BRB No. 01-0953 BLA

HERSHEL U. McCOY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
LEWIS COAL COMPANY, INCORPORATED	)	DATE ISSUED:
	)	
and	)	
	)	
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 Medical Benefits in Part of Pamela Lakes Wood, Administrative Law Judge, United States Department of Labor.

Susan D. Oglebay, Castlewood, Virginia, for claimant.

Natalie D. Brown (Jackson & Kelly PLLC), Lexington, Kentucky, for employer.

Jeffrey S. Goldberg (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy 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: SMITH, McGRANERY, and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order Awarding Medical Benefits in Part (00-BLA-0684) of Administrative Law Judge Pamela Lakes Wood on a Medical Benefits Only (MBO) 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 found that the sole issue in this case was whether claimant was entitled to the payment of certain medical bills by employer in accordance with 20 C.F.R. §725.701 as amended and the decisions of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999); *General Trucking Corp. v. Salyers*, 175 F.3d 322, 21 BLR 2-565 (4th Cir. 1999); *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991).[2] Decision and Order at 8. Claimant and the Director, Office of

[1] Claimant's Social Security Administration (SSA) application and the SSA decision awarding benefits are not found in the record. The record indicates only that claimant was awarded Part B benefits. *See* Director's Exhibit 1. Part B recipients who filed Part C claims subsequent to March 1, 1978, such as the instant claim, *see* Director's Exhibit 1, are limited to medical benefits only under the Black Lung Benefits Reform Act. 20 C.F.R. §725.701A; *see* 30 U.S.C. §924a; *Kosh v. Director, OWCP*, 8 BLR 1-168, 1-171 (1985), *aff'd* 791 F.2d 918 (3d Cir. 1986)(table). The instant MBO claim was filed on November 29, 1978. Director's Exhibit 1. After initially being awarded medical benefits by the claims examiner, Director's Exhibit 2, employer controverted liability, Director's Exhibit 3, then subsequently withdrew its controversion, Director's Exhibit 8, and in September 1981, agreed to pay for all medical treatment reasonable and necessary for claimant's pneumoconiosis, Director's Exhibits 9, 10. Employer paid for claimant's medical treatment until 1986, at which time it declined to continue such payments because it asserted that there was nothing in the record to establish that the medical treatment was for pneumoconiosis. Director's Exhibit 13. After submission of further medical evidence, this case was forwarded to the Office of Administrative Law Judges for a hearing. Director's Exhibit 40. On July 12, 2001, the administrative law judge issued the Decision and Order from which employer now appeals.

[2] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

The amended regulation at issue in this case is 20 C.F.R. §725.701. Section 725.701 provides as follows:

(a) A miner who is determined to be eligible for benefits under

this part or part 727 of this subchapter (*see* §725.4(d)) is entitled to medical benefits as set forth in this subpart as of the date of his or her claim, but in no event before January 1, 1974. No medical benefits shall be provided to the survivor or dependent of a miner under this part.

(b) A responsible operator, other employer, or where there is neither, the fund, shall furnish a miner entitled to benefits under this part with such medical, surgical, and other attendance and treatment, nursing and hospital services, medicine and apparatus, and any other medical service or supply, for such periods as the nature of the miner's pneumoconiosis and disability requires.

(c) The medical benefits referred to in paragraphs (a) and (b) of this section shall include palliative measures useful only to prevent pain or discomfort associated with the miner's pneumoconiosis or attendant disability.

(d) The costs recoverable under this subpart shall include the reasonable cost of travel necessary for medical treatment (to be determined in accordance with prevailing United States government mileage rates) and the reasonable documented cost to the miner or medical provider incurred in communicating with the employer, carrier, or district director on matters connected with medical benefits.

(e) If a miner receives a medical service or supply, as described in this section, for any pulmonary disorder, there shall be a rebuttable presumption that the disorder is caused or aggravated by the miner's pneumoconiosis. The party liable for the payment of benefits may rebut the presumption by producing credible evidence that the medical service or supply provided was for a pulmonary disorder apart from those previously associated with the miner's disability, or was beyond that necessary to effectively treat a covered disorder, or was not for a pulmonary disorder at all.

(f) Evidence that the miner does not have pneumoconiosis or is not totally disabled by pneumoconiosis arising out of coal mine employment is insufficient to defeat a request for coverage of

Workers' Compensation Programs (the Director) agreed that it would be appropriate for claimant to seek reimbursement for the medical expenses summarized at Director's Exhibit 41, but that any further medical expenses which might be part of the record are not compensable. *See* Director's Exhibits 31, 41; Transcript of Hearing at 10-11; Order of Administrative Law Judge dated August 31, 2000. The administrative law judge found, based upon her review of the arguments of the parties and all the evidence, "that most but not all, of the disputed [medical] treatment is compensable," Decision and Order at 11, and thus ordered employer to make reimbursement for various medicines and office visits.

On appeal, employer argues that the administrative law judge erred in applying the revised regulation at Section 725.701 to this case. Employer also argues that the administrative law judge erred in relying on the same type of burden shifting analysis that the Fourth Circuit rejected in *Salyers* and *Ling* when she found claimant entitled to medical benefits based on an irrebuttable presumption, *i.e.*, that claimant's treatment for chronic bronchitis was aggravated by pneumoconiosis and that all of claimant's pulmonary problems were interrelated. Rather, employer contends that *Ling* and *Salyers* require claimant to affirmatively prove that there is a connection between his medical treatment and his pneumoconiosis once employer has produced evidence that the treatment is not for pneumoconiosis. Specifically, employer contends that the administrative law judge erred in rejecting the opinions of Drs. Castle, Tuteur and Sargent, who diagnosed clinical pneumoconiosis, but explained that the treatment provided claimant was for bronchitis and infections related to claimant's cigarette smoking habit, not to his coal dust exposure. Employer further argues that the administrative law judge erred in invoking the "collateral source" rule by requiring employer to reimburse claimant for expenses that were not due or paid by him or which were paid or reduced by a third party. Employer contends that the "collateral source" rule is inapplicable to black lung claims. Claimant, in response, urges that the administrative law judge's Decision and Order be affirmed.

> any medical services or supply under this subpart. In determining whether the treatment is compensable, the opinion of the miner's treating physician may be entitled to controlling weight pursuant to §718.104(d). A finding that a medical service or supply is not covered under this subpart shall not otherwise affect the miner's entitlement to benefits.

The Director responds for the limited purpose of challenging employer's assertion that the newly revised regulation at Section 725.701 is not applicable to the instant claim. The Director contends that employer has provided no legal basis for such an assertion and that the Board should, therefore, summarily reject it. Further, the Director contends, that inasmuch as the amended regulation at Section 725.701 merely codifies existing case law in the Fourth Circuit by establishing a presumption of medical benefits coverage for the treatment of a miner's respiratory or pulmonary problems; Section 725.701(e), once invoked, merely shifts the burden of production (but not persuasion) to the employer to product credible evidence rebutting the presumption, and does not constitute a change in the law or alter the parties expectations.

Replying to the Director's response brief, employer asserts that the newly revised regulations are not applicable to the instant case because revised Section 725.701 is contrary to established Fourth Circuit precedent inasmuch as the revised regulation does not require claimant to bear the burden of establishing that his medical condition is related to pneumoconiosis. *See Ling*, *supra*; *Salyers*, *supra*; *Stiltner*, *supra*. Employer argues that while the Fourth Circuit in *Ling* and *Salyers* reiterated the presumption established in *Stiltner*, *i.e.*, that claimants seeking reimbursement for medical expenses are entitled to a presumption that their pulmonary treatment is related to pneumoconiosis, the court also held that once employer produces evidence showing that the treatment is not related to pneumoconiosis, claimant must then affirmatively establish that the treatment is related to pneumoconiosis. Employer asserts that in contrast to the holdings in *Ling* and *Salyers*, the revised regulation omits the critical part of the decisions that imposes the burden of persuasion on claimant and requires employer to produce credible evidence that the miner's treatment was not related to pneumoconiosis, thus, improperly shifting the burden of proof to employer. Employer's Reply Brief at 2-4. Employer further asserts that the revised regulation, unlike the Fourth Circuit decision in *Ling*, fails to explicitly state that the burden of proof rests with claimant; the regulation limits what types of evidence employers may submit, and raises the issue of total disability, which has no relevance in MBO cases. Employer's Reply Brief at 4. Employer also asserts that the newly revised regulation is, in this case, impermissibly being applied retroactively. Lastly, employer asserts that the Director exceeded its authority in promulgating these new regulations inasmuch as the Act grants "no regulatory authority to enlarge coverage beyond what the statute specifically provides." Employer's Reply Brief at 6.

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 this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe*

v. Smith, Hinchman & Grylls Associates, Inc., 380 U.S. 359 (1965).

We turn first to employer's argument regarding the applicability of revised Section 725.701 to this case. The United States Courts of Appeals have generally given special deference to the Director's position on issues involving the interpretation or the application of the Act because the Director is charged with the administration of the Act. *See Director, OWCP v. Palmer Coking Coal Co.* [*Manowski*], 867 F.2d 552, 555 (9th Cir. 1989); *Saginaw Mining Co. v. Mazzulli*, 818 F.2d 1278, 10 BLR 2-119 (6th Cir. 1987); *Peabody Coal Co. v. Blankenship*, 773 F.2d 173 (7th Cir. 1985); *Bethlehem Mines Corp. v. Simila*, 766 F.2d 128 (3d Cir. 1985). Further, the Fourth Circuit has held that "[t]he Director's interpretation of the regulations is entitled to substantial deference from this court." *Shuff v. Cedar Coal Co.*, 967 F.2d 977, 16 BLR 2-90, 2-92 (4th Cir. 1992), citing *BethEnergy Mines, Inc. v. Pauley*, 501 U.S. 680, 15 BLR 2-155 (1991), *aff'g* 890 F.2d 1295, 13 BLR 2-162 (3d Cir. 1989) and *Adkins v. Director, OWCP*, 878 F.2d 151, 12 BLR 2-313 (4th Cir. 1989); *cf. Gray v. Director, OWCP*, 943 F.2d 513, 15 BLR 2-214 (4th Cir. 1991); *Eplion v. Director, OWCP*, 794 F.2d 935, 9 BLR 2-52 (4th Cir. 1986). We, therefore, defer to the Director's interpretation of Section 725.701 and hold that the newly revised regulation is consistent with precedent established in the Fourth Circuit regarding claims for medical benefits only. *See Ling, supra*; *Salyers, supra*; *Stiltner, supra*; *see also Nat'l Mining Ass'n v. United States Dep't of Labor*, F.3d , 2002 WL 1300007 (D.C. Cir., June 14, 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). Accordingly, we reject employer's assertion that the revised regulation at Section 725.701 is not applicable to this case.

Employer next contends that the administrative law judge's analysis of the evidence does not comply with controlling authority. Specifically, employer asserts that the administrative law judge erred in presuming that all of claimant's pulmonary problems were related to pneumoconiosis. Employer argues that the administrative law judge improperly rejected all evidence that claimant's bronchitis was not related to pneumoconiosis because she erroneously believed such evidence was inconsistent with employer's stipulation that claimant was entitled to Part B benefits. Employer argues, however, that the Fourth Circuit in both *Ling* and *Salyers* makes clear that once employer produces evidence that claimant's medical treatment is not related to pneumoconiosis, the burden shifts to claimant to affirmatively demonstrate that the treatment was, in fact, for pneumoconiosis. Employer contends that the administrative law judge, in this case, failed to place such a burden on claimant and, therefore, erred in rejecting the opinions of Drs. Castle, Tuteur and Sargent, Director's Exhibits 36, 37, all of whom diagnosed the existence of pneumoconiosis, but indicated that the medical treatment in question was for bronchitis, unrelated to coal dust exposure. Employer also contends that the administrative law judge erred in relying on the opinions of Drs. Sherman and Cander, that the medical treatment in question was related to pneumoconiosis, because their opinions were not well-reasoned and failed to address the role that factors such as claimant's continued cigarette smoking played in his treatment.

Employer's Brief at 19-20. Additionally, employer argues that it was error for the administrative law judge to presume that employer had stipulated to the existence of legal pneumoconiosis merely because it stipulated that claimant was entitled to Part B benefits. Employer asserts that the issue of legal pneumoconiosis as opposed to clinical pneumoconiosis was never litigated and that it was inappropriate to preclude employer from now litigating the issue. Likewise, employer argues that the administrative law judge erred in concluding that employer could not contest its liability for medical bills at issue in this case merely because it had paid for previous medical treatment, and that the records in MBO cases must be carefully scrutinized in order to avoid fraud, which the administrative law judge failed to do in this case. Finally, employer contends that the administrative law judge did not have jurisdiction to award reimbursement to claimant for office visits to doctors on January 10, 1989 and November 7, 1989, as these charges were no longer at issue at the time of the hearing.

In accordance with the revised regulation at Section 725.701 and with the holdings of the Fourth Circuit in *Ling*, *Salyers*, and *Stiltner*, the only issue before us at this time is whether claimant's medical expenses were for the treatment of his totally disabling pneumoconiosis. The issue of whether claimant has established totally disabling pneumoconiosis is not before us, as the previous finding on this matter constitutes the law of the case. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Accordingly, we will not entertain any assertions raised by employer regarding the existence of claimant's totally disabling pneumoconiosis. 20 C.F.R. §725.701; *see Ling*, *supra*; *Salyers*, *supra*; *Stiltner*, *supra*.

The administrative law judge concluded that claimant's antibiotic treatment was compensable because it was for therapy for a condition diagnosed since the 1980's. The administrative law judge relied upon the opinions of Drs. Sherman and Cander, that such treatment was necessary for chronic bronchitis arising out of coal mine dust exposure. Decision and Order at 14. Further, the administrative law judge concluded that other medical treatment, specifically, bronchodilator agents and cough suppressants, was also compensable as such medical treatment was initiated in the 1970's and was prescribed for chronic bronchitis exacerbated by pneumoconiosis. Decision and Order at 16. Likewise, the administrative law judge also concluded that office visits for the treatment of pneumoconiosis and other respiratory ailments attributed to coal mine employment were compensable. In reaching this determination, the administrative law judge rejected Dr Tuteur's opinion that some of the office visits were for the treatment of non-pulmonary conditions because the physician failed to specifically indicate which office visits were "noncompensable on that basis." Decision and Order at 17. The administrative law judge further found that while Dr. Castle opined that the office visits of February 20, 1990, November 19, 1992, December 15, 1992 and February 12, 1993, were not compensable as they were for the treatment of diabetes, the office visit of February 2, 1990, was compensable

based on the opinions of Dr. Sherman and Dr. Cander.

We, therefore, reject employer's myriad assertions and hold that the administrative law judge's award of medical benefits is supported by substantial evidence and consistent with both the newly revised regulation and established Fourth Circuit precedent. Contrary to employer's assertions, the weight of the relevant evidence supports a finding that the medical treatment chronicled in the record and addressed by the administrative law judge, was for medical treatment arising out of claimant's pneumoconiosis. Accordingly, since the administrative law judge considered all of the relevant evidence of record and concluded that such evidence affirmatively demonstrated that claimant established that the medical treatment, in question, was for conditions related to pneumoconiosis, claimant has established entitlement to medical benefits. 20 C.F.R. §725.701; *see Ling*, *supra*; *Salyers*, *supra*; *Stiltner*, *supra*. We, thus, reject employer's assertions and hold that employer has failed to demonstrate that claimant's medical treatment was not for pneumoconiosis.

Contrary to employer's assertions, the administrative law judge permissibly accorded greatest weight to the opinions of Drs. Sherman and Cander based on the physicians' thorough review of claimant's medical record. *See Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, contrary to employer's assertion, the administrative law judge need not make a specific finding that a medical opinion is well-reasoned and well-documented inasmuch as the administrative law judge's crediting of the medical opinion is an implicit finding that the opinion is well-reasoned and well-documented. *See Pulliam v. Drummond Coal Co.*, 7 BLR 1-846, 1-851 (1985); *Adamson v. Director, OWCP*, 7 BLR 1-229 (1984); *Laird v. Alabama By-Products Corp.*, 6 BLR 1-1146 (1984)(Smith, J. dissenting on other grounds). Accordingly, we reject employer's argument that the administrative law judge erred in failed to make such a specific inquiry regarding the opinions of Drs. Sherman and Cander. Decision and Order at 15-16; *see Salyers*, *supra*.

We further reject employer's assertion that its previous voluntary payment of medical benefits was held against it by the administrative law judge. Contrary to employer's assertion, while the administrative law judge did indicate that employer had previously paid claimant's medical bills, a review of the decision demonstrates that the administrative law judge's determination that claimant established entitlement to medical benefits was based upon a review of the evidence of record. *See* Decision and Order at 8-18. Similarly, we reject employer's assertion that the administrative law judge's decision to accord less weight to the opinions of Drs. Sargent, Castle and Tuteur demonstrated bias. This assertion is not supported by the record inasmuch as the administrative law judge thoroughly analyzed all the evidence of record and provided legally permissible reasons for reaching her conclusions. *See Cochran v. Consolidation Coal Co.*, 16 BLR 1-101 (1992); *see also Marcus v. Director,*

OWCP, 548 F.2d 1044, 1050 (D.C. Cir. 1976); *Zamora v. C.F. & I. Steel Corp.*, 7 BLR 1-568 (1984).

Likewise, contrary to employer's assertion, the administrative law judge permissibly concluded that claimant's office visits on October 10, 1989 and November 27, 1989 were compensable. While acknowledging that these office visits were "not listed on the summary of bills that are due in Director's Exhibit 41," Decision and Order at 17 n.7, the record nevertheless demonstrated that these visits were for medication refills and thus reimbursable. Inasmuch as these medical bills were part of the record and the administrative law judge provided a permissible basis for concluding that such bills were reimbursable, accordingly, we affirm, as supported by substantial evidence, the administrative law judge's finding that claimant established entitlement to medical benefits. *See* 20 C.F.R. 725.701; *Ling*, *supra*; *Salyers*, *supra*; *Stiltner*, *supra*.

Finally, employer argues that it is being held liable for treatment expenses incurred eight to fifteen years ago when the record is devoid of relevant evidence: whether the physicians are still seeking recovery of such expenses; whether claimant has actually paid for these medical expenses; and whether such expenses were covered by insurance or reduced. Employer's Brief at 21. Employer argues that such facts are relevant in MBO cases and that there needs to be "an outstanding debt or an amount [claimant] has paid for him to recover." Employer's Brief at 22. Employer further contends that the administrative law judge improperly applied the "collateral source rule" by requiring employer to reimburse claimant even if the amounts compensable had been paid by another party. Employer contends, however, that the collateral source rule is only applicable to tort claims and is not available in MBO claims arising under the Act. Lastly, employer argues that, ultimately, the collateral source rule is irrelevant in the instant case because claimant failed to produce any evidence demonstrating out-of-pocket expenses, demands for payment, or adverse actions taken as a result of the non-payment of any medical bills. Thus, employer asserts that the burden rests with claimant to affirmatively demonstrate that the debt for such expenses still, in fact, exists.

The administrative law judge held, however, that the regulations do not take into account the personal health insurance of claimants, *see* 65 Fed. Reg. 80022; Decision and Order at 9. Accordingly, the administrative law judge determined that employer is liable for the medical benefits in question, regardless of the various factors asserted by employer. Further, we reject employer's assertions that claimant must affirmatively demonstrate that an outstanding debt exists in this case. Employer has failed to point to any relevant precedent, statute, or regulation holding that such a burden rests with claimant. While we recognize that neither the regulations nor the comments specifically address the "collateral source rule," we hold that employer's assertion, that claimant must affirmatively demonstrate that the bills in question were not paid for by a third party or were still being pursued for payment, affirmatively places upon claimant a burden not contemplated by the Act or the regulations.

In *Ling, supra*, the Fourth Circuit indicated that the "proof needed is a medical bill for the treatment of a pulmonary or respiratory disorder and/or other symptoms." *Ling* 176 F.3d at 233, 21 BLR at 2-583. We therefore reject employer's assertion in this regard.

Accordingly, the administrative law judge's Decision and Order Awarding Medical Benefits in Part is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge