BRB No. 04-0537 BLA

GROVER JUSTUS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	DATE ISSUED: 02/16/2005
	)	
RANDY & LISA HURLEY t/a MAY BRANCH TRUCKING	)	
	)	
and	)	
	)	
BITUMINOUS CASUALTY CORPORATION, c/o OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

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

DOLDER, J.:

Employer appeals the Decision and Order Awarding Benefits (2002-BLA-0020) 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).[1] This case is before the Board for the second time. In the administrative law judge's original Decision and Order, she credited claimant with at least nineteen years of coal mine employment[2] and found that the medical evidence established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 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 administrative law judge awarded benefits.

Upon review of employer's appeal, the Board vacated the administrative law judge's finding that the x-ray evidence established the existence of complicated pneumoconiosis because the administrative law judge did not consider several physicians' interpretations that claimant's x-rays were negative for any abnormalities consistent with pneumoconiosis. *Justus v. Randy & Lisa Hurley*, BRB No. 02-0690 BLA, slip op. at 4-5 (Jun. 17, 2003)(unpub.). The Board remanded the case for the administrative law judge to consider whether the weight of the x-ray evidence, considered in light of the qualifications of the physicians who provided the x-ray interpretations, established the existence of complicated pneumoconiosis by a preponderance of the evidence. *Justus*, slip op. at 5. The Board also vacated the administrative law judge's finding pursuant to Section 718.304(c) because the administrative law judge did not consider all of the relevant evidence. *Justus*, slip op. at 6. The Board instructed the administrative law judge to include in her consideration the medical reports of record stating that claimant does not have complicated pneumoconiosis, rather than limiting her review solely to objective tests such as claimant's negative CT scan. *Id.*

On remand, the administrative law judge again found that the evidence of record established the existence of complicated pneumoconiosis and thus invocation of the irrebuttable presumption of total disability due to pneumoconiosis. Pursuant to Section 718.304(a), the administrative law judge considered eleven readings of four chest x-rays. Two readings identified the presence of simple pneumoconiosis and Category A large opacities, while the remaining nine readings were either negative for pneumoconiosis or were unclassified for the presence or absence of pneumoconiosis. The administrative law judge discounted the negative readings as "equivocal" because the physicians excluded

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are codified at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] The record indicates that claimant's coal mine employment occurred in Virginia. Director's Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

pneumoconiosis as an etiology for the large masses seen on claimant's x-rays, but did not identify a definite etiology for the masses. Decision and Order on Remand at 2. The administrative law judge noted that the record contained no evidence that claimant was diagnosed with tuberculosis or cancer, alternative etiologies identified by the physicians who concluded that pneumoconiosis was absent. Pursuant to Section 718.304(c), the administrative law judge discounted the negative readings of claimant's CT scan because the readers who reported that the scan was negative for pneumoconiosis identified abnormalities but did not assign a definite etiology for the abnormalities. Additionally, the administrative law judge stated that Section 718.304(c) is limited to "medical tests, such as CT scans" and is "not a catch-all provision that allows for consideration of" other medical evidence, such as medical opinions. Decision and Order on Remand at 5. The administrative law judge nevertheless found that the medical opinions diagnosing the absence of complicated pneumoconiosis were equivocal because they did not identify exactly what process caused the large opacities classified by two x-ray readers. Additionally, the administrative law judge found that the medical opinions did not address the presence or absence of complicated pneumoconiosis as defined in the Act. Finally, the administrative law judge concluded that even considering the "excellent credentials" of employer's experts, employer's evidence was "simply insufficient to overcome the presumption triggered by the findings of large opacities on x-ray." *Id*. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge applied an improper standard in weighing the conflicting x-ray evidence. Employer further asserts that the administrative law judge erred in her analysis of the medical opinions and CT scan evidence. Claimant has not submitted a response in this appeal. The Director, Office of Workers' Compensation Programs, has filed a letter stating that he will not file a response brief in this appeal.

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

In order to establish entitlement to benefits under 20 C.F.R. Part 718, claimant must prove that he suffers from pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.201, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes a finding of entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

Section 411(c)(3)(A) of the Act, implemented by Section 718.304(a) of the

regulations, 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)(A); 20 C.F.R. §718.304(a). 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. In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *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*). Additionally, the Fourth Circuit court 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 (4th Cir. 1999).

Pursuant to Section 718.304(a), employer contends that the administrative law judge did not properly resolve the conflicting x-ray evidence. Specifically, employer alleges that the administrative law judge effectively shifted the burden to employer to disprove the existence of complicated pneumoconiosis upon claimant's introduction of two x-ray readings classified for the presence of large opacities. We hold that employer's contention has merit.

The administrative law judge applied an incorrect standard in analyzing the x-ray readings. In *Scarbro*, the Fourth Circuit court explained that where the x-ray evidence vividly displays the presence of large opacities, medical evidence under another prong of 30 U.S.C. §923(c) can undermine the positive x-rays only by affirmatively showing that the opacities are not there or are not what they seem to be. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The administrative law judge in this case relied on that language from *Scarbro* to require employer's medical experts to not only read claimant's x-rays as negative for large opacities or any form of pneumoconiosis, but also to ascertain a definite etiology for the large opacities identified by claimant's two medical experts, in order to be sufficient "to overcome the presumption triggered by the findings of large opacities on x-ray." Decision and Order on Remand at 5. The administrative law judge's analysis was incorrect because in *Scarbro* the question was whether evidence under other prongs of 30 U.S.C. §923(c) undermined x-

rays that clearly demonstrated large opacities,[3] whereas here the question before the administrative law judge was whether the x-rays themselves support a finding of complicated pneumoconiosis.

In this context, the administrative law judge's requirement that employer "affirmatively establish that the opacities identified by Dr. Forehand and Dr. Navani are not there, or that they are not what they seem to be" by identifying a definite etiology for the opacities, Decision and Order on Remand at 2, effectively required employer to disprove the existence of complicated pneumoconiosis once claimant submitted two positive readings under Section 718.304(a). The Fourth Circuit court has emphasized, however, that "claimant retains the burden of proving the existence of the disease" complicated pneumoconiosis. *Lester*, 993 F.3d at 1146, 17 BLR at 2-118. The administrative law judge's analysis runs counter to our prior instruction to consider whether claimant carried his burden to establish the existence of complicated pneumoconiosis by a preponderance of the evidence. Moreover, the record reflects that one of claimant's two x-ray readers, Dr. Forehand, indicated the need to rule out tuberculosis or malignancy, Director's Exhibit 20, thereby raising the same alternative etiologies for claimant's large opacities as did those experts whose negative readings were discredited for failing to assign a definitive etiology to claimant's lung condition. In light of the foregoing, we vacate the administrative law judge's findings at Section 718.304(a) and remand this case for further consideration of the weight of x-ray evidence viewed in light of the readers' radiological qualifications. *Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

Pursuant to Section 718.304(c), employer contends that the administrative law judge did not adequately carry out the Board's instruction to consider whether the CT scan evidence and medical opinions supported a finding of the existence of complicated pneumoconiosis. While the administrative law judge did mention this evidence, she did not adequately consider it on remand, but instead discredited it as not dispositive on the issue of the existence of large opacities on claimant's x-rays. The administrative law judge's analysis, however, was affected by her improper consideration of the conflicting x-ray evidence pursuant to Section 718.304(a). Consequently, we vacate the administrative law judge's findings at Section 718.304(c).

[3] In *Scarbro*, seven of eight readers of the most recent x-ray diagnosed large opacities. Here, by contrast, two readers diagnosed large opacities on claimant's January 22, 2001 x-ray while three readers classified the same x-ray as negative for pneumoconiosis or any large opacities. Director's Exhibits 20-22, 49; Employer's Exhibit 4. All four readings of claimant's June 15, 2001 x-ray were negative for pneumoconiosis or large opacities, Director's Exhibit 49; Employer's Exhibits 1, 4, and two readings of claimant's March 20, 2001 and July 20, 2001 x-rays were not classified for the presence or absence of pneumoconiosis. Employer's Exhibit 3.

On remand, the administrative law judge should consider whether the weight of the x-ray evidence at Section 718.304(a), and the weight of the CT scan and medical opinion evidence support a finding of the existence of complicated pneumoconiosis, and should then weigh together all of the relevant evidence to determine whether the existence of complicated pneumoconiosis is established. *Gollie v. Elkay Mining Co.*, 22 BLR 1-306, 1-311 (2003). Reluctantly, and in view of the administrative law judge's response to the Board's prior remand instructions, we grant employer's request to remand this case for assignment to a different administrative law judge, who will take "a fresh look at the evidence" to determine whether claimant has met his burden of proof pursuant to Section 718.304. *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998).

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 further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

SMITH, J:

I concur.

ROY P. SMITH
Administrative Appeals Judge

McGRANERY, J., dissenting:

I respectfully dissent from the majority's determination to vacate the administrative law judge's decision awarding benefits and to direct reassignment of the case. I believe that the majority's decision is based on a misreading of the administrative law judge's decision and a misreading of the Fourth Circuit's decision in *Eastern Associated Coal Corp. v. Director, [Scarbro] OWCP*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000).

The majority holds that the administrative law judge erred in her consideration of the x-ray evidence pursuant to 20 C.F.R. §718.304 because the majority construes her opinion as requiring employer to prove the etiology of the x-ray findings. That is not my understanding of her opinion. The administrative law judge observed that all of the x-ray readers identified

large masses or infiltrates, two doctors (one dually qualified and one B reader) found Category A large opacities due to coal dust exposure, four doctors (two dually qualified and two B readers) determined the x-rays did not show pneumoconiosis but were uncertain about etiology; they suggested the possibility of tuberculosis, granulomatous disease or malignancy. Because there is no medical evidence in the record to corroborate any of these diagnoses, the administrative law judge reasonably questioned the credibility of the opinions that the large masses seen on x-ray were not due to coal dust exposure. In contrast, the administrative law judge found credible the opinions of those doctors who related the large masses to coal dust exposure since the record established a nineteen year history of coal mine employment. The administrative law judge did not require employer's doctors to prove etiology; she undertook a reasonable analysis of the opinions to determine their credibility and ultimately found more credible those opinions which are consistent with other evidence in the record.[4]

The case at bar arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit which has declared: the findings of an administrative law judge

> may not be disregarded on the basis that other inferences might have been more reasonable. Deference must be given the fact-finder's inferences and credibility assessments, and we have emphasized the scope of review of ALJ findings is limited. *Newport News Shipbldg. & Dry Dock Co. v. Tann*, 841 F.2d 540, 543 (4th Cir. 1988).

Newport News Shipbldg. & Dry Dock Co. v. Cherry, 326 F.3d 449, 452, 37 BRBS 6, 8 (CRT) (4th Cir. 2003). Accordingly, the administrative law judge's analysis of the x-ray evidence should be affirmed.

The majority has also misread the Fourth Circuit's decision in *Scarbro*, repeating a mistake it made in its previous decision remanding the case. Both in its prior decision and in the current decision the administrative law judge is directed to consider together the CT scan and medical opinion evidence pursuant to 30 U.S.C. §921(c)(3)(C), as implemented by 20 C.F.R. §718.304(c). That Section provides:

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[4] Employer and the majority seize upon the administrative law judge's use of the word "equivocal" to describe Dr. Branscomb's reading which expressed uncertainty about etiology but ruled out coal dust exposure. The administrative law judge's choice of "equivocal" is unfortunate because the opinion was not equivocal in excluding coal dust exposure as a cause and the administrative law judge recognized that the doctor had ruled out coal dust exposure. It appears that the administrative law judge used "equivocal" to mean unpersuasive, to indicate that the opinion lacked the kind of lucid explanation which commands assent.

> When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however*, That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304(c).

As the administrative law judge correctly observed, the Fourth Circuit made clear in *Scarbro* that the Congressional definition of pneumoconiosis is different from the medical definition; in 30 U.S.C §921(c)(3), Congress set forth three different ways to establish statutory complicated pneumoconiosis, which is a single objective condition. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100; Decision and Order on Remand at 4-5. The administrative law judge indicated that for that reason she could not carry out the Board's instructions to consider the medical opinion evidence along with the CT scan evidence. She is correct. The only medical opinion evidence which can be considered at this subsection is a statement concerning whether the objective CT scan findings would appear as an opacity greater than one centimeter in diameter. There is no such evidence in this case.

The administrative law judge also stated that the Board did not make clear what medical opinion evidence she had not considered. In its current decision, the majority again leaves unclear the medical opinion evidence to be considered and the subsection at

which it should be considered.

In the instant case, the administrative law judge has never showed bias against employer, disrespect to the Board, or recalcitrance. *See United States v. North Carolina*, 180 F.3d 574, 583 (4th Cir. 1999); *see also Cochran v. Consolidated Coal Co.*, 16 BLR 1-101, 1-108 (1992). Removal of the trial judge is only appropriate in extraordinary cases where the record reveals that reassignment is necessary to do justice or to provide the appearance of justice. *E.g. United States v. Lentz*, 383 F.3d 191, 221-22 (4th Cir. 2004)(ordering reassignment to a different district court judge because in the previous trial the judge had twice accused the prosecutor of intentional misconduct and had been extremely critical of the prosecution team). The record in the case at bar provides no support for the majority's reassignment order.

In sum, the administrative law judge reasonably considered all relevant evidence pursuant to Section 718.304 and her decision awarding benefits should be affirmed. *See Cherry*, 326 F.3d at 452, 37 BRBS at 8. She was correct in expressing disagreement with the Board's interpretation of *Scarbro*, and she did so in a professional manner. The record reveals no justification for her removal from further consideration of the case. *See United States v. North Carolina*, 180 F.3d at 583.

REGINA C. McGRANERY
Administrative Appeals Judge