BRB No. 07-0195 BLA

R.D.D.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FARWEST COAL COMPANY, INCORPORATED	)	DATE ISSUED: 01/31/2008
	)	
and	)	
	)	
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 – Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

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

Before: SMITH, HALL, and BOGGS, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Awarding Benefits (2005-BLA-6152) of Administrative Law Judge Linda S. Chapman (the administrative law judge) 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). Noting the presence of three prior claims, the administrative law judge found this case to be a subsequent claim filed on June 17, 2004 pursuant to 20 C.F.R. §725.309(d).[1] The administrative law judge credited claimant with fourteen years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718.[2] Initially, the administrative law judge excluded CT scan interpretations submitted by employer as exceeding the evidentiary limitations set forth at 20 C.F.R. §725.414, and also found that these interpretations were not relevant in determining whether claimant has established one of the conditions of entitlement previously adjudicated against him.

Addressing the issue of the subsequent claim, the administrative law judge acknowledged that Administrative Law Judge Daniel F. Solomon denied benefits in the prior claim based on his determination that claimant failed to establish that his total respiratory disability was due to pneumoconiosis. Decision and Order at 15. Considering the medical evidence submitted since Judge Solomon's 2003 decision, the administrative law judge found that the weight of the medical opinion evidence is sufficient to establish disability causation pursuant to 20 C.F.R. §718.204(c) and thus, established a change in an applicable condition of entitlement. As an alternative finding, the administrative law judge found that the newly submitted evidence established the existence of complicated pneumoconiosis and, therefore, found that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. Consequently, the administrative law judge found that, weighing all of the newly submitted evidence together, claimant "has established a change in a condition of entitlement that defeated his most recent claim." Decision and Order at 24.

Considering the record as a whole on the merits of entitlement, the administrative law judge found that claimant has established that he is totally disabled due to pneumoconiosis pursuant to Section 718.204, and is entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, as the evidence establishes the existence of complicated pneumoconiosis. Accordingly, the

[1] The procedural history of this case, set forth in the Board's prior decision in [*R.D.D.*] *v. Farwest Coal Co.*, BRB No. 02-0189 BLA (Nov. 27, 2002)(unpub.), is incorporated herein by reference.

[2] The administrative law judge further found Administrative Law Judge Daniel F. Solomon's findings that employer is the responsible operator and that the subsequent claims were timely filed, to be law of the case, as they were affirmed previously by the Board. Decision and Order at 3-4.

administrative law judge awarded benefits, commencing in June 2004, the month in which claimant filed his most recent subsequent claim.

On appeal, employer challenges the administrative law judge's award of benefits, arguing that she erred in finding the newly submitted medical opinion evidence sufficient to establish disability causation and the existence of complicated pneumoconiosis. Furthermore, employer, in a footnote, challenges the administrative law judge's decision to exclude CT scan evidence submitted by employer as being in excess of the evidentiary limitations. In response, claimant urges affirmance of the administrative law judge's award of benefits as supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has not filed a brief in this appeal. Employer filed a reply brief in support of the arguments raised in its Petition for Review and brief.

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).

If 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., Inc*., 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 last claim was denied because he failed to establish that his total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this condition of entitlement to proceed with his claim.[3] 20 C.F.R. §725.309(d)(2),(3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996)(*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

Initially, we reject the evidentiary argument raised by employer, Employer's Brief at 8 n.1, that the administrative law judge erred in applying the Board's holding in *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006)(*en banc*)(Boggs, J., concurring), while *Webber* was pending before the Board on reconsideration, and therefore was not a final decision. At the hearing, the administrative law judge indicated that there was no

[3] As claimant's coal mine employment occurred in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Director's Exhibits 1, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

limitation on the admission of CT scan evidence under the new regulations.[4] However, subsequent to the hearing, the Board issued its initial decision in *Webber*, and the administrative law judge re-evaluated the CT scan evidence and found that several interpretations were excessive, and not relevant in the subsequent claim, and therefore excluded them from consideration.[5] Decision and Order at 15. Subsequent to the issuance of the administrative law judge's Decision and Order, the Board reconsidered its decision in *Webber* and reaffirmed it. *Webber v. Peabody Coal Co.*, 23 BLR 1-123 (2006), *aff'd on recon.*, 24 BLR 1-1 (2007)(*en banc*).

The evidentiary limitations set forth at Section 725.414 are mandatory and medical evidence that exceeds the limitations of Section 725.414 "shall not be admitted into the hearing record in the absence of good cause." 20 C.F.R. §725.456(b)(1); *see Smith v. Martin County Coal Corp.*, 23 BLR 1-69, 1-73-74 (2004); *Dempsey v. Sewell Coal Co.*, 23 BLR 1-47 (2004). Consequently, we reject employer's contention that it was error for the administrative law judge to apply the evidentiary limitations, as set forth in *Webber*, the applicable law at the time of the administrative law judge's decision.

However, because the administrative law judge's characterization of the holding in *Webber*, as it applies to the evidentiary limitations on CT scan evidence, is incorrect, we vacate her evidentiary findings. The administrative law judge, applying *Webber*, found that the parties were allowed two affirmative CT scan interpretations and one interpretation in rebuttal to each affirmative CT scan submitted by the opposing party. Decision and Order at 15. Contrary to the administrative law judge's characterization of the holding in *Webber*, while the Board held that the regulations provide for the admission of CT scan readings as affirmative case evidence under 20 C.F.R. §718.107, *Webber*, 23 BLR at 1-133, the regulations do not limit the number of separate CT scans that may be admitted into the record, *Dempsey*, 23 BLR at 1-59, but permit a party to proffer only one reading of each separate scan. *Webber*, 23 BLR at 1-134-135. Consequently, the administrative law judge's decision to limit employer to only two

[4] The administrative law judge admitted Dr. Mullen's interpretation of a July 22, 2005 PET scan, ordered by Dr. Robinette, whom the administrative law judge identified as claimant's treating physician, as well as Dr. Robinette's discussion of this PET scan, and a May 13, 2005 CT scan interpretation, as treatment records, which the administrative law judge found are not subject to evidentiary limitations. Decision and Order at 15; Claimant's Exhibit 5.

[5] The administrative law judge excluded one interpretation of the December 3, 2004 CT scan and three interpretations each of the March 5, 2002, July 9, 2001, December 6, 2000 CT scans as well as a single interpretation of the September 6, 2000 CT scan. Decision and Order at 15; Employer's Exhibits 5, 6, 7.

affirmative CT scan interpretations was error. Thus, we vacate the administrative law judge's findings concerning the admissibility of the CT scan evidence and remand the case for the administrative law judge to reconsider the admissibility of the proffered CT scan evidence. *Webber*, 23 BLR at 1-134-135; *Dempsey*, 23 BLR at 1-59.

In considering this subsequent claim, the administrative law judge found that the record contains the newly submitted medical opinions of Drs. Rasmussen and Robinette, which are supportive of a finding that claimant's total respiratory disability was due to pneumoconiosis, and the contrary opinions of Drs. Fino and Tuteur, that claimant's respiratory impairment was not related to pneumoconiosis. Decision and Order at 15-18; Director's Exhibit 12; Claimant's Exhibit 5; Employer's Exhibits 1, 8, 10. The administrative law judge accorded greater weight to the opinions of Dr. Rasmussen, whose conclusions she found were well reasoned and supported by the objective medical evidence, and Dr. Robinette, based on his status as claimant's treating physician and because Dr. Robinette administered objective testing and explained in detail how that evidence, which was the most recent objective evidence of record, supported his conclusions. Decision and Order at 18-19. In contrast, the administrative law judge accorded no weight to the opinions of Drs. Fino and Tuteur, finding that their opinions were contradictory because Dr. Fino found evidence of a diffuse interstitial process, not related to pneumoconiosis, whereas Dr. Tuteur concluded that there was no interstitial fibrosis, but only emphysema present. *Id*. In addition, the administrative law judge found that their opinions were not reliable because both Dr. Fino and Dr. Tuteur relied on an incomplete review of the evidence because they were not provided with the most recent evidence of record, particularly, the results of the May 13, 2005 CT scan and the July 9, 2005 PET scan. *Id.* The administrative law judge therefore found that the newly submitted evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to Section 718.204(c). Decision and Order at 15.

