BRB No. 07-0667 BLA

M.F.M. (Widow of R.M.)	)	
Claimant-Respondent	)	
v.	)	
SEWELL COAL COMPANY	)	DATE ISSUED: 04/29/2008
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.

Otis R. Mann, Jr., Charleston, West Virginia, for claimant.

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

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits (2004-BLA-6395) of Administrative Law Judge Linda S. Chapman on a survivor's 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).[1] The administrative law judge found that the

[1] Claimant is the widow of the miner, who died on May 12, 2003. Prior to his death, the miner filed a claim on February 14, 1973, which was finally denied by the Department of Labor on August 29, 1980, as the evidence failed to show the presence of

record established that the miner had a coal mine employment history of twenty-eight years, but that the evidence of record failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2), (4). The administrative law judge found, however, that the record did establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(3), as claimant established that the miner suffered from complicated pneumoconiosis pursuant to 20 C.F.R. §718.304(a), based on x-ray evidence. The administrative law judge further found that the miner's complicated pneumoconiosis arose out of coal mine employment, 20 C.F.R. §718.203(b), and that claimant was therefore entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to Section 718.304(a), 20 C.F.R. §718.205(c)(3). The administrative law judge further determined that the evidence of record supported a finding that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.205(c)(2). Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in evaluating the evidence of complicated pneumoconiosis pursuant to Section 718.304 and erred in finding that the evidence established that the miner's death was due to pneumoconiosis at Section 718.205(c)(2). Claimant responds in support of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a brief.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[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).

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a totally disabling respiratory impairment. Director's Exhibit 1. The miner took no further action on the claim.

[2] We affirm, as unchallenged on appeal, the administrative law judge's length of coal mine employment determination and the finding that claimant failed to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(1), (2) and (4). *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

[3] The administrative law judge found that the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. Review of the record, however, demonstrates that the miner was last employed in the coal mine industry in West Virginia. Director's Exhibit 1. We will, therefore, apply the law of the United States Court of Appeals for Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*); Director's Exhibit 1.

To establish entitlement to survivor's benefits, claimant must demonstrate by a preponderance of the evidence that the miner had pneumoconiosis arising out of coal mine employment and that his death was due to pneumoconiosis. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.205(a); *Trumbo v. Reading Anthracite Co.*, 17 BLR 1-85 (1993); *Neeley v. Director, OWCP*, 11 BLR 1-85 (1988); *Boyd v. Director, OWCP*, 11 BLR 1-39 (1988). For survivors' claims filed on or after January 1, 1982, death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, death was caused by complications of pneumoconiosis, or the presumption relating to complicated pneumoconiosis, set forth at 20 C.F.R. §718.304, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a substantially contributing cause of death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5); *see Shuff v. Cedar Coal Co.*, 969 F.2d 977-80, 16 BLR 2-90, 2-92-93 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993).

Employer first argues that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis pursuant to Section 718.304. Employer asserts that because the administrative law judge properly found that the existence of simple pneumoconiosis was not established,[4] a finding unchallenged by claimant, the administrative law judge irrationally found complicated pneumoconiosis established. Employer argues that because complicated pneumoconiosis is a more severe form of simple pneumoconiosis, the administrative law judge's finding that claimant did not suffer from simple coal worker's pneumoconiosis precludes a finding of complicated pneumoconiosis. Employer argues that the administrative law judge erred in failing to consider the weight of all of the evidence in finding the existence of complicated pneumoconiosis established.

30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304, provides that there is an irrebuttable presumption of death 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

[4] In finding that simple pneumoconiosis was not established, the administrative law judge found that the x-ray evidence did not support a finding of the disease pursuant to 20 C.F.R. §718.202(a)(1) as the "x-ray evidence [was] essentially in equipoise." Decision and Order at 14. The administrative law judge further found that claimant could not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(2) as there was no autopsy or biopsy evidence. Further, the administrative law judge found that the medical opinion evidence was not supportive of a finding of simple pneumoconiosis pursuant to 20 C.F.R. §718.202(a)(4), because, "other than the notations of a diagnosis of or a history of pneumoconiosis in [the miner's] hospital records, which are unsupported by objective or clinical or testing findings," there was "no physician who has concluded that [the miner] had pneumoconiosis." Decision and Order at 16.

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, however, does not automatically qualify claimant for the irrebuttable presumption found at Section 718.304. Rather, the administrative law judge must examine all the evidence on the 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. Further, claimant is entitled to the irrebuttable presumption only if the evidence establishes that the miner has or had a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991)(*en banc*); *see also 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 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 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 the instant case, the administrative law judge found that the miner suffered from complicated pneumoconiosis at Section 718.304(a), as the x-ray evidence established the presence of opacities greater than one centimeter. Specifically, the administrative law

judge found that Dr. Capiello read an August 3, 2001 x-ray as showing Category A opacities, and a March 4, 2003 x-ray as showing Category B opacities. Claimant's Exhibits 1, 8. The administrative law judge further found that Dr. Miller read a September 16, 2002 x-ray as demonstrating Category B opacities and also read the March 4, 2003 x-ray as demonstrating Category B opacities. Claimant's Exhibits 2, 4. Based upon these four positive readings, the administrative law judge found complicated pneumoconiosis established. Considering the interpretations of the same films by Drs. Wheeler and Scott, Director's Exhibit 17; Employer's Exhibit 4, the administrative law judge concluded that they did not "refute[]" the positive x-ray interpretations of complicated pneumoconiosis rendered by Drs. Capiello and Miller. Decision and Order at 19. In addition, the administrative law judge found that employer "has not offered affirmative evidence that the large opacity was due to something other than exposure to coal dust." Decision and Order at 20. The administrative law judge therefore found "that the preponderance of evidence points to coal dust exposure as the etiology of [the miner's] radiographic abnormalities." *Id*.

As employer argues, review of the administrative law judge's decision demonstrates that in finding complicated pneumoconiosis established, she failed to address all the relevant evidence, as required. Specifically, the administrative law judge failed to address x-ray interpretations that did not diagnose complicated pneumoconiosis or opacities greater than one centimeter, Director's Exhibits 8, 9, 17, and failed to address medical opinions, specifically those of Drs. Hippensteel and Spagnolo, that did not diagnose any form of pneumoconiosis, Employer's Exhibits 2, 3, 5. The administrative law judge's failure to address this evidence is error that requires remand. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33; *Truitt*, 2 BLR at 1-203. Accordingly, the administrative law judge's finding that complicated pneumoconiosis was established pursuant to Section 718.304(a) is vacated and the case is remanded for consideration of all the relevant evidence on the issue.

Employer further argues that in finding complicated pneumoconiosis established, the administrative law judge impermissibly shifted the burden of proof to employer. Employer argues that the administrative law judge improperly determined that claimant would be entitled to a presumption of complicated pneumoconiosis where there is x-ray evidence of a large opacity, based on an erroneous interpretation of *Scarbro*.

In this case, the administrative law judge cited the holdings of the Fourth Circuit in *Scarbro*. *See* Decision and Order at 16. However, the administrative law judge also stated that once claimant establishes the presence of large opacities, "[e]mployer must provide evidence that affirmatively shows the opacities are not there or that they are from a process other than complicated pneumoconiosis." Decision and Order at 19.

The Fourth Circuit, in an unpublished decision, recently explained that:

> *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 appeared to shift the burden of proof to the employer in *Lambert*, the Fourth Circuit found it necessary to remand that case for reconsideration.

We similarly hold that the administrative law judge, in this case, as employer asserts, appears to have improperly shifted the burden of proof to employer to "affirmatively show" that the opacities seen on x-ray do not exist or that they are not what they seem to be.[5] Consequently, on remand, the administrative law judge must correctly allocate the burden of proving the existence of complicated pneumoconiosis to claimant.

Finally, employer asserts that the administrative law judge erred in finding that claimant established that the miner's death was due to pneumoconiosis pursuant to Section 718.205(c)(2), when she found that pneumoconiosis was not established at Section 718.202(a)(1), (2) and (4). We agree. *See Trumbo*, 17 BLR at 1-90. In the instant case, the only method available for claimant to establish that the miner's death was due to pneumoconiosis is by establishing entitlement to the irrebuttable presumption of death due to pneumoconiosis by establishing complicated pneumoconiosis at Section 718.304.

[5] 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."). 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.), however. 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.

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