BRB No. 02-0594 BLA

CYNTHIA KENNER (o/b/o CLARENCE ED DAVIS, SR.)	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 06/27/2003
TENNESSEE CONSOLIDATED COAL COMPANY	)	
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 of Mollie W. Neal, Administrative Law Judge, United States Department of Labor.

Tab R. Turano and Laura Metcoff Klaus (Greenberg Traurig LLP), Washington, D.C., for employer.

Rita Ropolo (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: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (1996-BTD-00005) of Administrative Law Judge Mollie W. Neal 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 pertinent procedural history of this case is as follows. The miner was awarded black lung benefits by the district director on December 5, 1991, and employer accepted liability for the claim on January 3, 1992. Decision and Order at 2; Director=s Exhibits 1-2. In November of 1995, Dr. Loyd requested approval from the district director to have the miner evaluated for end stage lung disease and a lung transplant. In response, the district director solicited the opinions of Drs. Spagnolo, Cander and Sherman regarding whether a lung transplant was a necessary treatment related to the miner=s pneumoconiosis.[2] Based on the physicians= opinions, the district director authorized the procedure, and the miner underwent a lung transplant on April 15, 1996.

Employer was subsequently notified of its responsibility for payment of the medical expenses associated with the lung transplant, but disputed its liability for reimbursement as well as the necessity of the procedure to treat the miner=s pneumoconiosis. The case was referred to the Office of Administrative Law Judges on August 16, 1996 for an evidentiary hearing. Employer subsequently filed a Motion for Summary Decision, seeking judgment as a matter of law on the ground that the Department of Labor (DOL) had excluded organ transplants from coverage under the Act in its Federal Black Lung Program Provider Manual (Provider Manual), and contending that DOL=s unilateral reversal of its published policy violated the Administrative Procedure Act (APA), 5 U.S.C. '557(c)(3)(A), as incorporated into the Act by 5 U.S.C. '554(c)(2), 33 U.S.C. '919(d) and 30 U.S.C. '932(a).

Following a formal hearing on this sole issue, the administrative law judge denied

[1]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 725 (2002).

[2]In order to establish entitlement to medical benefits, claimant must establish that the miner=s 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).

employer=s Motion for Summary Decision. The administrative law judge also denied employer=s Request for Production of Documents and granted the Motion for a Protective Order filed by the Director, Office of Workers= Compensation Programs (the Director), finding that employer=s discovery requests were foreclosed by the administrative law judge=s pre-hearing scheduling order, and that they were overbroad, unduly burdensome and/or not relevant to the issue presented. The administrative law judge rejected employer=s argument that the district director=s approval of the lung transplant was an arbitrary and capricious agency action, and found that the Provider Manual=s exclusion of organ transplants from coverage under the Act was an interpretive rule and, therefore, exempt from the notice and comment requirements of the APA, *see* 5 U.S.C. '553(b)(3)(A), (c), as incorporated into the Act by 30 U.S.C. '932(a). Accordingly, the administrative law judge ordered employer to reimburse the Black Lung Disability Trust Fund (Trust Fund) for the reasonable medical expenses associated with the miner=s lung transplant, which she found was necessary and related to the treatment of the miner=s pneumoconiosis pursuant to 20 C.F.R. '725.701.

On appeal, employer contends that the administrative law judge erred in failing to hold a separate hearing on the merits of the claim for medical expenses associated with the lung transplant and in failing to allow employer the opportunity to present evidence on the issue of whether the lung transplant was reasonable and necessary for the treatment of the miner=s pneumoconiosis. In addition, employer contends that the administrative law judge erred in denying employer=s discovery requests and in rejecting its argument that the district director=s unexplained change in policy violated the APA and cannot be applied retroactively. Claimant has not filed a response brief in this appeal. The Director has filed a response brief, agreeing with employer=s contention that employer is entitled to further evidentiary development and a hearing on the merits regarding whether the miner=s lung transplant was a necessary treatment for his coal mine employment related disability. The Director argues, however, that employer cannot escape liability for the medical expenses of the miner=s lung transplant simply because the Provider Manual lists organ transplants among the services and conditions that are not Black Lung related and, therefore, are not reimbursable.

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, and is in accordance with applicable law. 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).

Employer contends that the administrative law judge erred in finding that DOL=s

unexplained deviation from its published policy, which is still in effect, that organ transplants are not reimbursable under the Act as treatment for pneumoconiosis, was a permissible act of agency discretion exempt from the notice and comment requirements of the APA. Employer also argues that it has ordered its affairs in reasonable reliance upon the consistent application of DOL=s published policy as set forth in Section 2.5 of the 1985 Provider Manual, and that DOL cannot retroactively implement any change in that policy. Employer=s arguments are without merit. The Act provides medical benefits for the treatment of a miner=s disabling pneumoconiosis if the miner is eligible for benefits. 33 U.S.C. '907, as incorporated by 30 U.S.C. '932(a). The Act does not exclude any type of treatment from coverage; rather, the implementing regulation provides that:

> A responsible operator . . . 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 ancillary pulmonary conditions and disability require.

20 C.F.R. '725.701(b).

Contrary to employer=s arguments, the administrative law judge properly found that the statutory and regulatory provisions are controlling, and that the Provider Manual=s exclusion of organ transplants from coverage was not binding. Decision and Order at 13-15; *see generally Christensen v. Harris County*, 529 U.S. 576 (2000); *Peabody Coal Co. v. Director, OWCP [Ricker]*, 182 F.3d 637, 21 BLR 2-663 (8th Cir. 1999).

In addition, the record reflects that the Provider Manual is prepared by Computer Sciences Corporation (CSC), in cooperation with DOL, and its stated purpose is to assist health care providers and contractors who handle billings for DOL by offering basic information about processing bills in the Federal Black Lung Program. *See* Preface, 1985 Provider Manual; Decision and Order at 10; Hearing Transcript at 39. The Provider Manual explains billing instructions and procedures; it specifies covered medical treatment services, indicating whether a Certificate of Medical Necessity is required; and it states that all decisions relating to allowable and non-allowable medical expenses are made by DOL. 1985 Provider Manual, Sections 1-3; Decision and Order at 10. The Provider Manual also contains, A*for informational purposes* . . . a partial list of services and conditions that are not Black Lung related and therefore, are not reimbursable.@

1985 Provider Manual, Section 2.5 (emphasis supplied); Decision and Order at 10. This list includes organ transplants. *Id.* DOL updates the Provider Manual periodically, without notice and comment, and CSC, whose responsibilities are strictly ministerial, issues replacement pages which revise existing provisions and/or add new information. *See* 1985 Provider Manual, Section 1.2; Decision and Order at 10-11; Hearing Transcript at 32. The Provider Manual lists DOL=s responsibilities as including, *inter alia*, establishing the program=s medical policy, approving or disapproving Certificates of Medical Necessity, reimbursing eligible miners and providers for treatment of the miner=s Black Lung disease, and reviewing unusual circumstances and cases. *Id*. Based upon these provisions, the administrative law judge properly concluded that DOL explicitly retained discretion under the Provider Manual=s guidelines to determine, on a case-by-case basis, whether a lung transplant is reasonable and necessary for the treatment of pneumoconiosis, consistent with the Act and the regulations and their underlying legislative intent.[3] Decision and Order at 13-15; *see Ricker*, 182 F.3d 637, 21 BLR 2-663.

Although the administrative law judge additionally found that the manual provision at issue was an interpretive rule exempt from the notice and comment requirements of the APA, Decision and Order at 12-15, we agree with the Director=s position that the manual provisions do not rise to the level of interpretive rules or formal policy, but are informal, instructional guidelines for the health care industry. As such, they do not have the force and effect of law, and the fact-finder has discretion to determine, based on the facts of each case, whether or not a lung transplant constitutes a covered procedure under the Act and the regulations. *See Christensen*, 529 U.S. at 587. We therefore affirm the administrative law judge=s denial of employer=s Motion for Summary Decision.[4]

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[3]In the present case, the district director approved the miner=s lung transplant based upon the opinion of Dr. Loyd, supported by the opinions of Drs. Cander and Sherman, that the miner was a good candidate for the procedure and that a lung transplant was the only option to treat the miner=s end stage lung disease, which was related to pneumoconiosis and had been unresponsive to all other known medical treatments. Director=s Exhibits 5, 19, 22, 38. Dr. Loyd is the Medical Director of the Lung Transplant Program at Vanderbilt University Medical Center, whose Lung Transplant Protocol was approved by Medicare in 1995. Director=s Exhibit 37.

[4]We also reject employer=s arguments regarding the administrative law judge=s denial of employer=s discovery requests, as the administrative law judge acted within her discretion in finding that the requests were overly broad, unduly burdensome and/or the information sought was not relevant to the issue presented. *Clark v. Karst-Robbins Coal*

Co., 12 BLR 1-149 (1989)(*en banc*); Decision and Order at 6-7. Consequently, any error in the administrative law judge=s finding that employer=s post-hearing discovery requests were foreclosed by the administrative law judge=s pre-hearing scheduling orders is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984); *Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

We agree, however, with employer=s contention that the administrative law judge erred in adjudicating the merits of this claim for medical benefits without holding an evidentiary hearing, as requested by employer. Employer contends that in a January 1999 Order, the administrative law judge bifurcated the issues regarding the Motion for Summary Decision and the merits, and scheduled two hearings. Employer states that, as a result, the parties anticipated that after a hearing was conducted on the issue of whether lung transplants were covered procedures under the Act and the administrative law judge ruled on employer=s Motion for Summary Decision, the evidentiary hearing would be rescheduled. Employer asserts, and the Director agrees, that it is entitled to a hearing and the opportunity to submit its evidence on the contested issue of whether the miner=s lung transplant was reasonable and necessary to treat the miner=s pneumoconiosis pursuant to the standard enunciated by the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Glen Coal Co. v. Seals*, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998).[5] As the Sixth Circuit has held that a party who has requested a hearing is entitled to one and that it is error for an administrative law judge to ignore such a request, *see Cunningham v. Island Creek Coal Co.*, 144 F.3d 388, 21 BLR 2-384 (6th Cir. 1998), we vacate the administrative law judge=s award of medical benefits and remand this case to the administrative law judge for a formal hearing on the merits and the introduction into the record of employer=s evidence. In considering the evidence of record on remand, the administrative law judge must include in her Decision and Order sufficient analysis and findings of fact to indicate that she has weighed all the relevant evidence of record, and she must state the basis for her decision therein. *See Ridings v. C & C Coal Co., Inc.*, 6 BLR 1-227 (1983).

[5]The record indicates that the miner=s most recent coal mine employment occurred in Tennessee. Director=s Exhibit 2. Accordingly, this case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989)(*en banc*).

Accordingly, the administrative law judge=s Decision and Order awarding medical benefits is affirmed in part, vacated in part, and this case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge