BRB No. 07-0995 BLA

R.D.H.	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
SUNSET LAND AND COAL COMPANY	)	DATE ISSUED: 09/30/2008
	)	
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.

Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Richard A. Seid (Gregory F. Jacob, Solicitor of Labor; Rae Ellen Frank James, Acting 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand Awarding Benefits (2004-BLA-06815) of Administrative Law Judge Linda S. Chapman issued on a subsequent

claim[1] 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 case is before the Board for a second time. In her first Decision and Order, the administrative law judge credited claimant with at least twenty-two years of coal mine employment, and found that his subsequent claim was timely filed. The administrative law judge found that the x-ray evidence developed since the denial of claimant's first claim established the existence of complicated pneumoconiosis, entitling claimant to the irrebuttable presumption of total disability due to pneumoconiosis at Section 411(c)(3) of the Act. *See* 30 U.S.C. §921(c)(3), as implemented by 20 C.F.R. §718.304. She therefore determined that claimant established a change in an applicable condition of entitlement, as required by 20 C.F.R. §725.309(d). The administrative law judge further found that all of the evidence of record established that claimant is entitled to benefits. Accordingly, the administrative law judge awarded benefits.

Employer appealed, and the Board affirmed the administrative law judge's finding that claimant timely filed his subsequent claim. [*R.D.*] *v. Sunset Land & Coal Co.*, BRB No. 06-0243 BLA (Nov. 30, 2006) (unpub.). However, the Board agreed with employer 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), when she found that once claimant submitted three x-ray readings that diagnosed Category A large opacities, then the burden shifted to employer to "affirmatively show" that the opacities were not complicated pneumoconiosis. [*R.D.*], slip op. at 6, citing Decision and Order (Sept. 23, 2005) at 5. Thus, the Board vacated the administrative law judge's findings pursuant to Section 718.304(a) and remanded the case for the administrative law judge to weigh the conflicting x-ray evidence with the burden on claimant to establish the presence of large opacities. *Id*. at 6. Because the Board vacated the administrative law judge's x-ray findings, the Board also vacated the administrative law judge's finding that the CT scan readings, of which there were two negative readings for complicated pneumoconiosis, "were not affirmative evidence that the large opacities identified by Drs. Baker, Cappiello and DePonte on x-ray were not there or were not what they seemed to be." *Id*. at 7, quoting Decision and Order (Sept. 23, 2005) at 5. The administrative law judge was instructed to weigh the CT scan evidence and the medical opinion evidence to determine whether it supported a finding of complicated pneumoconiosis, and then to weigh together all of the relevant evidence to determine whether claimant satisfied his burden to establish the existence of complicated pneumoconiosis. *Id*.

[1] Claimant first filed a claim for benefits on April 10, 1997, which was denied by the district director on July 15, 1997, on the ground that claimant was not totally disabled. Director's Exhibit 1. Claimant filed this subsequent claim on January 17, 2002. Director's Exhibit 3.

In her Decision and Order on Remand Awarding Benefits, the administrative law judge again found that claimant was entitled to the irrebuttabe presumption of total disability due to pneumoconiosis pursuant to Section 718.304; that he established a change in an applicable condition of entitlement pursuant to Section 725.309; and that he established that his pneumoconiosis arose out of coal mine employment at 20 C.F.R. §718.203. Accordingly, the administrative law judge awarded benefits, commencing March 14, 2002.

Employer appeals, asserting that *Island Creek Coal Co. v. Henline*, 456 F.3d 421, 425-26, 23 BLR 2-321, 2-330 (4th Cir. 2006) constitutes intervening case law, which requires the Board to revisit its affirmance of the administrative law judge's determination that claimant's subsequent claim was timely filed. Employer asserts that the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, recognized that "uncontradicted testimony" similar to the hearing testimony provided by claimant in this case "triggered the statute of limitations and rejected precisely the approach taken by the Board here." Employer's Brief in Support of Petition for Review (Employer's Brief) at 3 n.2. Employer also contends that the administrative law judge failed to follow the Board's remand instructions because she once again shifted the burden of proof to employer to disprove that claimant had complicated pneumoconiosis and failed to weigh all of the relevant evidence. Employer contends that the award of benefits must be vacated and the case remanded with instructions that it be assigned to a new administrative law judge "for a fresh look." *Id*. at 20.

Claimant has not responded to employer's appeal. The Director, Office of Workers' Compensation Programs (the Director), has filed a limited response addressing employer's arguments as to the timeliness of the subsequent claim. The Director asserts that employer's reliance on *Henline* is misplaced, as *Henline* "did not 'hold' that any particular type of 'uncontradicted testimony' triggered the statue of limitations, as [employer] incorrectly states." Director's Brief at 3, quoting Employer's Brief at 3 n.2. The Director maintains that employer has shown no basis for the Board to revisit its prior affirmance of the administrative law judge's findings pursuant to 20 C.F.R. §725.308. Employer filed a reply brief, urging the Board to reject the Director's arguments.

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.[2] 33 U.S.C. §921(b)(3), as incorporated by 30

[2] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as claimant's coal mine employment was in Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (*en banc*).

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

Timeliness of the Subsequent Claim

Initially, employer requests that we revisit our prior holding that the administrative law judge properly determined that claimant's subsequent claim was timely filed. Under the law of the case doctrine, the Board will adhere to a prior holding in the same case unless: 1) that there has been a change in the underlying fact situation; 2) intervening controlling authority demonstrates that the initial decision was erroneous; or 3) it is shown that the Board's prior holding was either clearly erroneous or that it results in manifest injustice. *See Stewart v. Wampler Brothers Coal Co.*, 22 BLR 1-80, 1-89 n.4 (2000) (*en banc*) (Hall, J. and Nelson, J., concurring and dissenting); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990). Employer relies on the second exception, and asserts that in *Henline*, which was issued subsequent to the Board's prior decision, the court "held that the type of uncontradicted testimony elicited in this case triggered the statute of limitations and rejected precisely the approach taken by [the] Board" in this case. Employer's Brief at 3 n.2. We reject employer's argument.

Section 422(f) of the Act, 30 U.S.C. §932(f), and its implementing regulation at 20 C.F.R. §725.308(a), provide that a claim for benefits must be filed within three years of a medical determination of total disability due to pneumoconiosis which has been communicated to the miner. The regulation at Section 725.308(c) provides a rebuttable presumption that every claim for benefits is timely filed. 20 C.F.R. §728.308(c).

In her Decision and Order, the administrative law judge found that there was no evidence to rebut the timeliness presumption. Employer argued in the prior appeal that the administrative law judge's finding was in error because claimant testified at the hearing that he left the mines in 1992 because:

> Dr. Patel told me if I didn't quit the mines, that I wasn't going to be around too long. He said my lungs and my heart was getting bad. So he told me to quit, so I quit working.

Hearing Transcript at 37.

The Board, however, affirmed the administrative law judge's finding that the subsequent claim was timely filed for two reasons. First, the Board held that Dr. Patel's recommendation that claimant stop working because of heart and lung problems did not constitute a medical determination of total disability due to pneumoconiosis as required by Section 725.308. [*R.D.*], slip op at 5. Therefore, the Board affirmed, as supported by substantial evidence, the administrative law judge's finding that "nothing in the record indicat[ed] that the [c]laimant was diagnosed with a total disability due to

pneumoconiosis at any time before he filed his application on April 10, 1997." *Id*., citing Decision and Order (Sept. 23, 2005) at 4. Secondly, the Board held:

> Moreover, even assuming *arguendo* that Dr. Patel diagnosed claimant as totally disabled due to pneumoconiosis as of 1992, "a medical determination later deemed to be a misdiagnosis . . . by virtue of a superseding denial of benefits cannot trigger the statute of limitations for subsequent claims." *Consolidation Coal Co. v. Williams*, 453 F.3d 609, 618, 23 BLR 2-345, 2-365 (4th Cir. 2006). In light of the denial of claimant's first claim on July 15, 1997, Dr. Patel's 1992 diagnosis must be treated as "a misdiagnosis" that "had no effect on the statute of limitations for [claimant's] second claim." *Williams*, 453 F.3d at 616, 23 BLR at 2-361. We therefore affirm the administrative law judge's finding that claimant's subsequent claim was timely . . . .

[*R.D.*], slip op. at 3.

We disagree with employer that *Henline* has any bearing on this case. In *Henline*, the Fourth Circuit court held that a medical determination of total disability due to pneumoconiosis does not have to be in writing in order to trigger the statute of limitations. *Henline*, 456 F.3d at 425-426, 23 BLR at 2-330. In this case, however, the Board's Section 725.308 holding did not depend on whether the communication by Dr. Patel was oral or written. Rather, it concerned whether the content of the oral communication was sufficient to constitute a medical determination of total disability. The Board held that Dr. Patel's oral communication, even if it was considered to be a medical determination of total disability due to pneumoconiosis, was insufficient to rebut that Section 725.308 presumption, as Dr. Patel's opinion was refuted by the subsequent denial of claimant's initial claim in 1997. [*R.D.*], slip op. at 5, citing *Williams*, 453 F.3d at 616, 23 BLR at 2-361. Because we consider the administrative law judge's finding that claimant's subsequent claim was timely filed to be in accordance with *Williams*, we reject employer's arguments, and reaffirm our prior holding pursuant to Section 725.308.

Invocation of the Irrebutable Presumption

Pursuant to Section 411(c)(3)(A) of the Act, as 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). While subsections (a), (b), and (c) set forth three different methods by which a claimant can invoke the irrebuttable presumption of total disability

due to pneumoconiosis, the administrative law judge must, in every case, review all relevant evidence. 30 U.S.C. §923(b); *Mullins Coal Co. of Va. v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988); *Scarbro*, 220 F.3d at 250, 22 BLR at 2-93; *Melnick v. Consolidation Coal Co.*, 16 BLR 1-31, 1-33 (1991) (*en banc*). The Fourth Circuit has specifically held that evidence under one prong of Section 718.304 can diminish the probative value of evidence under another prong if the two forms conflict; however, a single piece of relevant evidence can support an administrative law judge's finding that the irrebuttable presumption was successfully invoked if that piece of evidence outweighs the conflicting evidence of record. *See Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester v. Director, OWCP*, 993 F.2d 1143, 1146, 17 BLR 2-114, 2-118 (4th Cir. 1993). Furthermore, the Board has recognized that, because Section 718.304 does not provide any opportunity for rebuttal, failure to require an administrative law judge to consider all relevant evidence at the invocation stage may violate an opposing party's right to due process. *See Melnick*, 16 BLR at 1-33.

The Board remanded this case for the administrative law judge to resolve the conflict in the x-ray evidence as to whether claimant has complicated pneumoconiosis pursuant to Section 718.304(a). In her Decision and Order on Remand, the administrative law judge outlined the x-ray evidence, but did not weigh the conflicting readings for complicated pneumoconiosis as instructed by the Board. Rather, she essentially determined that there was no conflict in the x-ray evidence as to whether claimant had a Category A large opacity. She explained:

> I have reviewed the totality of the x-ray evidence, and again I find that the x-ray evidence clearly establishes the presence of large opacities, as noted by Dr. Baker, Dr. Cappiello, and Dr. DePonte. Dr. Scott, Dr. Wheeler, Dr. Fino, and Dr. Scatarige noted the presence of a large mass in [claimant's] right lungs; while they indicated that the mass was not the result of pneumoconiosis, they nevertheless clearly acknowledged its presence. Thus, while the x-ray interpretations may be "conflicting" on the issue of the etiology of the masses, they are not conflicting on the presence of a mass or masses that correspond to the large opacities noted by Dr. Baker, Dr. Cappiello, and Dr. DePonte.
>
> Again, based on the totality of the x-ray evidence, I find that [employer] has not introduced x-ray evidence sufficient to affirmatively show that the opacities of pneumoconiosis noted by Dr. Baker, Dr. DePonte, and Dr. Cappiello are not there. Indeed, the x-ray interpretations offered by [employer], which confirm the presence of large masses in [claimant's] lungs, corroborate the designation of large opacities by these physicians.

Decision and Order on Remand at 3. Thus, the administrative law judge found that claimant established the existence of a Category A large opacity pursuant to Section 718.304(a).

Turning to the CT scan evidence, the administrative law judge similarly found that "all the physicians who reviewed [claimant's] CT scans saw a large mass in his right upper lung," *Id*. at 4. Although she concluded that the CT scan findings "do no indicate that this mass would show up on x-ray as an opacity of at least one centimeter in diameter," she essentially repeated her findings from her prior Decision and Order issued on September 23, 2005, that the CT scans "certainly do not establish that the large opacities identified by Dr. Baker, Dr. DePonte, and Dr. Cappiello are not there" and in fact, "support and reinforce the designation of [C]ategory A opacities by Dr. Baker, Dr. Cappiello, and Dr. DePonte." *Id*.

Weighing the totality of the x-ray and CT scan interpretations, the administrative law judge found that it "overwhelmingly" established that the miner had a large Category A large opacity of pneumoconiosis. Decision and Order on Remand at 5. The administrative law judge considered the opinions of Drs. Scott, Wheeler, Scatarige and Fino as to the etiology of the mass they described, and found that while these doctors "were willing to exclude pneumoconiosis as a cause for the large mass . . . . they [did not agree as to the cause of the mass] and were not willing to make an affirmative diagnosis" as to its etiology. *Id*. Thus, she found the opinions of Drs. Scott, Wheeler, Scatarige and Fino to be "speculative, conflicting, and not sufficient to cause the findings by Dr. Baker, Dr. Cappiello, and Dr. DePonte to lose force." *Id*. Additionally, the administrative law judge found that the medical opinions of Drs. McSharry and Foster are not "*affirmative evidence sufficient to rebut the presumption* raised by the finding of [C]ategory A opacities on x-ray." Decision and Order on Remand at 6 (emphasis added). As such, the administrative law judge found that claimant was entitled to the irrebuttable presumption of total disability due to pneumoconiosis pursuant to Section 718.304.

We agree with employer that the administrative law judge's award of benefits must be vacated pursuant to Section 718.304. Despite our specific remand instruction, the administrative law judge repeated her prior error at Section 718.304(a) by indicating that, once evidence was submitted which showed large masses in the miner's lungs, the burden shifted to employer to establish either the absence of large opacities or that the large opacities were not related to pneumoconiosis or coal dust exposure. This contravenes the principle that "claimant retains the burden of proving the existence of" complicated pneumoconiosis. *Lester,* 993 F.2d at 1145, 17 BLR at 2-117.

We agree with employer that the administrative law judge erred by failing to weigh all of the conflicting x-ray evidence as to whether claimant established the existence of complicated pneumoconiosis. Although the administrative law judge

correctly noted that certain doctors diagnosed Category A large opacities of pneumoconiosis by x-ray, she erred in concluding that all of the x-ray readings, which diagnosed a mass that measured greater than one centimeter, were supportive of a finding of complicated pneumoconiosis. Contrary to the administrative law judge's analysis, complicated pneumoconiosis, seen as Category A, B or C opacities on x-ray, is not determined solely by the dimensions of the irregularity. Section 718.304 provides for invocation of the irrebuttable presumption if "such miner is suffering from a chronic dust disease of the lung" which, when diagnosed by x-ray, yields one or more opacities which would be classified as Category A, B or C. 20 C.F.R. §718.304; *Scarbro*, 220 F.3d at 256, 22 BLR at 2-101; *Lester*, 993 F.2d at 1145, 17 BLR at 2-117; *Melnick*, 16 BLR at 1-33. The ILO classification form requires the physician interpreting the x-ray film to first determine whether there are "[a]ny [p]arenchymal [a]bnormalities [c]onsistent with [p]neumoconiosis." *See* Form CM-933, question 2A. If the physician answers in the affirmative, then he/she proceeds to the sections regarding the size of the opacities, *i.e.*, small opacities or large opacities of size A, B, or C. *See* Form CM-933, question 2B and 2C. However, if the physician answers the question in the negative, then he/she is to skip the section regarding the size of the opacities. *See* Form CM-933, question 2A.

In weighing the conflicting x-ray evidence at Section 718.304(a), the administrative law judge did not consider the fact that several physicians made an unequivocal diagnosis on the ILO classification sheet that there were no parenchymal abnormalities consistent with pneumoconiosis on the x-rays they reviewed. She also did not consider that Drs. Wheeler, Scott, Scatarige and Fino specifically opined that there were no large opacities for pneumoconiosis. Contrary to the administrative law judge's analysis, absent a diagnosis of pneumoconiosis with a Category A, B, or C opacity, a physician's x-ray interpretation on an ILO form that notes an abnormality in the "Comments" section, does not satisfy the statutory definition of complicated pneumoconiosis pursuant to Section 718.304(a). *See* 20 C.F.R. §718.304(a). Thus, we vacate the administrative law judge's finding that the x-ray evidence was sufficient to establish the existence of complicated pneumoconiosis pursuant to Section 718.304(a).

Furthermore, in her consideration of the CT scan and medical opinion evidence at Section 718.304(c), the administrative law judge erred in shifting the burden of proof to employer, when she concluded that "inasmuch as the other evidence does not *affirmatively show* that the opacities are not there or are not what they seem to be, [claimant's] x-ray evidence under [Section 718.304(a)] does not lose force." Decision and Order on Remand at 7 (emphasis added). Thus, we vacate her findings pursuant to Section 718.304(c).

Consequently, because the administrative law judge ignored the Board's remand instructions, erroneously interpreted *Scarbro* in shifting the burden of proof to employer, and failed to weigh all of the evidence relevant to whether claimant has met his burden of

proof under Section 718.304, we vacate the administrative law judge's determination that claimant is entitled to invocation of the irrebutable presumption of total disability due to pneumoconiosis. Therefore, we vacate the administrative law judge's award of benefits.

We have also considered employer's request to assign this case to another administrative law judge on remand. Reluctantly, and in view of the administrative law judge's response to the Board's prior remand instructions, we hold that it is in the interest of justice and judicial economy to grant employer's request to remand this case for assignment to a new administrative law judge, for a *de novo* review of the record and proper application of the law in light of the evidence.[3] *See Milburn Colliery v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998); *see also Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992).

[3] Employer argues that the administrative law judge also erred in rejecting the opinions of Drs. Scott, Wheeler, Scatarige and Fino, that claimant does not have complicated pneumoconiosis, on the ground that their opinions were equivocal because they did not make a definitive diagnosis as to the etiology of the masses they diagnosed by x-ray or CT scan. Employer argues that the administrative law judge erred in rejecting the x-ray readings of physicians who attributed claimant's x-ray abnormalities to disease processes, such as tuberculosis or granulomatous disease, on the ground that their opinions were speculative. Employer's Brief in Support of Petition for Review at 16-19; Decision and Order on Remand at 5-7. In light of our decision to remand this case for *de novo* consideration by a different administrative law judge, it is not necessary that we address employer's arguments regarding the credibility of the medical experts.

Accordingly, the Decision and Order on Remand Awarding Benefits is vacated and the case is remanded for reassignment to a different administrative law judge for consideration consistent with our holdings in [*R.D.*], BRB No. 06-0243 BLA, and this opinion.[4]

SO ORDERED.

_____
NANCY S. DOLDER, Chief
Administrative Appeals Judge

_____
ROY P. SMITH
Administrative Appeals Judge

_____
BETTY JEAN HALL
Administrative Appeals Judge

[4] If claimant fails to establish on remand that he is entitled to invocation of the irrebuttable presumption at 20 C.F.R. §718.304, claimant may still demonstrate a change in an applicable condition of entitlement at 20 C.F.R. §725.309 by establishing his total disability pursuant to 20 C.F.R .§718.204(b)(2)(1)-(4). If claimant satisfies his burden of proof at Section 725.309, he is then entitled to have the new administrative law judge review all of the record evidence as to his entitlement to benefits under 20 C.F.R. Part 718.