to a different administrative law judge for a "fresh look at the evidence." Nothing in the record suggests that the administrative law judge is incapable of correctly applying the holding in *Scarbro* to this case. *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see also Lambert*, slip op. at 2.

Section 718.204(c)-Total Disability Due to Pneumoconiosis

Employer lastly argues that the administrative law judge erred in weighing the evidence to find that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c), in considering the claim pursuant to Section 725.309(d) and on the merits. The administrative law judge relied on the opinions of Drs. Forehand and Rasmussen, that claimant is totally disabled by respiratory impairments that are due to both his coal mine employment and smoking, and did not credit the opinions of Drs. Castle and Hippensteel, that claimant is totally disabled due to asthma and emphysema unrelated to coal mine employment. Decision and Order at 5-6, 8-11, 13-14; Director's Exhibits 17, 20; Claimant's Exhibit 1; Employer's Exhibits 4, 7.

The administrative law judge accorded significant weight to the opinions of Drs. Forehand and Rasmussen, finding that they were well reasoned because they were based on objective medical evidence. Decision and Order at 13, 14; Director's Exhibits 17, 20; Claimant's Exhibit 1. The administrative law judge additionally accorded significant weight to Dr. Forehand's opinion because it was "consistent with the other medical evidence of record." Decision and Order at 13; Director's Exhibit 20. The administrative law judge did not credit the opinions of Drs. Castle and Hippensteel, finding that they were speculative and based on generalities. Decision and Order at 14; Employer's Exhibits 4, 7. As employer correctly argues, the administrative law judge did not adequately explain why her reasons persuaded her to credit the opinions of Drs. Forehand and Rasmussen over the opinions of Drs. Castle and Hippensteel, where each doctor based his opinion on objective medical evidence. *See* Employer's Exhibits 4, 7. Because the administrative law judge did not explain adequately why she accorded significant weight to the opinions of Drs. Forehand and Rasmussen, and why she did not credit the opinions of Drs. Castle and Hippensteel, we vacate the administrative law judge's findings pursuant to Sections 718.204(c) and 725.309(d). *See Milburn Colliery Co.*, 138 F.3d at 532-535, 21 BLR at 2-334-2-340. On remand, the administrative law judge must

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judge erred in not considering the biopsy evidence of record before invoking the Section 718.304 presumption, as employer argues, and must consider this evidence on remand. Decision and Order at 12-13, 17 n. 7; Director's Exhibit 20; Employer's Exhibit 11; *see also* Transcript at 23.

reweigh the medical opinion evidence of record, and adequately explain why she credits a medical report over another.[5] If the administrative law judge, on remand, finds that claimant has established a change in an applicable condition of entitlement pursuant to Section 725.309(d), she must determine whether claimant established total disability due to pneumoconiosis, on the merits, upon consideration of all relevant evidence of record.[6]

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated, and the case is remanded to the administrative law judge for reconsideration consistent with this opinion.

[5] Employer argues further that the administrative law judge erred in her consideration of the newly submitted evidence at 20 C.F.R. §§718.204 and 718.304 by failing to discuss and weigh all relevant evidence in determining whether claimant ever had tuberculosis (tb). *See* Decision and Order at 14, 20. Although the administrative law judge considered claimant's contradictory statements regarding his tb history recorded in the reports of Drs. Castle, Hippensteel, and Rasmussen, the administrative law judge did not consider that the record contains possible diagnoses of tb on chest x-ray and CAT scan evidence. Thus, we vacate the administrative law judge's finding that there is no objective evidence in the record concerning claimant's tb history, and instruct the administrative law judge on remand to consider the objective evidence of claimant's tb history, including Dr. Scatarige's reading of the September 20, 2005 chest x-ray and Dr. Wheeler's reading of the CAT scan performed on October 5, 2004. *See* Employer's Exhibits 3, 6; *see also* Decision and Order at 11.

[6] Employer does not contest that claimant is totally disabled. *See* Transcript at 32-33.

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