BRB No. 08-0474 BLA

P.H. (Widow of R.H.) Claimant-Respondent v. CONSOLIDATION COAL COMPANY Employer-Petitioner DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 04/09/2009 DECISION and ORDER

Appeal of the Decision and Order on Remand of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Wendy G. Atkins and Douglas A. Smoot (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Helen H. Cox (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 Law Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (06-BLA-5087) of Administrative Law Judge Linda S. Chapman (the administrative law judge) awarding benefits on a survivor's claim filed on February 5, 2002, 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 the second time.[1] Pursuant to employer's prior appeal, the Board vacated the administrative law judge's earlier decision awarding benefits. The Board held that the administrative law judge applied an incorrect legal standard in determining that the miner had complicated pneumoconiosis and erred, therefore, in finding that claimant was entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. Accordingly, the Board remanded the case for the administrative law judge to reconsider all of the relevant evidence on the issue of complicated pneumoconiosis in accordance with the correct legal standard set forth in *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-101 (4th Cir. 2000).[2] *P.H. v. Consolidation Coal Co.*, BRB

[1] Claimant is the widow of the miner. The miner filed a claim for benefits on March 16, 1983, and was awarded benefits on that claim. Director's Exhibit 1. He died on January 8, 2002. Director's Exhibit 10. Claimant filed her survivor's claim on February 5, 2002. Director's Exhibit 3. On January 18, 2005, Administrative Law Judge Jeffrey Tureck issued a Decision and Order denying benefits on the survivor's claim because claimant: failed to establish that the miner's death was due to simple pneumoconiosis, 20 C.F.R. §718.205(c); and failed to establish that she was entitled to the irrebuttable presumption that the miner's death was due to pneumoconiosis, based on a finding of complicated pneumoconiosis at 20 C.F.R. §718.304. Director's Exhibit 56. By letter dated March 23, 2005, claimant filed a request for modification, alleging that a mistake in a determination of fact had been made. *See* 20 C.F.R. §725.310; Director's Exhibit 57. The case was assigned to Administrative Law Judge Linda S. Chapman (the administrative law judge). The administrative law judge credited the miner with "36.75 years of coal mine employment," 2006 Decision and Order at 2, and adjudicated the claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge found that the evidence did not establish that the miner's death was due to simple pneumoconiosis pursuant to 20 C.F.R. §718.205(c). However, the administrative law judge found that the evidence established the presence of complicated pneumoconiosis and that claimant was, therefore, entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that the evidence established that the miner's complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203(b). Consequently, the administrative law judge found that a mistake in a determination of fact had been made and claimant was entitled to modification pursuant to 20 C.F.R. §725.310. Accordingly, the administrative law judge awarded benefits on the survivor's claim.

[2] The Board also instructed the administrative law judge that claimant would be entitled to the presumption, that the miner's complicated pneumoconiosis arose out of

No. 06-0891 BLA, slip op. at 9-10 (July 24, 2007) (unpub.). Further, because the Board found that the administrative law judge erred in finding complicated pneumoconiosis established, it held that the administrative law judge erred in finding that claimant was entitled to modification of the prior denial of benefits, based on a mistake in a determination of fact at 20 C.F.R. §725.310.[3] *P.H.*, BRB No. 06-0891 BLA, slip op. at 11.

On remand, the administrative law judge again found that the evidence established the presence of complicated pneumoconiosis, that claimant was, therefore, entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis at 20 C.F.R. §718.304, and that claimant established that a mistake in a determination of fact had been made and was, therefore, entitled to modification at 20 C.F.R. §725.310.[4] The administrative law judge also found that claimant was entitled to the presumption that the miner's pneumoconiosis arose out of coal mine employment at Section 718.203(b), in light of the miner's length of coal mine employment. Accordingly, the administrative law judge again awarded survivor's benefits.

On appeal, employer challenges the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R §718.304. Specifically, employer argues that the administrative law judge erred in again applying the wrong legal standard on the issue of complicated pneumoconiosis, by shifting the burden to employer to show that the opacities, seen radiographically, were not what they appeared to be or were unrelated to coal mine dust exposure. Consequently, employer contends that the administrative law judge erred once again in finding that claimant established grounds for modification by showing a mistake in a determination of fact at

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coal mine employment at 20 C.F.R. §718.203(b), if she found complicated pneumoconiosis established on remand. *P.H. v. Consolidation Coal Co.*, BRB No. 06-0891 BLA, slip op. at 11 n.10 (July 24, 2007) (unpub.).

[3] Additionally, because this case involved a request for modification, the Board instructed the administrative law judge to consider whether reopening the case would render justice under the Act. Further, the Board instructed the administrative law judge to determine whether employer demonstrated that good cause existed at 20 C.F.R. §725.456(b)(1), for the admission of Drs. Scatarige's and Scott's readings of the June 28, 2000 x-ray, in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414. *P.H.*, BRB No. 06-0891 BLA, slip op. at 3, 10.

[4] Because this is a survivor's claim, claimant cannot establish modification by showing a change in conditions. *See* 20 C.F.R. §725.310.

Section 725.310.[5] Claimant responds, urging affirmance of the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has filed a limited response.[6]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational, and is in accordance with applicable law.[7] 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

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). On a survivor's claim filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, if pneumoconiosis was a substantially contributing cause or factor leading to the miner's death, if death was caused by complications of pneumoconiosis, or if the presumption set forth at Section 718.304, relating to complicated pneumoconiosis, is applicable. 20 C.F.R. §718.205(c)(1)-(3). Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death. 20 C.F.R. §718.205(c)(5).

In reviewing the record as a whole on modification, an administrative law judge is authorized "to correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted." *See O'Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971). The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, has held that a claimant need not allege a specific error in order for an administrative law

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[5] Employer also challenges the administrative law judge's finding that employer did not show good cause for the admission of Drs. Scatarige's and Scott's readings of the June 28, 2000 x-ray, as they were in excess of the evidentiary limitations set forth at 20 C.F.R. §725.414.

[6] The Director, Office of Workers' Compensation Programs, asserts that the administrative law judge properly found that modification was available in this case and that the administrative law judge's evidentiary rulings were proper.

[7] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as the miner's coal mine employment was in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

judge to find modification based upon a mistake in a determination of fact. *Jessee v. Director, OWCP*, 5 BLR 723, 18 BLR 2-26 (4th Cir. 1993).

Section 411(c)(3) of the Act, 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304 of the regulations, provides that there is an irrebuttable presumption of death due to pneumoconiosis if the miner suffered 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 Fourth Circuit has held, however, that "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition which is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561 (4th Cir. 1999).

The introduction of legally sufficient evidence of complicated pneumoconiosis does not, however, automatically invoke the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, in determining whether claimant has established invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 718.304, the administrative law judge must find that claimant has established a "chronic dust disease of the lung," commonly known as complicated pneumoconiosis, by weighing together all of the relevant evidence. 20 C.F.R. §718.304(a)-(c); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*). The burden of establishing that the large opacities, as defined at Section 718.304, are due to coal mine dust exposure, rests with claimant. *See Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006)(unpub.).

Employer contends that the administrative law judge has again erred in applying an incorrect standard, in finding complicated pneumoconiosis established. Specifically, employer asserts that the administrative law judge again shifted the burden of proof to employer to establish that the large opacities, seen radiographically, were not what they appeared to be or were unrelated to coal mine dust exposure. Employer's argument has merit.

In her prior decision, the administrative law judge found that the x-ray evidence established the presence of complicated pneumoconiosis at Section 718.304. 2006 Decision and Order. The Board, however, vacated this finding and remanded the case,

because the administrative law judge had found that employer failed to provide persuasive evidence affirmatively showing that the opacities, seen radiographically, were not what they appeared to be or were unrelated to coal mine dust exposure. *P.H.*, BRB No. 06-0891 BLA, slip op. at 7. Specifically, the Board noted that the administrative law judge stated, in pertinent part:

> the *Employer has not met the burden imposed on it by the Court in Scarbro to affirmatively establish that the opacities are due to a process other than pneumoconiosis*. Thus, the Claimant has established that [the miner] had pneumoconiosis that arose out of coal mine employment, and that his death was due to pneumoconiosis.[footnote omitted]. The Claimant is therefore entitled to benefits under the Act.

P.H., BRB No. 06-0891 BLA, slip op. at 8-9.

The Board held that the administrative law judge had improperly shifted the burden of proof to employer to "affirmatively establish" that the large opacities, seen radiographically, were unrelated to coal mine dust exposure.[8] The Board, therefore, remanded the case for application of the correct standard and consideration of the evidence thereunder.[9] *P.H.*, BRB No. 06-0891 BLA, slip op. at 9.

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[8] Citing the decision of the United States Court of Appeals for the Fourth Circuit in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.), the Board noted that the Fourth Circuit rejected the analysis employed by the administrative law judge that shifted the burden to employer to prove that the large opacities were not caused by coal mine dust exposure. The Board noted, however, that its holding was not based exclusively on the Fourth Circuit's decision in *Lambert*, but that its holding was based on a review of the administrative law judge's individual statements in the case. *P.H.*, BRB No. 06-0891 BLA, slip op. at 9 n.8.

[9] The Board noted that the administrative law judge's inaccurate application of the standard set forth in *Eastern Assoc. Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), affected her weighing of the medical opinion evidence. *P.H.*, BRB No. 06-0891 BLA, slip op. at 10. Hence, the Board instructed the administrative law judge to take into account the miner's medical records, which date back only to the year 2000, along with Dr. Repsher's deposition testimony that the miner could have had tuberculosis without knowing it, when considering the opinions of Drs. Bush, Caffrey, Hippensteel, and Repsher, that the miner had granulomatous disease or tuberculosis. *Id*. The Board additionally instructed the administrative law judge to address the totality of the rationales offered by Drs. Bush, Caffrey, Hippensteel, and Repsher for ruling out the presence of complicated pneumoconiosis, including their discussion of the extent to which the absence of a significant respiratory or pulmonary

In considering the relevant evidence under Section 718.304 on remand, the administrative law judge found that inasmuch as claimant met her burden of establishing that the miner had the statutory condition known as complicated pneumoconiosis based on x-ray evidence, and "employer had not offered any *affirmative* evidence that establishe[d] that the acknowledged masses in [the miner's] lungs [were] due to a process other than pneumoconiosis," *id.* at 11 (emphasis added), claimant was entitled to the presumption that the miner's death was due to pneumoconiosis at Section 718.304. As discussed previously, however, the Board remanded this case because the administrative law judge had erroneously shifted the burden of proof to employer to show that the large opacities, seen radiographically, were not what they appeared to be or were unrelated to coal mine dust exposure. Thus, on remand, the administrative law judge has again improperly shifted the burden of proof to employer. *See Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Consequently, we vacate the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at 20 C.F.R. §718.304, and we remand the case for further consideration of all of the evidence under the correct standard. *See Lambert*, No. 06-1154. Because we vacate the administrative law judge's finding that the evidence established the presence of complicated pneumoconiosis at Section 718.304, we also vacate the administrative law judge's finding that modification was established at Section 725.310.

If, on remand, the administrative law judge finds that the evidence establishes the presence of complicated pneumoconiosis at Section 718.304, claimant would then be entitled to invocation of the irrebuttable presumption that the miner's death was due to pneumoconiosis at Section 718.304 and entitled to modification at Section 725.310.[10] Further, if the administrative law judge finds complicated pneumoconiosis established on remand, claimant would be entitled to the presumption that the miner's complicated pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203(b), based on his length of coal mine employment. *See Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Finally, inasmuch as the administrative law judge has again applied the standard set forth in *Scarbro* erroneously, despite the Board's remand instructions, we conclude that "review of this claim requires a fresh look at the evidence . . . ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see* 20 C.F.R. §§802.404(a), 802.405(a); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101,

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impairment supported their opinion that the x-ray evidence was not consistent with a diagnosis of complicated pneumoconiosis. *Id.*

[10] If reached, however, the administrative law judge must also consider whether reopening this case on modification would render justice under the Act. *Sharpe v. Director, OWCP*, 495 F.3d 125, 24 BLR 2-56 (4th Cir. 2007).

1-107 (1992). We, therefore, reluctantly direct that the case be assigned to a different administrative law judge on remand.[11]

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

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge

[11] Because we must remand this case for further analysis of the medical evidence to the Office of Administrative Law Judges for reassignment, and the good cause issue is committed to the administrative law judge's discretion, the administrative law judge must initially determine whether employer has demonstrated that good cause exists for the admission of Drs. Scatarige's and Scott's readings of the June 28, 2000 x-ray at 20 C.F.R. §725.456(b)(1).