BRB No. 92-1887 BLA

JESS SEALS)
)
Claimant-Respondent)
v.) DATE ISSUED:
)
GLEN COAL COMPANY)
)
and)
)
OLD REPUBLIC INSURANCE COMPANY)
)
Employer/Carrier-)
Petitioners)
)
DIRECTOR, OFFICE OF WORKERS')
COMPENSATION PROGRAMS, UNITED)
STATES DEPARTMENT OF LABOR)
) DECISION and ORDER
Respondent) *EN BANC*

Appeal of the Decision and Order of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

H. Ronnie Montgomery, Jonesville, Virginia, for claimant.

Mark E. Solomons and Laura Montgomery (Arter & Hadden), Washington, D.C., for employer.

Eileen McCarthy and Tanya P. Harvey (Thomas S. Williamson, Jr., Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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: HALL, Chief Administrative Appeals Judge, SMITH, BROWN, DOLDER and McGRANERY, Administrative Appeals Judges.

HALL, Chief Administrative Appeals Judge:

Employer appeals the Decision and Order (89-BLA-01469) of Administrative Law Judge Clement J. Kichuk awarding medical 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).[1] The administrative law judge ordered employer to pay certain prescription bills for bronchodilators and antibiotics after finding that employer failed to establish rebuttal of 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*, with Brown, J., dissenting, and McGranery, J., concurring and dissenting). Accordingly, medical benefits were awarded. On appeal, employer challenges the administrative law judge's award of medical benefits. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond in support of the administrative law judge's award. Employer filed a reply to which the Director responded. Subsequent to the Director's supplemental brief, employer filed a Supplemental Brief and a Citation of Additional Authority.[2] Oral Argument was held in the instant case on June 8, 1994, in Lexington, Kentucky.[3] *See Seals v. Glen Coal Co.*, BRB No. 92-1887 BLA (Apr. 26, 1994)(unpub. Order).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon the Board and may not be disturbed. 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).

In order to establish entitlement to medical benefits, claimant must establish

[1]The miner filed his claim for medical benefits on June 26, 1979. *See* Director's Exhibit 1.

[2]The supplemental briefs filed by the Director and employer were accepted as part of the record on January 26, 1995. *Seals v. Glen Coal Co.*, BRB No. 92-1887 BLA (Jan. 26, 1995)(unpub. Order). We now accept employer's Citation of Additional Authority as part of the record. *See* 20 C.F.R. §802.215.

[3]Claimant did not participate at oral argument.

that his medical expenses were necessary to treat his pneumoconiosis and ancillary pulmonary conditions and disability. *See* 33 U.S.C. §907(a); 20 C.F.R. §725.701(b). Moreover, the United States Court of Appeals for the Fourth Circuit, wherein appellate jurisdiction of this claim lies, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), has held that when a miner receives treatment for a pulmonary disorder, a presumption arises that the disorder was caused or at least aggravated by the miner's pneumoconiosis, making employer liable for the medical costs. *See Stiltner*, *supra*. Employer can only use subsequent proceedings to challenge the necessity of certain medical charges for the treatment of a pneumoconiosis related disorder or challenge medical expenses not related to pneumoconiosis, but may not require the miner to prove again that he has pneumoconiosis each time he makes a claim for health benefits. *See Stiltner*, *supra*.

After consideration of the administrative law judge's Decision and Order, the arguments of the parties and the evidence of record, we conclude that the Decision and Order of the administrative law judge is supported by substantial evidence and that there is no reversible error contained therein. *See Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). In the instant case, the administrative law judge found claimant entitled to the rebuttable presumption set forth in *Stiltner*, *supra*, that the miner's pulmonary disorder was caused or at least aggravated by his pneumoconiosis.[4] *See*

[4]The presumption set forth in *Stiltner* reads,

> a miner meets his burden of showing that his medical expenses were necessary to treat pneumoconiosis if his treatment relates to any pulmonary condition resulting from or substantially aggravated by the miner's pneumoconiosis. Since most pulmonary disorders are going to be related or at least aggravated by the presence of pneumoconiosis,

Stiltner, 938 F.2d at 496-497, 15 BLR at 2-140; Decision and Order at 8. The administrative law judge then further evaluated the medical evidence to determine if employer rebutted the presumption by establishing that the bills submitted were not related to pneumoconiosis. Decision and Order at 8.

> when a miner receives treatment for a pulmonary disorder, a presumption arises that the disorder was caused or at least aggravated by the miner's pneumoconiosis, making the employer liable for the medical costs.

See Doris Coal Co. v. Director, OWCP [Stiltner], 938 F.2d 492, 496-497, 15 BLR 2-135, 2-140 (4th Cir. 1991).

Contrary to employer's arguments, the administrative law judge properly required employer to establish rebuttal of the presumption created in *Stiltner*, *supra*, by a preponderance of the evidence.[5] *See Stiltner*, *supra*; Decision and Order at 8-10. We agree with the Director that the administrative law judge permissibly rejected the opinion of Dr. Dahhan, that none of the prescribed medications claimant submitted for payment were necessary to treat his pneumoconiosis, as the physician's conclusion that there was insufficient objective evidence to diagnose occupational pneumoconiosis has no probative value. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *Beavan v. Bethlehem Mines Corp.*, 741 F.2d 689, 6 BLR 2-101 (4th Cir. 1984); *Kozele v. Rochester and Pittsburgh Coal Co.*, 6 BLR 1-378, 1-382, 1-383, n. 4 (1983); Decision and Order at 9-10; Employer's Exhibits 3, 5, 6. The administrative law judge noted that Dr. Dahhan's conclusions were contrary to the spirit of the Act in that a final determination of entitlement to medical benefits precluded raising the basic issues of entitlement. *See* Decision and Order at 10; Director's Exhibit 2; Employer's Exhibits 3, 5, 6. With respect to Dr. Branscomb's opinion, that all treatment for chronic bronchitis was secondary to claimant's cigarette smoking and not coal workers' pneumoconiosis, the administrative law judge permissibly determined that the physician did not provide a sufficient basis for rebuttal. The administrative law judge permissibly held that this opinion is irreconcilable with the presumption set forth in *Stiltner*.[6] *See Stiltner*, 938 F.2d at

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[5]Employer's argument that this presumption operates as a bursting bubble similar to the causation presumption pursuant to Section 20(a) of the Longshore Act, 33 U.S.C. §920(a), is rejected as there is no indication from *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*, with Brown, J., dissenting, and McGranery, J., concurring and dissenting), that the court applied this theory of rebuttal. We also reject employer's argument that the presumption created by the United States Court of Appeals for the Fourth
Circuit is dictum as the issue in *Stiltner*, *supra*, as in the instant case, is whether claimant met his burden of proof in establishing that the medical bills submitted were for the reasonable treatment of his pneumoconiosis. *See Stiltner*, 938 F.2d at 496, 15 BLR at 2-140.

[6]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 which states 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).

497, 15 BLR at 2-141; *Clark*, *supra*; *Kozele*, *supra*; Decision and Order at 10; Employer's Exhibits 8, 11. *See* Employer's Exhibits 8, 11.

Contrary to employer's remaining arguments, the opinions of Drs. Cander and McQuillan, which are based on a review of the medical evidence of record,[7] were properly considered by the administrative law judge as they are relevant to the ultimate issue of fact in this case and permissibly determined to be insufficient to establish that the treatment received by claimant for his respiratory or pulmonary impairment was unrelated to his coal workers' pneumoconiosis. *See* 29 C.F.R. §18.704; *Fuller v. Gibraltar Coal Corp.*, 6 BLR 1-1291 (1984); *Stiltner*, *supra*; *Piccin*, *supra*; Director's Exhibits 8, 17. Moreover, Dr. Kanwal's opinion is insufficient to establish rebuttal as he stated that pneumoconiosis patients also develop associated respiratory infections and chronic obstructive pulmonary disease [which must be treated with these medications]. *See Stiltner*, *supra*; Claimant's Exhibit 2; Employer's Exhibit 6. As the administrative law judge is empowered to weigh the medical evidence and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989); *Clark*, *supra*. Consequently, we affirm the administrative law judge's award of medical benefits as it is supported by substantial evidence and is in accordance with law.

[7]Dr. Cander stated that, without further information, the bronchodilators but not the antibiotics were reimbursable. *See* Director's Exhibit 8. Dr. Cander based his opinion on a review of
the available record on claimant which included the pharmacists' record of prescriptions filled from December 26, 1984 through June 8, 1987. Dr. McQuillan stated that the miner's intercurrent infections required antibiotics and that the antibiotics were required for complications of the miner's coal workers' pneumoconiosis. *See* Director's Exhibit 17. Dr. McQuillan's opinion was based on a review of office visits on claimant performed on July 24, 1989 and October 2, 1989, treatment notes dated May 17, 1989, and progress notes.

Accordingly, the administrative law judge's Decision and Order awarding medical benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

We concur:

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BROWN, Administrative Appeals Judge, concurring:

I write separately today to express my concerns with the presumption expressed 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*, with Brown, J., dissenting, and McGranery, J., concurring and dissenting) by the United States Court of Appeals for the Fourth Circuit. I believe

that this court-created presumption, which has no statutory or regulatory basis, is contrary to the holding of the United States Supreme Court that claimant must prove his case by a preponderance of the evidence. *See Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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). *See also Mullins Coal Co., Inc. of Virginia v. Director, OWCP*, 484 U.S. 135, 11 BLR 2-1 (1987), *reh'g denied*, 484 U.S. 1047 (1988), where the United States Supreme Court, in reviewing the invocation burden under the 20 C.F.R. Part 727 regulations, held that the invocation determinations were to be made under a preponderance-of-the-evidence standard. In this medical benefits case, claimant has the burden to prove by a preponderance of the evidence that the prescription bills he submitted are necessary to treat his pneumoconiosis. *See* 33 U.S.C. §907(a); 20 C.F.R. §725.701(b). I would consider this case without giving claimant the benefit of the presumption created in *Stiltner*, *supra*. Because the reports of Drs. Cander, Kanwal and McQuillan, weighed against the reports of Drs. Dahhan and Branscomb, are sufficient to establish that the treatment, including the prescriptions for the bronchodilators and antibiotics were necessary to treat claimant's pneumoconiosis, I would affirm as substantial evidence supports the administrative law judge's award of medical benefits. *See Price v. Peabody Coal Co.*, 7 BLR 1-671 (1985); *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983); Director's Exhibits 8, 17; Claimant's Exhibits 1-2. I, therefore, concur in the result.

JAMES F. BROWN
Administrative Appeals Judge