U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0526 BLA

JERRY ENDICOTT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
TAURUS COAL COMPANY, INCORPORATED	)	
	)	
and	)	DATE ISSUED: 4/11/2022
	)	
KENTUCKY EMPLOYER'S MUTUAL INSURANCE	)	
	)	
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 Benefits of Sean M. Ramaley, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul E. Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer and its Carrier.

Kathleen H. Kim (Seema Nanda, Solicitor of Labor; Barry H. Joyner, Associate Solicitor; Christian P. Barber, Acting Counsel for Administrative

Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer and its Carrier (Employer) appeal Administrative Law Judge (ALJ) Sean M. Ramaley's Decision and Order Awarding Benefits (2019-BLA-05413), ordering Employer to reimburse the Black Lung Disability Trust Fund (the Trust Fund) for medical bills paid on behalf of the Claimant in connection with a claim filed on January 23, 2012, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

ALJ Steven D. Bell awarded Claimant benefits in an August 14, 2017 Decision and Order, in which he found Claimant invoked the Section 411(c)(4) presumption[1] of total disability due to pneumoconiosis and Employer failed to rebut the presumption. Director's Exhibit 4 at 25, 29-30. Employer did not appeal the award.

On September 1, 2017, the district director requested reimbursement from Employer to the Trust Fund for $91,335.75 in medical expenses paid on Claimant's behalf. Director's Exhibit 5. Employer objected to these expenses. Director's Exhibit 6. In response, the district director requested Dr. Thomas review the charges to determine if they were reasonable and necessary for the treatment of pneumoconiosis. Director's Exhibit 12. Thereafter, Dr. Thomas issued two reports addressing the charges for Claimant's treatment and prescriptions. Director's Exhibits 13, 15.

On December 6, 2018, the district director issued a revised request for reimbursement of medical benefits, reducing the amount requested to $87,441.47 for twenty-seven treatment charges and twelve prescription medications. Director's Exhibit 17. Employer again objected and requested the case be forwarded to the Office of Administrative Law Judges for a hearing. Director's Exhibit 18.

[1] Section 411(c)(4) of the Act provides a rebuttable presumption that a miner's disability is due to pneumoconiosis if he had at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

Following the hearing, ALJ Ramaley (the ALJ) issued the Decision and Order that is the subject of this appeal. The ALJ found Claimant demonstrated he was treated for respiratory ailments and symptoms, and therefore invoked the rebuttable presumption at 20 C.F.R. §725.701(e) that his disorders were caused by, or aggravated by, his pneumoconiosis.[2] The ALJ further found Employer failed to rebut the presumption, except with respect to bills for treatment dated August 25, 2015 and November 13, 2015[3] and bills for prescriptions for Levaquin and Promethazine, which he found were prescribed to treat non-pulmonary ailments. The ALJ therefore found Employer was responsible for reimbursing the Trust Fund for the remaining medical expenses.

On appeal, Employer argues the ALJ erred in not considering whether the fee amounts complied with the regulations' required fee schedules. Employer also argues the ALJ failed to address certain expenses for which no supporting documentation was provided to determine whether such treatment was for a pulmonary disorder. Finally, it argues the ALJ erred in weighing the medical opinions regarding whether the remaining medical expenses were reasonable and necessary for the treatment of pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds, urging rejection of Employer's arguments regarding whether the requested fee amounts complied with the regulations and whether certain expenses were reasonable and necessary for the treatment of pneumoconiosis. The Director requests remand, however, for the ALJ to clarify his findings regarding the entries for which Employer alleges there is no supporting documentation and to provide the specific amount of the reimbursement required. Claimant also responds, urging affirmance of the ALJ's decision.

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[4] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359 (1965).

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[2] If a miner receives a medical service or supply for any pulmonary disorder, "there will be a rebuttable presumption that the disorder is caused or aggravated by the miner's pneumoconiosis." 20 C.F.R. §725.701(e)(1).

[3] It appears that the ALJ was referring to an entry dated November 3, 2015. Dr. Thomas's report and the billing history list provide an entry for a biopsy dated November 3, 2015. Director's Exhibits 5, 13.

[4] The Board will apply the law of the United States Court of Appeals for the Sixth Circuit because Claimant performed his last coal mine employment in Kentucky. *See*

Fee Compliance under Section 725.707

Employer argues the ALJ erred in failing to address whether the fees charged by the medical providers comply with the regulation's requirement that treatment "be paid at no more than the rate prevailing for the service, treatment, drug or equipment in the community in which the provider is located." Employer's Brief at 7, *citing* 20 C.F.R. §725.707. However, as the Director correctly indicates, Employer failed to raise this issue before the ALJ. Employer's Closing Brief; Director's Response at 4. Employer thus forfeited the argument, and we decline to address it for the first time on appeal. 20 C.F.R. §802.301(a) (Board's review authority limited to "findings of fact and conclusions of law on which the decision or order appealed from was based"); *see Joseph Forrester Trucking v. Director, OWCP* [*Mabe*], 987 F.3d 581, 588 (6th Cir. 2021) (black lung regulations require that an issue be "raised before the ALJ to preserve the issue for the Board's review"); *Dankle v. Duquesne Light Co.*, 20 BLR 1-1, 1-6-7; *Prater v. Director, OWCP*, 8 BLR 1-461, 1-462 (1986).

Undocumented Records

Employer contends the ALJ erred in failing to address nineteen charges that Dr. Thomas stated were unsupported by documentation such that "it is difficult to ascertain whether such treatment was even lung related."[5] Employer's Brief at 4-5. The Director agrees "the ALJ did not specifically address this point," and asserts the case should be remanded for the ALJ to "resolve any confusion on that issue." Director's Response Brief at 5. However, the Director also indicates "to the best of [his] knowledge," the revised reimbursement request excluded all but two of the entries Dr. Thomas identified as either unrelated to pneumoconiosis or undocumented and further does not object to removing those additional "undocumented" charges.[6] Director's Response at 5.

Shupe v. Director, OWCP, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 4 at 4.

[5] Employer asserts, "Specifically, those entries dates July 1, 2016, October 21, 2015, February 9, 2016, June 13, 2016, April 4, 2016, November 3, 2015, January 2, 2016, August 25, 2016, February 1, 2016 (two entries), January 5, 2016, July 28, 2015, August 14, 2015, July 28, 2015 (again), August 27, 2015, May 6, 2015, May 6, 2015 (again), and March 7, 2014 had 'no supporting documentation' to confirm or deny that such treatment was for pneumoconiosis." Employer's Brief at 4.

[6] The Director specifies a $70.71 charge on July 1, 2016 for an outpatient visit to Dr. Sikder and a $36.11 charge on March 7, 2014 for an x-ray by Eastern Kentucky Imaging. Director's Response at 5; *see* Director's Exhibit 17. However, it appears that

Given the Director's concession that charges Dr. Thomas identified as undocumented are not compensable and his representation that most of the undocumented charges were already excluded from the total reimbursement, as well as his indication that he does not object to the exclusion of those undocumented charges not previously excluded in the revised reimbursement request, we hold the Trust Fund is not entitled to reimbursement for the nineteen charges which Dr. Thomas has identified as undocumented.

Rebuttal of the Section 725.701 Presumption

We affirm, as unchallenged on appeal, the ALJ's determination that the remaining charges were for a pulmonary disorder, and therefore the 20 C.F.R. §725.701 presumption was invoked. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 7. Because Claimant invoked the Section 725.701 presumption, the burden shifted to Employer to "rebut the presumption by producing credible evidence that the . . . treatment 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." 20 C.F.R. §725.701(e)(2); *see* 65 Fed. Reg. 79,920, 80,022 (Dec. 20, 2000). However, an employer "cannot rely on evidence that the miner does not have pneumoconiosis . . . to defeat a request for coverage of any medical service or treatment under this subpart." 20 C.F.R. §725.701(e)(3).

In evaluating whether Employer established these charges are not compensable, the ALJ considered the medical opinions of Drs. Dahhan, Broudy, Thomas, and Green. Dr. Broudy indicated that there is no treatment for coal workers' pneumoconiosis except in the rare occurrence of complicated disease with severe impairment, which was not present in Claimant's case; thus, none of the treatments provided were necessary and reasonable for "the cure or treatment of coal workers' pneumoconiosis." Director's Exhibit 11; Employer's Exhibits 1-2, 6. He further opined the evidence is insufficient to conclude Claimant's chronic obstructive pulmonary disorder (COPD) is related to coal mine dust exposure. Employer's Exhibit 6.

Dr. Dahhan acknowledged that Claimant has legal pneumoconiosis in the form of COPD, but not clinical pneumoconiosis. Employer's Exhibits 3-5. He indicated that the treatments provided to Claimant, including oxygen therapy, bronchodilators, ace inhibitor,

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one other expense Dr. Thomas identified as unsupported was neither deducted in the revised reimbursement request nor addressed by the Director in his calculations (a May 6, 2015 charge for $36.11 by Eastern Kentucky Imaging for an x-ray). *See* Director's Exhibits 13; 17 at 17; Director's Response at 7-8. Dr. Thomas opined the remaining charges were related to Claimant's pulmonary disease. Director's Exhibits 13, 15.

and steroids, would not be useful to treat legal pneumoconiosis. Employer's Exhibits 3-5. He also opined that the oxygen therapy was not necessary to treat Claimant because it did not meet Centers for Medicare and Medicaid Services guidelines. Employer's Exhibit 3.

Dr. Thomas opined that the treatment and prescriptions related to Claimant's COPD and respiratory infections were compensable as reasonable and necessary. Director's Exhibits 13, 15. Dr. Green also opined the treatment provided to Claimant for his COPD and related exacerbations were reasonable and necessary. Claimant's Exhibit 1.

The ALJ found neither Dr. Broudy's nor Dr. Dahhan's opinion to be sufficient to rebut the presumption that Claimant's treatment was for pulmonary and respiratory conditions caused or aggravated by his coal workers' pneumoconiosis. Decision and Order at 9. He further credited Drs. Thomas's and Green's opinions as well-reasoned and well-documented. *Id.* at 9-10. The ALJ found that Employer rebutted the presumption that an August 25, 2015 emergency room visit and EKG, a November 13, 2015 biopsy, and two prescription medications were sufficiently related to pneumoconiosis; he based this finding on Dr. Thomas's opinion that these charges were unrelated to Claimant's pneumoconiosis. *Id.* at 10.

Employer contends the ALJ erred in his weighing of the medical opinion evidence[7] to determine whether the remaining treatments are compensable. Employer's Brief at 5-6. Specifically, Employer argues the ALJ failed to consider that respiratory infections are pulmonary disorders found in the general public and are "apart from those previously associated with the miner's disability." Employer's Brief at 6. It also contends the ALJ failed to address whether taking multiple bronchodilators is "beyond what is necessary to effectively treat a covered disorder." *Id.* Employer's arguments lack merit.

As the issue of the existence of pneumoconiosis is not to be relitigated in a medical treatment dispute, the ALJ rationally found Dr. Broudy's opinion - that Claimant does not suffer from legal pneumoconiosis and there is no specific treatment for pneumoconiosis - to be insufficient to rebut the presumption that Claimant's treatment for pulmonary disorders was necessitated by his pneumoconiosis. 20 C.F.R. §725.701(e)(3) (evidence that the miner does not have pneumoconiosis cannot be used to defeat a request for coverage of any medical service or treatment); *Doris Coal Co. v. Director, OWCP* [*Stiltner*], 938 F2d 492, 497 (4th Cir. 1991); Decision and Order at 8-9. Because Dr.

[7] Drs. Dahhan and Broudy opined that some of the antibiotics used to treat Claimant are used to kill bacterial infections, which are not conditions related to coal mine dust exposure. Employer's Exhibits 1, 3-6. They further opined Claimant's use of bronchodilators is unnecessary for the treatment of legal pneumoconiosis. *Id.*

Broudy failed to recognize Claimant has legal pneumoconiosis and opined there is no reasonable and necessary treatment for pneumoconiosis, the ALJ rationally found his opinion undermined regarding the reasonableness and necessity of treatment, including treatments for respiratory infections such as pneumonia. *See Gulf & Western Industries v. Ling*, 176 F.3d 226, 232 (4th Cir. 1999) (the presumption regarding medical benefits relates to any pulmonary condition, as most pulmonary disorders are going to be "related or at least aggravated by the presence of pneumoconiosis"); Decision and Order at 9.

The ALJ further permissibly discounted Dr. Dahhan's opinion, for while he acknowledged the presence of legal pneumoconiosis, he did not address Claimant's clinical pneumoconiosis or whether the treatments could be for that condition.[8] 20 C.F.R. §725.701(e)(3); Decision and Order at 9. Accordingly, the ALJ permissibly discounted his opinion regarding whether pneumoconiosis caused or aggravated Claimant's other respiratory ailments for which he received treatment. *See Ling*, 176 F.3d at 232.

Further, contrary to Employer's argument that the multiple bronchodilators prescribed were beyond what is useful to treat Claimant's pneumoconiosis or attendant disability, Dr. Dahhan indicated the treatment Claimant received was beneficial for his respiratory conditions. Employer's Exhibit 5 ("Nobody is arguing that the medications prescribed are not needed, indicated or beneficial for Mr. Endicott's respiratory problem . . . ."). However, the ALJ permissibly found Dr. Dahhan's opinion inconsistent and insufficiently explained because while he indicated the treatment was beneficial for Claimant's COPD, he also opined it would not be beneficial for conditions related to pneumoconiosis.[9] *Tenn. Consol. Coal Co v. Crisp*, 866 F.2d 179, 185 (6th Cir. 1989); *Director, OWCP v. Rowe*, 710 F.2d 251, 255 (6th Cir. 1983); Employer's Exhibit 5; Decision and Order at 9.

[8] ALJ Bell found that, after Claimant invoked the Section 411(c)(4) presumption, Employer failed to rebut the presence of either legal or clinical pneumoconiosis. Director's Exhibit 4 at 25, 29.

[9] Dr. Dahhan did not specify what he was considering as Claimant's legal pneumoconiosis and how it differed from Claimant's COPD. We note that COPD significantly related to, or substantially aggravated by, coal dust exposure constitutes legal pneumoconiosis. 20 C.F.R. §718.201(a)(2), (b). In the adjudication of Claimant's entitlement to benefits, ALJ Bell found Drs. Zaldivar's and Rosenberg's opinions insufficient to rebut the presumption that Claimant's COPD was significantly related to his coal mine dust exposure. Director's Exhibit 4 at 10-11, 17-19; *Endicott v. Taurus Coal Co., Inc.*, OALJ No. 2013-BLA-05320 slip. op. at 25-28 (Aug. 7, 2017) (unpub).

Accordingly, the ALJ permissibly found Drs. Broudy's and Dahhan's opinions insufficient to rebut the presumption of the treatments' compensability. *Jericol Mining, Inc. v. Napier*, 302 F.3d 703, 713-14 (6th Cir. 2002); *Crisp*, 866 F.2d at 185. Because we affirm the ALJ's discrediting of the opinions of Drs. Broudy and Dahhan, we affirm the ALJ's finding that the remaining charges for treatment of Claimant's respiratory conditions are compensable.[10] 20 C.F.R. §725.701(c); Decision and Order at 10.

The remaining issue is the total amount due to the Trust Fund. The ALJ found that he could not reconcile the total expenses due from the evidence before him. Decision and Order at 11, n. 6. The Director asks that the case be remanded for the ALJ to make a specific finding on the dollar amount of treatment charges to be reimbursed. Director's Response Brief at 5. We conclude remand to the district director is the appropriate course of action. The Director has conceded that the nineteen expenses listed by Dr. Thomas as undocumented are not compensable and does not challenge the ALJ's determination that the bills for treatment on August 25, 2015 and for prescriptions for Levaquin and Promethazine dated November 13, 2015 are not compensable. Director's Response Brief at 5. We have affirmed the ALJ's findings that the remaining expenses must be reimbursed by Employer, and the record contains itemized lists of the compensable charges with their associated treatment or medical records. Director's Exhibits 5, 7, 12, 17. All that remains is the ministerial act of totaling those expenses that Employer must reimburse the Director. This calculation is within the purview of the district director.

[10] We need not address Employer's arguments regarding the ALJ's crediting of Drs. Thomas's and Green's opinions regarding whether Claimant's treatment for his respiratory ailments was reasonable and necessary to treat pneumoconiosis, as neither opinion supports rebuttal of the presumption. Employer's Brief at 5-7.

Accordingly, the ALJ's Decision and Order Awarding Benefits is affirmed in part and vacated in part, and this case is remanded to the district director to calculate the amount owed to the Trust Fund.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge