BRB No. 08-0680 BLA

B.H. Claimant-Respondent v. C S & S COAL COMPANY and AMERICAN INTERNATIONAL SOUTH INSURANCE COMPANY c/o AIG DOMESTIC CLAIMS, INCORPORATED Employer/Carrier-Petitioners DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR Party-in-Interest	)	DATE ISSUED: 05/29/2009 DECISION and ORDER

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

Sarah Y. M. Kirby (Sands Anderson Marks & Miller), Blacksburg, Virginia, for employer/carrier.

Sarah M. Hurley (Carol A. DeDeo, Deputy Solicitor; Rae Ellen Frank James, 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 Awarding Benefits (07-BLA-5575) of Administrative Law Judge Linda S. Chapman (the administrative law judge) rendered on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq.* (the Act). The administrative law judge credited claimant with 26.36 years of coal mine employment[1] and adjudicated this claim under the regulations at 20 C.F.R. Part 718. The administrative law judge determined that, although the medical evidence of record does not establish the existence of simple pneumoconiosis pursuant to 20 C.F.R. §§718.202(a), 718.107(a),[2] claimant established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304, and that claimant was therefore entitled to the irrebuttable presumption of total disability due to pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer contends that the administrative law judge erred in invoking the irrebuttable presumption because she did not consider whether the evidence under 20 C.F.R. §718.304(a), (b), or (c) independently established both a chronic dust disease of the lung and the additional criteria set forth within prongs (a), (b), or (c), to satisfy the regulatory definition of complicated pneumoconiosis. Employer additionally asserts that the administrative law judge erred in placing the burden of proof on employer to prove that the large opacities seen on the claimant's x-rays were not complicated pneumoconiosis. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response, urging the Board to reject employer's argument that a miner must prove separately that he suffers from a chronic dust disease of the lung, in addition to proving that he suffers from large opacities of complicated pneumoconiosis, in order to invoke the irrebuttable presumption by x-ray evidence.[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 law. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30

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[1] The law of the United States Court of Appeals for the Fourth Circuit is applicable, as claimant's last coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

[2] Relevant to the existence of pneumoconiosis, the record contains x-ray, biopsy, medical opinion, and computerized tomography (CT) scan evidence.

[3] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant established 26.36 years of coal mine employment. *See Coen v. Director, OWCP*, 7 BLR 1-30, 1-33 (1984); *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

To be entitled to benefits under the Act, claimant must establish the existence of pneumoconiosis, that the pneumoconiosis arose out of coal mine employment, and that the pneumoconiosis is totally disabling. 30 U.S.C. §901; 20 C.F.R. §§718.3, 718.202, 718.203, 718.204.

Section 411(c)(3) of the Act, implemented by Section 718.304 of the regulations, provides that 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 that would yield results equivalent to (A) or (B). 30 U.S.C. §921(c)(3); 20 C.F.R. §718.304. The United States Court of Appeals for the Fourth Circuit has held that, "[b]ecause prong (A) sets out an entirely objective scientific standard" for diagnosing complicated pneumoconiosis, that is, an x-ray opacity greater than one centimeter in diameter, the administrative law judge must determine whether a condition that is diagnosed by biopsy or autopsy under prong (B) or by other means under prong (C) would show as a greater-than-one-centimeter opacity if it were seen on a chest x-ray. *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 255, 22 BLR 2-93, 2-100 (4th Cir. 2000); *Double B Mining, Inc. v. Blankenship*, 177 F.3d 240, 243, 22 BLR 2-554, 2-561-62 (4th Cir. 1999). In determining whether claimant has established invocation of the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304, the administrative law judge must weigh together all of the evidence relevant to the presence or absence of complicated pneumoconiosis. *Lester v. Director, OWCP*, 993 F.2d 1143, 1145-46, 17 BLR 2-114, 2-117-18 (4th Cir. 1993); *Gollie v. Elkay Mining Corp*., 22 BLR 1-306, 1-311 (2003); *Melnick v. Consolidation Coal Co*., 16 BLR 1-31, 1-33-34 (1991)(*en banc*).

Employer initially contends that the administrative law judge erred in finding the existence of complicated pneumoconiosis established without first determining whether the evidence under 20 C.F.R. §718.304(a), (b), or (c) established the existence of a chronic dust disease of the lung. Employer's Brief at 8. The Director responds, asserting that, to the extent employer argues that a miner must prove that he suffers from a chronic dust disease of the lung, in addition to proving that he suffers from large opacities of complicated pneumoconiosis in order to invoke the irrebuttable presumption by x-ray evidence pursuant to 20 C.F.R. §718.304(a), employer is mistaken. Director's Brief at 2. The Director, however, notes that "[a] claimant attempting to invoke the irrebuttable presumption with evidence other than chest x-rays classified as Category 1, 2, 3, A, B, or

C in the ILO system must, of course, prove that the evidence reveals a chronic dust disease of the lung." Director's Brief at 3 n.3.

We agree with the Director to the extent that Section 718.304(a) requires only that pneumoconiosis have been diagnosed by x-ray evidence establishing the existence of Category A, B, or C large opacities under the ILO system for classifying pneumoconiosis. *See* 20 C.F.R. §718.304(a); Director's Response at 2. Additional proof of a chronic dust disease of the lung is not required because pneumoconiosis, by definition, is "a chronic dust disease of the lung" arising out of coal mine employment. 30 U.S.C. §902(b). To the extent employer argues that the other methods of establishing complicated pneumoconiosis require additional proof of a chronic dust disease, we need not resolve that issue on the facts of this case.[4]

However, there is merit in employer's argument that the administrative law judge erred in finding that the evidence establishes that the large masses seen on claimant's x-rays are complicated pneumoconiosis. As employer asserts, the administrative law judge improperly placed the burden of proof on employer to establish that the large masses seen on x-ray were not pneumoconiosis, rather than require that claimant establish the existence of the disease. Employer's Brief at 11.

The administrative law judge prefaced her consideration of the x-ray evidence with a discussion of *Scarbro*:

> In determining the validity of claims, all relevant evidence must be considered. However, once [claimant] has provided evidence satisfying one of these prongs, if the [e]mployer can affirmatively show that the opacity is not there or is something other than pneumoconiosis, the x-ray loses force, and [claimant] is not entitled to the benefits of the presumption.

Decision and Order at 14 (citations omitted). The administrative law judge noted that claimant had submitted "x-ray evidence that satisfies the requirements of prong (A), in the form of the three interpretations with findings of Category A or B opacities caused by coal dust exposure." *Id*. However, because there was other x-ray evidence, the administrative law judge stated that "all of the evidence must be considered and evaluated to determine whether the evidence as a whole indicates a condition of such

[4] The administrative law judge found that the biopsy evidence is negative for pneumoconiosis. Decision and Order at 11. The administrative law judge further found that the CT scans were not sufficient, standing alone, to establish complicated pneumoconiosis, but instead found them to be supportive of the x-ray evidence. Decision and Order at 17 n.9.

severity that it would produce opacities greater than one centimeter in diameter on an x-ray." *Id*. at 15 (internal citation omitted).

Relying on the fact that every physician who reviewed claimant's x-rays and CT scans noted either category A or B opacities, or a corresponding mass or process in claimant's lungs that measured greater than one centimeter, the administrative law judge determined that "the preponderance of the evidence clearly shows that [claimant] has a condition that shows up on x-ray as a one centimeter or greater opacity in his lungs." *Id*.

Further finding that none of employer's physicians established that the masses seen on x-ray were not due to pneumoconiosis, the administrative law judge determined that "the preponderance of the x-ray evidence establishes that [claimant] has a condition that has resulted in the presence of a large opacity on x-ray, due to his 26 years of occupational exposure to coal dust." *Id*. at 18. The administrative law judge explained:

> [T]he [e]mployer has not offered affirmative evidence that this large opacity of pneumoconiosis is due to something other than exposure to coal dust. Indeed, the record contains no evidence of exposure to causative agents other than coal dust, such as asbestos or tuberculosis. Nor are there any treatment records indicating that [claimant] has ever been diagnosed with or treated for tuberculosis, granulomatous [disease], or any other pulmonary impairment that would produce opacities on an x-ray. Thus, I find that the preponderance of the evidence points to coal dust exposure as the etiology for [claimant's] unanimously acknowledged radiographic abnormalities.
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> I find that the suggestions [on the x-ray and CT scan reports] of tuberculosis, granulomatous disease, histoplasmosis, or pneumonia by Dr. Wheeler, Dr. Scatarige, and Dr. Scott are equivocal and speculative, because they did not offer any additional information to support their opinion[s] that [claimant's] x-rays showed such conditions, instead of pneumoconiosis. Thus, I have relied on the interpretations by Dr. DePonte and Dr. Rasmussen, who concluded that [claimant's] x-rays showed simple pneumoconiosis as well as category A or B opacities.

Id.

Contrary to the administrative law judge's analysis, claimant bears the burden of establishing entitlement to benefits and bears the risk of non-persuasion if his evidence does not establish a requisite element of entitlement. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. Further, the Fourth Circuit stated in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006)(unpub.), that its decision in *Scarbro* did not impose a

burden on the party opposing entitlement to affirmatively establish that opacities are not there or are not what they seem to be, and emphasized that the burden of proof remains with claimant at all times. As the administrative law judge failed to place the burden of establishing the existence of complicated pneumoconiosis on claimant, we must vacate the administrative law judge's findings pursuant to 20 C.F.R. §718.304 and remand this case for further consideration. On remand, the administrative law judge must reconsider whether the evidence of record establishes that the large masses seen on claimant's x-rays are complicated pneumoconiosis. In so doing, the administrative law judge must bear in mind that the burden of proof remains on claimant at all times, and that it is not employer's burden to rule out pneumoconiosis as the cause of the large masses seen on claimant's x-ray. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lambert*, No. 06-1154, slip op. at 2. Further, prior to determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established, the administrative law judge must first make specific credibility findings under subsections 718.304(a)-(c) as to whether the evidence supports a finding of complicated pneumoconiosis. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Melnick*, 16 BLR at 1-33-34.

We additionally find merit in employer's assertion that the administrative law judge erred in finding that the x-ray evidence supports a finding of complicated pneumoconiosis.[5] Contrary to the administrative law judge's findings, the record reflects that Drs. Wheeler, Scatarige, and Scott indicated that there were no parenchymal or pleural abnormalities consistent with pneumoconiosis on claimant's x-rays. Employer's Exhibits 1-5. Consequently, substantial evidence does not support the administrative law judge's determination to discount the x-ray interpretations of Drs. Wheeler, Scatarige,

[5] The record contains eight interpretations of four x-rays. The June 19, 2006 x-ray was interpreted as positive for complicated pneumoconiosis by Dr. Rasmussen, a B reader, and Dr. DePonte, a Board-certified radiologist and B reader. Director's Exhibit 12; Claimant's Exhibit 2. By contrast, Drs. Scott and Wheeler, Board-certified radiologists and B readers, interpreted this x-ray as negative for complicated pneumoconiosis, but opined that it was compatible with tuberculosis, histoplasmosis, or advanced granulomatous disease. Employer's Exhibits 4, 5. The March 13, 2007 x-ray was interpreted as positive for complicated pneumoconiosis by Dr. DePonte and as negative for pneumoconiosis, but consistent with tuberculosis, histoplasmosis, or a mycobacterial infection, by Dr. Scatarige, a Board-certified radiologist and B reader. Claimant's Exhibit 1; Employer's Exhibit 3. The August 30, 2007 x-ray was interpreted as negative for pneumoconiosis, but consistent with tuberculosis, histoplasmosis, mycobacterium, and cancer, by Dr. Scatarige. Employer's Exhibit 1. And, the March 22, 2007 x-ray was interpreted as negative for pneumoconiosis, but consistent with conglomerate granulomatous disease, tuberculosis, or histoplasmosis, by Dr. Wheeler. Employer's Exhibit 2.

and Scott as equivocal.[6] *See Island Creek Coal Co. v. Compton*, 211 F.3d 203, 211, 22 BLR 2-162, 2-175 (4th Cir. 2000); *Lane v. Union Carbide Corp.*, 105 F.2d 166, 174, 21 BLR 2-34, 2-48 (4th Cir. 1997). Further, as employer asserts, the administrative law judge's finding that the x-ray interpretations of Drs. Wheeler, Scatarige, and Scott are equivocal is unexplainedly inconsistent with her finding, at 20 C.F.R. §718.202(a)(1), in which she credited these physicians' negative x-ray interpretations, over the positive interpretations of Drs. Rasmussen and DePonte, to find that the x-ray evidence does not support a finding of pneumoconiosis.[7] *See Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10, 21 BLR 2-587, 2-603 n.10 (4th Cir. 1999); *Lane Hollow Coal Co. v. Director, OWCP* [*Lockhart*], 137 F.3d 799, 802-03, 21 BLR 2-302, 2-311 (4th Cir. 1998); Decision and Order at 11. The administrative law judge must therefore reconsider the x-ray evidence under Section 718.304(a) and explain her findings on remand.

Pursuant to 20 C.F.R. §718.304(c), we additionally find merit in employer's contention that the administrative law judge failed to state a valid reason for finding that the CT scan reports of Drs. Byers and Sutherland support Dr. DePonte's and Dr. Rasmussen's x-ray readings of category A and B large opacities. As employer asserts,

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[6] The administrative law judge cited *Cooper v. Westmoreland Coal Co*., BRB No. 04-0589 BLA (March 24, 2005)(unpub.) in support of her determination to discount as equivocal the negative x-ray interpretations of Drs. Wheeler, Scatarige, and Scott under 20 C.F.R. §718.304(a). *Cooper* is distinguished from the instant case, as the radiologists in *Cooper* made questionable comments as to whether the mass they identified was, in fact, a Category A large opacity. In the instant case, however, Drs. Wheeler, Scatarige, and Scott were unequivocal that claimant does not have any large opacities consistent with pneumoconiosis. These doctors found no pneumoconiosis of any kind.

[7] Relevant to 20 C.F.R. §718.202(a)(1), the administrative law judge considered eight interpretations of four x-rays. Noting that the June 19, 2006 x-ray was read as positive by Dr. Rasmussen, a B reader, and by Dr. DePonte, a B reader and Board certified radiologist, and as negative by Drs. Wheeler and Scott, both dually qualified readers, the administrative law judge found this x-ray to be in equipoise. Noting that the March 13, 2007 x-ray was read as positive by Dr. DePonte and as negative by Dr. Scatarige, a dually qualified physician, the administrative law judge also found this x-ray to be in equipoise. Noting that the March 22, 2007 and August 30, 2007 x-rays were each interpreted as negative by Drs. Wheeler and Scatarige, and that there were no positive interpretations, the administrative law judge found these x-rays to be negative for pneumoconiosis. Weighing the x-ray evidence together, the administrative law judge concluded that "[g]iven the preponderance of negative readings by the most highly qualified physicians, I find that [claimant] has not established the existence of pneumoconiosis by virtue of the x-ray evidence." Decision and Order at 11.

this finding is inconsistent with the administrative law judge's finding that the CT scan readings of Drs. Byers and Sutherland were equivocal as to whether the masses seen were pneumoconiosis or cancer.[8] *See Mays*, 176 F.3d at 762 n.10, 21 BLR at 2-603 n.10; *Lockhart*, 137 F.3d at 802-03, 21 BLR at 2-311; Decision and Order at 14. Consequently, the administrative law judge must reconsider the CT scan evidence under Section 718.304(c) and explain the basis for her credibility determinations on remand.

To summarize, we instruct the administrative law judge, on remand, to reconsider whether claimant has satisfied his burden to establish that he has complicated pneumoconiosis. The administrative law judge must first determine whether the evidence in each category at subsection 718.304(a), (b), or (c) tends to establish the existence of complicated pneumoconiosis, also taking into consideration the equivalency requirements of subsections 718.304(b) and (c). Then she must weigh together the evidence at subsections 718.304(a)-(c) before determining whether invocation of the irrebuttable presumption pursuant to Section 718.304 has been established. *See Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18; *Gollie*, 22 BLR at 1-311; *Melnick* at 16 BLR 1-33-34. If so, the administrative law judge must then determine whether claimant's pneumoconiosis arose, at least in part, out of coal mine employment pursuant to Section 718.203. *See* 20 C.F.R. §718.203; *Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007).

[8] Relevant to 20 C.F.R. §718.304(c), the administrative law judge considered four interpretations of two CT scans. With respect to the July 26, 2006 CT scan, the administrative law judge observed that Dr. Sutherland reported that although the appearance of mass-like densities in claimant's chest was characteristic of complicated pneumoconiosis, he could not entirely exclude an underlying neoplastic process. Dr. Scott interpreted the same CT scan, opining that the nodes and probable centrilobular densities were due to an infectious process such as tuberculosis or histoplasmosis. With respect to the August 31, 2007 CT scan, the administrative law judge observed that Dr. Byers reported that the bilateral densities in claimant's lungs were probably part of progressive massive fibrosis and pneumoconiosis, but that an underlying malignancy could not be excluded, while Dr. Scott opined that the changes in claimant's lungs were due to tuberculosis or histoplasmosis. Considering this evidence, the administrative law judge concluded, "[g]iven the equivocal nature of the findings by Dr. Byers and Dr. Sutherland, as well as Dr. Scott's findings, I find that the CT scan interpretations do not establish that [claimant] has pneumoconiosis." Decision and Order at 14.

Accordingly, the administrative law judge's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and the case is remanded to the administrative law judge 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