BRB Nos. 07-0787 BLA and
07-0787 BLA-S

H.P.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
PREMIUM ENERGY, INCORPORATED	)	
	)	DATE ISSUED: 12/18/2008
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 and the Supplemental Decision and Order Awarding Attorneys Fees of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

Ashley M. Harman (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits and the Supplemental Decision and Order Awarding Attorneys Fees (07-BLA-5079) of Administrative Law Judge Linda S. Chapman rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge accepted

employer's stipulation to twenty-seven years of coal mine employment,[1] and adjudicated this claim pursuant to the regulations contained in 20 C.F.R. Part 718. The administrative law judge determined that the existence of simple pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (2), but she found that the evidence established the existence of complicated pneumoconiosis arising out of coal mine employment, thereby entitling claimant to the irrebuttable presumption that he was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Accordingly, she awarded benefits. Subsequently, the administrative law judge considered claimant's counsel's petition for a fee and employer's objections thereto, and awarded a fee of $7,392.50.

On appeal, employer challenges the administrative law judge's finding of complicated pneumoconiosis. Employer also asserts that the administrative law judge erred in her award of attorney's fees. Claimant's response, limited to employer's supplemental appeal, urges affirmance of the administrative law judge's fee award. The Director, Office of Workers' Compensation Programs, has not submitted a brief on appeal.[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. 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).

Employer argues that the administrative law judge erred in finding that claimant established the existence of complicated pneumoconiosis, and was, therefore, entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis set out at 20 C.F.R. §718.304. Under Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (a) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (b) when diagnosed by biopsy

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

[2] We affirm the administrative law judge's length of coal mine employment finding, as well as her findings that the existence of simple pneumoconiosis was not established pursuant to 20 C.F.R. §718.202(a)(1), (2), as these findings are not challenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

or autopsy, yields massive lesions in the lung; or (c) when diagnosed by other means, is a condition that would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held 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. *Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §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 that pneumoconiosis is not present, resolve any conflict, and make a finding of fact. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Employer asserts that the administrative law judge misapplied the law in weighing the x-ray evidence pursuant to Section 718.304(a), because she did not weigh the conflicting evidence together, with the burden of proof on claimant, to determine if claimant established that he had a chronic dust disease of the lungs that would be classified as Category A, B, or C.[3] We agree.

[3] The record contains five interpretations of a March 9, 2006 x-ray. Dr. Alexander, a B reader and Board-certified radiologist, read this film as 1/2 r, r, and Category A. Director's Exhibit 13. Dr. Rasmussen, a B reader, read this film as 1/1 r, r, and Category A. Director's Exhibit 11. Dr. Wheeler, a B reader and Board-certified radiologist, read the film as 0/1 t, q, and as "O", or negative for large opacities. He noted several masses and nodular infiltrates in the miner's lungs and commented that they were compatible with conglomerate granulomatous disease, tuberculosis, and histoplasmosis. Dr. Wheeler also commented:

> CWP is unlikely because pattern is asymmetrical, involving pleura and small nodules are in lateral left mid and upper lung. CWP typically gives symmetrical small nodular infiltrates in central mid and upper lungs. Mass in RUL is not a large opacity of CWP because any background nodules are low profusion and it involves lateral pleura which has no alveoli.

In evaluating the x-ray evidence pursuant to 20 C.F.R. §718.304, the administrative law judge concluded that complicated pneumoconiosis was established because claimant submitted x-rays that were classified for large opacities, and employer did not establish that the large opacities were not present:

> Based on the totality of the x-ray evidence, I find that [claimant] has established that he has a process that shows up on his x-ray as category A or B opacities. Thus, Dr. Wheeler, Dr. Scott, and Dr. Scatarige acknowledge the presence of large masses on [claimant's] chest x-rays; their reports are not affirmative evidence that establishes that the large opacities identified by Dr. Rasmussen, Dr. Alexander, and Dr. DePonte are not there.

Decision and Order at 15. The administrative law judge also found that the x-rays contained in claimant's treatment records "lend credibility to the findings of large opacities by Dr. Rasmussen, Dr. Alexander, and Dr. DePonte." *Id.* at 16.

The administrative law judge's evaluation of the x-ray evidence pursuant to Section 718.304(a) improperly shifted the burden of proof to employer to affirmatively establish that the opacities seen on the x-ray by some doctors were not there. *See* Decision and Order at 15. Because claimant bears the burden of proof at all times, we must vacate the administrative law judge's finding that the x-ray evidence established

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Employer's Exhibit 1. Dr. Scott, a B reader and Board-certified radiologist, read this film as negative for pneumoconiosis and noted "infiltrates and/or fibrosis" in the upper lungs, and calcified granulomata, and opined that the changes "are probably due to tb, unknown activity. . . ." Employer's Exhibit 2. Dr. Scatarige, also a B reader and Board-certified radiologist, interpreted this film as negative for pneumoconiosis. He identified a mass in claimant's lung that he believed was due to tuberculosis, and he stated "No small, round, symmetrical opacities to suggest CWP or silicosis." Employer's Exhibit 2. This film was also read as quality "2" by Dr. Navani. Director's Exhibit 12.

The December 21, 2006 film was read by Dr. DePonte, who is dually qualified as a B reader and Board-certified radiologist, as 1/2 q, r, and as Category B. Claimant's Exhibit 1. Dr. Wheeler read this film as negative for pneumoconiosis. He noted masses in claimant's lung that he stated were more likely compatible with histoplasmosis than tuberculosis. Employer's Exhibits 7-8. In his deposition, Dr. Wheeler stated that the x-rays did not show complicated coal workers' pneumoconiosis. Employer's Exhibit 6. The record also contains numerous x-ray interpretations submitted with claimant's hospital and treatment records that were not classified for the presence of large opacities pursuant to 20 C.F.R. §718.304(a) Claimant's Exhibits 3-6.

complicated pneumoconiosis pursuant to Section 718.304(a). *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118.

Employer also argues that the administrative law judge erred by not determining whether the x-ray evidence established that claimant suffers from a chronic dust disease of the lung. The existence of complicated pneumoconiosis is not determined solely by claimant's doctors' designation of Category A, B, or C opacities on x-ray. Rather, Section 718.304 provides for invocation of the irrebuttable presumption if "such miner is suffering from a chronic dust disease of the lung" which when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B, or C. 20 C.F.R. §718.304; *Melnick*, 16 BLR at 1-33. Therefore, the administrative law judge should have indicated the weight accorded to the comments of Drs. Scott, Scatarige, and Wheeler on their negative interpretations that the masses seen were caused by medical conditions other than coal workers' pneumoconiosis. Employer's Exhibits 1, 2, 6; *see Melnick*, 16 BLR at 1-37. In addition, the administrative law judge should have considered fully Dr. Wheeler's interpretation of the March 9, 2006 x-ray, which stated "O" large opacities, indicating that Dr. Wheeler found no large opacities. Employer's Exhibit 1. On remand, the administrative law judge must consider Dr. Wheeler's interpretation of "O" as well as the opinions that the opacities seen by x-ray were not coal workers' pneumoconiosis. In addition, the administrative law judge should consider the relative qualifications of the physicians who provided the x-ray interpretations in her analysis of the x-ray evidence pursuant to Section 718.304(a). *See Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Employer challenges the administrative law judge's evaluation of the CT scan evidence at Section 718.304(c),[4] contending that the administrative law judge erred by failing to reconcile the differing diagnoses as to the presence of complicated pneumoconiosis.

The administrative law judge considered the CT scan interpretations and stated:

> While none of these CT scan interpretations state that the conglomerate masses would appear on an x-ray as an opacity of at least one centimeter in diameter, which is the standard set out by the Fourth Circuit in *Scarbro*, all of these interpretations lend credibility to the conclusion that [claimant] has a process in his lungs that shows up on x-ray as an opacity of at least one

[4] As the administrative law judge noted, the record did not contain any autopsy or biopsy evidence relevant to 20 C.F.R. §718.304(b). Decision and Order at 13.

> centimeter in diameter, as reported by Dr. Rasmussen, Dr. De Ponte, and Dr. Alexander. These reports certainly do not refute such a conclusion, and thus they are not affirmative evidence to establish that the opacities noted by Dr. Rasmussen, Dr. DePonte, and Dr. Alexander are not there.

Decision and Order at 17.

Because the administrative law judge's analysis of the CT scan evidence[5] was based on her finding that the x-rays established large opacities, and because the administrative law judge improperly shifted the burden to employer to present "affirmative evidence" to "refute" the conclusion that the opacities seen by some doctors on x-ray were not there, we vacate her findings pursuant to Section 718.304(c). *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118. On remand, the administrative law judge must evaluate all of the CT scan evidence of record, and weigh this evidence in light of the credentials of the physicians who interpreted the CT scans.[6] *See Hicks*, 138 F.3d at 533, 21 BLR at 2-335; *Akers*, 131 F.3d at 441, 21 BLR at 2-275-76. Moreover, the administrative law judge on remand should consider Dr. McMurray's diagnosis of extensive progressive massive fibrosis in both lungs, Claimant's Exhibit 6, in evaluating the CT scan evidence.

[5] The record contains interpretations of four CT scans. Dr. Siner read claimant's April 20, 2001 CT scan, and stated that it was "suggestive of pneumonia or progressive massive fibrosis." Claimant's Exhibit 6. Dr. Lepsch read the August 15, 2002 CT scan and stated that the findings "suggest sarcoidosis[, but that i]nhalational disease such as silicosis or coal-miner's pneumoconiosis are also possible." Claimant's Exhibit 5. Dr. Pugh read the February 7, 2003 CT scan and stated that "Silicosis is the favored etiology. Sarcoidosis and other pneumoconiosis are also diagnostic considerations." Claimant's Exhibit 5. Dr. Wheeler read this CT scan and diagnosed masses compatible with conglomerate granulomatous disease, more likely tuberculosis than histoplasmosis, and he stated, "No symmetrical small nodular infiltrates in mid and upper lungs which could indicate CWP." Employer's Exhibit 8. The March 23, 2006 CT scan was read by Dr. McMurray, who diagnosed "Findings consistent with coal workers pneumoconiosis and/or silicosis. Extensive progressive massive fibrosis is seen in both lungs most prominent in the upper lobes." Claimant's Exhibit 6. Dr. Wheeler read this CT scan and he stated that it showed "no pneumoconiosis." Employer's Exhibit 8.

[6] The administrative law judge's analysis of the CT scan evidence referenced an interpretation of the August 2002 CT scan by Dr. Pugh. Decision and Order at 16. There is no such interpretation in the record. The record contains only one interpretation of a CT scan by Dr. Pugh, the February 2003 CT scan. Claimant's Exhibit 5.

We next consider the administrative law judge's evaluation of the medical opinion evidence pursuant to Section 718.304(c). Employer asserts that the administrative law judge erred in her weighing of the evidence and by failing to consider the impact of medical opinion evidence of "no pulmonary impairment."

In evaluating the medical opinion evidence, the administrative law judge found that Dr. Rasmussen's diagnosis of complicated pneumoconiosis[7] outweighed the contrary opinions of Drs. Spagnolo and Repsher.[8] The administrative law judge found that Dr. Spagnolo's opinion was not entitled to significant weight because he did not adequately discuss the significance of the medical records he considered and because he did not explain his reliance on Dr. Wheeler's x-ray interpretation. The administrative law judge accorded less weight to Dr. Repsher's opinion because he did not explain his preference for the x-ray interpretations of Drs. Wheeler, Scott and Scatarige. Decision and Order at 18-19.

Because the administrative law judge's evaluation of the medical opinion evidence pursuant to Section 718.304(c) is based on her findings pursuant to Section 718.304(a), which we have vacated, we also vacate her findings as to the medical opinions pursuant to Section 718.304(c).[9] In addition, contrary to the administrative law judge's statement that Dr. Spagnolo did not explain why he relied upon Dr. Wheeler's x-ray interpretation, Dr. Spagnolo stated "I placed greater weight on this report by Dr. Wheeler who is a pre-eminent radiologist in the evaluation of chest x-rays of individuals with occupational exposure and related lung disease." Employer's Exhibit 3. The administrative law judge

[7] Dr. Rasmussen examined claimant and diagnosed complicated coal workers' pneumoconiosis, Category A, due to claimant's coal mine dust exposure. Dr. Rasmussen noted a minimal loss of lung function, and opined that claimant retained the pulmonary capacity to perform his last usual coal mine employment. Director's Exhibit 11.

[8] Dr. Spagnolo reviewed claimant's medical records and opined that claimant did not have a pulmonary or respiratory impairment aggravated by inhalation of coal mine dust. He stated that claimant retained the respiratory capacity to perform his last coal mine employment. Employer's Exhibit 3. Dr. Repsher reviewed claimant's medical records and stated that claimant did not suffer from medical or legal coal workers' pneumoconiosis, and he opined that claimant has "no clinically significant pulmonary impairment." Employer's Exhibit 5.

[9] We, therefore, also vacate the administrative law judge's finding that "the medical opinion evidence supports the conclusion that [claimant] has established that he has . . . simple . . . pneumoconiosis." Decision and Order at 18.

must consider all of Dr. Spagnolo's opinion on remand. *Tackett v. Director, OWCP*, 7 BLR 1-703 (1985).

Further, we find merit in employer's assertion that the administrative law judge erred by failing to consider the medical opinions that opined claimant did not suffer from a pulmonary impairment. In determining whether the evidence is sufficient to establish complicated pneumoconiosis, the statute directs the administrative law judge to consider all relevant evidence. 30 U.S.C. §923(b); *see Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gray v. SLC Coal Co.*, 176 F.3d 382, 388, 21 BLR 2-615, 2-628 (6th Cir. 1999)(holding that evidence of the presence or absence of a respiratory impairment may be relevant to a physician's diagnosis of the existence of complicated pneumoconiosis.) Therefore, on remand the administrative law judge must consider the medical opinions that stated that claimant does not suffer from a pulmonary impairment.

Consequently, we vacate the administrative law judge's finding that the evidence established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304(a), (c). In light of this holding, we also vacate the administrative law judge's finding pursuant to 20 C.F.R. §718.203.

On remand, the administrative law judge must first determine whether the relevant evidence in each category under 20 C.F.R. §718.304(a)-(c) tends to establish the existence of complicated pneumoconiosis, and then 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. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. In weighing the evidence together, the administrative law judge should interrelate the evidence, considering whether evidence from one category supports or undercuts evidence from other categories. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 22 BLR 2-162 (4th Cir. 2000). Further, she must also determine whether the opacities seen are related to a chronic dust disease of the lung, and whether claimant's pneumoconiosis arose out of his coal mine employment. *See* 20 C.F.R. §718.203; *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007); *Lester*, 993 F.2d at 1145, 17 BLR at 2-117.

Employer challenges the administrative law judge's award of a fee, specifically, the decision to allow an hourly rate of $300 for claimant's counsel and $100 for his legal assistant, without considering their customary billing rates. Claimant's counsel is entitled to a fee only if there has been a successful prosecution of the claim. 33 U.S.C. §928(a), as incorporated into the Act by 30 U.S.C. §932(a); 20 C.F.R. §725.367(a); *Brodhead v. Director, OWCP*, 17 BLR 1-138, 1-139 (1993). Because we have vacated the award of benefits, there has not been a successful prosecution. Consequently, no fee is due and we decline to address the fee order at this time. Should a fee be sought on remand, a fee

petition "shall indicate . . . the customary billing rate" of each person seeking a fee. 20 C.F.R. §725.366(a). Further, risk of loss cannot be factored into determining a reasonable hourly rate. *City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *Broyles v. Director, OWCP*, 974 F.2d 508, 17 BLR 2-1 (4th Cir. 1992).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part, vacated in part, and this 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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JUDITH S. BOGGS
Administrative Appeals Judge