

BRB No. 06-0259 BLA

GLEND A HAMILTON (o/b/o)	
ART V. STANLEY (Deceased)))	
)	
Claimant- Respondent)	
)	
v.)	
)	
BETTY B COAL COMPANY)	DATE ISSUED: 11/27/2006
)	
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 of Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

Tab R. Turano (Greenberg Traurig LLP), Washington, D.C., for employer.

Helen H. Cox (Howard M. Radzely, 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: DOLDER, Chief Administrative Appeals Judge, SMITH and HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand (02-BTD-0002) of Administrative Law Judge Daniel F. Solomon (the administrative law judge) ordering employer to reimburse the Black Lung Disability Trust Fund (the Trust Fund) for three medical bills paid on behalf of the miner in connection with 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). The miner was previously awarded benefits under the Act.¹ This medical benefits only case is before the Board for the second time. In an April 28, 2003 Decision and Order, the administrative law judge found the evidence sufficient to establish invocation of the rebuttable presumption that the miner's treatment for a pulmonary disorder was caused by, or aggravated by, his pneumoconiosis pursuant to 20 C.F.R. §725.701. The administrative law judge also found the evidence insufficient to establish rebuttal of the presumption that the miner's treatment for a pulmonary disorder was caused by, or aggravated by, his pneumoconiosis pursuant to 20 C.F.R. §725.701. Consequently, the administrative law judge found that the claimed expenses were reasonable and necessary to treat the covered pulmonary disorder. Accordingly, the administrative law judge ordered employer to provide reimbursement to the Trust Fund in the amount of \$127,688.10 for the reasonable and necessary medical treatment previously provided for the miner's totally disabling coal workers' pneumoconiosis. Furthermore, the administrative law judge ordered the district director to calculate and assess any interest due and owing.

In its May 28, 2004 Decision and Order, the Board affirmed the administrative law judge's decision to accord significant weight to Dr. Sherman's opinion and, thus, to find the evidence sufficient to establish invocation of the rebuttable presumption that the miner's pulmonary disorder was caused by, or at least aggravated by, his pneumoconiosis at 20 C.F.R. §725.701.² The Board also affirmed the administrative law judge's decision to find the evidence insufficient to establish rebuttal of the presumption that the miner's pulmonary disorder was caused by, or at least aggravated by, his pneumoconiosis at 20 C.F.R. §725.701. Therefore, the Board affirmed the administrative law judge's Decision and Order ordering the repayment of medical expenses. *Hamilton v. Betty B Coal Co.*, BRB No. 03-0547 BLA (May 28, 2004)(unpub.).

Subsequently, in a February 28, 2005 Decision and Order on Reconsideration, the Board stated that it found no basis to alter its previous affirmance of the administrative law judge's decision to accord significant weight to Dr. Sherman's opinion, and thus, his finding that the evidence was sufficient to establish invocation of the rebuttable presumption that the miner's pulmonary disorder was caused by, or at least aggravated by, his pneumoconiosis at 20 C.F.R. §725.701. The Board also stated that it discerned no basis to alter its affirmance of the administrative law judge's finding that employer failed to establish rebuttal of the

¹The full procedural history of this case with regard to the award of benefits is set forth in the following Board decision: *Hamilton v. Betty B Coal Co.*, BRB No. 03-0547 BLA, slip op. at 2-3 n.2 (May 28, 2004)(unpub.).

²The Board held that Administrative Law Judge Daniel F. Solomon correctly found that Dr. Sherman's itemization of treatment costs that he deemed reimbursable did not include charges for any treatment rendered on December 11, 1991.

presumption that the miner's pulmonary disorder was caused by, or at least aggravated by, his pneumoconiosis.

However, in that Decision and Order on Reconsideration, the Board stated that, upon further review, it agreed with employer that the total of \$127,688.10, which the administrative law judge ordered employer to reimburse to the Trust Fund, included \$189.70 in costs associated with the miner's hospitalization from December 11, 1991 through December 16, 1991. In addition, the Board held that, contrary to the administrative law judge's characterization, employer was charged for medical costs of \$1,675.20 associated with the miner's emergency room visit on January 18, 1993 and \$795.10 associated with the miner's emergency room visit on January 21, 1993.

As discussed *supra*, the administrative law judge relied on Dr. Sherman's opinion to find the evidence sufficient to establish invocation of the rebuttable presumption at Section 725.701(e). Dr. Sherman, in an April 16, 2001 report, provided a list of medical services that he determined were for the treatment of pulmonary conditions coverable and reimbursable under the Black Lung Program. Director's Exhibit 50. However, none of the charges noted by the Board in its 2005 Decision and Order on Reconsideration, for the miner's hospitalization and emergency room visits on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993, was specifically addressed in Dr. Sherman's report.³ *Id.* Consequently, the charges for these medical services were not considered by the administrative law judge pursuant to the rebuttable presumption at Section 725.701(e). The Board therefore remanded the case to the administrative law judge for reconsideration of whether these particular costs were reimbursable under Section 725.701, on the basis that the administrative law judge was unaware that his order for reimbursement included costs associated with the miner's hospitalization and emergency room visits on these dates. *Hamilton v. Betty B Coal Co.*, BRB No. 03-0547 BLA (Feb. 28, 2005)(unpub.).

In a November 18, 2005 Decision and Order on Remand, the administrative law judge found that "the documentary evidence submitted by the [Director] and the report of Dr. Sherman [are] sufficient to invoke the rebuttable presumption that these three charges were for the [c]laimant receiving treatment for pulmonary disorders either caused or aggravated by pneumoconiosis." 2005 Decision and Order on Remand at 3. Although the medical bills for the miner's treatments on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993 noted congestive heart failure, the medical reports that these bills were based upon noted the miner's cardiac conditions and his chronic obstructive pulmonary

³Dr. Sherman's April 16, 2001 report also provided a list of medical services that he determined were not for the treatment of pulmonary conditions coverable and reimbursable under the Black Lung Program. Director's Exhibit 50. However, there is no indication as to why Dr. Sherman did not specifically consider the charges for medical services on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993 in his report.

disease. The administrative law judge also found the evidence insufficient to establish rebuttal of the presumption that the treatments were for a pulmonary disorder either caused or aggravated by pneumoconiosis at 20 C.F.R. §725.701. Consequently, the administrative law judge found that the claimed expenses were reasonable and necessary to treat the miner's pulmonary disorder. Accordingly, the administrative law judge found that employer was obligated to reimburse the Trust Fund for these charges. However, the administrative law judge stated that the total reimbursement amount is unchanged because the amounts of the three charges were incorrectly included in the total reimbursement amount ordered in his previous Decision and Order. The administrative law judge therefore ordered employer to provide reimbursement to the Trust Fund in the amount of \$127,688.10 for the reasonable and necessary medical treatment previously provided for the miner's totally disabling coal workers' pneumoconiosis. The administrative law judge also ordered the district director to calculate and assess any interest due and owing.

On appeal, employer challenges the administrative law judge's finding that the evidence is sufficient to establish invocation of the rebuttable presumption that the miner's treatments on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993 were for a pulmonary disorder either caused or aggravated by pneumoconiosis. Employer also challenges the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the presumption that these treatments were for a pulmonary disorder either caused or aggravated by pneumoconiosis. Further, employer contends that the Board should reconsider its previous decisions, which affirmed the administrative law judge's finding that the medical treatments explicitly reviewed by Dr. Sherman were reasonable and necessary to treat the miner's pulmonary disorder. Claimant has not filed a brief in this appeal. The Director, Office of Workers' Compensation Programs (the Director), responds, urging affirmance of the administrative law judge's Decision and Order on Remand.

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

Employer initially contends that the administrative law judge erred in finding the evidence sufficient to establish invocation of the rebuttable presumption that the miner's treatments on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993 were for a pulmonary disorder either caused by, or aggravated by, his pneumoconiosis. Specifically, employer asserts that the Director offered no proof to carry his burden of persuasion in this case, because the Director's expert, Dr. Sherman, did not render an opinion on the cause and nature of the treatment claimant received for the relevant medical bills. Employer's assertion is based on the premise that the administrative law judge

improperly applied the standard articulated by the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991). In response, the Director contends that the administrative law judge properly determined that the medical bills, combined with Dr. Sherman's credible opinion, satisfied the initial showing that the miner's treatment was for a respiratory or pulmonary disorder.

The administrative law judge considered three medical bills for services performed on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993, as well as Dr. Sherman's report. Although the three medical bills only noted that the miner was diagnosed with congestive heart failure, the reports that were submitted with these relevant medical bills noted that the miner had chronic obstructive pulmonary disease and other cardiac conditions.⁴ Further, in an April 16, 2001 report, Dr. Sherman generally stated that "[m]edical bills associated with treatment for [the miner's] COPD are reimbursable under the Federal Black Lung Act as COPD is a known manifestation of coal workers' pneumoconiosis and coal dust exposure can cause clinically significant and severe disease." Director's Exhibit 50. Dr. Sherman's report listed medical charges that Dr. Sherman specifically determined were for the treatment of a pulmonary condition covered under the Black Lung Program, as well as medical charges that he determined were not for the treatment of a pulmonary condition covered under the Black Lung Program. *Id.* However, Dr. Sherman's report did not actually address the charges for medical treatments on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993 that were included in the administrative law judge's April 28, 2003 Decision and Order ordering employer to reimburse the Trust Fund in the amount of \$127,688.10 for the reasonable and necessary medical treatment previously provided for the miner's totally disabling coal workers'

⁴In the St. Mary's Hospital Discharge Summary for the miner's hospitalization from December 11, 1991 through December 16, 1991, Dr. Renfro opined that the principal diagnoses responsible for that hospitalization were unstable angina, chronic obstructive pulmonary disease, hypertension, history of peptic ulcer disease and peripheral vascular disease. Director's Exhibit 48. Dr. Renfro also opined that a myocardial infarction was ruled out. *Id.* In a St. Mary's Hospital Short Stay Summary for the miner's January 18, 1993 emergency room visit, Dr. Kanj noted that the miner's chief complaint was dyspnea and chest discomfort. *Id.* Dr. Kanj further noted that the miner's history of present illnesses included chronic obstructive pulmonary disease, coronary artery disease, hypertension and seizure disorder. *Id.* Dr. Kanj additionally noted that although the miner was advised of admission to the hospital for congestive heart failure and to rule out a myocardial infarction, he chose to leave against the medical advice anyway. *Id.* Lastly, in the St. Mary's Hospital Emergency Department form for the miner's January 21, 1993 emergency room visit, the miner was diagnosed with congestive heart failure, hypertension and chronic obstructive pulmonary disease. *Id.* This form does not contain a legible signature of the physician who rendered these diagnoses. *Id.*

pneumoconiosis. *Id.*

Based upon his consideration of the relevant medical bills and Dr. Sherman's report, the administrative law judge stated:

...the records surrounding each of these charges clearly implicate COPD by listing it as one of the diagnoses and as a problem treated. Moreover, the records reveal numerous tests and treatments related to COPD. All of these recorded details are in accord with Dr. Sherman's general analysis of the [c]laimant's treatments and their reimbursability. After a review of all of the evidence, I find that the documentary evidence submitted by [the Director] and the report of Dr. Sherman is sufficient to invoke the rebuttable presumption that these three charges were for the [c]laimant receiving treatment for pulmonary disorders either caused or aggravated by pneumoconiosis.

2005 Decision and Order on Remand at 3.

In *Stiltner*, the Fourth Circuit court held that 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, his pneumoconiosis. *Stiltner*, 938 F.2d at 492, 15 BLR at 2-135. The court further 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 the employer liable for the medical costs, since most pulmonary disorders would be related to, or at least aggravated by, the presence of pneumoconiosis. *Id.* Further, in *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999), the court explained that the proof needed to establish invocation of the rebuttable presumption that the miner's pulmonary disorder was caused by, or at least aggravated by, his pneumoconiosis is a medical bill for the treatment of the pulmonary or respiratory disorder and/or associated symptoms. Section 725.701(e) codified the presumption and rebuttal methods adopted by the Fourth Circuit in *Stiltner* and *Ling*. 20 C.F.R. §725.701(e).

Since the Director submitted three medical bills for the treatment of the miner's chronic obstructive pulmonary disease, as well as Dr. Sherman's report regarding reimbursement for medical bills for the miner associated with the treatment of this disease, we reject employer's assertion that the Director offered no proof to carry his burden of persuasion in this case. *Ling*, 176 F.3d at 233, 21 BLR at 2-583. Furthermore, since it is supported by substantial evidence, we affirm the administrative law judge's finding that the evidence is sufficient to establish invocation of the rebuttable presumption that the miner's treatments were for a pulmonary disorder either caused by, or aggravated by, his pneumoconiosis. *Stiltner*, 938 F.2d at 492, 15 BLR at 2-135.

Employer next contends that the administrative law judge erred in finding the evidence insufficient to establish rebuttal of the presumption that the miner's treatments on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993 were for a pulmonary disorder either caused by, or aggravated by, his pneumoconiosis. Employer specifically asserts that Dr. Castle's opinion, that claimant actually had been treated for nonrespiratory conditions, meets its burden of production to rebut the presumption under the *Stiltner* standard. Employer further asserts that there is no indication that Dr. Castle's or Dr. Tuteur's beliefs, regarding the presence or absence of pneumoconiosis, played a role in their opinions regarding the cause and necessity of claimant's treatment. The Director argues that the administrative law judge properly discredited the opinions of Drs. Castle and Tuteur because they refused to acknowledge the existence of claimant's disabling coal workers' pneumoconiosis.

In a report dated March 20, 2002, Dr. Castle opined that the miner was hospitalized on numerous occasions for the treatment of multiple problems that were unrelated to coal workers' pneumoconiosis or a lung disease induced by coal dust exposure. Director's Exhibit 62. Similarly, in a report dated February 11, 2002, Dr. Tuteur opined that none of the charges for health care that he reviewed were in any way related to the miner's exposure to coal dust or his work in the coal mines. *Id.* The administrative law judge properly discredited the opinions of Drs. Castle and Tuteur, on the ground that the doctors premised their opinions on the inaccurate assumption that the miner did not have pneumoconiosis. *Toler v. Eastern Associated Coal Corp.*, 43 F.3d 109, 19 BLR 2-70 (4th Cir. 1995). Drs. Castle and Tuteur opined that the miner did not have coal workers' pneumoconiosis or any other disease process induced by coal mine dust exposure. *Id.* Thus, we reject employer's assertion that Dr. Castle's opinion, that claimant had actually been treated for nonrespiratory conditions, meets its burden of production to rebut the presumption under the *Stiltner* standard. Moreover, since the administrative law judge properly discredited the opinions of Drs. Castle and Tuteur, the only opinions of record that could support a finding that the miner's treatments were not for a pulmonary disorder, we affirm the administrative law judge's finding that the evidence is insufficient to establish rebuttal of the presumption that the miner's treatments were for a pulmonary disorder either caused by, or aggravated by, his pneumoconiosis.

Employer further contends that the Board should reconsider its previous decisions, which affirmed the administrative law judge's findings that medical expenses explicitly reviewed by Dr. Sherman were reasonable and necessary to treat the miner's pulmonary disorder. Specifically, employer argues that controlling case law required the administrative law judge to parse out nonrespiratory treatment from any covered medical care. Employer asserts that the administrative law judge did not consider, let alone resolve, the dispute between Dr. Castle and Dr. Sherman with respect to whether claimant's treatment was attributable solely to cardiac conditions. In addition, employer asserts that the net effect of the administrative law judge's and the Board's application of *Stiltner* was an impermissible,

irrebuttable presumption. Employer's assertion is based on the premise that while he discredited the opinions of Drs. Tuteur and Castle solely because neither physician believed that claimant had pneumoconiosis, the administrative law judge credited Dr. Sherman's opinion without considering whether it was reasoned and documented. Employer argues that the administrative law judge applied the wrong standard in evaluating the proof in this claim, on the basis that nothing in *Stiltner* or *Ling* (1) alters the standard that an administrative law judge must examine the reasoning employed in a medical opinion in light of the objective material supporting the opinion, or (2) indicates that medical opinions may be accepted at face value in medical benefits claims. The Director contends that the Board should hold that its prior findings constitute the law of the case.

Based on the medical expenses explicitly reviewed by Dr. Sherman, the administrative law judge, in his April 28, 2003 Decision and Order, found the evidence sufficient to establish invocation of the rebuttable presumption that the miner's treatment for a pulmonary disorder was caused by, or aggravated by, his pneumoconiosis pursuant to 20 C.F.R. §725.701. The administrative law judge also found the evidence insufficient to establish rebuttal of the presumption that the miner's treatment for a pulmonary disorder was caused by, or aggravated by, his pneumoconiosis pursuant to 20 C.F.R. §725.701. Thus, the administrative law judge ordered employer to reimburse the Trust Fund for the medical expenses explicitly reviewed by Dr. Sherman, based upon his finding that these particular claimed expenses were reasonable and necessary to treat the miner's pulmonary disorder. In its May 28, 2004 Decision and Order, the Board affirmed the administrative law judge's findings at Section 725.701, and thus, his finding that employer must reimburse the Trust Fund for these particular medical expenses. *Hamilton v. Betty B Coal Co.*, BRB No. 03-0547 BLA (May 28, 2004)(unpub.). The Board's previous disposition of these issues constitutes the law of the case. Employer does not argue that an exception to the law of the case doctrine applies in this case. As we are not persuaded that the law of the case doctrine is inapplicable, or that an exception has been demonstrated, we need not revisit these issues. *Coleman v. Ramey Coal Co.*, 18 BLR 1-9 (1993); *Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984).

Accordingly, we affirm the administrative law judge's Decision and Order on Remand ordering employer to reimburse the Trust Fund for three medical bills for the treatment of a pulmonary disorder either caused by, or aggravated by, the miner's pneumoconiosis on December 11, 1991 through December 16, 1991, January 18, 1993 and January 21, 1993.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

BETTY JEAN HALL
Administrative Appeals Judge