BRB No. 07-0703 BLA

C.L.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
CLINCHFIELD COAL COMPANY	)	
	)	DATE ISSUED: 06/30/2008
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Gerald F. Sharp (Gerald F. Sharp, P.C.), Lebanon, Virginia, for claimant.

Ann Musgrove and Timothy W. Gresham (Penn, Stuart & Eskridge), Abingdon, Virginia for employer.

Sarah M. Hurley (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 Fourth Decision and Order on Remand Awarding Benefits (2000-BLA-00298) of Administrative Law Judge Linda S. Chapman issued on a claim[1] 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 case has been before the Board previously, and a complete procedural history of the case has been set forth in the Board's prior decisions, which is incorporated by reference herein.[2] The more recent procedural history, relevant for the purposes of this decision, is as follows. On November 17, 2004, the administrative law judge issued a Third Decision and Order on Remand Awarding Benefits, finding that claimant was entitled to modification under 20 C.F.R. §725.310 (2000) because the newly submitted evidence established that he suffered from complicated pneumoconiosis and was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §410.418(a). The administrative law judge based her finding that claimant established the existence of complicated pneumoconiosis, on her interpretation of 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).[3] The administrative law

[1] Claimant is pursuing modification of a denied claim filed on September 13, 1979.

[2] [*C.L.*] *v. Clinchfield Coal Co.*, BRB No. 84-1850 BLA (Dec. 15, 1986) (unpub.); [*C.L.*], BRB No. 92-2402 BLA (Jun. 13, 1995) (unpub.); [*C.L.*], BRB No. 99-0544 BLA (Apr. 16, 1999) (Order) (unpub.); [*C.L.*], BRB No. 01-0514 BLA (Mar. 8, 2002) (unpub.); [*C.L.*], BRB No. 03-0464 BLA (Mar. 26, 2004); [*C.L.*], BRB No. 05-0251 BLA (Nov. 30, 2005).

[3] In *Scarbro*, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, held that a single piece of relevant evidence could support an administrative law judge's finding that the irrebuttable presumption was successfully invoked "if that piece of evidence outweighs conflicting evidence in the record." *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 256, 22 BLR 2-93, 101 (4th Cir. 2000). The court further explained:

> Thus, even where some x-ray evidence indicates opacities that would satisfy the requirements of prong (a), if other x-ray evidence is available or if evidence is available that is relevant to an analysis under prong (b) or prong (c), then all of 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. Of course, if the x-ray evidence vividly displays opacities exceeding one centimeter, its probative force is not reduced because the evidence under some other prong is inconclusive or less vivid.

judge determined that the x-ray readings by physicians who, in her opinion, merely speculated as to the possible causes for the abnormalities in claimant's lung, failed to "*affirmatively* outweigh the findings of Category A opacities by the eight physicians who noted the presence of such opacities." Third Decision and Order on Remand Awarding Benefits at 13 (emphasis added). She also found that two medical reports, stating that claimant did not have complicated pneumoconiosis, failed to provide "affirmative evidence" that "there are no large opacities on [claimant's] x-rays, or that the large opacities are due to a disease process other than pneumoconiosis." *Id.* at 18. Accordingly, the administrative law judge awarded benefits commencing August 1988. *Id*. at 20.

Employer appealed and the Board affirmed the award of benefits. *[C.L.] v. Clinchfield Coal Co.*, BRB No. 05-0251 BLA (Mar. 26, 2004) (unpub.). Employer then filed an appeal with the Fourth Circuit. The court agreed with employer that the administrative law judge misapplied *Scarbro* insofar as she improperly shifted the burden of proof to employer in her consideration of whether claimant established complicated pneumoconiosis and was entitled to the irrebuttable presumption. *Clinchfield Coal Co. v. Lambert*, 206 Fed.Appx. 252, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpub.). The court explained:

> *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

> Instead, the x-ray evidence can lose force only if other evidence affirmatively shows the opacities are not there or are not what they seem to be, perhaps because of an intervening pathology, some technical problem with the equipment used, or incompetence of the reader.

Scarbro, 220 F.3d at 256, 22 BLR at 2-101.

F.2d 1143, 1146 (4th Cir. 1993) ("The claimant retains the burden of proving the existence of the disease.").

Lambert, 206 Fed.Appx. at 255. In light of the administrative law judge's error, the court remanded the case for further consideration, but also refused employer's request to have the case reassigned to a different administrative law judge, noting that "[Judge] Chapman, who is familiar with the record and has thrice made detailed factual findings in this case, can adequately apply *Scarbro* and expeditiously resolve [this] claim." *Id*.

In her Fourth Decision and Order on Remand Awarding Benefits (Fourth Decision and Order) dated April 16, 2007, which is the subject of the instant appeal, the administrative law judge determined that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 410.418. She also determined that claimant established that his complicated pneumoconiosis arose out of coal mine employment pursuant to 20 C.F.R. §410.416. She therefore found that claimant was entitled to modification pursuant to Section 725.310 (2000) and awarded benefits, commencing August 1988.

Employer appeals, asserting that the administrative law judge has once again erred in shifting the burden of proof under Section 410.418 to require employer to affirmatively establish that claimant does not have complicated pneumoconiosis. Employer contends that the administrative law judge improperly relied on the ten-year presumption at Section 410.416[4] to assist claimant in invoking the irrebuttable presumption at Section 410.418. Further, employer contends that the administrative law judge erred in failing to properly consider whether employer had rebutted the Section 410.416 presumption. Employer asks the Board to vacate the award of benefits and remand this case with instructions that it be reassigned to a new administrative law judge for further consideration.

Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response brief addressing some of employer's arguments, but not employer's contention that the administrative law judge erred in shifting the burden of proof. As noted by the Director, employer maintains that that the irrebuttable presumption "applies to claimants who can establish by a preponderance of the evidence that they have a chronic dust disease of the

[4] A miner who has worked ten or more years in the coal mines is entitled to a rebuttable presumption that his pneumoconiosis arose out of coal mine employment. 30 U.S.C. §921(c); 20 C.F.R. §§410.416(a), 718.203(b). Although the administrative law judge referenced the ten-year presumption, at 20 C.F.R. §718.203, we consider that error to be harmless, as the regulation at Section 410.416(a), which is applicable to this case, contains an identical presumption. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

lung resulting in an opacity greater than one centimeter and classified as [C]ategory A, B, or C in the ILO system." Director's Brief at 2, citing Employer's Brief in Support of Petition for Review at 6 (emphasis in the original). The Director, however, asserts that "[p]roof that the x-ray evidence is properly classified as [C]ategory A, B or C in the ILO classification system necessarily proves the presence of one or more large opacities greater than one centimeter." Director's Brief at 2. The Director also urges the Board to reject employer's argument that the administrative law judge failed to properly separate her analysis of the presumptions at Sections 410.416 and 410.418. The Director asserts that, if the administrative law judge's Section 410.418 finding is affirmed, it is unnecessary to remand this case for further consideration of whether employer has rebutted the Section 410.416 presumption, noting that "[n]one of employer's experts found that [claimant] suffered from pneumoconiosis so, logically, their opinions can shed little light on whether [claimant's] pneumoconiosis arose out of [his] coal mine employment." Director's Brief at 4. Employer has also filed a reply brief, reiterating its position that administrative law judge erred by failing to separately analyze the presumptions at Sections 410.416 and 410.418.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

After consideration of the administrative law judge's Fourth Decision and Order, the briefs of the parties, and the evidence of record, we vacate the administrative law judge's award of benefits because her analysis is not consistent with the directive of the Fourth Circuit. Specifically, the administrative law judge shifted the burden of proof to employer by indicating that, once evidence was submitted which showed large masses in the miner's lungs, the burden shifted to employer to establish either the absence of large opacities or that the large opacities were not related to pneumoconiosis or coal dust exposure. This contravenes the 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).

In her Fourth Decision and Order, the administrative law judge outlined the x-ray evidence and essentially determined that there was no dispute that claimant had a Category A large opacity. Fourth Decision and Order at 5. She specifically explained:

> [T]he majority of the interpreters who reviewed the x-rays performed since 1998, and who did not designate on the ILO form the presence of any large opacities, did nevertheless indicate the presence of some process in the [c]laimant's lungs, whether it was a mass, infiltrate, scarring, fibrosis, or atelectasis. As [employer] correctly argues, the instructions for completing the ILO form do not require the interpreting physician to designate an

> opacity as category A, B, or C based on size alone; the physician must also conclude that the abnormality is an opacity of pneumoconiosis. *Clearly, those physicians who described masses or abnormalities on x-ray, but did not designate them as category A, B, or C opacities, concluded that these masses or abnormalities were not the result of pneumoconiosis. But their acknowledgment that these underlying masses or abnormalities were present on x-ray, regardless of etiology, supports the conclusions of Dr. Ahmed, Dr. Miller, Dr. Pathak, Dr. Cappiello, Dr. Alexander, Dr. Mathur, Dr. DePonte, and Dr. Patel that the x-rays showed an opacity greater than one centimeter.* They do not establish or suggest, that the opacities identified … do not exist.

Id. Thus, the administrative law judge found that the x-ray evidence "overwhelmingly establishes that [claimant] has a disease process that show up on his x-rays as opacities greater than one centimeter in diameter" pursuant to Section 410.418(a). *Id*.

Reviewing the CT scan evidence at Section 410.418(b), the administrative law judge noted that "there are findings of a conglomerate mass, progressive fibrosis and complicated pneumoconiosis on CT scans, although, with the possible exception of Dr. DePonte, no physician has specifically indicated that these findings would equate to opacities of at least one [centimeter] on x-ray." Fourth Decision and Order at 6. Thus, she concluded that the CT scan readings were insufficient, in and of themselves, to support a finding of complicated pneumoconiosis under the standards set out in *Scarbro*," but they "do not detract from the force of the x-ray interpretations of Category A opacities" since they "do not show that the opacities identified by Drs. Ahmed, Miller, Pathak, Cappiello, Alexander, Mathur, DePonte and Patel on x-ray are not there; indeed, they confirm the presence of an underlying process corresponding to the appearance of opacities on x-ray." *Id*. The administrative law judge, therefore, concluded that the CT scan evidence was not "affirmative evidence" showing that claimant does not have a Category A large opacity. *Id*.

Turning to the "Cause of the Large Opacity," the administrative law noted that Drs. Ahmed, Miller, Pathak, Cappiello, Alexander, Mathur, DePonte and Patel attributed claimant's Category A large opacity to pneumoconiosis. *Id*. The administrative law judge found that claimant was entitled to a presumption that his pneumoconiosis arose out of coal mine employment, pursuant to Section 410.416, based on his history of twenty-one and one-quarter years of coal mine employment. Fourth Decision and Order at 7. The administrative law judge also found that employer failed to produce affirmative evidence to show that claimant did not have a Category A large opacity due to pneumoconiosis. She stated:

> I find that [e]mployer has not offered affirmative evidence that is sufficient to cause the interpretations of Drs. Ahmed, Miller, Pathak, Cappiello,

> Alexander, Mathur, DePonte and Patel to lose force. Instead, [e]mployer has relied on x-ray and CT scan interpretations that acknowledge the presence of large masses or processes, but speculate that they are the result of a variety of conditions other than pneumoconiosis, without sufficient corroboration or evidentiary support. Certainly, they do not provide an explanation that could be considered affirmative evidence that would cause the evidence that meets the standard under prong (A) to lose force, or to rebut the presumption of causation at [Section 410.416].

Fourth Decision and Order at 10. Thus, because the administrative law judge found that employer's evidence was insufficient to affirmatively establish that claimant did not have a Category A large opacity, she found that claimant was entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis at Section 410.418. She also found that employer failed to rebut the Section 410.416 presumption. Thus, the administrative law judge found that claimant was entitled to modification pursuant to Section 725.310 (2000) and she awarded benefits.

In this case, the administrative law judge improperly shifted the burden of proof despite guidance from the Fourth Circuit as to how to correctly apply *Scarbro*. Contrary to the administrative law judge's Section 410.418(a) analysis, the introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption. 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*).

We agree with employer that the administrative law judge erred by failing to weigh all of the conflicting x-ray evidence as to the existence of a Category A opacity. Although the administrative law judge correctly noted that certain doctors diagnosed Category A opacities of pneumoconiosis by x-ray, she erred in concluding that all of the x-ray readings, noting any type of abnormality, such as a mass, infiltrate, fibrosis or atelectasis, that measured greater than one centimeter were supportive of a finding of a Category A opacity for pneumoconiosis. Contrary to the administrative law judge's analysis, complicated pneumoconiosis, seen as Category A, B or C opacities on x-ray, is not determined solely by the dimensions of the irregularity. Section 410.418 provides for invocation of the irrebuttable presumption if "such miner is suffering from a chronic dust disease of the lung" which, when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B or C. 20 C.F.R. §§410.418; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. The ILO classification form requires the physician interpreting the x-ray film to first determine whether there are "[a]ny [p]arenchymal [a]bnormalities [c]onsistent with [p]neumoconiosis." *See* Form CM-933, question 2A. If the physician answers in the affirmative, then he/she proceeds to the sections regarding the size of the opacities, *i.e.*,

small opacities or large opacities of size A, B, or C. *See* Form CM-933, question 2B and 2C. However, if the physician answers the question in the negative, then he/she is to skip the section regarding the size of the opacities. *See* Form CM-933, question 2A.

In weighing the conflicting x-ray evidence at Section 410.418(a), the administrative law judge did not consider the fact that several physicians made an unequivocal diagnosis on the ILO classification sheet that there were no parenchymal abnormalities consistent with pneumoconiosis on the x-rays they reviewed. She also did not consider they did not identify any small or large opacities. Contrary to the administrative law judge's analysis, absent a diagnosis of pneumoconiosis with a Category A, B, or C opacity, a physician's x-ray interpretation on an ILO form that notes an abnormality in the "Comments" section, does not satisfy the statutory definition of complicated pneumoconiosis pursuant to Section 410.418(a). *See* 20 C.F.R. §§410.418(a), 718.304(a). Thus, we vacate the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 410.418(a).

Additionally, we address employer's argument that the administrative law judge erred in her use of Section 410.416 to assist claimant in establishing his entitlement to the irrebuttable presumption at 410.418. Claimant is not required to prove that his complicated pneumoconiosis arose out of coal mine employment under Section 410.418. Although Section 410.418 refers to the statutory definition of complicated pneumoconiosis as a "chronic dust disease of the lung," 20 C.F.R. §410.418, the issue of whether this disease arose out of coal mine employment is considered separately at 20 C.F.R. §410.416. *See* 20 C.F.R. §§410.416, 410.418; 718.203(b), 718.302; *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007).

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 410.418, 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. §410.416. 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. Fourth Decision and Order on Remand at 7. The administrative law judge, however, considered the evidence relevant to rebuttal of this presumption in the context of her finding on invocation at Section 410.418, a finding that we have vacated. If on remand, the evidence is found sufficient to meet claimant's burden on invocation at Section 410.418, thereby establishing the existence of a chronic dust disease of the lung, claimant is also entitled to invoke the Section 410.416 presumption that his complicated pneumoconiosis arose out of coal mine employment. 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. §410.416; *Mitchell*, 479 F.3d at 337, 24 BLR at 2-28.

Consequently, because the administrative law judge again shifted the burden of proof, despite guidance from the Fourth Circuit on how to apply *Scarbro*, we vacate the administrative law judge's finding that claimant is entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 410.418, and that he established a basis for modification pursuant to Section 725.310 (2000). We, therefore, vacate the award of benefits.

Additionally, in view of the administrative law judge's failure to properly apply *Scarbro*, despite guidance by the Fourth Circuit, and in consideration of the length of time that this case has been in litigation, we conclude that it is in the interest of justice and judicial economy to grant employer's request to remand this case for assignment to a new administrative law judge, for a *de novo* review of the record and proper application of the law in light of the evidence.[5] *See Milburn Colliery v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

[5] Employer argues that the administrative law judge erred in rejecting the x-ray readings of physicians who attributed claimant's x-ray abnormalities to disease processes, such as tuberculosis or granulomatous disease, on the ground that their opinions were speculative. Employer also asserts that the administrative law judge erred in finding that the opinion of Dr. Sargent was "not relevant" to her analysis of the evidence at 20 C.F.R. §410.418. In light of our decision to remand this case for further consideration by a different administrative law judge, it is not necessary that we address employer's arguments regarding the credibility of the medical experts.

Accordingly, the Fourth Decision and Order on Remand Awarding Benefits is vacated and the case is remanded for 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