BRB No. 06-0188 BLA

RICKY LEE DEEL	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BUCHANAN PRODUCTION COMPANY	)	
	)	DATE ISSUED: 11/30/2006
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 Linda S. Chapman, Administrative Law Judge, United States Department of Labor.

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

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

PER CURIAM:

Employer appeals the Decision and Order (04-BLA-5819) of Administrative Law Judge Linda S. Chapman awarding benefits 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 initially noted that the only contested issue before her was whether claimant was totally disabled due to pneumoconiosis. Although the administrative law judge found that the evidence was insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), she found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). The administrative law judge also found that the evidence was sufficient to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). The administrative law judge, therefore, found that claimant was entitled to benefits. Alternatively, the administrative

law judge found that the evidence was sufficient to establish the existence of complicated pneumoconiosis, thereby enabling claimant to establish entitlement based on the irrebuttable presumption at 20 C.F.R. §718.304. Accordingly, the administrative law judge awarded benefits. On appeal, employer argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv). Employer also argues that the administrative law judge erred in finding that the evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Neither claimant nor the Director, Office of Workers' Compensation Programs, has filed a response brief.

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).

Employer argues that the administrative law judge erred in finding the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).[1] In considering whether the medical opinion evidence was sufficient to establish total disability, the administrative law judge considered the opinions of Drs. Rasmussen and Dahhan.[2] Dr. Rasmussen opined that claimant's ventilatory impairment, combined with his very marked over-ventilation with exercise, would prevent claimant's performance of work consistent with his previous coal mine employment. Claimant's Exhibit 5. On the other hand, Dr. Dahhan opined that, from a functional respiratory standpoint, claimant retained the physiological capacity to continue his previous coal mining work. Employer's Exhibit 10.

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[1]Because no party challenges the administrative law judge's findings that the evidence is insufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(i)-(iii), these findings are affirmed. *Skrack v. Island Creek Coal Co.*, 7 BLR 1-710 (1983).

[2]The record also contains Dr. Ranavaya's October 3, 2002 report, wherein the doctor diagnosed complicated pneumoconiosis. Director's Exhibit 12. Based upon his diagnosis of complicated pneumoconiosis, Dr. Ranavaya opined that claimant satisfied "the total disability criteria for Federal Black Lung Benefits." *Id.* Although Dr. Ranavaya recognized that a diagnosis of complicated pneumoconiosis would entitle claimant to black lung benefits, he did not otherwise address whether claimant suffered from a totally disabling respiratory or pulmonary impairment. Consequently, the administrative law judge properly found that Dr. Ranavaya's opinion was not relevant to the issue of whether claimant was totally disabled pursuant to 20 C.F.R. §718.204(b)(2)(iv).

The administrative law judge discredited Dr. Dahhan's opinion because she found that there were several "glaring omissions" in his report. Decision and Order at 7. The administrative law judge explained that:

> Dr. Dahhan prepared his report on January 26, 2005, stating that he had reviewed the records submitted to him by Employer. Although he discussed Dr. Ranavaya's October 3, 2002 report, including his findings on pulmonary function and arterial blood gas studies, and his conclusion that the Claimant has complicated pneumoconiosis, he failed to mention that Dr. Ranavaya read the Claimant's x-ray as showing pneumoconiosis, and Category A opacities. He did, however, note Dr. Wheeler's interpretation of this x-ray.
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> Although Dr. Dahhan noted the interpretations by Dr. Patel and Dr. Scott of the Claimant's June 9, 2004 x-ray, he did not mention the interpretations of the Claimant's December 13, 2003 x-ray by Dr. Scott and Dr. Deponte. Regardless of the reason, the omission of any discussion or consideration of these records seriously detracts from the credibility of Dr. Dahhan's opinions.
>
> Although Dr. Dahhan reviewed Dr. Rasmussen's report, he did not address Dr. Rasmussen's detailed discussion of the results of the objective testing, or Dr. Rasmussen's conclusion that the test results showed very poor exercise tolerance, and at least moderate loss of lung function, as reflected by his reduced single breath diffusing capacity, his impairment in ventilatory capacity, and his impairment in oxygen transfer, or his conclusion that these findings would prevent the Claimant from returning to his previous coal mining work. Rather than address these findings, or explain why he apparently disagreed with them, Dr. Dahhan merely stated his opinion in a conclusory fashion. I find that Dr. Dahhan's opinions are not reasoned, much less well-reasoned, and lack any supporting rationale, and I accord them no weight.

Decision and Order at 7.

The administrative law judge found that Dr. Rasmussen's opinion was well-reasoned and adequately supported by the objective medical evidence. The administrative law judge, therefore, found that the medical opinion evidence was sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv).

Employer contends that the administrative law judge erred in her consideration of Dr. Dahhan's opinion. Employer argues that the administrative law judge erred in

according less weight to Dr. Dahhan's opinion because the doctor did not refute Dr. Rasmussen's conclusions and interpretation of the evidence. We agree. Claimant has the burden of submitting evidence to establish entitlement to benefits and bears the risk of non-persuasion if his evidence is found insufficient to establish a requisite element of entitlement. *Young v. Barnes & Tucker Co.*, 11 BLR 1-147 (1988); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985). Employer is not required to establish rebuttal of claimant's evidence. By requiring employer to refute Dr. Rasmussen's conclusions, the administrative law judge improperly shifted the burden of proof to employer.

The administrative law judge also did not explain why Dr. Dahhan's failure to address various x-ray interpretations "detract[ed] from the credibility of [his] opinions." Decision and Order at 7. It is well settled that x-rays, while useful in determining the presence or absence of disease, are not diagnostic of the extent of a respiratory disability. *Short v. Westmoreland Coal Co.*, 10 BLR 1-127, 1-129 n.4 (1987).

The administrative law judge found that Dr. Dahhan stated his opinion "in a conclusory fashion." However, the administrative law judge did not discuss Dr. Dahhan's basis for concluding that claimant was not totally disabled from a pulmonary standpoint; namely, that claimant had "no evidence of total or permanent pulmonary disability based on the various pulmonary function and arterial blood gas studies." Employer's Exhibit 10. Consequently, the administrative law judge, on remand, is instructed to reconsider whether Dr. Dahhan's opinion is sufficiently reasoned.[3] *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985).

In light of the above-referenced errors, we vacate the administrative law judge's finding that the medical opinion evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), and remand the case for further consideration. On remand, should the administrative law judge find the medical opinion evidence sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b)(2)(iv), she must weigh all the relevant evidence together, both like and unlike, to determine whether claimant has established total disability pursuant to 20 C.F.R. §718.204(b). *See Fields v.*

[3]Employer argues that the administrative law judge should have accorded less weight to Dr. Rasmussen's opinion because he relied upon non-qualifying objective tests. Employer's contention has no merit. Test results that exceed the applicable table values may be relevant to the overall evaluation of a miner's condition if a physician states that they show values indicative of reduced pulmonary function. *Marsiglio v. Director, OWCP*, 8 BLR 1-190 (1985). The determination of the significance of the test is a medical assessment for the doctor, rather than the administrative law judge. *See Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984).

Island Creek Coal Co., 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986), *aff'd on recon*. 9 BLR 1-236 (1987) (*en banc*).

In light of our decision to vacate the administrative law judge's finding that the evidence is sufficient to establish total disability pursuant to 20 C.F.R. §718.204(b), we also vacate the administrative law judge's finding that the evidence is sufficient to establish that claimant's total disability is due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c).

Employer also contends that the administrative law judge erred in finding the evidence sufficient to establish the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Section 718.304 provides that there is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis if (A) an x-ray of the miner's lungs shows an opacity greater than one centimeter; (B) a biopsy or autopsy shows massive lesions in the lung; or (C) when diagnosed by other means, the condition could reasonably be expected to reveal a result equivalent to (A) or (B). *See* 20 C.F.R. §718.304.[4]

[4]Section 718.304 provides in relevant part:

> There is an irrebuttable presumption that a miner is totally disabled due to pneumoconiosis...if such miner is suffering...from a chronic dust disease of the lung which:
>
> > (a) When diagnosed by chest X-ray...yields one or more large opacities (greater than 1 centimeter in diameter) and would be classified in Category A, B, or C...; or
> >
> > (b) When diagnosed by biopsy or autopsy, yields massive lesions in the lung; or
> >
> > (c) When diagnosed by means other than those specified in paragraphs (a) and (b) of this section, would be a condition which could reasonably be expected to yield the results described in paragraph (a) or (b) of this section had diagnosis been made as therein described: *Provided, however,* That any diagnosis made under this paragraph shall accord with acceptable medical procedures.

20 C.F.R. §718.304.

The introduction of legally sufficient evidence of complicated pneumoconiosis does not automatically qualify a claimant for the irrebuttable presumption found at 20 C.F.R. §718.304. 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*); *Truitt v. North American Coal Corp.*, 2 BLR 1-199 (1979), *aff'd sub nom. Director, OWCP v. North American Coal Corp.*, 626 F.2d 1137, 2 BLR 2-45 (3d Cir. 1980).

In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), 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." *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101. The Fourth Circuit 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. 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 (case citation omitted).

In this case, the administrative law judge cited the holdings of the Fourth Circuit in *Scarbro*. *See* Decision and Order at 8-9. However, the administrative law judge also stated that:

> [I]f the Claimant meets the congressionally defined condition, that is, if he establishes that he has a condition that manifests itself on x-rays 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.

Decision and Order at 10 (emphasis added).

The Fourth Circuit, in an unpublished decision, recently held that this *identical language* "misstates *Scarbo*" and appears to shift the burden of proof to employer. *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpublished). The Fourth Circuit 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.").

Lambert, slip op. at 2. Because the administrative law judge, in misstating *Scarbro*, appeared to shift the burden of proof to the employer in *Lambert*, the Fourth Circuit found it necessary to remand the case for reconsideration.

We similarly hold 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 that they are not what they seem to be.[5] Consequently, we

[5]We recognize that unpublished decisions are not considered binding precedent in the Fourth Circuit. *See* Local Rule 36(c) of the Fourth Circuit ("Citation of this Court's unpublished dispositions in briefs and oral arguments in this Court and in the district courts within this Circuit is disfavored, except for the purpose of establishing res judicata, estoppel, or the law of the case."). While we agree with its reasoning, our holding is not based exclusively upon the Fourth Circuit's decision in *Clinchfield Coal Co. v. Lambert*, No. 06-1154 (4th Cir. Nov. 17, 2006) (unpublished). Rather, our holding is based upon a review of the administrative law judge's individual statements in the instant case. These

vacate the administrative law judge's finding that claimant is entitled to the irrebuttable presumption at 20 C.F.R. §718.304 and remand the case for reconsideration.[6]

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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BETTY JEAN HALL
Administrative Appeals Judge

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statements appear to indicate that she improperly shifted the burden of proof to employer. On remand, the administrative law judge should weigh all of the relevant evidence together to determine whether claimant has established the existence of complicated pneumoconiosis by a preponderance of the evidence.

[6]Employer argues that the administrative law judge erred in discrediting the interpretations of physicians who found abnormalities consistent with tuberculosis or other diseases because she found no evidence in the record to support a finding that tuberculosis or another disease process could be responsible for these findings. Decision and Order at 11. The Board has long held that the interpretation of the objective data is a medical determination for which an administrative law judge cannot substitute her own opinion. *See Casella v. Kaiser Steel Corp.*, 9 BLR 1-131 (1986). Many of the physicians interpreted claimant's x-rays as revealing other abnormalities. The fact that the record does not reveal that claimant suffered from tuberculosis does not undermine the interpretations of those physicians who found that claimant's x-rays revealed abnormalities consistent with that disease.