BRB No. 06-0698 BLA

OSCAR NEECE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LAMBERT COAL COMPANY	)	DATE ISSUED: 06/28/2007
	)	
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 of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

John R. Sigmond (Penn, Stuart & Eskridge), Bristol, Virginia, for employer.

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

PER CURIAM:

Employer appeals the Decision and Order (05-BLA-6164) of Administrative Law Judge Linda S. Chapman awarding benefits 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 parties stipulated to, and the administrative law judge found, at least twenty-five years of coal mine employment and that employer was the responsible operator. Decision and Order at 3; Hearing Transcript at 22-23; Director's Exhibit 57. Based on the date of filing, the administrative law judge adjudicated the claim pursuant to 20 C.F.R. Part 718. Decision and Order at 2, 8. After determining that

the instant claim was a subsequent claim,[1] the administrative law judge found that a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309 was established, since the newly submitted evidence was sufficient to establish both that claimant was totally disabled due to pneumoconiosis pursuant to 20 C.F.R. §718.204(b)(2), (c) and, alternatively, that claimant was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304, because the evidence established the existence of complicated pneumoconiosis. Decision and Order at 2-3, 8-13; Director's Exhibit 1. The administrative law judge, therefore, considered all of the evidence of record, and concluded that it was sufficient to establish entitlement to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304. The administrative law judge also found that complicated pneumoconiosis arose out of coal mine employment. 20 C.F.R. §718.203(b). Accordingly, the administrative law judge found entitlement to benefits established and awarded benefits. Decision and Order at 13-15.

On appeal, employer contends that the administrative law judge erred in finding a change in an applicable condition of entitlement established and erred in finding entitlement on the merits. Claimant responds, asserting that substantial evidence supports the administrative law judge's award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.[2]

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 this 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 in a living miner's claim filed pursuant to 20 C.F.R. Part 718, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 20 C.F.R. §§718.3, 718.202, 718.203, 718.204; *Gee v. W.G. Moore and*

[1] Claimant filed his first claim on February 26, 1991. That claim was finally denied by the Department of Labor on December 19, 1994, as claimant failed to establish that he was totally disabled and totally disabled due to pneumoconiosis. Director's Exhibit 1. Claimant took no further action until he filed the instant claim on March 23, 2004.

[2] The administrative law judge's length of coal mine employment and responsible operator determinations are affirmed as unchallenged on appeal. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Sons, 9 BLR 1-4 (1986)(*en banc*). Failure to establish any one of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986)(*en banc*).

If claimant establishes the existence of complicated pneumoconiosis, then he is entitled to the irrebuttable presumption that his pneumoconiosis is totally disabling and that his death is due to pneumoconiosis. 20 C.F.R. §718.304. Since the administrative law judge found a change in an applicable condition of entitlement established because the evidence established complicated pneumoconiosis, and thereby, entitlement to the irrebuttable presumption, we will first address employer's challenge to the administrative law judge's finding of complicated pneumoconiosis.[3]

Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis ..., if such miner is suffering or suffered from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray ... yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) 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 [emphasis in original]. *See Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 22 BLR 2-554 (4th Cir. 1999).

[3] The record indicates that claimant was last employed in the coal mine industry in Virginia. Director's Exhibits 1, 4, 8. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. *See Kopp v. Director, OWCP*, 877 F.2d 307, 12 BLR 2-299 (4th Cir. 1989); *Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

The introduction of legally sufficient evidence of complicated pneumoconiosis, however, does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. Rather, claimant must establish that he has a chronic dust disease of the lung commonly known as complicated pneumoconiosis. The administrative law judge must, therefore, weigh together the evidence at subsections (a), (b), and (c) before determining whether invocation of the irrebuttable presumption has been established. *Gray v. SLC Coal Co.*, 176 F.3d 382, 21 BLR 2-615, 2-628-629 (6th Cir. 1999); *Lester v. Director, OWCP*, 993 F.2d 1143, 1145, 17 BLR 2-114, 2-117 (4th Cir. 1993); *see 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).

Employer contends that the administrative law judge erred in determining that the newly submitted x-ray evidence of record supported a finding of complicated pneumoconiosis, and therefore established a change in an applicable condition of entitlement by establishing totally disabling pneumoconiosis. Specifically, employer contends that the administrative law judge erred in concluding that the mass seen on claimant's x-rays was complicated pneumoconiosis, as a majority of the more qualified physicians who examined claimant, *i.e.*, Drs. Wheeler, Scatarige, and Scott, concluded that the mass seen on x-ray was unrelated to claimant's coal mine employment, and opined that the mass was due to tuberculosis or unknown activity. Employer's Brief at 9-11. Employer contends that because Drs. Wheeler, Scott and Scatarige are professors of radiology, in addition to being Board-certified B readers, their negative readings more than counter-balanced the positive readings of Drs. Patel and DePonte, who found complicated pneumoconiosis. Likewise, employer contends that Dr. Robinette's finding of complicated pneumoconiosis on the December 30, 2004 x-ray, is counter-balanced by the reading of the more recent October 26, 2005 x-ray by Dr. Wheeler, who did not find complicated pneumoconiosis. Additionally, employer contends that the administrative law judge should have credited the reasoned opinion of Dr. Hippensteel, who found that claimant did not have complicated pneumoconiosis.

In concluding that claimant established the existence of complicated pneumoconiosis, the administrative law judge found that Dr. Patel, a B reader and board-certified radiologist, interpreted claimant's June 14, 2004 x-ray as showing complicated pneumoconiosis, Category B, Dr. DePonte, a B reader and Board-certified radiologist, interpreted the November 1, 2004 x-ray as showing complicated pneumoconiosis, Category B, and Dr. Robinette, a B reader, interpreted the December 29, 2004 x-ray as showing complicated pneumoconiosis, Category A. Decision and Order at 3-4, 11-12; Director's Exhibit 14; Claimant's Exhibits 1, 2. The administrative law judge found that Drs. Wheeler, Scott and Scatarige, dually qualified physicians, while acknowledging that there was a significant mass in claimant's lungs, declined to diagnose the abnormality as representing complicated pneumoconiosis, and instead, offered other diagnoses such as

tuberculosis or a disease process of unknown activity. Decision and Order at 3-4, 11-13; Employer's Exhibits 1, 3, 4, 9. The administrative law judge found, however, that there was no clinical correlation that established that claimant had tuberculosis, granulomatous disease, or any other pulmonary impairment that would produce opacities on an x-ray. The administrative law judge, therefore, found the opinions of Drs. Wheeler, Scott, and Scatarige, attributing the mass seen on claimant's x-ray to tuberculosis or granulomatous disease, to be speculative. Accordingly, the administrative law judge determined that the newly submitted x-ray evidence, showing Category A and B opacities, was sufficient to establish complicated pneumoconiosis. Decision and Order at 11-13.

Contrary to employer's contention, while an administrative law judge may consider that a reader is a professor of radiology in weighing x-ray readings, the administrative law judge is not required to accord the interpretation of a physician with that credential greater weight. *See* 20 C.F.R. §718.202(a)(1); *Worhach v. Director, OWCP*, 17 BLR 1-105 (1993). We also reject employer's assertion that the administrative law judge should have considered claimant's non-qualifying blood gas study evidence in determining whether complicated pneumoconiosis was established.[4] Employer's Brief at 11, 14-15. Contrary to employer's assertion, however, blood gas study evidence is not a method provided for establishing invocation of the irrebuttable presumption pursuant to Section 718.304. *See* 20 C.F.R. §718.304(a)-(c).

Nonetheless, we hold that the administrative law judge erred in finding complicated pneumoconiosis established. In finding complicated pneumoconiosis established, the administrative law judge, citing the Fourth Circuit's holding in *Scarbro*, stated:

> I view the Court's decision in *Scarbro* to require that, when the Claimant presents evidence satisfying § 718.304 and the Employer also presents relevant x-ray evidence or evidence relevant to prongs (B) or (C), I must determine if the evidence under these prongs as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter. This evidence loses force *only if* evidence is presented that affirmatively shows either that the opacities are not there, or that they are not what they seem to be. If the evidence fails to meet this burden, the Claimant is entitled to the benefit of the § 718.304 presumption.

[4] A "qualifying" pulmonary function study or blood gas study yields values that are equal to or less than the appropriate values set out in the tables at 20 C.F.R. Part 718, Appendices B and C, respectively. A "non-qualifying" study exceeds those values. *See* 20 C.F.R. §718.204(b)(2) (i), (ii).

Decision and Order at 10. In a recent unpublished decision, however, the Fourth Circuit held that such language "misstates *Scarbro*" and appears to shift the burden of proof to employer. *Clinchfield Coal Co. v. Lambert*, No 06-1154 (4th Cir. Nov. 17, 2006) (unpublished). 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, slip op. at 2. 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.[5] Consequently, we

[5] We recognize that unpublished decisions are not considered binding precedent in the Fourth Circuit. *See* Local Rule 36(c) of the Fourth Circuit ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."). While we agree with its reasoning, our holding is not based exclusively upon the Fourth Circuit's decision in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpublished). Rather, our holding is based upon a review of the administrative law judge's individual statements in the instant case. These statements appear to indicate that she improperly shifted the burden of proof to employer. On remand, the administrative law judge should weigh all of the relevant evidence together to determine whether claimant has established the existence of complicated pneumoconiosis by a preponderance of the evidence.

vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at 20 C.F.R. §718.304 and remand the case for reconsideration.[6] On remand, the administrative law judge must consider Dr. Hippensteel's 2005 opinion that claimant does not have complicated pneumoconiosis as the doctor's finding that claimant's "overall clinical findings" do not support a finding of complicated simple pneumoconiosis along with the x-ray evidence.[7]

We note that if the administrative law judge finds that claimant has not established a change in an applicable condition of entitlement because he is not entitled to the irrebuttable presumption, the administrative law judge must reconsider whether the evidence establishes totally disabling pneumoconiosis at Section 718.204(b), (c), as the administrative law judge did not consider together all of the relevant evidence thereunder. *See* 20 C.F.R. §718.204(b), (c); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*., 9 BLR 1-236 (1987).

On remand, the administrative law judge must, therefore, consider whether claimant is entitled to the irrebuttable presumption, whether claimant has established a change in an applicable condition of entitlement and, if reached, whether claimant has established entitlement on the merits.

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[6] Employer argues that the administrative law judge erred in discrediting the interpretations of physicians who found abnormalities consistent with tuberculosis or other diseases because she found no evidence in the record to support a finding that tuberculosis or another disease process could be responsible for these findings. Decision and Order at 11. The Board has long held that the interpretation of the objective data is a medical determination for which an administrative law judge cannot substitute her own opinion. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Many of the physicians interpreted claimant's x-rays as revealing other abnormalities. The fact that the record does not reveal that claimant suffered from tuberculosis does not undermine the interpretations of those physicians who found that claimant's x-rays revealed abnormalities consistent with that disease.

[7] Employer attached to his brief a report, dated July 28, 2006, from Dr. Hippensteel, stating that he has given a complete explanation of his findings, as well as a statement evidencing his acceptance of the concept of complicated pneumoconiosis. The Board is without authority, however, to consider new evidence on appeal. 20 C.F.R. §802.301; *Berka v. North American Coal Corp.*, 8 BLR 1-183 (1985). Accordingly, we only address those opinions of Dr. Hippensteel that were part of the record before the administrative law judge.

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.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge