BRB Nos. 99-0734 BLA
and 99-0734 BLA-A

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

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

Terri L. Bowman (Arter & Hadden LLP), Washington, D.C., for employer/carrier.

Michelle S. Gerdano (Henry L. Solano, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Richard A. Seid and 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 and BROWN, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer/carrier 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 (Trust Fund) in the amount of $20,030.22 for medical expenses incurred in the treatment of claimant's pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), has filed a cross-appeal. The relevant procedural history of this case is as follows: The Social Security Administration awarded claimant benefits on November 17, 1978. Director's Exhibit 12. Claimant filed an application for medical benefits only with the Department of Labor on April 5, 1979. Director's Exhibit 1. Administrative Law Judge Robert J. Feldman ultimately determined, in a Decision and Order dated August 24, 1993, that claimant was entitled to such benefits based upon his finding that claimant established invocation of the interim presumption pursuant to 20 C.F.R. §727.202(a)(4) and that employer did not establish rebuttal under 20 C.F.R. §727.203(b)(1)-(4). Director's Exhibit 9. Employer did not appeal from this judgement.

On November 22, 1993, the district director issued a supplement to the award of medical benefits instructing employer to reimburse the Trust Fund for payment of medical bills totaling $29,328.43. Director's Exhibit 11. A second letter was sent on December 16, 1993, informing employer and its carrier that if no response was received within thirty days, the case would be referred for enforcement. Director's Exhibit 12. On January 25, 1994, the district director issued additional correspondence to employer/carrier, noting the absence of any response to the 1993 orders and, again, requesting reimbursement and indicating that the case would be referred for enforcement if a reply was not received within thirty days. Director's Exhibit 13. In a letter dated March 18, 1994, employer/carrier asked the district director to provide copies of the medical bills at issue. Director's Exhibit 14. The district director complied with this request on May 13, 1994. Director's Exhibit 15. On May 20, 1994, employer/carrier acknowledged receipt of claimant's medical bills and requested that the district director treat its letter as a controversion of the supplement to the award of medical benefits. Director's Exhibit 16.

The case was eventually transferred to the Office of Administrative Law Judges (OALJ) for a hearing. Director's Exhibits 28, 29. The district director identified as contested issues whether employer was liable for the medical bills paid by the Trust Fund and whether employer waived its right to contest reimbursement of the medical expenses by failing to respond to the orders dated November 22, 1993 and December 16, 1993. Director's Exhibit 29. A hearing was held before Administrative Law Judge Paul H. Teitler (the administrative law judge) on June 7, 1995. At the hearing, the administrative

law judge denied employer/carrier's motion to dismiss the case on the ground that the OALJ lacked jurisdiction to resolve disputes concerning medical benefits.

In a Decision and Order issued on October 18, 1995, the administrative law judge determined that employer was liable for all of the claimed charges with the exception of the expenses related to claimant's hospitalization in November 1988. In so finding, the administrative law judge applied the rebuttable presumption adopted 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), *aff'g in part and rev'g in part Stiltner v. Doris Coal Co.*, 14 BLR 1-116 (1990)(*en banc*)(Brown, J., dissenting, McGranery, J., concurring and dissenting) that any treatment related to a pulmonary condition is compensable.[1] The administrative law judge rejected Dr. Branscomb's opinion that claimant's pneumoconiosis was in the early stages and, therefore, did not require any treatment and that treatment for claimant's chronic obstructive pulmonary disease (COPD) had no relationship to pneumoconiosis. Director's Exhibit 22. The administrative law judge concluded that he was not required to reach the waiver issue in light of his findings on the merits.

Employer/carrier appealed to the Board which, in a Decision and Order issued on July 29, 1997, affirmed the administrative law judge's invocation of the presumption adopted by the Fourth Circuit in *Stiltner* and affirmed the administrative law judge's discrediting of Dr. Branscomb's medical report on the ground that it was incompatible with the presumption. *Hamilton v. Island Creek Coal Co.*, BRB No. 96-0345 BLA (July 29, 1997)(unpub.), slip opinion at 3. The Board further held, however, that the administrative law judge did not comply with the Administrative Procedure Act, 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), as he did not identify in sufficient detail which charges employer was required to reimburse. *Id*. at 3-4. Therefore, the Board remanded the case to the administrative law judge for him to render more specific findings. The Board also indicated that inasmuch as the administrative law judge did not address the issue of whether employer waived its right to contest its liability for reimbursement of the medical expenses paid by the Trust Fund, the administrative law judge "may do so on

[1]This case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, as claimant's last year of coal mine employment occurred in Kentucky. Director's Exhibit 2; *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

remand" and should consider whether employer/carrier's May 20, 1994 controversion was a request for modification pursuant to 20 C.F.R. §725.310. *Id*. at 6-7 n.10.

In a Decision and Order issued on March 25, 1998, the administrative law judge determined that because the Director did not raise the issue of waiver when the case was initially before the administrative law judge, employer was not precluded from challenging the medical expenses for which the Director seeks reimbursement. The administrative law judge identified the charges for which employer is liable and ordered employer to remit payment to the Director. Employer/carrier appealed to the Board, but before the Board could address the appeal, employer/carrier and the Director filed motions for reconsideration with the administrative law judge, based upon the recent decision of the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, in *Seals v. Glen Coal Co*., 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998), *rev'g* 19 BLR 1-80 (1995)(*en banc*)(Brown, J., concurring). Following the submission of briefs on reconsideration, the administrative law judge issued a second Decision and Order on remand. The administrative law judge found that the holding in *Seals* did not alter his prior determination that Dr. Branscomb's opinion does not support a finding that the expenses for which the Director seeks reimbursement were not for the treatment of pneumoconiosis. After making minor adjustments in the specific charges for which employer is liable, the administrative law judge ordered employer/carrier to pay the Director $20,030.22. The administrative law judge also instructed employer/carrier to review additional bills submitted by the Director in a Request for Reimbursement dated April 23, 1998, and remit payment for the charges related to treatment of pneumoconiosis or COPD.

Employer/carrier argues on appeal that the administrative law judge erred in rejecting Dr. Branscomb's opinion. Employer/carrier also contends that the administrative law judge did not properly apply the Sixth Circuit's holding in *Seals* by determining, without adequate foundation, that the vast majority of medical expenses incurred were for the treatment of pneumoconiosis. In his cross-appeal, the Director asserts initially that the administrative law judge should have determined that employer and carrier were barred from contesting the finding that employer is liable for the charges identified by the Director, as the response to the reimbursement orders was untimely. The Director also argues that even assuming that employer/carrier's May 1994 letter constituted a request for modification, the objections to the administrative law judge's findings must fail, as employer did not satisfy its burden of demonstrating that the expenses were not incurred for the treatment of pneumoconiosis. Claimant has not participated in this appeal.

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 into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The only evidence submitted by employer/carrier consists of the medical report in which Dr. Branscomb stated that claimant had COPD caused by cigarette smoking and early simple "medical" pneumoconiosis, which required no treatment and did not contribute in any way to claimant's COPD. Director's Exhibit 22. The administrative law judge found that Dr. Branscomb's opinion was entitled to "little weight" on the ground that the doctor "was not considering the medical expenses in the context of a patient who had totally disabling pneumoconiosis, as does claimant in this case." Decision and Order on Remand at 2-3. Employer/carrier asserts that evidence, such as Dr. Branscomb's report, demonstrating that there is no connection between the pulmonary treatment received by a miner and his pneumoconiosis cannot be automatically discredited as contrary to the finding of total disability due to pneumoconiosis made at the entitlement stage of the proceedings. The Director maintains that the administrative law judge acted properly in discrediting Dr. Branscomb's opinion on the ground that the doctor relied on an assumption contrary to that set forth in Judge Feldman's Decision and Order awarding medical benefits.

We hold that the administrative law judge rationally determined that Dr. Branscomb's opinion was entitled to little weight. As the administrative law judge found, Dr. Branscomb based his assessment of the medical bills at issue upon his conclusion that claimant's clinical pneumoconiosis is not totally disabling and that claimant's COPD is not a form of legal pneumoconiosis. Director's Exhibit 22. In *Seals*, the Sixth Circuit stated that in contesting the claimed medical expenses, an employer or carrier can offer evidence that the bills are not related to pneumoconiosis, but cannot offer evidence controverting the existence of pneumoconiosis because the determination of whether the miner has pneumoconiosis is made at the entitlement phase of the proceedings. *See Seals, supra*. Thus, the court indicated that evidence controverting the elements of entitlement adjudicated in claimant's favor is not appropriate at the second stage of the proceedings, which concerns the actual payment of medical benefits. Inasmuch as Dr. Branscomb's conclusions are contrary to the premises upon which the finding of entitlement to medical benefits was based, *i.e.*, invocation of the interim presumption pursuant to Section 727.203(a)(4) and no rebuttal, which established that claimant is totally disabled due to pneumoconiosis, the administrative law judge acted within his discretion in finding that Dr. Branscomb's opinion was "unreliable in assessing whether the medical expenses are related to claimant's pneumoconiosis." Decision and Order on Remand at 2; *see Seals, supra*.

With respect to the administrative law judge's consideration of the remainder of the evidence pursuant to *Seals*, however, employer/carrier's contentions have merit, in part. In *Seals*, the Sixth Circuit held that the *Stiltner* presumption, that treatment for any pulmonary condition constituted treatment for pneumoconiosis, was not valid inasmuch as the Act did not create a statutory presumption in favor of claimants with respect to entitlement to medical benefits. The court further held that a claimant has the burden of proving that the expenses at issue involve reasonable and necessary treatment for the miner's pneumoconiosis and, therefore, that a claimant also bears the burden of producing evidence that the treatment was related to the miner's totally disabling pneumoconiosis. With respect to identifying medical treatments that are reimbursable, the court noted that pursuant to 20 C.F.R. §725.701(b), an operator found liable for medical benefits must provide such treatment as "the nature of the miner's pneumoconiosis and ancillary pulmonary conditions and disability require." 20 C.F.R. §725.701(b). The Sixth Circuit indicated that under this provision, "ancillary" refers to pulmonary conditions which are related to pneumoconiosis. The court further indicated that "relatedness" is present in situations in which the miner's pneumoconiosis makes the other pulmonary condition more severe *or* when pneumoconiosis has a synergistic relationship with another pulmonary condition such that the combination of diseases cause a sum of disease greater than the two parts.

In this context, the administrative law judge acted rationally in determining that charges for office visits, hospitalizations , and medications which are accompanied by comments explaining that the treatment was for pneumoconiosis or black lung are reimbursable. Thus, we affirm the administrative law judge's determination that employer/carrier must reimburse the Trust Fund for the cost of claimant's hospitalization in January of 1987, the office visits with Dr. Leslie that are described as being related to the treatment of claimant's pneumoconiosis or black lung disease, and the medications that Dr. Leslie identified as being for pneumoconiosis. Decision and Order on Remand at 3; Director's Exhibit 15; *see Seals, supra*. We also affirm the administrative law judge's exclusion of expenses for claimant's November 1988 hospitalization and other charges concerning treatment of claimant's chronic back problems. *Id*.

Regarding claimant's office visits with Drs. Bangudi and Ocampa, however, the administrative law judge must ascertain whether the record contains evidence demonstrating that the COPD that Drs. Bangudi and Ocampa treated is a condition related to pneumoconiosis or coal dust exposure as required under Section 725.701(b). *See Seals, supra*. Moreover, the administrative law judge must make the same determination with respect to the respiratory equipment rental and medication expenses for which the Director seeks reimbursement. Finally, the administrative law judge did not actually render a finding under the standard described in *Seals* with respect to claimant's hospitalizations in June and December of 1987. In light of the foregoing, we vacate the

administrative law judge's treatment of these specific issues and remand the case to the administrative law judge for reconsideration.

On remand, the administrative law judge must initially reconsider his determination that the Director waived the argument that employer/carrier was precluded from controverting reimbursement because its responses to the district director's Orders were untimely under 20 C.F.R. §725.419. The Director was not foreclosed from raising this argument, as the district director identified it as a contested issue when the case was transferred to the OALJ for a formal hearing, the administrative law judge noted it in his initial Decision and Order, and the Director did, in fact, make allegations regarding this matter before the Board.[2] *See Kurcaba v. Consolidation Coal Co.*, 9 BLR 1-73 (1986); *Grant v. Director, OWCP*, 6 BLR 1-619 (1983); *see also Freeman United Coal Mining Co. v. Benefits Review Board [Doty]*, 942 F.2d 415, 422 n.10 (7th Cir. 1991). If the administrative law judge determines that employer/carrier's responses were untimely and constituted waiver of the right to contest the reimbursement Orders, he must then consider whether employer/carrier's letter dated May 13, 1994, was a request for modification pursuant to 20 C.F.R. §725.310(a). *See* 20 C.F.R. §725.419(d). If the administrative law judge finds that the present case is in the posture of employer/carrier's request for modification, the burden is on employer/carrier to demonstrate a mistake in a determination of fact in the district director's proposed Decisions and Orders or a change in conditions pursuant to Section 725.310(a). In light of the Sixth Circuit's decision in *Seals*, however, even in the context of modification, the central issue concerns whether there is evidence affirmatively establishing that the expenses for which the Director seeks reimbursement represent reasonable and necessary treatment of claimant's totally disabling pneumoconiosis.

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

SO ORDERED.

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[2]It also appears that the time limit set forth in 20 C.F.R. §725.419(a) and (d) is jurisdictional in nature, thereby placing its violation in the category of issues that can be raised at any juncture in the proceedings. *See Cabral v. Eastern Associated Coal Corp.*, 18 BLR 1-25 (1993); *see also Freeman United Coal Mining Co. v. Director, OWCP [Shelton]*, 957 F.2d 302, 16 BLR 2-40 (7th Cir. 1992); *Freeman United Coal Mining Co. v. Benefits Review Board [Doty]*, 942 F.2d 415, 422 n.10 (7th Cir. 1991); *Peabody Coal Co. v. Shonk*, 906 F.2d 264, 272 n.11 (7th Cir. 1990).

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge