PART III

PROCEDURAL ISSUES

B. CONSEQUENCES OF FILING A PART B CLAIM

1. MEDICAL BENEFITS ONLY CLAIMS (MBO)

Under the 1977 Amendments, miners awarded Part B benefits were extended an opportunity to file for medical benefits only (MBO) under Part C pursuant to Section 11 of those Amendments codified at 30 U.S.C. §924a, as implemented by Sections 725.308, 725.309, and 725.701A, whereas miners who had denied or pending Part B claims and who chose Department of Labor review were eligible to establish entitlement to full benefits under Part C. *See* Section 435(a)(1)(A), (B), (a)(2) B of the Act as amended by Section 15 of the 1977 Amendments, codified at 30 U.S.C. §945. The Board has held that it is rational to conclude that Congress sought to provide an opportunity for Part B beneficiaries to obtain MBO pursuant to Part C under the 1977 Amendments without endangering their established rights under Part B. *See* ***Zaccaria v. North American Coal Corp.***, 9 BLR 1-119, 1-123 (1986). Moreover, the Board held that where a claimant files a claim for medical benefits only under Part C pursuant to 30 U.S.C. §924a, the employer is not denied due process although it may have been excluded from participation when claimant was found eligible for benefits under Part B. *Id*. Social Security Administration's initial determinations of eligibility pursuant to Part B are not binding upon Department of Labor as final adjudications of eligibility, *id*. at 1-122, ***Settlemoir v. Old Ben Coal Co.***, 9 BLR 1-109, 1-112 (1986). Thus, the opportunity for a *de novo* administrative hearing on the merits of the medical benefits claim under Part C satisfies employer's procedural due process rights. ***Zaccaria***, 9 BLR at 1-122; ***Settlemoir***, 9 BLR at 1-112.

Under Section 725.308(b), a Part B beneficiary is allowed to file for "medical benefits under Part C" if such claim is filed within six months following the claimant's notification of potential eligibility by the Department of Health, Education and Welfare. Section 725.701A is titled "[c]laims for medical benefits only under Section 11 of the Reform Act." Moreover, the text of Section 11 specifically provides eligibility for "medical services and supplies" to Part B beneficiaries, ***Kosh v. Director, OWCP***, 8 BLR 1-168, 1-171 (1985), *aff'd* 791 F.2d 918 (3d Cir. 1986)(unpub.), and that Section does not provide a basis for Part B beneficiaries to seek cash benefits under Part C. *See* ***Milam v. Director, OWCP***, 874 F.2d 223, 12 BLR 2-291 (4th Cir. 1989); ***Stowers v. Director, OWCP***, 9 BLR 1-124 (1986). The Board has held that the regulations at 20 C.F.R. Part 727 were applicable to an MBO claim that was filed on May 6, 1980, which is after the effective date of Part 718, *see* 20 C.F.R. §718.2, but prior to the final date for which claims for medical benefits shall be submitted, *i.e.*, December 31, 1980. The

Board thus vacated the administrative law judge's finding of no entitlement under 20 C.F.R. Part 718 and remanded the case to the administrative law judge for consideration under Part 727. ***Stallard v. South East Coal Co.***, 14 BLR 1-32 (1990).

CASE LISTINGS

[No medical benefits shall be awarded to survivor or dependent of miner] 20 C.F.R. §725.701(a); ***Simila v. Bethlehem Mines Corp.***, 7 BLR 1-535, 1-540 (1984), *rev'd on other grounds sub nom.* ***Bethlehem Mines Corp. v. Director, OWCP***, 766 F.2d 128, 8 BLR 2-4 (3d Cir. 1985); ***Thachik v. Greenwich Collieries***, 5 BLR 1-709 (1983).

DIGESTS

The Board rejected the argument that 30 U.S.C. §924a, which provides medical benefits only under Part C to Part B beneficiaries, allows Part B beneficiaries to file for additional monetary benefits under Part C where the Part B beneficiary is not receiving benefits due to the offset for excess earnings provisions of Part B. ***Stowers v. Director, OWCP***, 9 BLR 1-124 (1986).

Where claimant's attorney agreed at the hearing that the only issue to be considered at the hearing was whether there were any medical bills outstanding and where evidence and testimony indicated that the deceased miner incurred no covered medical expenses prior to his death, the administrative law judge properly denied entitlement. ***Shadowens v. Freeman United Coal Mining Co.***, 9 BLR 1-225 (1988).

The Board held that the amendments to 20 C.F.R. §725.308(b), which extended the time limitations for the filing of claims by Part B beneficiaries under Part C for medical benefits only, are procedural regulations and therefore are not subject to the Administrative Procedure Act requirements of notice and opportunity for public comment. ***Ariotti v. North American Coal Corp.***, 9 BLR 1-113, 1-115 (1986), *aff'd sub nom.* ***North American Coal Corp. v. Director, OWCP***, 854 F.2d 386, 11 BLR 2-216 (6th Cir. 1988).

In affirming an award of medical benefits only under Part C, the Board held that the administrative law judge properly confined the scope of the hearing to the adjudication of claimant's application for MBO under Part C. Only after liability is established, and upon a demand for reimbursement, is the Department of Labor under any obligation to present the requisite documentation for reimbursement. ***Lute v. Split Vein Coal Co.***, 11 BLR 1-82 (1987); *see* 20 C.F.R. §725.707.

The Board found that an agreement stating that employer will withdraw its controversion of claimant's eligibility for medical benefits only in return for claimant's agreement to

submit all future medical expenses to alternate health carriers initially constitutes an illegal settlement agreement under the Black Lung Benefits Reform Act of 1977. The Board determined that the Act and its accompanying regulations render an employer "absolutely liable" for furnishing medical and other expenses in connection with a work-related injury. The Board further decided that the agreement at issue would deprive claimant of protections afforded to him under the regulations governing the provision of medical care to eligible miners. ***Gerzarowski v. Lehigh Valley Anthracite, Inc.***, 12 BLR 1-62 (1988); *see* 20 C.F.R. §§725.701-725.707.

Citing ***Kosh v. Director, OWCP***, 8 BLR 1-168 (1985), and ***Stowers v. Director, OWCP***, 9 BLR 1-124 (1986), in interpreting 30 U.S.C. §924a, the Fourth Circuit held that a Part B beneficiary who had his award offset under the excess earnings offset provision may not circumvent the offset by seeking cash benefits under Part C. The Court held that claimant was a Part B recipient with an additional opportunity to receive medical benefits under Part C but not a second opportunity to seek cash benefits. ***Milam v. Director, OWCP***, 874 F.2d 223, 12 BLR 2-291 (4th Cir. 1989).

The Board affirmed the administrative law judge's decision and order granting reimbursement of medical expenses under Section 725.707, holding that employer's acceptance of liability for medical benefits completed the first step of the two step process anticipated by the Board's holding in ***Lute v. Split Vein Coal Co.***, 11 BLR 1-82, 1-84 (1987). The Board further held that, having accepted liability, employer cannot at this stage of the proceedings challenge its liability for medical benefits except through a petition for modification, *see* 20 C.F.R. §725.310, which has not been filed in this case. In affirming the administrative law judge's finding that claimant had carried his burden of providing documentation that demonstrates a proper basis for reimbursement of medical expenses pursuant to Section 725.701(b), the Board emphasized the administrative law judge's role as fact-finder in making such determinations. In a dissenting opinion, J. Brown concluded that claimant had not carried his burden of proof to establish that the medical treatment at issue was required for coal workers' pneumoconiosis and stated that he would reverse the administrative law judge's decision and order as not based on substantial evidence. In a concurring and dissenting opinion, J. McGranery agreed with the majority that the only method by which employer can challenge its liability for the award of medical benefits, *see* ***Lute***, ***supra***, is by filing a petition for modification under Section 725.310, which is not before the Board. J. McGranery further agreed with her colleagues and the parties that claimant has the burden of providing documentation that demonstrates a proper basis for reimbursement pursuant to Section 725.701(b). J. McGranery would, however, vacate the administrative law judge's order of payments and remand the case to the administrative law judge to determine whether claimant has demonstrated entitlement to payment of each of the medical bills. ***Stiltner v. Doris Coal Co.***, 14 BLR 1-116 (1990)(*en banc*)(Brown, J., dissenting; McGranery, J., concurring and dissenting), *aff'd in part and rev'd in part,* ***Doris Coal Co. v. Director, OWCP*** **[*Stiltner*]**, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991).

Interest is to be assessed against employer for reimbursable medical costs just as it is to be assessed on benefits costs initially paid by the Trust Fund. *See* 20 C.F.R. 725.602; 30 U.S.C. 934(b). ***Baldwin v. Oakwood Red Ash Coal Corp.***, 14 BLR 1-23 (1990)(*en banc*).

The administrative law judge erred in finding that employer, who conceded its liability in the medical benefits only case, waived its right to have claimant examined for purposes of 20 C.F.R. §725.701A *et. seq.* since it had not exercised its right to examination pursuant to 20 C.F.R. §725.414 during the liability phase of this action. Employer's earlier concession of liability in this medical benefits only case does not affect its right or constitute a waiver of its right to later request an employer sponsored physical examination of claimant to dispute the reasonableness and necessity of questionable medical bills. ***Allen v. Island Creek Coal Co.***, 15 BLR 1-32 (1991).

The Black Lung Act and its implementing regulations do not preclude employee from requesting an employer-sponsored examination of claimant in order to dispute questionable medical bills submitted for reimbursement. ***Allen v. Island Creek Coal Co.***, 15 BLR 1-32 (1991).

The Board rejected employer's contention that Section 907(d)(14) of the Longshore and Harbors Workers' Compensation Act affords it with an absolute right to compel an employer-sponsored examination of a miner at any time. Rather, an employer may request to have a claimant examined by its doctors when disputing a medical bill under the Act. When a claimant declines employer's request, employer bears the burden of demonstrating that the refusal is unreasonable. ***Allen v. Island Creek Coal Co.***, 15 BLR 1-32 (1991).

In this case, the Board held that it was proper for the administrative law judge to require some proffer of evidence to demonstrate that the request for a physical examination of claimant is reasonable under the circumstances. ***Allen v. Island Creek Coal Co.***, 15 BLR 1-32 (1991).

The Board held that the administrative law judge did not abuse his discretion in denying employer's request to an employer-sponsored examination, based on the absence of any evidence to support employer's request. ***Allen v. Island Creek Coal Co.***, 15 BLR 1-32 (1991).

The Board held that the resolution of medical bill disputes is determined on a case-by-case basis, and that the Black Lung Act and the regulations afford the fact-finder broad discretion in resolving these disputes. The Board, therefore, declined to set forth the specific factors to be considered by the deputy commissioner and the administrative law judge, when resolving medical bill disputes under 20 C.F.R. §725.707. ***Allen v. Island Creek Coal Co.***, 15 BLR 1-32 (1991).

The Board affirmed the administrative law judge's award of medical benefits in this case arising within the Fourth Circuit as the administrative law judge found claimant entitled to the presumption set forth in ***Doris Coal Co. v. Director, OWCP* [*Stiltner*]**,938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), *aff'g in part and rev'g in part* ***Stiltner v. Doris Coal Co.***, 14 BLR 1-116 (1990)(*en banc*)(Brown, J., dissenting; McGranery, J., concurring and dissenting). Employer did not rebut this presumption by a preponderance of the evidence. Judge Brown concurred in the result after expressing his belief that the court-created presumption set forth in ***Stiltner*** is contrary to the holding of the Supreme Court, ***Director, OWCP v. Greenwich Collieries* [*Ondecko*]**, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993), that claimant must prove his case by a preponderance of the evidence. ***Seals v. Glen Coal Co.***, 19 BLR 1-80 (1995)(*en banc*)(Brown, J., concurring).

In order to rebut the presumption in ***Stiltner***, employer may show, by a reasoned medical opinion, either that: 1) the expenses in question were not reasonable for the treatment of any of claimant's pulmonary diseases (*i.e*., a reasoned medical opinion stating that a certain type of treatment is excessive or simply not necessary for the treatment of claimant's pulmonary condition); or 2) the treatment is for a condition completely unrelated to claimant's pulmonary condition (e.g., treatment for a heart condition, broken bone or bad back). ***Seals v. Glen Coal Co.***, 19 BLR 1-80, fn. 6 (1995)(*en banc*)(Brown, J., concurring).

The Board held that an administrative law judge permissibly rejected a medical opinion that stated that there was insufficient objective evidence to diagnose occupational pneumoconiosis as having no probative value in establishing rebuttal of the presumption as enunciated by the Fourth Circuit in ***Doris Coal Co. v. Director, OWCP* [*Stiltner*]**, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), *aff'g in part and rev'g in part* ***Stiltner v. Doris Coal Co.***, 14 BLR 1-116 (1990)(*en banc*)(Brown, J., dissenting; McGranery, J., concurring and dissenting). ***Seals v. Glen Coal Co.***, 19 BLR 1-80 (1995)(*en banc*)(Brown, J., concurring).

The Board denied reconsideration, rejecting employer's request that the case be remanded to the administrative law judge for de novo findings as to the reasonableness of employer's request for an examination. The Board declined to remand the case, noting that claimant is entitled to the presumption set forth in ***Doris Coal Co. v. Director, OWCP* [*Stiltner*]**, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), *aff'g in part and rev'g in part* ***Stiltner v. Doris Coal Co.***, 14 BLR 1-116 (1990)(*en banc*)(Brown, J., dissenting; McGranery, J., concurring and dissenting), and that there is no evidence of record to rebut that presumption. ***Allen v. Island Creek Coal Co.***, 21 BLR 1-1 (1996), *aff'g on recon.* 15 BLR 1-32 (1991).

The Board affirmed the administrative law judge's denial of employer's Motion for Summary Decision, which sought judgment as a matter of law on the ground that DOL had excluded organ transplants from coverage under the Act in its Federal Black Lung Program Provider Manual and that DOL's unilateral reversal of its published policy violated the APA and could not be retroactively implemented. The Board agreed with the Director's position that the Provider Manual provisions do not rise to the level of interpretive rules or formal policy, but are informal, instructional guidelines for the health care industry. As such, they are exempt from the notice and comment requirements of the APA as they do not have the force and effect of law, and the fact-finder has discretion to determine, based on the facts of each case, whether or not a lung transplant constitutes a covered procedure under the Act and the regulations. ***Kenner v. Tennessee Consolidated Coal Co.***, 22 BLR 1-287 (2003).

The D.C. Circuit held that the revised regulation at 20 C.F.R. §725.701(e), providing, in a medical benefits case, a presumption that a treated pulmonary disorder is caused by pneumoconiosis, shifts only the burden of production, not the burden of proof, to operators to produce evidence that the treated disease was unrelated to pneumoconiosis. Because the ultimate burden of proof remains on claimants at all times, the revised regulation is valid, not arbitrary or capricious, and not inconsistent with ***Director, OWCP v. Greenwich Collieries***, 512 U.S. 267, 18 BLR 2A-1 (1994), *aff'g sub nom*. ***Greenwich Collieries v. Director, OWCP***, 990 F.2d 730, 17 BLR 2-64 (3d Cir.1993). ***Nat'l Mining Ass'n v. Department of Labor* [*NMA*]**, 292 F.3d 849, 872-873, 23 BLR 1-24 (D.C. Cir. 2002), *aff'g in part and rev'g in part* ***Nat'l Mining Ass'n v. Chao***, 160 F.Supp.2d 47 (D.D.C. 2001). However, Section 725.701 is impermissibly retroactive as applied to pending claims. ***NMA***, 292 F.3d at 866-867.

The Sixth Circuit concluded that the administrative law judge properly found that the claimant was entitled to the presumption set forth in ***Doris Coal Co. v. Director, OWCP* [*Stiltner*]**, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991). The Sixth Circuit rejected employer's argument that its settlement agreement (through which employer agreed to accept the initial determination that the miner met the standards of disability) did not give rise to the ***Doris Coal*** presumption because the agreement did not amount to a stipulation that the miner had "legal" pneumoconiosis. The Court held that the medical evidence as well as the settlement agreement reasonably supported the administrative law judge's conclusion that the miner was totally disabled under the Act and that chronic bronchitis figured in that determination. Because the evidence qualified as a predicate for the ***Doris Coal*** presumption, which foreclosed relitigation of the underlying disability determination, the Court held that employer was limited to rebutting the presumption that attached to the miner's medical expenses related to chronic bronchitis by showing that the expenses were actually incurred to treat a separate pulmonary disorder, were unnecessary, or were not for a pulmonary disorder at all. ***Lewis Coal Co. v. Director, OWCP* [*McCoy*]**, 373 F.3d 570 (4th Cir. 2004).

The Sixth Circuit rejected employer's contention that the ***Doris Coal*** presumption constitutes an abuse of the doctrine of offensive collateral estoppel. Employer argued that it had no legal interest in the miner's Part B proceeding at the time it was decided because any award would be paid by the federal government. Employer, therefore, contended that it should not be precluded from challenging the merits of that proceeding when its interests would be adversely affected by it. The Sixth Circuit, however, concluded that employer's characterization of the ***Doris Coal*** presumption as "violative of the strictures on non-mutual offensive collateral estoppel" was "a thinly veiled attempt to circumvent the consequences of the settlement to which it [had] agreed." The Court noted that employer understood at the time that it entered into the settlement agreement with the miner that it might form "the basis for the issuance of an Award of Medical Benefits and Order to Pay Medical Benefits in [the] claim." Citing 20 C.F.R. §§410.473 and 410.490(d) (2003), the Court further noted that the regulations would have permitted employer to challenge the miner's Part B award before it began denying the miner's requests for Part C benefits. Finally, the Sixth Circuit held that, because the ***Doris Coal*** presumption is rebuttable (with the burden of proof remaining at all times with the miner), the fairness concerns implicit in the limitations on offensive collateral estoppel simply do not arise. ***Lewis Coal Co. v. Director, OWCP* [*McCoy*]**, 373 F.3d 570 (4th Cir. 2004).

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