On appeal, employer argues that the administrative law judge erred in according determinative weight to the opinions of Drs. Rasmussen and Robinette, that claimant's total disability was due to pneumoconiosis, over the contrary opinions of Drs. Fino and Tuteur. There is merit to employer's contentions.

Employer argues that the administrative law judge erred in according determinative weight to Dr. Robinette's opinions because Dr. Robinette never provided an opinion regarding disability causation, and because the record does not support the administrative law judge's finding that Dr. Robinette was claimant's treating physician. Employer's Brief 15-17. We agree.

As employer argues, the administrative law judge found that Dr. Robinette did not offer an opinion regarding a specific etiology of claimant's impairment, Decision and Order at 18-19, but nonetheless stated that, based on Dr. Robinette's opinion, claimant

has established that his total disability is due to pneumoconiosis. Decision and Order at 19. Dr. Robinette, in his August 5, 2005 opinion following the review of the July 22, 2005 PET scan, states that the "most likely diagnosis was an occupational pneumoconiosis with evidence of axillary coalescence and probably progressive massive fibrosis," but does not further comment on the cause of a respiratory disability. Claimant's Exhibit 5. In his initial examination of claimant in July 2005, Dr. Robinette notes a history of black lung and chronic obstructive pulmonary disease (COPD) and opines that there is probable complicated coal workers' pneumoconiosis, but that an occult neoplasm must be ruled out, and also finds COPD with underlying black lung disease and associated chronic airflow obstruction. However, Dr. Robinette does not specifically comment as to whether claimant is totally disabled, or the cause of any such disability. Claimant's Exhibit 5. Consequently, because the administrative law judge does not adequately explain how Dr. Robinette's opinion supports a finding of disability causation, we vacate her finding and remand the case for the administrative law judge to provide a more detailed explanation of her finding regarding Dr. Robinette's opinion on the issue of disability causation and to reconcile her conclusion that Dr. Robinette's opinion supports a finding of disability causation with her finding that Dr. Robinette does not provide an opinion on the cause of claimant's respiratory disability. Decision and Order at 18-19; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589 (1984).

Moreover, the administrative law judge does not explain her conclusion that Dr. Robinette is claimant's treating physician. Decision and Order at 18. While the record in the most recent claim contains two reports by Dr. Robinette, there is no indication that Dr. Robinette is claimant's treating physician. Specifically, the July 15, 2005 report, written in letter form to Dr. Melton, states that Dr. Robinette examined claimant on July 14, 2005 for assessment of an abnormal x-ray and in that report requested a PET scan for further diagnosis. Claimant's Exhibit 5. The second report, dated August 4, 2005, also written as a letter to Dr. Melton, discusses the conclusion from the PET scan and provides his diagnosis. Claimant's Exhibit 5. Because the administrative law judge does not discuss the specifics of her characterization of Dr. Robinette as a treating physician, we vacate her crediting of Dr. Robinette's opinion with additional weight because of his status as a treating physician and remand the case for the administrative law judge to more fully discuss her finding concerning Dr. Robinette pursuant to the criteria set forth at 20 C.F.R. §718.104(d). If, on remand, the administrative law judge again finds that Dr. Robinette qualifies as a treating physician, she must then also discuss how this status afforded Dr. Robinette an advantage in rendering an opinion on the issue of disability causation. 20 C.F.R. §718.104(d); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997); *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998).

Employer also contends that the administrative law judge erred in according determinative weight to the current opinion of Dr. Rasmussen, because it was the same as his opinion in 2001, which was rejected by Judge Solomon, and, thus, cannot be found sufficient to establish a change in an applicable condition of entitlement. Employer's Brief at 17-18. In addition, employer contends that the administrative law judge erred in failing to adequately discuss whether Dr. Rasmussen's opinion was well-reasoned and documented. Rather, employer contends that the administrative law judge merely reiterated Dr. Rasmussen's conclusions and found them well reasoned and documented. Employer's Brief at 18. We agree.

The administrative law judge, in weighing the opinion of Dr. Rasmussen, stated that she "rel[ies] on the opinions of Dr. Rasmussen, whose conclusions I find to be well reasoned and supported by the objective evidence…." Decision and Order at 18. However, as the administrative law judge did not elaborate on her rationale for finding the opinion well reasoned, she has not provided a sufficient discussion of her bases for crediting Dr. Rasmussen's opinion. Rather, she sets forth Dr. Rasmussen's diagnosis and provides a conclusory statement that the opinion was well reasoned and supported by the objective evidence. Decision and Order at 18; Director's Exhibit 12. Because the administrative law judge has not adequately discussed whether the evidence relied on by Dr. Rasmussen supports his conclusion, we vacate her finding and remand the case to the administrative law judge for her to provide a more detailed explanation of her conclusions. *Akers*, 131 F.3d 438, 21 BLR 2-269; *Hicks*, 138 F.3d 524, 21 BLR 2-323; *see also Wojtowicz*, 12 BLR 1-162; *Tenney*, 7 BLR 1-589.

Employer further contends that the administrative law judge erred in according no weight to the contrary opinions of Drs. Fino and Tuteur, arguing that the administrative law judge failed to adequately explain the bases for her conclusions regarding these opinions. Employer's Brief at 20-22. There is merit to this contention.

With regard to the contrary opinions of Drs. Fino and Tuteur, the administrative law judge found that these opinions were entitled to little weight because neither Dr. Fino nor Dr. Tuteur reviewed the 2005 CT scan or 2005 PET scan evidence and, therefore, their opinions were not based on the most recent evidence. Decision and Order at 17; Employer's Exhibits 1, 8, 10, 11. Consequently, the administrative law judge found that the opinions of Drs. Fino and Tuteur were "less reliable" because they were based on an incomplete and dated review of the evidence. Decision and Order at 17. In evaluating the newly submitted medical opinion evidence, however, the administrative law judge has not provided comparable evaluations of all of the relevant medical opinions. Specifically, the administrative law judge, in finding that the opinions of Drs. Fino and Tuteur, dated March 8, 2005 and December 19, 2005, respectively, were not entitled to any significant weight, based her determination on the fact that these physicians did not review the most recent CT scan dated May 5, 2005 or the PET scan dated July 22, 2005.

Decision and Order at 17. However, the administrative law judge has not provided a similar discussion with regard to Dr. Rasmussen's medical opinion dated October 6, 2004, which she credits as establishing that claimant's total disability was due to pneumoconiosis. Rather, the administrative law judge appears to rely on the fact that Dr. Rasmussen examined claimant, in finding that his opinion is well reasoned and supported by the objective evidence. Decision and Order at 18; Director's Exhibit 12. Moreover, in weighing Dr. Fino's opinion, it is not evident from her discussion of the underlying documentation relied upon by Dr. Fino, whether the administrative law judge considered that Dr. Fino administered a physical examination, including a chest x-ray and objective testing, of claimant in February, 2005. Employer's Exhibit 1. Dr. Fino also set forth several chest x-rays dated in 2004, which he included in his review of the medical evidence prior to rendering his opinion. *Id*. In requiring Drs. Fino and Tuteur to discuss all of the additional testing in support of their opinions, without requiring Dr. Rasmussen to do the same, and examining whether or not the results of the later testing affected the credibility of the physicians' opinions, the administrative law judge has applied an inconsistent and unconsidered standard to her evaluation of the medical opinion evidence.

In addition, on remand, the administrative law judge's rationale for discrediting Dr. Fino's opinion requires reconsideration. The administrative law judge stated:

> With respect to the findings in Mr. D's lower and middle lungs, [Dr. Fino] relied on the fact that the opacities were irregular, and that in his experience, pneumoconiosis cannot exist without rounded opacities. Of course, this ignores the fact that the ILO form includes both round and irregular small opacities in its classification of pneumoconiosis.

Decision and Order at 16. Contrary to the administrative law judge's implication, the ILO classification form is not limited to the classification of coal workers' pneumoconiosis, but is used to classify multiple forms of pneumoconiosis and, therefore, she must consider the entirety of a physician's reasoning and comments in the interpretation of the x-ray films. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-37 (1991)(*en banc*). In addition, subsequent language used by the administrative law judge suggests that she may have applied a presumption that pneumoconiosis is latent and progressive. Decision and Order at 16. Under the regulations, it is recognized that pneumoconiosis can be latent and progressive; however, the miner bears the burden of establishing the statutory elements of entitlement. *Workman v. Eastern Associated Coal Corp.*, 23 BLR 1-22, 1-26 (2004) (*en banc recon.*); *see Nat'l Mining Ass'n v. Dep't of Labor*, 292 F.3d 849, 863, 23 BLR 2-124, 2-172-173 (D.C. Cir. 2002). Consequently, we further vacate her Section 718.204(c) findings with regard to her weighing of the opinions of Drs. Fino and Tuteur and remand the case to the administrative law judge for further consideration and evaluation of the relevant medical opinions of evidence. *Christian v. Monsanto Corp.*, 12 BLR 1-56, 1-58 (1988).

On remand, the administrative law judge must reconsider all of the relevant evidence submitted since the prior denial and provide a rational and detailed basis for her conclusions regarding the credibility and weight accorded each of the medical opinions of record on the issue of disability causation. 20 C.F.R. §718.204(c); *Scott v. Mason Coal Co.*, 289 F.3d 263, 22 BLR 2-372 (4th Cir. 2002); *Robinson v. Pickands Mather and Co.*, 914 F.2d 35, 14 BLR 2-68 (4th Cir. 1990). In considering the medical opinion evidence, the administrative law judge must consider the entire reasoning provided by each of the physicians in rendering their opinions pursuant to the applicable standards of law. *Akers*, 131 F.3d 438, 21 BLR 2-269; *Hicks*, 138 F.3d 524, 21 BLR 2-323 Moreover, in determining the credibility of the medical opinion evidence, the administrative law judge must also be mindful of her reconsideration of the admissibility of the CT scan evidence, *see* discussion, *infra* at 4-5, and whether the inclusion of any additional CT scans, relied on by the physicians in rendering their opinions, affects the credibility of such opinions.

In the alternative, the administrative law judge found that the newly submitted medical evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304,[6] and thus, that it establishes a change in an applicable condition of entitlement. Decision and Order at 24. Specifically, the administrative law judge found that the preponderance of the x-ray evidence established that claimant has a condition that resulted in the presence of large opacities on his x-rays due to his years of occupational exposure to coal dust. Decision and Order at 24. The administrative law judge further found that employer has not offered persuasive affirmative evidence that the large opacity is due to something other than claimant's exposure to coal dust. Id. Consequently, the administrative law judge found that claimant established, by a preponderance of the evidence, invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304.

On appeal, employer contends that the administrative law judge erred in finding that the evidence established the existence of complicated pneumoconiosis and, therefore, established invocation of the irrebuttable presumption at Section 718.304. Employer contends that the administrative law judge erroneously shifted the burden of proof to employer to persuasively establish that the opacities do not exist or that they are due to a disease other than pneumoconiosis.

[6] Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if: (a) an x-ray of the miner's lungs shows an opacity greater than one centimeter; (b) a biopsy or autopsy shows massive lesions in the lung; or (c) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (a) or (b). *See* 20 C.F.R. §718.304.

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 of no pneumoconiosis, resolve any conflict, and make a finding of fact. *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31 (1991) (*en banc*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

As employer correctly asserts, in evaluating the medical evidence relevant to the existence of complicated pneumoconiosis, the administrative law judge incorrectly applied the law as to the burden of proof. While the administrative law judge weighed evidence under each of the subsections at Section 718.304, she nonetheless misapplied the holding 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 shifted the burden to employer to affirmatively disprove claimant's evidence. Specifically, the administrative law judge stated:

> The Fourth Circuit's language in *Scarbro* is straightforward. The Court has made it clear that under the statute, a claimant who meets the congressionally defined condition is entitled to the irrebuttable presumption that he is totally disabled due to pneumoconiosis. [Claimant] is not required to establish that he has the medical condition known as complicated pneumoconiosis. Rather, once [claimant] shows, by a preponderance of the x-ray, autopsy or biopsy, or equivalent objective medical evidence that he has a condition that shows up on x-ray as a large opacity due to coal dust exposure, he is entitled to benefits unless the Employer affirmatively shows, by persuasive objective medical evidence, either that the opacities are not there, or that they are due to a process other than pneumoconiosis. I find that [claimant] has met these requirements, and that the Employer has not met the burden imposed on it by the Court in *Scarbro* to affirmatively establish that the opacity is due to a process other than pneumoconiosis. Thus, [claimant] has established that he has pneumoconiosis that arose out of his coal mine employment, and that he is totally disabled due to his pneumoconiosis. [Claimant] is therefore entitled to benefits under the Act.

Decision and Order at 26. However, the Fourth Circuit, in an unpublished decision, held that the exact language used by the administrative law judge in summarizing her

understanding of the court's holding "misstates *Scarbro*" and appears to shift the burden of proof to employer. *Clinchfield Coal Co. v. Lambert*, 206 Fed.Appx. 252, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.). The Fourth Circuit explained that:

> *Scarbro* does not impose on the employer the burden to "persuasively establish" that the opacities physicians may have found do not exist or are due to a disease other than pneumoconiosis. Nor does *Scarbro* require that evidence in general "persuasively establish" (as opposed to "affirmatively show") that the opacities discovered in a claimant's lungs are not what they seem. Scarbro holds only that once the 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 ("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, 206 Fed.Appx. 252, 255. Because the administrative law judge, in misstating *Scarbro*, appeared to shift the burden of proof to the employer in *Lambert*, the Fourth Circuit found it necessary to remand the case for reconsideration.

We similarly hold that the administrative law judge, in this case, appears to have improperly shifted the burden of proof to employer to "persuasively establish" that the opacities do not exist or that they are not what they seem to be. Consequently, we vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at Section 718.304 and remand the case for consideration of all relevant evidence prior to the invocation of the irrebuttable presumption at Section 718.304, as required in *Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-629 (6th Cir. 1999). In considering the evidence relevant to the issue of complicated pneumoconiosis, the administrative law judge must consider this evidence in its entirety, including any additional comments included by the physicians in interpreting the x-ray and CT scan evidence, particularly, the comments which call into question a physician's positive diagnosis of complicated pneumoconiosis. *Melnick*, 16 BLR at 1-37. Specifically, while comments in an x-ray report that address the source of a pneumoconiosis diagnosed by x-ray are not relevant to the issue of the existence of pneumoconiosis, comments in an x-ray report that undermine a diagnosis of pneumoconiosis as defined in 20 C.F.R. §718.201, are relevant to the issue of the existence of pneumoconiosis. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1, 1-5 (1999); *Melnick*, 16 BLR at 1-37. Therefore, on remand, the administrative law judge must determine whether the comments made by the

physicians, particularly the additional comments of Drs. Alexander and DePonte, in reading the relevant x-rays, call into question their finding of complicated pneumoconiosis pursuant to Section 718.304(a). *United States Steel Mining Co. v. Director, OWCP* [*Jarrell*], 187 F.3d 384, 21 BLR 2-639 (4th Cir. 1999).

If, on remand, the administrative law judge finds invocation of the irrebuttable presumption of total disability due to pneumoconiosis established at Section 718.304, she must also determine whether the claimant's pneumoconiosis arose, at least in part, out of coal mine employment pursuant to Section 718.203, as this finding is not subsumed into the Section 718.304 finding. *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007).

Inasmuch as the administrative law judge's findings at Section 718.204(c) and her finding that claimant established invocation of the irrebuttable presumption under Section 718.304 have been vacated, we further vacate her finding that claimant has established the element of entitlement previously adjudicated against him pursuant to Section 725.309(d). If, on remand, the administrative law judge again finds that the newly submitted evidence establishes either that claimant's total disability is due, at least, in part, to his pneumoconiosis pursuant to Section 718.204(c), or invocation of the irrebuttable presumption under Section 718.304, then claimant has established the condition of entitlement previously adjudicated against him. If the administrative law judge so finds, then she must then consider all of the evidence of record to determine whether claimant has established entitlement to benefits on the merits. 20 C.F.R. §725.309(d); *Rutter*, 86 F.3d 1358, 20 BLR 2-227; *White*, 23 BLR at 1-3.

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 further consideration consistent with this opinion.

SO ORDERED.

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

_____
JUDITH S. BOGGS
Administrative Appeals Judge