BRB No. 06-0443 BLA

ZANE CHILDRESS	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED: 03/27/2007
	)	
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.

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

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

DOLDER, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order on Remand Awarding Benefits (2003-BLA-0174) of Administrative Law Judge Linda S. Chapman 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). This is the third time that this case has been before the Board.[1] In a Decision and Order dated June 17, 2004, Judge Chapman (the

[1] Claimant filed an application for benefits on April 13, 1992, which was denied in a Decision and Order dated January 10, 1994 by Administrative Law Judge Reno E. Bonfanti because the evidence was insufficient to establish total disability. Claimant filed a petition for modification on December 14, 1994. In a Decision and Order issued on January 29, 1996, Administrative Law Judge Charles P. Rippey determined that claimant did not establish the existence of pneumoconiosis or that he was totally disabled.

administrative law judge) considered claimant's request for modification of a denial of benefits. The administrative law judge found that the x-ray reading in which Dr. Pathak diagnosed Category B large opacities established invocation of the irrebuttable presumption of total disability due to pneumoconiosis set forth in 20 C.F.R. §718.304. The administrative law judge then discredited the medical opinions of Drs. Zaldivar, Jarboe, Morgan, Ghio and Dahhan diagnosing the absence of complicated pneumoconiosis, finding that they were equivocal because they did not identify exactly what process caused the large opacities seen on x-ray and CT scan.

Finally, the administrative law judge found that the x-ray and CT scan interpretations relied on by employer are inconclusive and not affirmative evidence that the large masses are not there, or are due to another disease process. 2004 Decision and Order at 28. Therefore, *citing Eastern Associated Coal Corp. v. Director, OWCP [Scarbro]*, 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000), the administrative law judge concluded that Dr. Pathak's x-ray reading showing Category B large opacities did not "lose force" and was sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304, and, consequently, sufficient to establish a change in conditions pursuant to 20 C.F.R. §725.310 (2000).[2] *Id*. Upon

---

Accordingly, modification and benefits were denied. In *Childress v. Island Creek Kentucky Mining [sic]*, BRB No. 96-0726 BLA (May 30, 1997)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 103. Claimant requested modification on April 20, 1998. Administrative Law Judge Jeffrey Tureck initially assumed that a change in conditions was shown by evidence that claimant suffers from pneumoconiosis. Judge Tureck then considered the merits and found that claimant failed to establish total disability. Accordingly, benefits were denied. Claimant appealed the denial of benefits to the Board and in *Childress v. Island Creek Coal Co.*, BRB No. 99-1324 BLA (October 31, 2000)(unpub.), the Board affirmed the denial of benefits. Director's Exhibit 132. Claimant subsequently requested modification pursuant to 20 C.F.R. §725.310 on July 27, 2001. Following a hearing on claimant's request for modification, Administrative Law Judge Richard T. Stansell-Gamm issued a remand order, at claimant's request, to allow for the development of additional medical evidence. On April 30, 2003, after the completion of such development, the case was returned to the Office of Administrative Law Judges for a hearing before Administrative Law Judge Linda S. Chapman.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725 and 726 (2002). The amendments to 20 C.F.R. §725.310 do not apply to cases, such as the present one, that were pending on January 19, 2001. *See* 20 C.F.R. §725.2.

consideration of the merits of entitlement, the administrative law judge again found the evidence sufficient to invoke the irrebuttable presumption of total disability due to pneumoconiosis at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits.

Employer appealed to the Board, arguing that the administrative law judge applied an improper standard in weighing the conflicting x-ray evidence. Employer further asserted that the administrative law judge did not properly weigh the medical opinions or the CT scan evidence. The Director, Office of Workers' Compensation Programs (the Director), concurred with employer's argument that the administrative law judge applied an improper standard to invoke the irrebuttable presumption of total disability at 20 C.F.R. §718.304.

In a Decision and Order issued on July 7, 2005, the Board vacated the administrative law judge's finding that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis and remanded the case to the administrative law judge for reconsideration. *Childress v. Island Creek Coal Co.*, BRB No. 04-0779 BLA (July 7, 2005)(unpub.). The Board held that the administrative law judge applied an interpretation of the decision of the United States Court of Appeals for the Fourth Circuit in *Scarbro*, 220 F.3d 250, 22 BLR 2-93, which improperly shifted the burden of proof to employer to disprove the existence of complicated pneumoconiosis after claimant submitted one x-ray reading in which the physician diagnosed an opacity greater than one centimeter in diameter. The majority of 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. Judge McGranery dissented on this issue, indicating that she would have held that an administrative law judge can properly question the credibility of a medical report in which the physician attributes a condition to a disease that is not related to pneumoconiosis or coal dust exposure if there is no corroborating evidence in the record that claimant has ever had this disease.

On remand, the administrative law judge again determined that claimant established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 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. Neither the Director nor claimant has filed a brief in response to employer's appeal.

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 relevant to Section 718.304(a) consists of twenty-six readings of six chest x-rays. Dr. Navani read the x-ray dated July 5, 2001, as positive for simple pneumoconiosis. Director's Exhibit 138. Dr. Dahhan read the film dated May 4, 2002, as positive for simple pneumoconiosis. *Id*. Dr. Wiot classified the same x-ray as unreadable. Director's Exhibit 144. Dr. Pathak, a B reader, interpreted the film dated February 24, 2003, as positive for simple pneumoconiosis and also identified Category B large opacities. Claimant's Exhibit 1. The remaining twenty-two readings were negative for pneumoconiosis, but the physicians noted the presence of masses larger than one centimeter in size or areas of infiltrates and fibrosis. Director's Exhibits 144, 159, 157; Employer's Exhibits 2-4, 12, 17.

The administrative law judge prefaced her consideration of the x-ray evidence with a discussion of *Scarbro*. The administrative law judge concluded 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 5-6 (emphasis in original). The administrative law judge determined that because all of the physicians, with the exception of Dr. Navani, described conditions that appear on an x-ray as a one centimeter or greater opacity, the preponderance of the x-ray evidence "reflects agreement with Dr. Pathak's conclusion that the large opacities he identified on x-ray are actually there." *Id*. at 7. The administrative law judge then considered whether the preponderance of the x-ray

evidence establishes that the Category B large opacities diagnosed by Dr. Pathak are not what they seem to be, *i.e.*, are unrelated to pneumoconiosis or coal dust exposure.

The administrative law judge noted that Dr. Pathak indicated that the large opacities observed on x-ray are due to pneumoconiosis. Decision and Order on Remand at 9; Claimant's Exhibit 1. The administrative law judge determined that Drs. Wheeler, Scott, Hippensteel, Scatarige, Pendergrass, Repsher, and Fino 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*. at 9-10; Director's Exhibits 144, 159, 157; Employer's Exhibits 2-4, 12, 17. The administrative law judge found that there is no evidence in the record that claimant ever suffered from inflammatory disease, tuberculosis, granulomatous disease, histoplasmosis, pneumonia, cancer, or any of the other conditions to which these physicians referred. *Id*. Citing the Board's instructions that she must not place the burden upon employer to rebut Dr. Pathak's x-ray reading, 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 of these physicians support the conclusion that Category B 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. at 10.

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 Dr. Pathak's x-ray reading was 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 a single x-ray reading that was positive for large opacities, employer was required to affirmatively establish 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 clearly 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 B opacities observed by Dr. Pathak were not there or not what they seemed to be, effectively shifted the burden of proof to employer once claimant submitted Dr. Pathak's x-ray reading.[4] However, "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 to the administrative law judge for reconsideration of whether claimant has established the presence of large opacities as defined in prong (A) of §921(c)(3) of the Act and 20 C.F.R. §718.304(a) by a preponderance of the evidence. *See Adkins v. Director, OWCP*, 958 F.2d 49, 16 BLR 2-61 (4th Cir. 1992).

---

[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, by contrast, Dr. Pathak diagnosed large opacities on claimant's February 24, 2003 x-ray while Drs. Wheeler, Scott, and Scatarige classified the same x-ray as completely negative for any abnormalities consistent with the existence of pneumoconiosis. Claimant's Exhibit 1; Employer's Exhibit 12.

[4] The administrative law judge also did not accurately summarize the Fourth Circuit's holding in *Scarbro*. She indicated that the court held that if the x-ray evidence, autopsy or biopsy evidence, or other medical evidence establishes the presence of opacities larger than one centimeter in diameter or their equivalent, the irrebuttable presumption is invoked unless there is evidence that affirmatively shows either that the opacities are not there, or that they are not what they seem to be. Decision and Order on Remand at 5-6. In actuality, the court referred only to x-ray evidence that "vividly displays opacities exceeding one centimeter." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. In addition, a recent unpublished case issued by the Fourth Circuit, supports the view that the administrative law judge has not correctly interpreted *Scarbro*. 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 (4th Cir. Nov. 17, 2006) (unpub.), slip op. at 2 (citations omitted). The court emphasized that the burden of proof remains with the claimant at all times. *Id*.

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. Because the administrative law judge did not apply the appropriate standard in weighing the conflicting x-ray evidence, we also vacate the administrative law judge's findings with respect to the x-ray interpretations submitted by Drs. Wheeler, Scott, Hippensteel, Scatarige, Pendergrass, Repsher, and Fino and instruct the administrative law judge to reconsider them on remand. In resolving the conflict between Dr. Pathak's reading and the contrary interpretations of record on remand, the administrative law judge must weigh the credibility of Dr. Pathak's attribution of the large opacities to pneumoconiosis against the credibility of the contrary interpretations of record. The fact that a physician has not identified a definitive alternate source for the x-ray findings does not necessarily undermine a negative x-ray interpretation, provided that the physician sets forth a rational explanation of why neither pneumoconiosis nor coal dust exposure is the cause of the abnormalities observed on x-ray. *See generally 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).

With respect to 20 C.F.R. §718.304(c), employer contends that the administrative law judge's findings regarding the CT scan evidence must be vacated as the administrative law judge shifted the burden of proof to employer and erred in discrediting the CT scan readings because the physicians did not definitively diagnose an alternative etiology for the abnormalities identified on the scans.[5] These contentions have merit, as

[5] The record contains ten readings of three computerized tomography (CT) scans. Dr. Navani interpreted the scan dated August 1, 2001, as positive for simple pneumoconiosis. He also observed the presence of a 2 centimeter mass in the right upper lung, a 2.5 centimeter mass near the lower right hilum, and a 1 centimeter mass in the right apex. Dr. Navani indicated that the masses were compatible with inflammatory disease, possibly tuberculosis or cancer, and granulomatous disease. Director's Exhibit 158. Dr. Forehand reviewed the CT scan obtained on August 9, 2002, and diagnosed complicated pneumoconiosis based upon the presence of a large opacity in the right upper lung. Claimant's Exhibit 3. Dr. Antoun interpreted this scan as containing findings that could be compatible with the sequelae of coal workers' pneumoconiosis. Director's Exhibit 152. The remaining physicians who interpreted CT scans did not diagnose pneumoconiosis. They detected masses larger than one centimeter in size, indicated that their appearance was not consistent with pneumoconiosis, and suggested that they might be due to cancer, tuberculosis, inflammatory disease, or granulomatous disease. Director's Exhibits 154, 155, 157; Employer's Exhibit 12.

the administrative law judge applied the improper standard that she used when weighing the x-ray evidence at 20 C.F.R. §718.304(a), by shifting the burden of proof to employer. We must vacate, therefore, the administrative law judge's finding under 20 C.F.R. §718.304(c) and remand the case to the administrative law judge for reconsideration of the CT scan evidence. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118.

In addition, the administrative law judge's inaccurate application of *Scarbro* has affected her weighing of the medical evidence that is not premised directly upon x-ray or CT scan interpretations under 20 C.F.R. §718.304(c). Employer argues that the administrative law judge erred in excluding the opinions of Drs. Fino and Jarboe from consideration and in discrediting the opinions of Drs. Zaldivar, Morgan, Dahhan, and Ghio. Each of these physicians stated that claimant does not have pneumoconiosis in any form and that the x-ray and CT scan findings are consistent with cancer or various inflammatory disease processes. Contrary to employer's contention, however, the administrative law judge did not exclude the opinions of Drs. Fino and Jarboe. Rather, the administrative law judge gave these opinions, and the opinions of employer's other experts, little weight, as the physicians "speculated" as to the cause of the x-ray and CT scan findings or relied upon the report of another physician who identified possible etiologies of the abnormalities noted on claimant's x-rays and CT scans. Decision and Order on Remand at 11-13. However, because the administrative law judge analyzed this evidence in the context of employer having the burden to disprove the presence of large opacities caused by pneumoconiosis, we must vacate the administrative law judge's findings with respect to these opinions. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118.

On remand, the administrative law judge is instructed to reconsider the medical opinions of Drs. Fino, Jarboe, Zaldivar, Morgan, Dahhan, and Ghio pursuant to 20 C.F.R. §718.304(c), while being mindful of the fact that a physician's failure to conclusively identify an alternate source for the finding of Category B opacities does not necessarily undermine an opinion that claimant does not have pneumoconiosis, provided that the physician sets forth a rational and documented explanation of why the abnormalities observed on x-ray are not due to pneumoconiosis or coal dust exposure. In addition, employer is correct in asserting that the administrative law judge must address 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 pneumoconiosis. *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).

In summary, we vacate the administrative law judge's finding that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.304 and remand the case to the administrative law judge for reconsideration. On remand, the administrative law judge cannot base a finding of invocation of the irrebuttable presumption upon the mere introduction of legally sufficient evidence of complicated pneumoconiosis. The administrative law judge must weigh together all of the evidence relevant to the presence or absence of pneumoconiosis in any form, resolve any conflict, and determine whether claimant has met his burden of proving that he has the condition described in 20 C.F.R. §718.304 by a preponderance of the evidence. *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Because the administrative law judge relied upon her determination that claimant invoked the irrebuttable presumption to find that claimant established a change in conditions under 20 C.F.R. §725.310 (2000), we must also vacate this finding. The administrative law judge must reconsider on remand whether claimant has established a change in conditions or a mistake in a determination of fact in the prior denial of benefits before reaching the merits of entitlement. 20 C.F.R. §725.310 (2000); *see Jessee v. Director, OWCP*, 5 F.3d 723, 18 BLR 2-26 (4th Cir. 1993). 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. *Daniels Co. v. Mitchell*, F.3d , 2007 WL 765269 (4th Cir. 2007).

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is vacated and the case is remanded to the administrative law judge for further proceedings consistent with this opinion.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur.

_____
ROY P. SMITH
Administrative Appeals Judge

McGRANERY, Administrative Appeals Judge, concurring:

I concur in the majority's decision vacating the administrative law judge's decision awarding benefits because the administrative law judge again misstated the Fourth Circuit decision in *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 f.3d 250, 22 BLR 2-93 (4th Cir. 2000).

In *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. November 17, 2006)(unpublished). The Fourth Circuit held that a similar misstatement of *Scarbro* by the same administrative law judge essentially poisoned her decision. Accordingly, the court vacated the award of benefits, but expressed confidence that the same administrative law judge could capably resolve the claim on remand.

I would flatly reject, however, employer's argument that the administrative law judge erred in her analysis of the medical evidence. In another unpublished decision, *Yogi Mining Co. v. Fife*, No. 04-2140 (4th Cir. Dec. 7, 2005)(unpublished), the Fourth Circuit expressly approved the administrative law judge's discrediting of employer's doctors' opinions because they were equivocal on the abnormalities shown and failed to explain adequately the contrary data, *i.e.*, record evidence indicating the miner did not have tuberculosis.

_____

REGINA C. McGRANERY
Administrative Appeals Judge