BRB No. 06-0717 BLA

VERNON E. BREWSTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CONSOLIDATION COAL COMPANY	)	DATE ISSUED: 06/27/2007
	)	
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 on Remand Awarding Benefits of Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

Frederick K. Muth (Hensley, Muth, Garton & Hayes), Bluefield, West Virginia.

Kathy L. Snyder (Jackson Kelly PLLC), Morgantown, West Virginia, for employer.

Sarah M. Hurley (Jonathan L. Snare, Acting Solicitor of Labor, Rae Ellen Frank James, Deputy Associate Solicitor, Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

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

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2004-BLA-5314) of Administrative Law Judge Linda S. Chapman with respect to 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). This is the second time that this case has been before the Board. In a Decision and Order dated August 25, 2004, the administrative law judge found that the claim before her, filed on August 22, 2001, was a subsequent claim.[1] The administrative law judge determined that the newly submitted evidence was sufficient to establish invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304 and, therefore, a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309(d). Accordingly, benefits were awarded.

Employer appealed to the Board, which held that the administrative law judge applied an interpretation of the decision of the United States Court of Appeals for the Fourth Circuit in *Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), which improperly shifted the burden of proof to employer to disprove the existence of complicated pneumoconiosis on x-ray. *Brewster v. Consolidation Coal Co.*, BRB No. 04-0948 BLA (Sept. 28, 2005)(unpub.). The Board also found merit in employer's argument that the administrative law judge erred in discrediting the x-ray readings and opinions in which the physicians ruled out the presence of complicated pneumoconiosis, but did not identify evidence in the record supporting their diagnoses of an alternative disease process. The Board vacated, therefore, the administrative law judge's findings under Section 718.304 and remanded the case to the administrative law judge for reconsideration of the relevant evidence.

On remand, the administrative law judge again determined that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis and awarded benefits. Employer's present appeal followed. Employer argues that rather than follow the Board's remand instructions, the administrative law judge merely reiterated the improper analysis that she relied upon in her prior Decision and Order. Employer also requests that the Board remand the case to a different administrative law judge for decision. Claimant has responded and urges affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has also responded and concurs with employer's assertion that the administrative law judge did not properly weigh the evidence relevant to Section 718.304. The Director takes no position on employer's request for transfer of the case to another administrative law judge on remand.

[1] Claimant filed an application for benefits on May 22, 1996, which was denied by the district director on October 7, 1996, on the ground that claimant failed to establish that he was totally disabled. Director's Exhibit 1. Claimant took no further action until filing a second claim on August 22, 2001. Director's Exhibit 3.

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 applicable 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).

Pursuant to Section 411(c)(3)(A) of the Act, implemented by 20 C.F.R. §718.304 of the regulations, there is an irrebuttable presumption of total disability due to pneumoconiosis if the miner suffers from a chronic dust disease of the lung which, (A) when diagnosed by chest x-ray, yields one or more large opacities (greater than one centimeter in diameter) classified as Category A, B, or C; (B) when diagnosed by biopsy 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)-(c). In this case, the 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 performed by physicians who were dually qualified as Board-certified radiologists and B readers.[2] 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 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 found Category A

[2] Employer asserts that "there is no explanation as to why ALJ Chapman only considers six of the ten x-ray interpretations of record." Employer's Brief at 8 n. 3. At the hearing and in her 2004 Decision and Order, the administrative law judge indicated that she would address only those readings designated by the parties under the evidentiary limitations set forth in 20 C.F.R. §725.414(a)(2)(i), (ii), (a)(3)(i), (ii). Hearing Transcript at 9; 2004 Decision and Order at 2 n. 2. The administrative law judge's consideration of the x-ray evidence conforms to the parties' designations with the exception of Dr. Ahmed's interpretation of a film dated October 30, 2003, which claimant listed as a third affirmative x-ray reading, and Dr. Scatarige's reading of the same film, which employer designated as a rebuttal interpretation. The administrative law judge did not err in omitting Dr. Ahmed's interpretation from consideration, however, as it is in excess of the limitation on claimant's affirmative x-ray evidence under Section 725.414(a)(2)(i). With this reading properly excluded, employer was not entitled to submit a rebuttal reading pursuant to Section 725.414(a)(3)(ii). Regarding the two remaining interpretations, because the administrative law judge initially considered the x-ray evidence in the context of whether the newly submitted evidence was sufficient to establish a change in an applicable condition of entitlement under 20 C.F.R. §725.309, she acted rationally in weighing only the readings of x-rays obtained after the denial of claimant's initial application for benefits.

large opacities. Claimant's Exhibit 1. Drs. Scott and Scatarige 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 on this film. 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:

> 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 (A), (B), or (C), I must determine if the evidence as a whole indicates a condition of such severity that it would produce opacities greater than one centimeter in diameter on x-ray. 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.

Decision and Order on Remand at 9 (emphasis in original)(footnotes omitted). The administrative law judge then determined that because all of the physicians described conditions that appear on an x-ray as a one-centimeter or greater opacity in claimant's left lung, "[c]laimant has established the presence of an opacity measuring at least one centimeter in diameter as required by the plain language of 30 U.S.C. 921(c)(3)(A)." *Id*. at 11.

The administrative law judge then considered whether the preponderance of the x-ray evidence established that the large opacities are not what they seem to be, *i.e.*, are unrelated to pneumoconiosis or coal dust exposure. The administrative law judge noted that Drs. Patel, Ahmed, and Cappiello specifically determined that the Category A opacities observed on x-ray are due to pneumoconiosis. Decision and Order on Remand at 11; Director's Exhibit 21; Claimant's Exhibit 1. The administrative law judge indicated that Drs. Wheeler, Scott, and Scatarige acknowledged the presence of large masses or areas of infiltrates and fibrosis, stated that the x-ray findings were not consistent with pneumoconiosis, and identified various other conditions as the possible source. *Id*.; Employer's Exhibits 1, 4. The administrative law judge found that there is no evidence in the record that claimant ever suffered from inflammatory disease, tuberculosis, granulomatous disease, histoplasmosis or any of the other conditions to which these physicians referred. *Id*. at 12. Citing the Board's instructions that she must not place the burden upon employer to rebut the x-ray readings of Drs. Patel, Ahmed, and Cappiello, the administrative law judge stated that:

> I have not required the Employer to affirmatively identify a definite etiology for the abnormalities. I find that the interpretations by Dr. Scott,

> Dr. Wheeler, and Dr. Scatarige support the conclusion that Category A opacities appear on the Claimant's x-rays. Thus, they are not affirmative evidence that these large opacities are not there, nor are they persuasive affirmative evidence that they were due to another disease process. These interpretations are equivocal, in that they do not make a diagnosis or an "objective determination," but instead speculate on the various possible etiologies for the abnormalities or masses that they acknowledge are there.

Id.

Employer argues that despite the administrative law judge's statement to the contrary, she again improperly shifted the burden of proof to employer to establish that the x-ray readings by Drs. Patel, Ahmed, and Cappiello were erroneous. This contention has merit. The court in *Scarbro* held that where the x-ray evidence "*vividly displays*" the presence of large opacities as defined in prong (A), this evidence "only loses force" if the other types of medical evidence described in §921(c)(3) of the Act affirmatively show "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 (emphasis added); *see also* 20 C.F.R. §718.304(b), (c). In this case, the administrative law judge found that because claimant submitted x-ray readings that were positive for Category A opacities, employer was required to submit x-ray evidence that affirmatively establishes either the absence of the large opacities or that they were not related to pneumoconiosis or coal dust exposure. The administrative law judge's analysis is incorrect because in *Scarbro*, the issue was whether evidence *under the other prongs* of 30 U.S.C. §923(c) undermined x-rays that demonstrated large opacities that met the requirements set forth in prong (A), whereas here, the issue was whether the conflicting x-ray readings actually met these requirements, *i.e.*, whether they contain diagnoses of large opacities of pneumoconiosis under the ILO-U/C, International Labor Office, or UICC/Cincinnati classification systems.[3]

In this context, the administrative law judge's requirement that employer affirmatively establish that the Category A opacities observed by Drs. Patel, Ahmed, and Cappiello were not there or not what they seemed to be, effectively shifted the burden of proof to employer once claimant submitted these x-ray readings.[4] This contravenes the

[3] In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), seven of eight readers of the most recent x-ray diagnosed large opacities. *Scarbro*, 220 F.3d at 255, 22 BLR at 2-100. Here, three physicians diagnosed large opacities, while three physicians classified the x-rays as negative for large opacities. Director's Exhibit 21; Claimant's Exhibit 1; Employer's Exhibits 1, 4.

[4] In a recent unpublished case issued by the United States Court of Appeals for the Fourth Circuit, the court held that the administrative law judge's interpretation of its

principle that "claimant retains the burden of proving the existence of" complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993). We vacate, therefore, the administrative law judge's findings at 20 C.F.R. §718.304(a) and remand this case for reconsideration of whether claimant has established the presence of large opacities as defined in prong (A) of Section 921(c)(3) of the Act and Section 718.304(a) of the regulations by a preponderance of the evidence. *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).

Employer also argues that the administrative law judge erred in discrediting the negative x-ray evidence under 20 C.F.R. §718.304(a) on the ground that the physicians excluded pneumoconiosis as the cause of the large masses observed, but did not definitively identify an alternative etiology. This contention has merit as well. In resolving the conflict between the positive interpretations for Category A opacities and the contrary readings, the probative value of the respective interpretations must be assessed in light of all relevant factors affecting the credibility of the x-ray readings. The mere fact that a physician has not identified a definitive alternate source for the x-ray findings does not undermine a negative x-ray interpretation, since the burden of proof rests with claimant to establish the existence of complicated pneumoconiosis. *Lester*, 993 F.2d at 1146, 17 BLR at 2-118; *see also Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994)(holding that a medical opinion ruling out the presence of a totally disabling respiratory or pulmonary impairment can be given weight even if the physician does not identify the actual cause of claimant's total disability).

Employer also contends that the administrative law judge did not properly weigh the medical opinions of Drs. Crisalli and Spagnolo pursuant to Section 718.304(c). Dr. Crisalli examined claimant on July 28, 2003 and diagnosed simple pneumoconiosis based upon a chest x-ray. Employer's Exhibit 2. Dr. Crisalli opined that the masses observed on the x-ray were not indicative of large opacities consistent with complicated pneumoconiosis. He concluded that claimant is totally disabled due to a respiratory impairment caused by cigarette smoking and the effects of heart disease. Employer's Exhibits 2, 7. Dr. Spagnolo reviewed claimant's medical records and stated that claimant

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decision in *Scarbro* is incorrect. The court indicated that, contrary to the administrative law judge's analysis, "*Scarbro* only holds that once the claimant presents legally sufficient evidence of large opacities classified as category A, B, or C in the ILO system, he is likely to win unless there is contrary evidence." *Clinchfield Coal Co. v. Lambert*, No. 06-1154, slip op. at 2 (4th Cir. Nov. 17, 2006) (unpub.)(citations omitted). The court emphasized that the burden of proof remains with the claimant at all times. *Id.*

was totally disabled due to conditions that are not related to coal dust exposure. Employer's Exhibits 5, 8.

The administrative law judge discredited Dr. Crisalli's opinion on the ground that Dr. Crisalli's "latest diagnosis of 'either tuberculosis or histoplasmosis' certainly does not provide affirmative evidence that the opacity is not there or is not what it appears to be." Decision and Order on Remand at 14. The administrative law judge determined that Dr. Spagnolo's opinion was also insufficient to affirmatively establish that "the large masses shown on [c]laimant's x-ray either are not there, or are in fact due to another pathology such as heart failure." *Id*.

Employer maintains that the administrative law judge improperly shifted the burden of proof from claimant to employer, rather than assessing whether the physicians' shared conclusion – that the objective data does not support a diagnosis of a condition related to coal dust exposure – is reasoned and documented. We agree. In *Lester*, the Fourth Circuit court emphasized 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. When weighing the medical opinion evidence relevant to Section 718.304(c), the administrative law judge implicitly required employer's medical experts to ascertain a definite etiology for the masses observed on claimant's x-rays. Decision and Order on Remand at 13-14. Furthermore, the administrative law judge's analysis of the medical evidence under Section 718.304(c) was affected by her improper consideration of the conflicting x-ray evidence at Section 718.304(a). Thus, we vacate the administrative law judge's finding that the evidence is sufficient to establish the presence of complicated pneumoconiosis at Section 718.304(c). *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.3d at 1146, 17 BLR at 2-118. On remand, the totality of the rationale offered by these physicians 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, must be addressed. *See Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 148, 11 BLR 2-1, 2-8 (1987), *reh'g denied*, 484 U.S. 1047 (1988)(recognizing that evidence regarding the presence of an impairment may shed light on the interpretation of an x-ray); *see also Marcum v. Director, OWCP*, 11 BLR 1-23, 1-24 (1987).

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 also 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 entitlement. 20 C.F.R. §725.309(d); *White v. New White Coal Co.*, 23 BLR 1-1, 1-3 (2004). If, upon reconsidering the merits of entitlement, the administrative law judge

finds that claimant has established the existence of either simple or complicated pneumoconiosis, she must determine whether the pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §718.203.[5] *Daniels Co. v. Mitchell*, 479 F.3d 321, BLR 2- (4th Cir. 2007).

With respect to the latter issue, we hold that, contrary to employer's assertion on appeal, claimant is not required to prove under 20 C.F.R. §718.304 that his complicated pneumoconiosis arose out of coal mine employment. Although Section 718.304 refers to complicated pneumoconiosis as a "chronic dust disease of the lung," 20 C.F.R. §718.304, the issue of whether this disease arose out of coal mine employment is considered separately at 20 C.F.R. §718.203. 20 C.F.R. §§718.203(b), 718.302; *Mitchell*, 479 F.3d at 337, BLR at 2- . Based on claimant's more than ten years of coal mine employment, if he is found to have a chronic dust disease of the lung pursuant to Section 718.304, he is entitled to the presumption that his complicated pneumoconiosis arose out of that employment. 30 U.S.C. §921(c)(1); 20 C.F.R. §§718.302, 718.203(b). The administrative law judge in the instant case found claimant entitled to the presumption that his complicated pneumoconiosis arose out of his coal mine employment. Decision and Order on Remand at 15-16. The administrative law judge, however, considered the evidence relevant to rebuttal of this presumption in the context of her finding on invocation at Section 718.304, a finding that we have vacated. If, on remand, the evidence is found sufficient to meet claimant's burden on invocation at Section 718.304, thereby establishing the existence of a chronic dust disease of the lung, it must then be determined whether employer has rebutted the presumption that claimant's complicated pneumoconiosis arose out of his coal mine employment. 20 C.F.R. §§718.203(b), 718.302; *Mitchell*, 479 F.3d at 337, BLR at 2- .

Lastly, employer asks that this case be remanded to a different administrative law judge in order to avoid "administrative gridlock." Employer's Brief at 22. We decline to grant employer's request. In the absence of evidence of bias on the administrative law judge's part and in light of the guidance provided by the Fourth Circuit in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.), which was issued subsequent to the administrative law judge's Decision and Order on Remand, there is no compelling reason to order the assignment of this case to a different administrative law judge. *See generally Cochran v. Consolidation Coal Co.*, 12 BLR 1-136 (1989).

[5] If the administrative law judge reaches the merits, she must consider entitlement based upon a weighing of all of the evidence of record, not just the evidence developed subsequent to the denial of the first claim. *See 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).

Accordingly, the administrative law judge's Decision and Order on Remand Awarding Benefits is vacated and the case is remanded to the administrative law judge for further proceedings 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