BRB No. 08-0471 BLA

V.B.[1] (Deceased)	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	
	)	DATE ISSUED: 02/12/2009
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Wendy G. Adkins (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 Second Decision and Order on Remand Awarding Benefits (04-BLA-5314) of Administrative Law Judge Linda S. Chapman with respect to a subsequent claim[2] filed pursuant to the provisions of Title IV of the Federal Coal Mine

[1] By letter dated June 5, 2008, claimant's counsel informed the Board that claimant died on May 22, 2008. Subsequently, by letter dated December 1, 2008, claimant's counsel withdrew from this case without having filed a brief on behalf of claimant.

[2] Claimant's first claim for benefits, filed on May 22, 1996, was denied by the district director on October 7, 1996, because claimant did not establish that he was totally

Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). This is the third time that this case has been before the Board.[3] In the Board's last decision, pursuant to employer's appeal, the Board held that the administrative law judge misapplied the decision of the United States Court of Appeals for the Fourth Circuit in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), and thereby improperly shifted the burden of proof to employer to disprove the existence of complicated pneumoconiosis on x-ray.[4] [*V.B.*] *v. Consolidation Coal Co.*, BRB No. 06-0717 BLA (June 27, 2007)(unpub.). The Board additionally held that the administrative law judge erred in discrediting the negative x-ray readings and medical opinions submitted by employer in which the physicians ruled out the presence of complicated pneumoconiosis, because the doctors did not definitively identify an alternate etiology. [*V.B.*], slip op. at 6-7. Consequently, the Board vacated the administrative law judge's finding that the newly submitted evidence established complicated pneumoconiosis under 20 C.F.R. §718.304, and that claimant therefore established a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. [*V.B.*], slip op. at 7. The Board instructed the administrative law judge, on remand, to place the burden of proof on claimant and reconsider the relevant x-ray and medical opinion evidence to determine whether the existence of complicated pneumoconiosis was established under Section 718.304.

In the Second Decision and Order on Remand Awarding Benefits, the administrative law judge again found that the newly submitted evidence established invocation of the irrebuttable presumption at Section 718.304, and that claimant therefore established a change in an applicable condition of entitlement since the previous denial. On the merits of entitlement, the administrative law judge determined that the evidence established the existence of simple and complicated pneumoconiosis arising out of coal

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disabled. Director's Exhibit 1. Claimant took no further action until filing this claim on August 22, 2001. Director's Exhibit 3.

[3] The Board set forth previously this claim's full procedural history. [*V.B.*] *v. Consolidation Coal Co.*, BRB No. 06-0717 BLA, slip op. at 2 (June 27, 2007)(unpub); [*V.B.*] *v. Consolidation Coal Co.*, BRB No. 04-0948 BLA, slip op. at 2 (Sept. 28, 2005)(unpub.). Our prior discussion of the procedural history is incorporated by reference.

[4] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc)*; Director's Exhibit 3; Hearing Transcript at 14.

mine employment, and that claimant was therefore entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that in reconsidering the x-ray evidence under Section 718.304(a), the administrative law judge again shifted the burden of proof to employer to establish that the large masses seen by some physicians on x-ray were not complicated pneumoconiosis. Employer further asserts that the administrative law judge did not comply with the Board's instruction to consider the totality of Dr. Crisalli's and Dr. Spagnolo's rationale for ruling out the presence of complicated pneumoconiosis under Section 718.304(c). Employer additionally requests that the Board remand the case to a different administrative law judge for decision. No representative on behalf of claimant's estate has responded. The Director, Office of Workers' Compensation Programs, has declined to file a response in this appeal.

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 law. 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 be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Where a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's prior claim was denied because he failed to establish that he was totally disabled by a respiratory or pulmonary impairment. Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing total disability to obtain review of the merits of his claim. 20 C.F.R. §725.309(d)(2),(3).

One method of establishing total disability is by means of the irrebuttable presumption set forth at 20 C.F.R. §718.304. 20 C.F.R. §718.204(b)(1). Section 411(c)(3) of the Act, implemented by Section 718.304 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 that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. 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. *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, 2-561-62 (4th Cir. 1999). 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); *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*).

On remand, the new x-ray evidence considered by the administrative law judge under Section 718.304(a) consisted of six readings of two chest x-rays, all of which were rendered by physicians who were dually qualified as Board-certified radiologists and B readers. Dr. Patel indicated that the x-ray dated August 27, 2002, contained Category A large opacities and was positive for simple pneumoconiosis. Director's Exhibit 21. Dr. Wheeler classified this film as 0/1, noted that there were "0" large opacities consistent with pneumoconiosis, and diagnosed a two-centimeter mass and a few one to two-centimeter calcified granuloma. Employer's Exhibit 4. With respect to the x-ray dated July 28, 2003, Drs. Cappiello and Ahmed diagnosed simple pneumoconiosis and found Category A large opacities, Claimant's Exhibit 1, while Drs. Scott and Scatarige diagnosed simple pneumoconiosis, noted "0" large opacities consistent with pneumoconiosis, and identified a two to three-centimeter calcified granuloma in claimant's left lower lung and a three-centimeter mass or infiltrate in the claimant's left mid-lung. Employer's Exhibit 1.

The administrative law judge prefaced her consideration of the x-ray evidence with a discussion of *Scarbro*. The administrative law judge stated that:

> In determining the validity of claims, all relevant evidence must be considered. However, once [claimant] has provided evidence satisfying one of these prongs, if the Employer can affirmatively show that the opacity is not there or is something other than pneumoconiosis, the x-ray loses force, and [claimant] is not entitled to the benefits of the presumption.

Second Decision and Order Remand at 7 (citations omitted). The administrative law judge noted that claimant had submitted "x-ray evidence that satisfies the requirements of

prong (A), in the form of the four interpretations with findings of Category A or B opacities caused by coal dust exposure." *Id*. However, because there was other x-ray evidence, the administrative law judge stated that "all 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." *Id*. (internal quotation marks and citation omitted).

Relying on the readings of Drs. Patel, Cappiello, and Ahmed, the administrative law judge found that claimant "has established that he has a process in his lungs that appears as an opacity of one centimeter or greater on x-ray." Second Decision and Order on Remand at 8. As to the contrary readings, the administrative law judge found that while Drs. Wheeler, Scott, and Scatarige "do not include findings of category A or B opacities, neither do they contradict the presence of the masses" seen by Drs. Patel, Cappiello, and Ahmed. *Id*.

The administrative law judge then turned to the etiology of the masses, noting that, "[u]nder *Scarbro*, once [claimant] establishes [the] etiology, the Employer must provide evidence that affirmatively shows the opacities are not there or that they are from a disease process other than complicated pneumoconiosis." *Id*. The administrative law judge found that the preponderance of the new x-ray evidence "points to coal dust exposure as the source for [claimant's] radiographic abnormalities." Second Decision and Order on Remand at 10. Specifically, the administrative law judge found that five of the six new x-ray interpretations diagnosed simple pneumoconiosis. The administrative law judge further found that none of employer's physicians excluded pneumoconiosis as a cause for the masses or opacities:

> [A]s I explained in both of my previous decisions, neither Dr. Scott, Dr. Scatarige, nor Dr. Wheeler "excluded" pneumoconiosis as the cause of the large masses they observed. Thus, in this context, their x-ray interpretations are not "negative" for complicated pneumoconiosis. Again, Dr. Scott and Dr. Scatarige provided **NO** etiology for the large masses they observed, other than Dr. Scott's comment that he could not rule out cancer. Neither of them indicated in any fashion that this mass was **NOT** the result of complicated pneumoconiosis.

Second Decision and Order on Remand at 9. The administrative law judge found that, to the extent Dr. Wheeler opined that the large masses were compatible with histoplasmosis or tuberculosis, his opinion was equivocal and speculative because there was no record evidence that claimant had ever been diagnosed or treated for these diseases. *Id*.

Employer argues that the administrative law judge again improperly shifted the burden of proof to employer to establish that the x-ray readings of Drs. Patel, Ahmed, and

Cappiello were wrong. We agree. In its last decision, the Board held that it was error for the administrative law judge, in weighing the evidence under prong A, to require employer to affirmatively establish that the large opacities seen on x-ray were either not there or not related to pneumoconiosis, upon the mere submission of positive readings claimant. [*V.B.*], slip op. at 5. Further, the Board explained that the Fourth Circuit court stated in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006)(unpub.), that its decision in *Scarbro* did not impose a burden on the party opposing entitlement to affirmatively establish that opacities are not there or are not what they seem to be, and emphasized that the burden of proof remains with claimant at all times. [*V.B.*], slip op. at 5 n.4. On remand, however, the administrative law judge stated that "once [claimant] has provided evidence satisfying one of these prongs, if the Employer can affirmatively show that the opacity is not there or is something other than pneumoconiosis, the x-ray loses force, and [claimant] is not entitled to the benefits of the presumption." Second Decision and Order on Remand at 7. Although rephrased, this amounts to the same requirement the administrative law judge imposed on employer previously, namely, to affirmatively show that the opacities seen on the x-ray readings submitted by claimant are not there or are not pneumoconiosis.

Further, the administrative law judge found that the negative readings of Drs. Scott, Scatarige, and Wheeler were, in fact, "not 'negative'" for complicated pneumoconiosis because they did not exclude pneumoconiosis as a cause for the opacities or, in Dr. Wheeler's case, credibly point to other causes for the x-ray abnormalities. Second Decision and Order on Remand at 9. As employer asserts, however, Drs. Scott, Scatarige, and Wheeler concluded that there were no large opacities consistent with complicated pneumoconiosis. Employer's Brief at 10; Employer's Exhibits 1, 4. The record reflects that these physicians stated that there were "0" large opacities consistent with pneumoconiosis. Employer's Exhibits 1, 4. Substantial evidence, therefore, does not support the administrative law judge's finding that Drs. Scott, Scatarige, and Wheeler did not exclude pneumoconiosis as the cause of the large masses they observed. *See* 20 C.F.R. §718.304(a)(requiring a large opacity on x-ray classified as Category A, B, or C); *Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir 1997); Decision and Order at 9. Moreover, as employer further asserts, in discounting the x-ray interpretations of Drs. Scott, Scatarige, and Wheeler for failing to designate a precise etiology for the masses seen on x-ray, the administrative law judge once again shifted the burden of proof to employer to establish the absence of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118.

As it is claimant's burden to establish the existence of complicated pneumoconiosis, we vacate the administrative law judge's finding pursuant to Section 718.304(a) and remand this case for further consideration. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.3d at 1146, 17 BLR at 2-118; *Adkins v. Director, OWCP*,

958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992). On remand, the administrative law judge must reconsider the relevant, conflicting x-ray evidence under Section 718.304(a) and determine whether claimant has established the existence of large opacities consistent with pneumoconiosis. In so doing, the administrative law judge must bear in mind that the burden of proof remains on claimant, and that Drs. Scott, Scatarige, and Wheeler indicated that there were "0" large opacities consistent with pneumoconiosis. Employer's Exhibits 1, 4.

Pursuant to Section 718.304(c), we additionally find merit in employer's assertion that the administrative law judge did not comply with the Board's remand instructions in considering the medical opinions of Drs. Crisalli[5] and Spagnolo.[6] Employer's Brief at 11-12, 17. The last time this case was before the Board, the Board held that the administrative law judge erred in requiring employer's medical experts to ascertain a definite etiology for the masses observed on claimant's x-rays, and instructed the

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[5] Dr. Crisalli explained in his deposition that the location of the mass, as it was described in the radiologists' reports, was "atypical" of complicated coal workers' pneumoconiosis, Employer's Brief at 16-17, Employer's Exhibit 7 at 17, 25, 26, 32; and that claimant's emphysema was not the type of change caused by complicated coal workers' pneumoconiosis, rather it was the type of change caused by smoking. Employer's Exhibit 7 at 32. Further, upon noting that there was a conflict in x-ray interpretations as to the existence of a Category A opacity, Dr. Crisalli stated:

> Taking all of the [radiologists'] reports together, I must conclude that there are changes consistent with simple coal worker's pneumoconiosis, old granulomatous disease of the lung, and there is a larger density in the left, etiology unknown.

Employer's Exhibit 1. Thus, Dr. Crisalli did not diagnose complicated pneumoconiosis.

[6] Dr. Spagnolo opined that claimant did not suffer from either simple or complicated pneumoconiosis. In support of his opinion, Dr. Spagnolo explained that claimant's x-rays did not provide reliable evidence of pneumoconiosis, because the findings of multiple calcified granuloma "complicate the radiologic findings," and because "interstitial changes from heart failure result in changes similar to those of pneumoconiosis and can result in coalescence of lesions resulting in densities that are easily confused with a category A opacity(s)." Employer's Exhibit 5. Dr. Spagnolo additionally stated that "none of [claimant's] pulmonary function data would even suggest that he would have complicated pneumoconiosis," Employer's Exhibit 8 at 27, and that the abnormality demonstrated by claimant's pulmonary function studies could be explained by his progressive cardiac disease. Employer's Exhibit 5.

administrative law judge on remand to reconsider "the totality of the rationale offered by [Drs. Crisalli and Spagnolo] for ruling out the presence of complicated pneumoconiosis, including their discussion of the extent to which the absence of a significant respiratory or pulmonary impairment supports their opinion that the x-ray evidence is not consistent with a diagnosis of complicated pneumoconiosis." [*V.B.*], slip op. at 7. On remand, however, the administrative law judge again found that the opinions of Drs. Crisalli and Spagnolo were not probative as to the existence of complicated pneumoconiosis because neither physician's opinion "add[ed] anything to the resolution of the question of the etiology of the mass." Decision and Order at 10-12.

As the Board previously explained, because it is claimant's burden to establish the existence of complicated pneumoconiosis, it is error for the administrative law judge to discount the opinions of employer's experts for failing to ascribe a definite etiology to the mass seen on x-ray. *See Lester*, 993 F.2d at 1146, 17 BLR at 2-118. It is not employer's burden to establish an absence of complicated pneumoconiosis. *Id*. Further, although the administrative law judge additionally discounted Dr. Spagnolo's opinion for failing to address whether the mass would measure more than one centimeter on x-ray, the relevant inquiry under prong (C) is whether the evidence supports or undermines the existence of large opacities consistent with pneumoconiosis. *See* 20 C.F.R. §718.304(c); *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *see also Lambert*, slip op. at 2. As employer asserts, Drs. Spagnolo and Crisalli ruled out complicated pneumoconiosis, and their opinions are therefore relevant evidence under Section 718.304(c). The administrative law judge thus erred in failing to consider the totality of the physicians' rationales for excluding a diagnosis of complicated pneumoconiosis.[7] *Id*. Consequently, we vacate the administrative law judge's findings at Section 718.304(c). On remand, the administrative law judge must assess the probative value of Drs. Crisalli and Spagnolo's rationales for excluding a diagnosis of complicated pneumoconiosis, including their discussion of claimant's lack of a respiratory impairment of the sort that they opined would be caused by coal mine dust exposure. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.3d at 1146, 17 BLR at 2-118.

Because the administrative law judge relied upon her determination that claimant invoked the irrebuttable presumption to find that the evidence established a change in an applicable condition of entitlement under Section 725.309(d), we must again vacate this finding. The issue of whether claimant has established the requisite change in an applicable condition of entitlement must be reconsidered before reaching the merits of

[7] Although the administrative law judge additionally discounted Dr. Spagnolo's deposition testimony with respect to his review of inadmissible evidence during the deposition, Decision and Order at 12, the administrative law judge did not provide a valid reason for discounting any aspect of Dr. Spagnolo's written report.

entitlement. 20 C.F.R. §725.309(d); *White*, 23 BLR at 1-3. If, upon reconsidering the merits of entitlement, the administrative law judge finds that claimant has established the existence of complicated pneumoconiosis, then the administrative law judge must determine whether the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203. *Daniels Co. v. Mitchell*, 479 F.3d 321, 24 BLR 2-1 (4th Cir. 2007).

Lastly, employer asks that this case be remanded to a different administrative law judge because the case has "reached the point of administrative gridlock." Employer's Brief at 17. Reluctantly, we find merit in employer's request that the case be reassigned. Previously, the Board instructed the administrative law judge to consider the Fourth Circuit's opinion in *Lambert* explaining the proper interpretation of *Scarbro*, but on remand, the administrative law judge again applied *Scarbro* erroneously. Accordingly, in light of the two previous remands, and the administrative law judge's repetition of error, 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, 1-107 (1992).

Accordingly, the administrative law judge's Second 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.

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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