BRB No. 08-0827 BLA

R.D.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FARWEST COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 09/30/2009
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Joseph E. Wolfe (Wolfe Williams Rutherford & Reynolds), Norton, Virginia, for claimant.

W. William Prochot (Greenberg Traurig LLP), Washington, D.C. for employer/carrier.

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

PER CURIAM:

Employer appeals the Decision and Order Awarding Benefits on Remand and the Decision and Order Awarding Attorney Fees (2005-BLA-06152) of Administrative Law

Judge Linda S. Chapman (the administrative law judge) rendered on a subsequent 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).[1] In her previous Decision and Order dated October 12, 2006, the administrative law judge credited claimant with fourteen years of coal mine employment, based on a stipulation of the parties, and adjudicated the claim pursuant to 20 C.F.R. Part 718. The administrative law judge initially found that because the newly submitted evidence was sufficient to establish total disability due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c), claimant demonstrated a change in an applicable condition of entitlement pursuant to 20 C.F.R. §725.309. In the alternative, the administrative law judge also found that claimant demonstrated a change in an applicable condition of entitlement because the newly submitted medical evidence established the existence of complicated pneumoconiosis pursuant to 20 C.F.R. §718.304. Specifically, the administrative law judge found that the preponderance of the x-ray evidence established that claimant has a condition that resulted in the presence of large opacities on his x-rays due to his years of occupational exposure to coal dust. The administrative law judge further found that employer had not offered persuasive affirmative evidence to show that the large opacity was due to something other than claimant's exposure to coal dust. Reviewing all of the record evidence as to the merits of claimant's entitlement, the administrative law judge gave determinative weight to the opinions of Drs. Robinette and Rasmussen, that claimant is totally disabled due to pneumoconiosis. The administrative law judge further found that claimant suffered from complicated pneumoconiosis and was entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Accordingly, the administrative law judge awarded benefits, commencing in June 2004, the month in which claimant filed his most recent subsequent claim.

[1] Claimant first filed a claim for benefits on July 25, 1974, which was finally denied by the district director on June 10, 1982. Director's Exhibit 1. Claimant filed a second claim on February 3, 1994, which was also denied on the ground that claimant failed to establish that pneumoconiosis was a substantially contributing cause or factor in his disabling respiratory impairment. *Id*. Claimant appealed and the denial was affirmed by the Board. [*R.D.D.*] *v. Farwest Coal Co.*, BRB No. 98-1828 BLA (Sept. 25, 1998) (unpub.). Claimant filed a third claim on June 12, 2000. Director's Exhibit 1. In a Decision and Order issued on October 22, 2001, Administrative Law Judge Daniel F. Solomon awarded benefits. *Id*. Pursuant to employer's appeal, the Board vacated the award and remanded the case for further consideration. [*R.D.D.*] *v. Farwest Coal Co.*, BRB No. 02-0189 BLA (Nov. 27, 2002) (unpub.). In his Decision and Order on Remand dated May 21, 2003, Judge Solomon determined that the evidence failed to establish that claimant's total disability was due to pneumoconiosis pursuant to 20 C.F.R. §718.204(c). Director's Exhibit 1. Claimant took no further action with regard to the denial of his second claim, until he filed his current subsequent claim on June 17, 2004. Director's Exhibit 3.

Employer appealed, and the Board agreed with employer that the administrative law judge erred in limiting the number of separate CT scans that she admitted into the record pursuant to 20 C.F.R. §725.414. *R.D.D. v. Farwest Coal Co.*, BRB No. 07-0195 BLA, slip op. at 4-5 (Jan. 31, 2008) (unpub.). The Board vacated the administrative law judge's finding that claimant established total disability due to pneumoconiosis at Section 718.204(c), holding that she erred in failing to explain the basis for her credibility findings with respect to the conflicting opinions of Drs. Rasmussen, Robinette, Fino and Tuteur, as to the cause of claimant's disability. *Id*. at 5-9. The Board also vacated the administrative law judge's finding pursuant to Section 718.304, holding that she erred in shifting the burden to employer to disprove that claimant has complicated pneumoconiosis. *Id*. at 11. Therefore, the Board vacated the award of benefits and remanded the case for further consideration.

On remand, the administrative law judge was instructed to "reconcile her conclusion that Dr. Robinette's opinion supports a finding of disability causation with her statement that Dr. Robinette did not provide an opinion as to the cause of claimant's disability." *R.D.D*., BRB No. 07-0195 BLA, slip op. at 6; *see* 2006 Decision and Order at 18-19. She was also directed to explain the basis for her finding that Dr. Robinette was a treating physician, and "to discuss how this status afforded Dr. Robinette an advantage in rendering an opinion on the issue of disability causation." *Id*. The Board also instructed the administrative law judge to explain the basis for her determination that Dr. Rasmussen's opinion was reasoned and documented. *Id*. at 7. Additionally, the Board instructed the administrative law judge to reconsider whether claimant satisfied his burden of proving the existence of complicated pneumoconiosis pursuant to Section 718.304 and, if necessary, determine whether claimant's pneumoconiosis arose, at least in part, out of coal mine employment pursuant to 20 C.F.R. §718.203. *Id*. at 12.

In her Decision and Order Awarding Benefits on Remand dated August 21, 2008, the administrative law judge found that claimant satisfied his burden of proof under Section 718.204(c), finding that the opinions of Drs. Fino and Tuteur, that claimant is not totally disabled by pneumoconiosis, were outweighed by the reasoned and documented opinions of Drs. Rasmussen and Robinette, that claimant is totally disabled due to pneumoconiosis. She therefore found that claimant established a change in an applicable condition of entitlement pursuant to Section 725.309, and entitlement to benefits based on a review of all of the evidence of record. Additionally, the administrative law judge found that claimant invoked the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304. Accordingly, benefits were awarded on remand.

Employer appeals, asserting that the administrative law judge erred in failing to follow the Board's remand instructions and in repeating her errors in evaluating the conflicting medical evidence at Sections 718.204(c) and 718.304. Employer contends

that the administrative law judge improperly shifted the burden to employer to disprove that claimant has complicated pneumoconiosis. Employer requests that the Board remand the case with instructions that it be assigned to a different administrative law judge. Additionally, employer contends that the administrative law judge erred in awarding attorney fees. Claimant responds, urging affirmance of the award of benefits. The Director, Office of Workers' Compensation Programs, has declined to file a brief in this appeal. Employer has also filed reply brief, reiterating its arguments.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 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).

If a miner files a claim for benefits more than one year after the final denial of a previous claim, the subsequent claim must also be denied unless the administrative law judge finds that "one of the applicable conditions of entitlement . . . has changed since the date upon which the order denying the prior claim became final." 20 C.F.R. §725.309(d); *White v. New White Coal Co., Inc.*, 23 BLR 1-1, 1-3 (2004). The "applicable conditions of entitlement" are "those conditions upon which the prior denial was based." 20 C.F.R. §725.309(d)(2). Claimant's last claim was denied because he failed to establish that his total respiratory disability was due to pneumoconiosis pursuant to Section 718.204(c). Director's Exhibit 1. Consequently, claimant had to submit new evidence establishing this condition of entitlement to proceed with his claim. 20 C.F.R. §725.309(d)(2),(3); *see also Lisa Lee Mines v. Director, OWCP* [*Rutter*], 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) (*en banc*), *rev'g* 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1995).

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[2] In her Decision and Order Awarding Benefits on Remand, the administrative law judge found that employer failed to demonstrate good cause for admitting, in excess of the evidentiary limitations, two interpretations of a December 3, 2004 CT scan. 2008 Decision and Order at 4. The administrative law judge also ruled that, insofar as employer failed to comply with her order directing employer to specifically designate its CT scan evidence, the interpretations proffered by employer of the CT scans dated March 5, 2002, July 9, 2001 and December 6, 2000 were also excluded from the record. Employer disagrees with the administrative law judge's evidentiary rulings but maintains that any error committed by the administrative law judge with respect to the exclusion of its CT scan readings is harmless error. Employer's Brief at 7 n.1; 7-8 n. 2.

[3] As claimant's coal mine employment occurred in Virginia, this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit. Director's Exhibits 1, 4; *see Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

I. DISABILITY CAUSATION

On remand, the administrative law judge credited the opinions of Drs. Robinette and Rasmussen and found that claimant established total disability due to pneumoconiosis pursuant to Section 718.204(c), and thus, a change in an applicable condition of entitlement under Section 725.309. Employer, however, maintains that the administrative law judge erred in relying on Dr. Robinette's opinion to find that claimant satisfied his burden of proof at Section 718.204(c), and that she erred in weighing the conflicting medical opinions as to whether claimant is totally disabled due to pneumoconiosis. There is merit to employer's arguments.

A. Dr. Robinette

In her 2006 decision, the administrative law judge identified Dr. Robinette as a treating physician. After noting that Dr. Robinette "did not offer any opinions specifying the etiology of [claimant's] impairments," she concluded that both the opinions of Dr. Rasmussen and Dr. Robinette supported a finding that claimant was totally disabled due to pneumoconiosis. 2006 Decision and Order at 18-19. The Board vacated the administrative law judge's finding pursuant to Section 718.204(c) and instructed her on remand to explain the basis for her finding that Dr. Robinette is a treating physician. The Board further instructed the administrative law judge to reconcile her conflicting findings with regard to whether Dr. Robinette addressed the issue of disability causation.

On remand, the administrative law judge found that Dr. Robinette qualified as one of claimant's treating physicians since he examined claimant on referral from the primary care physician, prescribed medication to claimant, and made recommendations for the treatment of claimant's respiratory condition. Decision and Order Awarding Benefits on Remand at 6. The administrative law judge explained, however, that she was not giving determinative weight to Dr. Robinette's opinion based on his status as a treating physician and stated:

> Dr. Robinette saw [claimant] as a treating specialist for assessment of respiratory abnormalities four times over a period of approximately four weeks. He evaluated and reviewed CT scans and a PET scan, and he performed and reviewed pulmonary function studies. Weighing these criteria, and given his opportunity to observe [claimant] over a period (albeit short) of time, I find that Dr. Robinette's opinions are entitled to significant weight, not due to his "status" as a treating physician, but because of his extensive testing of [claimant] and the multiple opportunities he had to evaluate his condition.

Id. She also determined that Dr. Robinette's opinion supports a finding that claimant is

totally disabled due to pneumoconiosis at Section 718.204(c), and explained:

> In his July 15, 2005 report . . . Dr. Robinette diagnosed COPD with underlying black lung disease and associated chronic airflow obstruction." I interpret this language to reflect that Dr. Robinette determined that [claimant's] impairment, consisting of chronic airflow obstruction, was associated with his black lung disease, both of which were underlying causes of his COPD. His report clearly indicates that [claimant's] chronic airflow obstruction, had a material adverse effect on his respiratory condition, and supports a finding that [claimant's] total disability was substantially contributed to by pneumoconiosis, or "black lung."

Decision and Order Awarding Benefits on Remand at 7.

Employer asserts that the administrative law judge erred in assigning determinative weight to Dr. Robinette's opinion because her findings are factually incorrect. Employer states that Dr. Robinette saw claimant "two times over a three-week period," and not four times over four weeks, as stated by the administrative law judge. Employer's Brief in Support of Petition for Review at 22. Employer contends that her statement that Dr. Robinette conducted extensive testing is inaccurate since he performed only one pulmonary evaluation of claimant, and reviewed the results of a single pulmonary function study, a single chest x-ray, and a singe PET scan, in reaching his diagnoses. Furthermore, employer asserts that the administrative law judge erred in finding that Dr. Robinette addressed in his July 15, 2005 report whether black lung disease had a materially adverse affect on claimant's respiratory disability. Employer's assertions of error have merit.

We agree with employer that the administrative law judge erred in misstating the number of times that claimant was seen by Dr. Robinette and in failing to properly explain why Dr. Robinette's pulmonary evaluation gave him any advantage over the other physicians of record in reaching his medical conclusions in this case. Furthermore, the administrative law judge erred in drawing inferences with respect to Dr. Robinette's July 15, 2005 report. Employer correctly points out that, as of July 15, 2005, Dr. Robinette had conducted no objective testing of claimant and, therefore, the administrative law judge mischaracterized Dr. Robinette's July 15, 2005 opinion when she concluded that it was based on extensive testing. Thus, because her credibility finding is not supported by substantial evidence, we are compelled to vacate the administrative law judge's reliance on Dr. Robinette's July 15, 2005 opinion to support her finding that claimant established total disability due to pneumoconiosis pursuant to

Section 718.204(c).[4]

B. Drs. Fino and Tuteur

Employer also challenges the weight accorded the opinions of Drs. Fino and Tuteur. Employer asserts that the administrative law judge erred in rejecting the opinions of Drs. Fino and Tuteur, that claimant's disabling respiratory condition is unrelated to coal dust exposure, because she found that they had not reviewed the CT scan dated May 13, 2005 or the PET scan dated July 22, 2005. Employer's assertion of error has merit. Insofar as the May 13, 2005 CT scan was interpreted by Dr. Scatarige as showing no opacities of coal workers' pneumoconiosis, the administrative law judge has failed to rationally explain why it was necessary for either Dr. Fino or Dr. Tuteur to review it, before concluding that claimant does not have a disabling respiratory condition due to coal dust exposure.[5] Furthermore, with respect to the July 22, 2005 PET scan, while it was interpreted by Dr. Mullens as showing abnormalities consistent with silicosis and coal workers' pneumoconiosis, the administrative law judge erred in relying on the PET scan without first addressing whether there was evidence of record to establish that PET scans are valid diagnostic tools for the diagnosis of pneumoconiosis.[6] *See* 20 C.F.R. §718.107(b).[7]

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[4] We note that the administrative law judge specifically found the opinions of Drs. Fino and Tuteur were outweighed by Dr. Robinette because he "*explained in detail* how [the objective] testing, which is the most up to date in the exhibit record, supports his conclusion that [claimant] has an interstitial process, as well as an obstructive impairment, that are due to his exposure to coal mine dust." Decision and Order Awarding Benefits on Remand at 11-12 (emphasis added).

[5] Dr. Robinette reported that the May 13, 2005 CT scan was "generally unchanged with the exception of some prominence of a single node in the right middle lobe which had been described prior on CT scan [sic]." Claimant's Exhibit 5.

[6] The regulations provide that "[t]he results of any medically acceptable test or procedure reported by a physician and not addressed in this subpart, which tends to demonstrate the presence or absence of pneumoconiosis . . . may be submitted in conjunction with a claim." 20 C.F.R. §718.107(a). However, "[t]he party submitting the test or procedure . . . bears the burden to demonstrate that the test or procedure is medically acceptable and relevant to establishing or refuting a claimant's entitlement to benefits." 20 C.F.R. §718.107(b).

[7] The Board previously held that the administrative law judge erred in "requiring Drs. Fino and Tuteur to discuss all of the additional testing in support of their opinions, without requiring Dr. Rasmussen to do the same." *R.D.D. v. Farwest Coal Co.*, BRB No.

We also agree with employer that the administrative law judge erred in according less weight to the opinions of Drs. Fino and Tuteur because she considered them to be "contradictory" as to the etiology of claimant's respiratory impairment. The administrative law judge noted that: "Dr. Fino claim[s] that although [claimant] has a diffuse interstitial process in his lungs, it is not due to pneumoconiosis, although he cannot say what caused it." Decision and Order Awarding Benefits on Remand at 12. She found, however, that Dr. Tuteur opined that claimant "does not have interstitial fibrosis at all, but only emphysema" due to smoking. *Id*. Contrary to the administrative law judge's analysis, although Drs .Fino and Tuteur disagree as to whether claimant suffers from interstitial fibrosis, they agree that claimant does not have a disabling respiratory condition due to pneumoconiosis. *See 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). Therefore, in light of the administrative law judge's errors in weighing the newly submitted medical opinions as to whether claimant established total disability due to pneumoconiosis, we vacate her findings pursuant to Section 718.204(c).

II. COMPLICATED PNEUMOCONIOSIS:

Employer also asserts that the administrative law judge erred in finding that claimant is entitled to invocation of the irrebuttable presumption of total disability due to pneumoconiosis at Section 718.304. Employer argues that the administrative law judge erred, once again, in shifting the burden to employer to disprove that claimant has complicated pneumoconiosis. We agree.

07-0195 BLA, slip op. at 8 (Jan. 31, 2008) (unpub.). Employer asserts that, contrary to the Board's directive, "the level of scrutiny applied to the opinions of Drs. Fino and Tuteur was far greater than the level of scrutiny applied to Drs. Rasmussen and Robinette's opinions." Employer's Brief in Support of Petition for Review at 27. We agree. The administrative law judge repeated her error in finding that the opinions of Drs. Fino and Tuteur were less credible because they had not reviewed the more recent CT scans and the July 2005 PET scan, while not applying that same standard to her review of Dr. Rasmussen's opinion. Decision and Order Awarding Benefits on Remand at 10-11. The administrative law judge cannot selectively analyze the evidence in this manner. On remand, the administrative law judge must apply the same criteria in assessing the credibility of the conflicting medical opinions.

Section 411(c)(3) of the Act, as implemented by Section 718.304, 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 which would yield results equivalent to (a) or (b). 30 U.S.C. §921(c)(3); 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).

The Board previously held that the administrative law judge misinterpreted *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), as requiring employer to affirmatively disprove claimant's evidence.[8] [*R.D.D.*], BRB No. 07-0195 BLA, slip op. at 10. The Board explained that the Fourth Circuit held in *Clinchfield Coal Co. v. Lambert*, 206 Fed.Appx. 252, 2006 WL 3344010 (4th Cir. Nov. 17, 2006) (unpub.), that its decision in *Scarbro* did not impose a burden on the party opposing entitlement to persuasively establish that the opacities are not there or are not what they seem to be; rather, the court emphasized that the burden of proof remains with claimant at all times. *R.D.D.*, BRB No. 07-0195 BLA, slip op at 10.

On remand, the administrative law judge noted the Board's directive and set forth the following standard to be applied:

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[8] In *Eastern Associated Coal Corp. v. Director, OWCP* [*Scarbro*], 220 F.3d 250, 22 BLR 2-93 (4th Cir. 2000), the Fourth Circuit 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 explained that "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 x-ray." *Id*. (citation omitted).

> [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 Awarding Benefits on Remand at 16 (emphasis added). She found that "a preponderance of the x-ray interpretations by the dually qualified interpreters [Board-certified radiologists and B readers] includes findings of [C]ategory A opacities." *Id*. at 19. The administrative law judge summarized the CT scan evidence and stated:

> I find that the preponderance of the CT scan evidence confirms the presence of a large mass or masses that correspond with the x-ray findings by Dr. Patel, Dr. Alexander, and Dr. DePonte. As there is no evidence that these CT scan findings would produce opacities of at least [one centimeter] in diameter on x-ray, which is the standard in *Scarbro*, these CT scan findings do not independently support a conclusion that [claimant] has complicated pneumoconiosis. But they do support the identification of these large masses on x-ray by Dr. Patel, Dr. Alexander, and Dr. DePonte, and they certainly do not support a conclusion that the opacities are not there.

Id. at 20. The administrative law judge next found that Drs. Scott, Wheeler, Fino and Scaterige did not identify a large opacity and therefore "did not provide an opinion as to the etiology of the [C]ategory A opacity identified by Dr. Patel, Dr. DePonte, and Dr. Alexander." *Id*. The administrative law judge further found that "Dr. Fino did not make a diagnosis or 'objective determination,' but instead speculated on the possible etiology [granulomatous infection] of the abnormality that he acknowledged was there." *Id*. Then, weighing all of the evidence together, she noted that a preponderance of the x-ray evidence established a large opacity, and that the "[e]mployer has not offered any affirmative evidence that this large opacity is due to something other than exposure to coal dust." She then concluded:

> I have considered [the] CT scan evidence in conjunction with the x-ray evidence, and I find that the preponderance of the persuasive x-ray evidence establishes that [claimant's] x-rays show a Category A opacity, an abnormality that is due to pneumoconiosis, and that *[e]mployer has not offered affirmative evidence* either that the opacity is not there, or that it is due to a process other than pneumoconiosis.

Decision and Order Awarding Benefits on Remand at 21.

We agree with employer that the administrative law judge improperly shifted the burden of proof to employer to provide affirmative evidence that claimant does not have complicated pneumoconiosis. The administrative law judge erred in once again citing to *Scarbro* as a basis for her conclusion that once claimant submitted some evidence supporting a finding of complicated pneumoconiosis by x-ray or CT scan, employer was required to present affirmative evidence to establish either the absence of the large opacities or that they were not related to pneumoconiosis or coal dust exposure. The particular language in *Scarbro* that was cited by the administrative law judge, was used by the Fourth Circuit court only in reference to situations where the x-ray evidence "vividly displays opacities exceeding one centimeter," *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101, unlike the present case, where the x-ray evidence is in conflict as to whether claimant has any large or small opacities of pneumoconiosis. Therefore, we conclude that the administrative law judge erred in her application of *Scarbr*o, and in shifting the burden in this case to employer to disprove that claimant has complicated pneumoconiosis. *See Lambert*, 206 Fed.Appx. at 255, WL 3344010 at 3.

Furthermore, to the extent that the administrative law judge failed to explain how she resolved the conflict in the evidence as to the existence of complicated pneumoconiosis, her decision is not in compliance with the Administrative Procedure Act (APA), 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a), by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2), which requires that an administrative law judge independently evaluate the evidence and provide an explanation for her all of her findings of fact and conclusions of law. *See Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989). We, therefore, vacate the administrative law judge's finding that claimant established the existence of complicated pneumoconiosis based on the newly submitted evidence at Section 718.304.

III. CONCLUSION/REMAND INSTRUCTIONS

To summarize, because we vacate the administrative law judge's findings that the newly submitted evidence was sufficient to establish that claimant's respiratory disability was due to pneumoconiosis pursuant to 718.204(c), and that claimant has complicated pneumoconiosis pursuant to Section 718.304, we must also vacate her finding that claimant demonstrated a change in an applicable condition of entitlement pursuant to Section 725.309. On remand, the administrative law judge must determine whether the newly submitted medical opinions establish that claimant is totally disabled due to pneumoconiosis pursuant to Section 718.204(c). In addition, the administrative law judge should reconsider whether claimant has satisfied his burden to establish that he has complicated pneumoconiosis pursuant to Section 718.304. In so doing, the

administrative law judge must first determine whether the evidence in subsections 718.304(a) or (c) tends to establish the existence of complicated pneumoconiosis, then she must weigh this evidence together before determining whether claimant is entitled to invoke the irrebuttable presumption of total disability due to pneumoconiosis. *See Lester v. Director, OWCP*, 993 F.2d 1143, 17 BLR 2-114 (4th Cir. 1993); *Gollie v. Elkay Mining Corp.*, 22 BLR 1-306, 1-311 (2003); *Melnick,* 16 BLR at 1-33-34.

In determining the weight to accord the conflicting medical evidence, the administrative law judge must consider "the qualifications of the respective physicians, the explanation of their medical opinions, the documentation underlying their medical judgments, and the sophistication and bases of their diagnoses." *Sterling Smokeless Coal Company v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269, 2-275-76 (4th Cir. 1997). The administrative law judge must also comply with the APA by resolving all conflicts in the evidence and setting forth the rationale underlying her findings. *Wojtowicz,* 12 BLR at 1-165. If it is determined on remand that the newly submitted evidence is sufficient to establish the element of disability causation pursuant to Section 718.204(c) or the existence of complicated pneumoconiosis pursuant to Section 718.304, the administrative law judge must also conclude that claimant has satisfied his burden to establish a change in an applicable condition of entitlement pursuant to Section 725.309. *See White*, 23 BLR at 1-3. Thereafter, the administrative law judge must consider all of the record evidence and determine whether claimant has established his entitlement to benefits based on a finding that he is totally disabled due to simple pneumoconiosis or alternatively, based on invocation of the irrebuttable presumption of total disability due to pneumoconiosis. *See* 20 C.F.R. §§718.202(a), 718.203, 718.204, 718.304; *Lester*, 993 F.2d at 1145-46, 17 BLR at 2-117-18. If the administrative law judge finds that claimant established complicated pneumoconiosis pursuant to Section 718.304, a finding must be made as to 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; *The Daniels Co. v. Mitchell*, 479 F.3d 321, 337, 24 BLR 2-1, 2-28 (4th Cir. 2007).

Lastly, as discussed, supra, the Board previously instructed the administrative law judge to consider the Fourth Circuit's opinion in *Lamber*t, which explained the proper interpretation of *Scarbro*. However, on remand, the administrative law judge again applied *Scarbro* erroneously. In light of the Board's previous remand of this case, and the administrative law judge's repetition of error on remand, we conclude that "review of this claim requires a fresh look at the evidence . . . ." *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 537, 21 BLR 2-323, 2-343 (4th Cir. 1998); *see* 20 C.F.R. §§802.404(a), 802.405(a); *Cochran v. Consolidation Coal Co.*, 16 BLR 1-101, 1-107 (1992). Thus, we reluctantly direct that the case be assigned to a different administrative law judge on remand.

IV. ATTORNEY FEE AWARD

Subsequent to the administrative law judge's award of benefits, claimant's counsel filed a fee petition and requested $2,650 in legal fees (3.75 hours at the hourly rate of $300 for Mr. Wolfe, 3 hours at the hourly rate of $175 for Mr. Gilligan, and 10 hours at the hourly rate of $100 for a legal assistant) for services performed while the case was pending before the Office of Administrative Law Judges. Claimant's counsel also requested $1,662.90 for expenses related to the claim ($1,100 for an examination by Dr. Rasmussen, $278.45 for x-ray readings, and $284.45 for medical records). Employer objected to the fee petition, and claimant's counsel responded.

In a Decision and Order Awarding Attorney Fees dated January 29, 2009, the administrative law judge considered employer's objections, but found the hourly rate and number of hours claimed to be reasonable. The administrative law judge overruled employer's objection to the payment of the expenses for medical experts who did not testify at the hearing, but she reduced the amount owed to Dr. Rasmussen to $995 to match the doctor's actual bill. Thus, the administrative law judge awarded the sum of $2,650 for legal services performed by claimant's counsel, and $1,557.59 for expenses.

The award of an attorney's fee is discretionary and will be upheld on appeal unless shown by the challenging party to be arbitrary, capricious, or an abuse of discretion. *B & G Mining, Inc. v. Director, OWCP [Bentley]*, 522 F.3d 657, 661, 24 BLR 2-106, 2-117 (6th Cir. 2008); *Jones v. Badger Coal Co.*, 21 BLR 1-102, 1-108 (1998) (*en banc*).

Employer argues that the administrative law judge erred in awarding an hourly rate of $300 to Mr. Wolfe and $175 to Mr. Gilligan. Employer asserts that the administrative law judge erred by not requiring claimant's counsel to meet their burden of producing market evidence to support the rates requested or the fees that she awarded. Employer also contends that the administrative law judge erred in factoring in risk of loss in determining the appropriate hourly rate, in relying on the Altman & Weil 2006 *Survey of Law Firm Economics* and in citing a prior Board decision affirming awards of $300 per hour in other cases involving both claimant's counsel and another black lung attorney.

Employer's arguments are without merit. Although employer asserts that the administrative law judge inappropriately referred to "risk of loss" as a factor in determining the hourly rate, *see City of Burlington v. Dague*, 505 U.S. 557, 567 (1992); *Broyles v. Director, OWCP*, 974 F.2d 508, 509, 17 BLR 2-1, 2-3 (4th Cir. 1992), there is no indication that in setting Mr. Wolfe's hourly rate at $300 or Mr. Gilligan's rate at $175, the administrative law judge used contingency multipliers to "enhance" the fee award in order to compensate for a risk of loss in black lung claims. Rather, the

administrative law judge properly considered the regulatory criteria, taking into account the quality of the representation, the qualifications of the representative, the complexity of the legal issues involved, the level of the proceedings to which the claim was raised, and the level at which each representative entered the proceedings. Decision and Order Awarding Attorney Fees at 3. The administrative law judge specifically noted that Mr. Wolfe's $300.00 fee was justified based on his level of legal experience in black lung litigation, his thirty-two years of law practice, and the administrative law judge's observation of counsel.[9] *Id*. Additionally, contrary to employer's assertion, the administrative law judge properly considered employer's objections to the use of the Altman & Weil survey, prior to taking judicial notice of the hourly rates reported therein as support for her findings. *See Maddaleni v. The Pittsburg & Midway Coal Mining Co.*, 14 BLR 1-135, 1-139 (1990).

Furthermore, we reject employer's assertion that the administrative law judge erred in considering the Board's holding in *O.R.H. v. Blue Star Coal Corp*., BRB No. 07-0124 BLA (Oct. 30, 2007) (unpub.), in which the Board affirmed an hourly rate of $300 to another attorney, as the administrative law judge merely referenced but did not rely on that decision to reach his finding as to the hourly rate in this case. Thus, we affirm the administrative law judge's approval of an hourly rate of $300 for Mr. Wolfe, $175 for Mr. Gilligan and $100 for the services of a legal assistant as being reasonable under the circumstances of this case.

Employer also contends that the administrative law judge erred in approving three specific time entries. Employer objected below to the entries by Mr. Wolfe and Mr. Gilligan on August 22, 2008 for 0.6 and 0.5 hours of review of the Decision and Order. Contrary to employer's contention, the administrative law judge properly found that "it was reasonable and compensable for both Mr. Wolfe and his associate to each review the case decision." Decision and Order Awarding Attorney Fees. The administrative law judge also properly found that Mr. Wolfe's time charge on August 25, 2008 for preparing a letter requesting receipts from his client was not merely clerical in nature and was, therefore, compensable. *Id*. Lastly, the administrative law judge permissibly found that it was appropriate for counsel to charge 11.5 hours for briefing in this case (9 hours by the legal assistant drafting the brief and 2.5 hours by Mr. Gilligan to review it). Employer has not shown that the administrative law judge acted arbitrarily, capriciously, or abused her discretion, in finding that these three time entries were either excessive or unreasonable. *See* 20. C.F.R. §725.366; *Jones*, 21 BLR at 1-108; *Whitaker v. Director*,

[9] The administrative law judge noted that she had observed the practice of the attorneys in Mr. Wolfe's firm and found them to be "highly competent, experienced, and qualified attorneys, who produce superior work product." Decision and Order Awarding Attorney Fees at 4.

OWCP, 9 BLR 1-216, 1-217, 1-218 (1986); *McNulty v. Director, OWCP*, 4 BLR 1-128, 1-132 (1981); Decision and Order Awarding Attorney Fees at 4-5.

Additionally, we affirm the administrative law judge's determination that counsel's practice of billing in quarter-hour increments was permissible. *See Poole v. Ingalls Shipbuilding, Inc.*, 27 BRBS 230, 237 n.6 (1993). Consequently, we affirm the administrative law judge's finding that a total of 16.75 hours of legal services was reasonable under the circumstances of this case.

We also reject employer's assertion that the administrative law judge abused her discretion in awarding expenses. Contrary to employer's assertion, Section 28(d) of the Longshore Act, as incorporated by 30 U.S.C. §932(a), permits the recovery of fees for medical experts who do not attend the hearing. *Zeigler Coal Co. v. Director, OWCP [Hawker]*, 326 F.3d 894, 899-902 (7th Cir. 2003), *aff'g Hawker v. Zeigler Coal Co.*, 22 BLR 1-177 (2001). Therefore, because employer has not demonstrated an abuse of discretion in the administrative law judge's award of fees and expenses in this case, we affirm the administrative law judge's fee award of $2,650 for legal services performed on behalf of claimant, and $1,557.50 for expenses. *See Jones*, 21 BLR at 1-108.

Accordingly, the Decision and Order Awarding Benefits on Remand is vacated and the case is remanded to the Office of Administrative Law Judges for reassignment and further consideration consistent with this opinion. The Decision and Order Awarding Attorney Fees is affirmed. We order employer to pay claimant's counsel $2,650 for legal services and $1,557.50 for expenses incurred while the case was before the Office of Administrative Law Judges.

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge