BRB No. 08-0159 BLA

C.S.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
WEST VIRGINIA SOLID ENERGY INCORPORATED	)	
	)	
	)	DATE ISSUED: 06/30/2009
Employer-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	DECISION and ORDER on RECONSIDERATION
Party-in-Interest	)	*EN BANC*

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

Stephen A. Sanders (Appalachian Citizens Law Center, Inc.), Prestonburg, Kentucky, for claimant.

Laura Metcoff Klaus and W. William Prochot (Greenberg Traurig LLP), Washington, D.C., for employer.

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

DOLDER, Chief Administrative Appeals Judge:

Claimant has filed a timely Motion for Reconsideration *En Banc* requesting that the Board reconsider its Decision and Order dated November 25, 2008, in this case arising under Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). In that decision, pursuant to employer's appeal, the Board held that the administrative law judge failed to follow the Board's previous remand instructions to place the burden of proof on claimant to establish the existence of complicated pneumoconiosis, and erred in her consideration of the x-ray,

biopsy, and medical opinion evidence. *C.S. v. W. Va. Solid Energy, Inc.*, BRB No. 08-0159 BLA, slip op. at 5-8 (Nov. 25, 2008)(unpub.)(McGranery, J., dissenting). Consequently, the Board vacated the administrative law judge's findings that claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and remanded the case to the administrative law judge for further consideration.[1]

Claimant seeks reconsideration of the Board's decision to vacate the administrative law judge's findings under Section 718.304. Employer has not responded to claimant's motion. The Director, Office of Workers' Compensation Programs, has not filed a response to claimant's motion.

Claimant initially contends that, contrary to the Board's holding, the administrative law judge did not require employer to establish an absence of complicated pneumoconiosis. Claimant's Motion at 10. However, claimant merely restates the administrative law judge's analysis:

> Claimant proved he had large opacities based on x-ray and CT scan evidence. [The administrative law judge] found [that] this evidence established the premises of the presumption and that it was not outweighed by other relevant evidence in the record . . . .
>
> [T]he [administrative law judge] found [that claimant] introduced sufficient evidence to invoke the irrebuttable presumption of total disability due to pneumoconiosis and she observed that the other evidence failed to affirmatively show that the x-ray opacities were not there or were not what they appeared to be.

[1] Judge McGranery dissented, stating that a review of the administrative law judge's decision on remand revealed that she did not misallocate the burden of proof. *C.S. v. W. Va. Solid Energy, Inc.*, BRB No. 08-0159 BLA, slip op. at 10 (Nov. 25, 2008)(unpub.)(McGranery, J., dissenting). Although Judge McGranery agreed that the administrative law judge erred in determining that Dr. Dahhan's x-ray interpretation supported a finding of a Category A large opacity, Judge McGranery concluded that the error was harmless, as substantial evidence supported the administrative law judge's alternative finding that, even without Dr. Dahhan's reading, a preponderance of the x-ray evidence established complicated pneumoconiosis. *Id*. at 11. Judge McGranery would have held that the administrative law judge properly weighed the remaining evidence of record and adequately explained her determination that a mistake of fact was established. *Id*. at 15. Thus, Judge McGranery would have affirmed the award of benefits.

Claimant's Motion at 9, 10. Claimant's argument contradicts his position. As it is the evidence favorable to claimant that must outweigh the evidence to the contrary, we decline to alter our prior holding that the administrative law judge erred in requiring employer to establish that the large opacities seen on x-ray were not complicated pneumoconiosis.[2]

Claimant additionally asserts that the Board exceeded its scope of review with regard to the administrative law judge's weighing of Dr. Dahhan's x-ray reading and additional comments under 20 C.F.R. §718.304(a). Claimant states that "[d]etermining the weight to give an x-ray reading is essentially a credibility determination, and this

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[2] The Board explained that:

> We previously remanded this case because the administrative law judge improperly shifted the burden of proof to employer to "persuasively establish" that the Category A x-ray opacities were not there or were not what they seemed to be. Yet on remand, the administrative law judge weighed the x-ray evidence and concluded that "[e]mployer has not introduced x-ray evidence sufficient to affirmatively show that the opacities of pneumoconiosis noted by Dr. Forehand and Dr. Barrett, as well as Dr. Dahhan, are not there, or that they are not what they seem to be." Decision and Order on Remand at 5. The administrative law judge then weighed the other evidence of record and found that Dr. Wheeler's CT scan interpretation was "not affirmative evidence sufficient to establish that the large opacities noted on x-ray are not there, or that they are due to an etiology other than pneumoconiosis;" and, [that] Dr. Dahhan's medical opinion was poorly reasoned, because Dr. Dahhan based his opinion on pathology evidence that did not "rule out" the existence of complicated pneumoconiosis, and because Dr. Dahhan failed to discuss the more recent x-ray and CT scan findings of large opacities. Decision and Order on Remand at 6-8. Thus, although the administrative law judge eliminated the "persuasively establish" language from her decision on remand, as employer asserts, the administrative law judge imposed the same burden on employer. Employer's Brief at 13-14. Rather than consider, with the burden of proof on claimant, whether the weight of all relevant evidence establishes the existence of complicated pneumoconiosis before invoking the irrebuttable presumption, the administrative law judge weighed the x-ray evidence, and then required employer to "affirmatively show" or "establish" that the x-ray opacities were not there or were not what they seemed to be.

C.S., BRB No. 08-0159 BLA, slip op. at 5 (McGranery, J., dissenting).

Board does not have the authority to substitute its judgment for that of the [administrative law judge]." Claimant's Motion at 11. Contrary to claimant's assertion, the Board did not assess the credibility of Dr. Dahhan's x-ray reading. Rather, the Board held that the administrative law judge erred in failing to determine whether Dr. Dahhan diagnosed a chronic dust disease of the lung that yielded a Category A x-ray opacity. *C.S.*, slip op. at 6 (McGranery, J., dissenting). Consequently, we reject claimant's assertion of error.

Further, claimant's contention that the Board erred in failing to demonstrate why the evidence from pulmonary function tests and blood gas studies is relevant to an inquiry under Section 718.304 lacks merit. Claimant's Motion at 15. In its February 28, 2007 decision remanding the case for the first time, the Board, citing *Gray v. SLC Coal Co.*, 176 F.3d 382, 389, 21 BLR 2-615, 2-628-29 (6th Cir. 1999),[3] explained that the pulmonary function and blood gas study evidence was relevant because the "[t]he Sixth Circuit has held that evidence of the presence or absence of a respiratory impairment may be relevant to a physician's diagnosis of the existence of complicated pneumoconiosis." [*C.S.*] *v. W. Va. Solid Energy, Inc.*, BRB Nos. 06-0402 BLA/A, slip op. at 9 (Feb. 28, 2007)(unpub.). Consequently, we reject claimant's contention.

The remainder of claimant's motion represents contentions previously addressed and rejected by the Board. There have been no changes in Board or circuit court law that would affect the Board's previous disposition. Consequently, claimant's Motion for Reconsideration *En Banc* is denied and the case is remanded to the administrative law judge for further consideration.

[3] The law of the United States Court of Appeals for the Sixth Circuit is applicable as claimant was last employed in the coal mining industry in Kentucky. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989) (*en banc*).

Accordingly, we deny claimant's Motion for Reconsideration *En Banc* and affirm the Board's Decision and Order of November 25, 2008. 20 C.F.R. §802.409.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

We concur.

_____
ROY P. SMITH
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

McGRANERY, J., dissenting:

I respectfully dissent from the majority's decision to deny claimant's motion for reconsideration of the panel's decision vacating the administrative law judge's award of benefits. Like the majority's decision on the merits, the majority's decision on reconsideration rests upon a misunderstanding of a decision of the United States Court of Appeals for the Fourth Circuit and upon a usurpation of the administrative law judge's authority.

The majority asserts that in her decision on remand the administrative law judge again shifted the burden of proof to employer. When this case first came before this administrative law judge, she found that employer had failed to "persuasively establish" that the Category A x-ray opacities were not there or were not what they seemed to be. [*C.S.*] *v. W. Va. Solid Energy, Inc*., No. 05-BLA-0018, slip op. at 11 (Dec. 19. 2005). On appeal, the Board held 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 are not what they seem to be." [*C.S.*] *v. W. Va. Solid Energy, Inc.*, BRB Nos. 06-0402 BLA/A, slip op. at 1 (Feb. 28, 2007)(unpub.). In a footnote, the Board expressed its agreement with an unpublished decision of the Fourth Circuit, *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006)(unpub.), holding that this administrative law judge had erroneously shifted the burden of proof to employer when purporting to apply the Fourth Circuit's teaching in *Eastern Assoc. Coal Corp. v. Director, OWCP*, [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000). In *Lambert*, the Fourth Circuit quoted the portion of the administrative law judge's statement of the law which troubled the court:

> [I]f claimant meets the congressionally defined condition, that is, if he establishes that he has a condition that manifests itself on x-ray with opacities greater than one centimeter, he is entitled to the irrebuttable presumption of total disability due to pneumoconiosis, unless there is affirmative evidence under prong A, B, or C that persuasively establishes either that these opacities do not exist, or that they are the result of a disease process unrelated to his exposure to coal mine dust.

(J.A. 416; emphasis added.) *Lambert*, slip op. at 5.

The administrative law judge's first decision in the case at bar contained identical language to that quoted by the court. Of course, the administrative law judge's decision was issued on December 21, 2005, before the administrative law judge had the benefit of the Fourth Circuit's analysis in *Lambert*, issued on November 17, 2006. In its order vacating the administrative law judge's decision, the Board quoted the same language cited by the court and the Board quoted from the court's opinion in *Lambert*, stating that the Fourth Circuit had 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.").

[*C.S.*], BRB Nos. 06-0402 BLA/A, slip op. at 6-7, *quoting Lambert*, slip op. at 2.

On remand, the administrative law judge followed the Board's instructions. She analyzed the relevant evidence before deciding to invoke the irrebuttable presumption of total disability. She stated:

> Therefore, inasmuch as the other evidence does not affirmatively show that the opacities are not there, or are not what they seem to be, the Claimant's x-ray evidence under prong (A) and CT scan evidence under prong (C) does not lose force. Consequently, Section 21 (c)(3) and the implementing regulations at 20 C.F.R. §718.304 compel me to invoke the irrebuttable presumption that Mr. S. is totally disabled due to pneumoconiosis.

Decision and Order on Remand at 8.

On review of the administrative law judge's decision on remand, the majority of the Board held that the administrative law judge had again misallocated the burden of proof because the administrative law judge had replaced "persuasively establish" with "affirmatively show" in her analysis of the evidence. The majority explained:

> [A]though the administrative law judge eliminated the "persuasively establish" language from her decision on remand, as employer asserts, the administrative law judge imposed the same burden on employer. Employer's Brief at 13-14. Rather than consider, with the burden of proof on claimant, whether the weight of all relevant evidence establishes the existence of complicated pneumoconiosis before invoking the irrebuttable presumption, the administrative law judge weighed the x-ray evidence, and then required employer to "affirmatively show" or "establish" that the x-ray opacities were not there or were not what they seemed to be."

C.S. v. W. Va. Solid Energy, Inc., BRB No. 08-0159 BLA, slip op. at 5 (Nov. 25, 2008)(unpub.)(McGranery, J., dissenting).

The majority thereby equated "persuasively establish" with "affirmatively show." The majority's statement contravenes the Fourth Circuit's teaching in *Lambert*, that "affirmatively show" is an acceptable standard, unlike "persuasively establish." The court stated: "Nor does *Scarbro* require that evidence "persuasively establish" (as opposed to 'affirmatively show') that the opacities

discovered in a claimant's lung are not what they seem." *Lambert*, slip op. at 5 (emphasis added). The court thereby declared that the two standards are different and that "affirmatively show" "as opposed to" "persuasively establish," is a proper formulation of the standard. In proposing application of the "affirmatively show" standard, the Fourth Circuit was demonstrating the difference between that evidence which is sufficient to undermine the credibility of the opposing party's evidence, as opposed to that evidence which is necessary to disprove the opposing party's evidence. The administrative law judge properly understood and applied the Fourth Circuit's teaching when she reconsidered the evidence on remand. The majority's holding that she again misallocated the burden of proof is not supported by reason or law.

The majority's remaining allegations of error reflect the majority's failure to recognize the limited scope of the Board's review. Even though the administrative law judge provided valid reasons for crediting Dr. Forehand's opinion as establishing complicated pneumoconiosis under prong (A) with x-ray evidence, and under prong (C) with CT scan evidence, but not under prong (B) with biopsy evidence, the majority directs her to reconsider Dr. Forehand's opinion in light of the biopsy evidence. That is irrational, as well as an encroachment on the administrative law judge's authority. *See Harlan Bell Coal Co. v. Lemar*, 904 F.2d 1042, 1046, 14 BLR 2-1, 2-7 (6th Cir. 1990)(holding that the "Board engaged in a *de novo* review of the facts and clearly exceeded its statutory authority . . . .") Similarly unsound is the Board's direction to reconsider Dr. Dahhan's opinion since substantial evidence supports her finding that even without consideration of Dr. Dahhan's second x-ray reading, the preponderance of the x-ray evidence establishes the existence of complicated pneumoconiosis. Furthermore, in requiring the administrative law judge to reconsider Dr. Dahhan's opinion, the majority ignores the fact that she discredited it, *inter alia*, because he refused to discuss the x-ray and CT scan evidence of complicated pneumoconiosis of which he was well aware. The validity of the administrative law judge's reason for discrediting the doctor's opinion is not addressed by the majority because it cannot be denied. In directing the administrative law judge to reconsider the opinions of Drs. Forehand and Dahhan, the majority has clearly exceeded the Board's authority.

The Sixth Circuit is emphatic that it is for the administrative law judge as factfinder to "decide whether a physician's report is 'sufficiently reasoned,' because such a determination is "essentially a credibility matter'." *Wolf Creek Collieries v. Director, OWCP*, 298 F.3d 511, 522, 22 BLR 2-495, 2-512 *quoting Peabody Coal Co. v. Groves*, 277 F.3d 829, 836, 22 BLR 2-320, 2-330 (6th Cir. 2002), *quoting Director, OWCP v. Rowe*, 710 F.2d 251, 255, 5 BLR 2-99, 2-103 (6th Cir. 1983). Apparently, the majority has forgotten that, like the court, the

Board "is required to defer to the [administrative law judge's] assessment of the physicians' credibility." *Jericol Mining, Inc. v. Napier*, 301 F.3d 703, 713, 22 BLR 2-537, 553 (6th Cir. 2002), *citing Groves*, 277 F.3d at 836, 22 BLR at 2-330.

In sum, the majority's decision to deny claimant's motion for reconsideration suffers from the same defects as the panel's decision: both reflect a misunderstanding of the Fourth Circuit's teaching in *Lambert*, and a refusal to observe the limitations on the Board's authority to review administrative law judge decisions.

Accordingly, I respectfully dissent.

_____
REGINA C. McGRANERY
Administrative Appeals Judge

I concur.

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BETTY JEAN HALL
Administrative Appeals Judge