BRB No. 02-0476 BLA-A

RAY HAMILTON, JUNIOR	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION AND ORDER

Appeal of the Decision and Order on Remand of Paul H. Teitler, Administrative Law Judge, United States Department of Labor.

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

Michelle S. Gerdano (Howard M. Radzely, Acting 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 on Remand (95-BLA-0621) of Administrative Law Judge Paul H. Teitler requiring employer to reimburse the Black Lung Disability Trust Fund (the Trust Fund) in the amount of $23,861.76 for medical expenses

incurred in the treatment of claimant's pneumoconiosis [1] 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).[2] This medical benefits only case is before the Board for a third time.[3] When this case was most recently before the Board, the Board remanded the case for the administrative law judge to determine whether certain medical expenses were compensable pursuant to the standard established by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this cases arises, in *Glen Coal Co. v. Seals*, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998)(Boggs, J., concurring; Moore, J., concurring and dissenting), *rev'g Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(*en banc*)(Brown, J., concurring). *Hamilton v. Island Creek Coal Co.*, BRB Nos. 99-0734 BLA and 99-0734 BLA-A (Nov. 20, 2000)(unpub.), *slip op*. at 6-8. The Board also instructed the administrative law judge to reconsider his finding that the Director, Office of Workers'

[1] Part B recipients who file 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). Claimant was originally found entitled to Part B benefits by the Social Security Administration. Director's Exhibit 12.

[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 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[3] The full procedural history of this case is set forth in *Hamilton v. Island Creek Coal Co.*, BRB Nos. 99-0734 BLA and 99-0734 BLA-A (Nov. 20, 2000)(unpub.).

Compensation Programs (the Director), waived his argument that employer was precluded from controverting the issue of reimbursement because of untimely responses. *Hamilton*, BRB Nos. 99-0734 BLA and 99-0734 BLA-A, *slip op*. at 7.

On remand, the administrative law judge found that while the Director did not waive his argument that employer's controversion was not timely, the employer's controversion was, in fact, made in a timely manner. Decision and Order on Remand at 4; Erratum at 1-2. The administrative law judge further reviewed the medical evidence that he was instructed to review and, after making several adjustments, concluded that a total of $23,861.76 was compensable as treatment for pneumoconiosis. Employer was thus ordered to reimburse the Trust Fund in that amount.

On appeal, employer contends that the administrative law judge improperly considered this claim pursuant to the revised regulation at 20 C.F.R. §725.701(e) as application of the revised regulation was impermissibly retroactive. Employer further argues that even if it were appropriate to apply the new regulations, the administrative law judge erred in awarding medical benefits as the record contained no reliable evidence that any of the treatments and costs in this case were related to pneumoconiosis. Lastly, employer argues that the Board's prior decision to affirm the administrative law judge's discrediting of Dr. Branscomb's opinion needs to be revisited. Claimant has not filed a brief. The Director has filed a response brief [4] urging the Board to affirm most of the administrative law judge's determinations. The Director contends that while the administrative law judge's award of some medical charges needs to be vacated and the case remanded for further consideration of those charges, the remainder of the administrative law judge's award is affirmable.[5]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is supported by substantial evidence, is rational,

[4] The Director filed an appeal in this case. BRB No. 02-0476 BLA. By Order dated November 1, 2002, however, the Board granted the Director's motion to withdraw his appeal.

[5] We affirm the administrative law judge's findings regarding the issues of waiver and timeliness of controversion as these findings are unchallenged on appeal. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

and is in accordance with applicable law. 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).

Initially, we reject employer's invitation to revisit the issue of the probative value to be accorded Dr. Branscomb's opinion. Dr. Branscomb stated that claimant suffered from chronic obstructive pulmonary disease caused by cigarette smoking and early, simple, "medical pneumoconiosis", which required no treatment and did not in any way contribute to claimant's chronic obstructive pulmonary disease. Director's Exhibit 22. The Board held that the administrative law judge rationally determined that Dr Branscomb's opinion was entitled to little weight. *Hamilton*, BRB Nos. 99-0734 BLA and 99-0734 BLA-A, *slip op.* at 5-6. Specifically, the Board held that the administrative law judge rationally concluded that Dr. Branscomb's conclusions were contrary to the premises upon which the finding of entitlement to medical benefits was based, and that the administrative law judge's determination was consistent with holding of the Sixth Circuit in *Seals*, *supra*. Employer does not challenge the Board's holding on this issue and has not pointed to any intervening case law which renders the administrative law judge's previous findings erroneous. Accordingly, we conclude that the Board's previous holdings with respect to Dr. Branscomb's opinion constitutes the law of the case and we will not address employer's assertions on the matter. *See Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Next, employer contends that the administrative law judge impermissibly considered this case pursuant to the revised regulations at Section 725.701(e).[6] Employer argues that the

[6] Section 725.701, as revised, provides in pertinent part:

> (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 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

recent decision of the United States Court of Appeals for the District of Columbia Circuit in *National Mining Ass'n v. Department of Labor [Chao]*, 292 F.3d 849, BLR (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, BLR (D.D.C. 2001) held that revised Section 725.701(e) could not be applied retroactively outside of the Fourth Circuit. Although employer concedes that the administrative law judge stated that he did not rely on the presumption codified at Section 725.701(e) and originally enunciated by the United States Court of Appeals for the Fourth Circuit in *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), employer nevertheless contends the administrative law judge erred because his analysis of the charges for medical treatment in this case fails to specify the basis on which he relied to find claimant entitled to reimbursement for the charges associated with this treatment. Specifically, employer argues that the administrative law judge provides no rationale for determining whether the medical charges in question were reimbursable other than that provided by the presumption set forth in the regulations. Thus, employer asserts that the administrative law judge's application of the presumption in this case is inconsistent with the holding of the Sixth Circuit in *Seals* and the administrative law judge's finding must therefore be vacated.

In analyzing the charges for treatment and other medical expenses, the administrative law judge indicated that the validity of the revised regulations at Section 725.701, "which includes the presumption," enunciated in *Doris Coal*, was upheld by the United States District Court for the District of Columbia in *Nat'l Mining Ass'n v. Chao*, 160 F.Supp.2d 47, BLR (D.D.C. 2001). The administrative law judge further noted that, while the District Court's decision allowed claimant to establish medical benefits through a presumption, he had nevertheless considered the medical expenses "with particular attention" and did "not rely merely on the presumption." Decision and Order on Remand at 4. Considering fourteen separate groups of bills for which the Director requested reimbursement from the employer, Director's Exhibit 15; Decision and Order on Remand at 4-7,[7] the administrative law judge

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> any medical service 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.

20 C.F.R. §725.701(e), (f).

[7] The initial three sets of bills considered by the administrative law judge, those submitted in connection with treatment by Dr. Leslie were previously considered by the Board and not before us at this time. *Hamilton*, BRB Nos. 99-0734 BLA and 99-0734 BLA-A, *slip op*. at 6. Accordingly, on remand, the administrative law judge need not address the

concluded that the total amount of medical expenses related to treatment of pneumoconiosis, and thus reimbursable by the Black Lung Disability Trust, was $23,861.76.[8] The administrative law judge also found that this total included Dr. Leslie's bills. *See* fn. 6, *supra*.

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compensability of these medical charges.

[8] In reaching this determination, the administrative law judge concluded that certain charges were not compensable as they were unrelated to the treatment of pneumoconiosis. *See* Decision and Order on Remand at 4-7. Because the administrative law judge's finding regarding those charges was not challenged, it was affirmed with respect to those charges. *See Skrack, supra*.

In light of the administrative law judge's ambiguous statement, "I do not rely merely on a presumption," Decision and Order on Remand at 4, the decision of the D.C. Circuit in *Chao*, *supra*, and the holding of the Sixth Circuit in *Seals*, *supra*, we vacate the administrative law judge's findings regarding the compensability of the medical expenses in this case.[9]

The administrative law judge's analysis of the medical charges in this case was cursory, Decision and Order on Remand at 4-7, and made no inquiry into the whether the medical treatment was reasonable and necessary for the treatment of pneumoconiosis. Further, it is unclear as to whether the administrative law judge did, in fact, rely on a presumption in this case. On remand, therefore, the administrative law judge must again review the medical charges in question and make findings regarding such charges in a manner consistent with the holding of the D.C. Circuit and the Sixth Circuit in *Chao* and *Seals*.

[9] On appeal the Director agrees with employer that 20 C.F.R. §725.701(e) which establishes a rebuttable presumption that medical treatment for pulmonary disease is treatment for pneumoconiosis, does not apply to this case. The Director notes that in *National Mining Ass'n v. Department of Labor [Chao]*, 292 F.3d 849, BLR (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, BLR (D.D.C. 2001), the United States Court of Appeals for the District of Columbia Circuit held that Section 725.701(e) may not be applied retroactively in cases arising outside of the Fourth Circuit.

Accordingly, the administrative law judge's Decision and Order on Remand is affirmed in part, vacated in part and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge