BRB No. 07-0552 BLA

T.F.A.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ROBINSON PHILLIPS COAL COMPANY	)	
	)	DATE ISSUED: 04/25/2008
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.

John Cline, Piney View, West Virginia, for claimant.

Christopher M. Hunter (Jackson Kelly PLLC), Charleston, West Virginia, for employer.

Jeffrey S. Goldberg (Gregory F. Jacob, 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 Awarding Benefits (05-BLA-06235) 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 his subsequent claim

on July 23, 2004.[1] Director's Exhibit 3. The administrative law judge credited claimant with thirteen years of coal mine employment and adjudicated the claim pursuant to 20 C.F.R. Part 718. Because the administrative law judge determined that the totality of the newly submitted evidence was sufficient to establish the existence of simple pneumoconiosis, she found that claimant had demonstrated a "material change in conditions" pursuant to 20 C.F.R. §725.309. Considering the merits of the claim, the administrative law judge determined that there was no medical evidence of record to establish that claimant had a totally disabling respiratory or pulmonary impairment.[2] However, because she found that the medical evidence was sufficient to establish that claimant had complicated pneumoconiosis, the administrative law judge also found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in admitting into the record the medical report of Dr. Alexander dated October 16, 2006, contained at Claimant's Exhibit 7, which was designated by claimant as rehabilitative evidence under 20 C.F.R. §725.414. Employer also challenges the administrative law judge's finding that claimant established complicated pneumoconiosis pursuant to Section 718.304. Employer specifically argues that the administrative law judge improperly shifted the burden to employer to disprove that claimant has complicated pneumoconiosis. Claimant responds, urging the Board to affirm the administrative law judge's evidentiary ruling and his award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also filed a brief, asserting that the administrative law judge erred in admitting Dr. Alexander's report as rehabilitative evidence under 20 C.F.R. §725.414(a)(2)(ii), and that she impermissibly shifted the burden of proof from claimant to employer in her consideration of whether claimant has complicated pneumoconiosis pursuant to Section 718.304.

[1] Claimant initially filed a claim on September 28, 2000. Director's Exhibit 1. The district director denied benefits on November 30, 2000, finding the evidence insufficient to establish any of the requisite elements of entitlement. *Id.* Claimant took no further action with regard to the denial of benefits, until he filed his subsequent claim on July 23, 2004. Director's Exhibit 3.

[2] We affirm, as unchallenged by the parties on appeal, the administrative law judge's finding that claimant failed to establish total disability pursuant to 20 C.F.R. §718.204(b)(2). *Skrack v. Director, OWCP*, 6 BLR 1-710 (1983).

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.[3] 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).

Evidentiary Limitations:

We will first address employer's contention that the administrative law judge erred in admitting Dr. Alexander's report. The relevant procedural history of the case for purposes of deciding this issue is as follows. Claimant underwent a Department of Labor examination on September 27, 2004, at which time an x-ray was read by Dr. Ranavaya, a B reader, as positive for pneumoconiosis. Director's Exhibit 14. Dr. Ranavaya recommended a follow-up CT scan to rule out a progressive pathology. The miner's treating physician ordered the CT scan, taken on December 16, 2004, which was read by Dr. Resier as being consistent with old granulomatous disease and coal workers' pneumoconiosis. Employer's Exhibit 14 (the CT scan was contained in treatment records submitted by employer). Employer designated two negative readings of the September 27, 2004 x-ray, by Drs. Scott and Wheeler, as affirmative medical evidence. Employer's Exhibits 2, 3. Claimant designated Dr. Alexander's positive reading of the September 27, 2004 x-ray as rebuttal evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii). Claimant's Exhibit 1. Claimant also designated Dr. Alexander's interpretation of several CT scans, including the one dated December 16, 2004, as showing complicated pneumoconiosis, under the category of "other medical evidence" pursuant to 20 C.F.R. §718.107, and he designated an October 16, 2006 report prepared by Dr. Alexander as rehabilitative evidence pursuant to Section 725.414(a)(2)(ii). Claimant's Exhibits 1, 7. In his October 16, 2006 report, Dr. Alexander refuted the negative readings for pneumoconiosis of the September 27, 2004 x-ray by Drs. Scott and Wheeler, and also refuted Dr. Wiot's negative interpretation of the December 16, 2004 CT scan. Claimant's Exhibit 7.

At the hearing, employer objected to the admission of Dr. Alexander's October 16, 2006 report, asserting that because Dr. Alexander was not the physician who originally interpreted either the September 27, 2004 x-ray or the December 16, 2004 CT scan, he was not permitted to "rehabilitate" his opinion by criticizing the findings of Drs. Scott,

[3] The Board will apply the law of the United States Court of Appeals for the Fourth Circuit as claimant's most recent coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*); Director's Exhibit 1.

Wheeler and Wiot. The administrative law judge admitted Dr. Alexander's report as rehabilitative evidence under Section 725.414(a)(2)(ii), finding that, "contrary to [e]mployer's suggestion, a physician does not have to be the first, or 'original,' person to interpret an item of medical evidence in order to be entitled to rehabilitate his or her opinion[,] [n]or is rehabilitation limited to those instances where a medical report is specifically offered in rebuttal of that physician's opinion." Decision and Order at 5 n.5. The administrative law judge specifically relied on Dr. Alexander's report as a basis for finding that claimant established the existence of pneumoconiosis pursuant to Section 718.202(a)(4) and complicated pneumoconiosis at Section 718.304. Decision and Order at 14.

Employer asserts that the administrative law judge erred in admitting Dr. Alexander's report as rehabilitative evidence under Section 725.414(a)(2)(ii), as Dr. Alexander was not the "original reader" of either the September 27, 2004 x-ray or the December 16, 2004 CT scan. Employer's Brief at 5. Employer also argues that the administrative law judge erred in weighing Dr. Alexander's x-ray and CT scan readings, along with the medical opinion evidence, in her consideration of whether claimant established the existence of simple pneumoconiosis at Section 718.202(a)(4) and complicated pneumoconiosis at Section 718.304. Claimant conversely argues that since the x-ray readings and CT scan interpretation tend to undermine Dr. Alexander's opinion, he was permitted to submit an "additional statement" by Dr. Alexander "explaining his conclusion in light of the rebuttal evidence." Claimant's Brief at 6, citing 20 C.F.R. §725.414(a)(2)(ii).[4] The Director contends that the administrative law judge erred in admitting Dr. Alexander's report, but not for the reason identified by employer. The Director explains that claimant was not entitled to submit rehabilitative evidence, in response to the negative x-ray readings of Drs. Scott and Wheeler of the September 27, 2004 x-ray, since claimant specifically designated Dr. Alexander's positive x-ray reading

[4] Claimant maintains that even if Dr. Alexander's report does not qualify as rehabilitative evidence pursuant to 20 C.F.R. §725.414(a)(2)(ii), the administrative law judge's error is harmless, as Dr. Alexander's report is admissible, nonetheless, as one of claimant's two permissible medical reports under Section 725.414(a)(2)(i). Claimant's Brief at 6. Claimant explains that one of his two designated medical reports is by Dr. Rasmussen, whose opinion claimant sought in response to the medical opinion of Dr. Rosenberg, employer's expert. *Id*. Although Claimant designated Dr. Rasmussen's opinion, employer decided not to designate Dr. Rosenberg's opinion. *Id*. The administrative law judge has refused to consider Dr. Rasmussen's report because it was developed as rebuttal evidence and "addressed only the findings of Dr. Rosenberg." Decision and Order at 15 n.9; Claimant's Brief at 6. Claimant proposes to withdraw Dr. Rasmussen's opinion and substitute Dr. Alexander's report as one of his two affirmative medical reports. Claimant's Brief at 6-7

of that film as rebuttal evidence to employer's submissions. Similarly, the Director argues that because employer designated Dr. Wiot's interpretation of the December 16, 2004 CT scan as affirmative evidence, and claimant responded by submitting a rebuttal report by Dr. Alexander of that same CT scan, claimant was not entitled to also submit an additional report by Dr. Alexander as rehabilitative evidence.[5] The Director also concurs with employer that the administrative law judge erred in treating Dr. Alexander's comments regarding the x-ray and CT scan readings as medical reports when considering the evidence relevant to Sections 718.202(a)(4) and 718.304(c).

After reviewing the parties' Evidence Summary Forms, the hearing transcript, the administrative law judge's Decision and Order, and the arguments on appeal, we defer to the Director's reasonable interpretation of the evidentiary regulation as it pertains to this case.[6] Section 725.414(a)(2)(ii) provides, in relevant part:

> [W]here the responsible operator or fund has submitted rebuttal evidence under paragraph (a)(3)(ii) or (a)(3)(iii) of this section with respect to medical testing submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing. Where the rebuttal evidence tends to undermine the conclusion of a physician who prepared a medical report submitted by the claimant, the claimant shall be entitled to submit an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.

[5] The Director, Office of Workers' Compensation Programs (the Director), notes that the original reading of the December 16, 2004 CT scan was part of claimant's medical treatment records, and was not subject to rebuttal by either party. Director's Brief at 10 n.3; s*ee* 20 C.F.R. §725.414(a)(4). Employer first submitted, as affirmative evidence, a negative reading for simple and complicated pneumoconiosis of the December 16, 2004 CT scan by Dr. Wiot, and then claimant submitted Dr. Alexander's positive reading for complicated pneumoconiosis of that CT scan as rebuttal evidence. Director's Brief at 10 n.3.

[6] Since the Director is charged with the administration of the Federal Coal Mine Health and Safety Act, special deference is generally given to the Director's reasonable interpretation of a regulation. *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 845 (1984); *Freeman United Coal Mining Co. v. Director, OWCP [Taskey]*, 94 F.3d 384, 387, 20 BLR 2-348, 2-355 (7th Cir. 1996); *Cadle v. Director, OWCP*, 19 BLR 1-55, 1-62 (1994).

20 C.F.R. §725.414(a)(2)(ii). The comments to Section 725.414(a)(2)(ii) emphasize that the parties have been given "an opportunity to rehabilitate the evidence they had submitted in connection with their *affirmative* case that had been the subject of *rebuttal*." 65 Fed. Reg. 79990 (Dec. 20, 2000) (emphasis supplied). Thus, because claimant designated Dr. Alexander's reading of the September 27, 2004 x-ray as rebuttal evidence and employer designated Dr. Wiot's interpretation of the December 16, 2004 CT scan as affirmative evidence, claimant was not entitled to submit a "rehabilitative" opinion from Dr. Alexander in support of the doctor's x-ray and CT scan readings.

Furthermore, contrary to claimant's assertion, Dr. Alexander's x-ray and CT scan findings are not, in the alternative, admissible as medical reports since Section 725.414(a)(1) specifically provides that "[a] physician's written assessment of a single objective test, such as a chest [x]-ray or a pulmonary function test, shall not be considered a medical report for purposes of this section." 20 C.F.R. §725.414(a)(1). Because Dr. Alexander's report, consisting of his assessment of the x-ray and CT scans, is not admissible as a second medical report pursuant to Section 725.414(a)(2)(i), we are compelled to vacate the administrative law judge's evidentiary ruling. Moreover, we must vacate the administrative law judge's award of benefits pursuant to Sections 725.309, 718.202(a) and 718.304, as her finding that claimant established the existence of simple and complicated pneumoconiosis, a "material change in conditions," and total disability due to pneumoconiosis, are based, in part, on her consideration of Dr. Alexander's inadmissible report.[7]

Merits of Entitlement:

In the interest of judicial economy and to avoid the repetition of error on remand, we further address employer's allegations of error with respect to the administrative law judge's weighing of the evidence under Sections 718.202(a) and 718.304. Employer

[7] We agree that the administrative law judge erred in weighing Dr. Alexander's rehabilitative report as a medical opinion at 20 C.F.R. §718.202(a)(4), and in relying on that report to discredit Dr. Castle's medical opinion as to the existence of pneumoconiosis. Employer's Brief at 22-23. We also agree with employer that the administrative law judge erred in rejecting Dr. Castle's opinion at Section 718.202(a)(4) on the ground that Dr. Castle did not personally review any of the x-rays or CT scans of record, and in stating that Dr. Castle "has not provided any basis for his reliance on the expertise of Dr. Wiot." Decision and Order at 14; Employer's Brief at 22-23. Contrary to the administrative law judge's finding, Dr. Castle specifically noted that Dr. Wiot is "an internationally known expert in pneumoconiosis." Employer's Exhibit 7. Employer is also correct that there is no requirement that a physician personally interpret an x-ray or CT scan in order to provide a reasoned opinion as to the existence of pneumoconiosis pursuant to Section 718.202(a)(4). *See* 20 C.F.R. §718.202(a)(4).

argues that the administrative law judge applied an incorrect legal standard in analyzing the x-ray, CT scan, and medical opinion evidence for complicated pneumoconiosis at Section 718.304, and that she improperly shifted the burden to employer to prove that the masses found on x-ray and CT scan were not there or were not due to complicated coal workers' pneumoconiosis, contrary to the holding in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). Employer's argument has merit. 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. 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 of 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. *Braenovich v. Cannelton Industries, Inc./Cypress Amax*, 22 BLR 1-236, 1-245 (2003) (Gabauer, J., concurring); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc).*

In *Scarbro*, 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 court 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.

In this case, the administrative law judge prefaced her consideration of the evidence for complicated pneumoconiosis by stating her interpretation of *Scarbro*:

> [I]f the [claimant] meets the congressionally defined condition, that is, if he establishes that he has a chronic dust disease of the lungs 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 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 17 (emphasis added).

Turning to the record evidence, the administrative law judge began her analysis by considering whether claimant had established a condition of such severity that it would produce one or more opacities greater than one centimeter in diameter on x-ray pursuant to Section 718.304(a). *Id*. at 16. The administrative law judge noted that the record included nine interpretations of two x-rays dated September 27, 2004 and July 6, 2005, of which there was one quality reading, four negative readings for simple pneumoconiosis by Drs. Wheeler, Wiot, Scatarige, and Scott, all of whom are Board-certified radiologists and B readers, two positive readings for simple pneumoconiosis by Drs. Ranavaya and Miller, both of whom are Board-certified radiologists and B readers, one positive reading for complicated pneumoconiosis, Category A, by Dr. Alexander, a Board-certified radiologist and B reader, and one positive reading for complicated pneumoconiosis, Category A, by Dr. Zaldivar, a B reader. Director's Exhibits 14, 25; Claimant's Exhibits 2, 5, 6; Employer's Exhibits 1, 2, 3, 5. The administrative law judge determined that claimant established the existence of a large opacity greater than one centimeter by a "preponderance of the evidence" because all of the physicians either diagnosed a Category A opacity or at least identified a large mass, an ill defined infiltrate, or a coalescence of small opacities in claimant's lung. Decision and Order at 18.

Reviewing the CT scan evidence under Section 718.304(c),[8] the administrative law judge stated:

> Dr. Alexander is the only physician who has indicated that the masses he saw on CT scan qualified as a [C]ategory A opacity. However I find that his determination is supported by the reports from Dr. Rieser and Dr. Zaldivar, who did not specifically designate [C]ategory A opacities, but

[8] There is no biopsy evidence for consideration at 20 C.F.R. §718.304(b).

> nevertheless described large masses or processes on their review of the CT scans. Although he did not indicate their size, Dr. Wheeler described several masses in the right and left lungs. I find that [claimant] has established the existence of an opacity measuring greater than [one centimeter] on x-ray by virtue of the CT scan evidence.

Id. at 19.[9]

The administrative law judge next discussed the etiology of the large opacity/masses that were reported on the x-ray and CT scan evidence. Decision and Order at 20. The administrative law judge specifically rejected the opinions of Drs. Wheeler, Wiot, Scott and Scatarige, that claimant did not suffer from either simple or complicated coal workers' pneumoconiosis, because she considered their opinions to be only "speculative" as to the etiology of claimant's x-ray findings. *Id*. In support of her determination, she stated that these doctors were "willing to exclude pneumoconiosis" but were unable to make a definitive diagnosis as to the etiology of claimant's condition, noting only the possibility of granulomatous disease. *Id*. Thus, after reviewing the x-ray and CT scan evidence, the administrative law judge found that claimant satisfied his burden of establishing a condition that showed up on x-ray as a Category A or B opacity, and that "[e]mployer has failed to provide persuasive x-ray or CT scan evidence affirmatively showing that the opacities [are] not there, or that they are due to a process other than pneumoconiosis." Decision and Order at 22.

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[9] The record contains interpretations of two CT scans. The first scan, dated December 16, 2004, was read by Dr. Rieser as showing a ten millimeter nodule in the left upper lobe, and numerous bilateral nodules. Employer's Exhibit 14. Dr. Rieser opined that claimant had findings consistent with both old granulomatous disease and simple pneumoconiosis. *Id*. Dr. Alexander read the same scan as showing a large opacity in the right lung, which he classified as Category A, complicated pneumoconiosis. Claimant's Exhibit 1. Dr. Wiot also read the December 16, 2004 CT and opined that there was no evidence of pneumoconiosis. Dr. Wiot diagnosed that there were multiple irregular nodules consistent with granulomatous disease. Employer's Exhibit 1. The second CT scan, dated July 6, 2005, was read by Dr. Cordell as showing findings consistent with simple pneumoconiosis. Claimant's Exhibit 3. Dr. Zaldivar also read the July 6, 2005 CT scan as showing nodular densities in the upper and mid zones compatible with simple pneumoconiosis, and masses in the left and right upper zones compatible with complicated pneumoconiosis. Claimant's Exhibit 2. Drs. Wheeler and Wiot read the July 6, 2005 CT scan as showing no evidence of pneumoconiosis, simple or complicated. Employer's Exhibits 1, 10. Dr. Wheeler noted several masses greater than one centimeter, which he attributed to granulomatous disease. Employer's Exhibit 10.

We agree with employer that the administrative law judge improperly shifted the burden to employer to disprove the existence of complicated pneumoconiosis. Contrary to the administrative law judge's interpretation of *Scarbro,* the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. 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*, 22 BLR at 1-245; *Melnick*, 16 BLR at 1-33.

In this case, however, once the administrative law judge found that claimant had presented evidence supportive of a finding of complicated pneumoconiosis, she improperly shifted the burden to employer to produce "persuasive affirmative evidence" to establish that the findings on claimant's x-ray or CT scan are caused by something other than coal dust exposure. Decision and Order at 20-22. The particular language cited by the administrative law judge in *Scarbro* was used by the court in reference to situations, unlike the one present in this case, 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* 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, [citation omitted], he is likely to win unless there is contrary evidence . . . in the record." *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.), slip op. at 6.[10] Thus, because the administrative law judge's analysis of the evidence relevant to invocation of the irrebuttable presumption is based on a faulty interpretation of *Scarbro*, we vacate her finding at Section 718.304.[11]

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[10] 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 the administrative law judge's individual statements, which indicate that she improperly shifted the burden of proof to employer in her consideration of the evidence under 20 C.F.R. §718.304.

[11] Employer contends that the administrative law judge erred in discrediting the x-ray and CT scan interpretations of those physicians who found abnormalities consistent with tuberculosis (TB) or granulomatous diseases because she found no evidence in the record that claimant had ever been treated for those conditions. Employer's Brief at 21;

Turning to employer's remaining arguments, we agree with employer that "while the [administrative law judge] correctly noted that all of the physicians found some sort of radiographic abnormality, she improperly characterized all of the x-ray and CT scan evidence as being supportive of Dr. Alexander's diagnosis of a Category A large opacity." Employer's Brief at 17. In weighing the conflicting x-ray evidence at Section 718.304(a), the administrative law judge ignored the fact that Drs. Wheeler, Wiot, Scott, and Scatarige each made an unequivocal diagnosis on the ILO classification sheet that there were no parenchymal abnormalities consistent with pneumoconiosis on the x-rays they reviewed. Further, the administrative law judge is advised that, absent a diagnosis of pneumoconiosis with a Category A, B, or C opacity, a physician's x-ray interpretation on an ILO form that notes a mass that is greater than one centimeter in the "Comments" section, does not support a finding of complicated pneumoconiosis pursuant to Section 718.304(a). 20 C.F.R. §718.304(a).

Similarly, the administrative law judge erred in treating Dr. Rieser's CT scan reading as being consistent with a finding of complicated pneumoconiosis. Decision and Order at 19. Dr. Rieser identified that claimant had a nodule *less than* one centimeter in diameter. Employer's Exhibit 14. In order to establish complicated pneumoconiosis based on a CT scan, the physician must diagnose a condition of such severity that it would produce opacities "greater" than a one centimeter opacity, classified as Category A, B, or C, on an x-ray. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101.

In summary, we vacate the administrative law judge's finding that claimant established simple coal workers' pneumoconiosis and a change in an applicable condition of entitlement pursuant to Sections 718.202(a), 725.309, and her finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, and remand the case to the administrative law judge for reconsideration. In light of her evidentiary error in admitting Dr. Alexander's rehabilitative report, the administrative law judge must discuss and weigh all of the properly admitted evidence relevant to whether claimant has established the existence of simple and/or complicated pneumoconiosis and, therefore, a change in an applicable

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Decision and Order at 11. Employer correctly notes that the administrative law judge failed to address that "claimant's [TB] test was over ten years ago" and that "Dr. Wiot explained that the granulomatous abnormalities on the [c]laimant's lungs could result from histoplasmosis or any inflammatory process." Employer's Brief at 21-22; Employer's Exhibit 4. Furthermore, contrary to the administrative law judge's finding, it is not employer's burden to prove the exact etiology of claimant's x-ray findings. *See Lester v. Director, OWCP*, 993 F.2d 1143, 1146 (4th Cir. 1993) ("The claimant retains the burden of proving the existence of the disease.").

condition of entitlement pursuant to Section 725.309.[12] 20 C.F.R. §§718.202; 718.304; 725.309. In her consideration of the issue of complicated pneumoconiosis, the administrative law judge must first determine whether the relevant evidence, including x-rays, CT scans and medical opinions, in each category under Section 718.304(a)-(c), tends to establish the existence of complicated pneumoconiosis, and then she must weigh the evidence at subsections (a), (b), and (c) together before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established.[13] *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 1146 (4th Cir. 1993); *Melnick*, 16 BLR at 1-33. On remand, the administrative law judge cannot base a finding of invocation of the irrebuttable presumption upon the mere introduction of legally sufficient evidence of complicated pneumoconiosis. The administrative law judge must weigh together all of the evidence relevant to the presence or absence of pneumoconiosis in any form, resolve any conflict, and determine whether claimant has met his burden of proving that he has the condition described in 20 C.F.R. §718.304 by a preponderance of the evidence. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34.

[12] The administrative law judge is required to consider all relevant evidence on the issue of the existence of complicated pneumoconiosis, including the objective test results and medical opinions concluding that claimant has no respiratory impairment. *See Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615 (6th Cir. 1999).

[13] On remand, if the administrative law judge determines that claimant has complicated pneumoconiosis, he must determine whether claimant is entitled to the presumption under 20 C.F.R. §718.203(b), that his pneumoconiosis arose out of coal mine employment, and further consider whether the presumption has been rebutted. *See* 20 C.F.R. §718.203(b); *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with 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