BRB No. 00-0720 BLA

VERNER LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KNOX CREEK COAL COMPANY	)	DATE ISSUED:
	)	
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 Further Remand from U.S. Court of Appeals for the Fourth Circuit of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

W. William Prochot (Arter & Hadden LLP), Washington, D.C., for employer.

Helen H. Cox (Judith E. Kramer, Acting 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, McGRANERY, and McATEER, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Further Remand from U.S. Court of Appeals for the Fourth Circuit (89-BLA-1023) of Administrative Law Judge Clement J. Kichuk 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] This case is

[1] The Department of Labor has amended the regulations implementing the Federal

on appeal before the Board for the third time. In the initial Decision and Order, Administrative Law Judge E. Earl Thomas found that employer executed an agreement to pay benefits on April 24, 1984, Director's Exhibit 2, and that although employer reimbursed the Black Lung Disability Trust Fund the amount of $14,971.30 on December 10, 1985, it refused to pay for claimant's[2] medical expenses pursuant to 20 C.F.R. §725.701 (2000). Administrative Law Judge Thomas weighed the relevant evidence and found that the disputed bills were for the treatment of claimant's pneumoconiosis or ancillary conditions, and therefore, that employer was responsible for the payment thereof. Accordingly, medical benefits were awarded.

Employer appealed and the Board held that Administrative Law Judge Thomas erred in failing to determine whether employer's request for an examination should be granted, in not rendering findings regarding claimant's failure to file an initial medical report under 20 C.F.R. §725.706(a)(2000), and in not addressing whether the district director abused his discretion in not requiring ongoing medical reports pursuant to 20 C.F.R. §725.706(b)(2000). Consequently, the Board vacated Administrative Law Judge Thomas' finding that the medical bills were for the treatment of claimant's pneumoconiosis and ancillary pulmonary conditions because it was unsupported by substantial evidence and remanded the case. *Lester v. Knox Creek Coal Co.*, BRB No. 90-1499 BLA (May 26, 1993)(unpub.). Subsequently, the Board granted the Director's Motion for Reconsideration and vacated that portion of the decision concerning Dr. Berry's report in light of *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991). Additionally, the Board denied employer's Motion to Publish the Board's decision. *Lester v. Knox Creek Coal Co.*, BRB No. 90-1499 BLA (Apr. 12, 1994)(unpub.).

Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2] Claimant is Verner Lester, who filed his application for benefits on June 26, 1979. Director's Exhibit 1.

On remand, the case was assigned to Administrative Law Judge Clement J. Kichuk (the administrative law judge) because Administrative Law Judge Thomas was no longer with the Office of Administrative Law Judges. The administrative law judge considered the newly submitted evidence by the parties and, in accordance with the standard articulated in *Stiltner*, found that Dr. Sherman's opinion was more persuasive and entitled to greater probative weight under Section 725.701 (2000). Accordingly, the administrative law judge awarded medical benefits.

Employer appealed and the Board affirmed the administrative law judge's finding that the medical evidence of record established that the submitted medical bills were reasonable and necessary for the treatment of claimant's pneumoconiosis inasmuch as this determination was rational and supported by substantial evidence. *Lester v. Knox Creek Coal Co.*, BRB No. 97-1061 BLA (Mar. 27, 1998)(unpub.). Furthermore, the Board summarily denied employer's motion for reconsideration. *Lester v. Knox Creek Coal Co.*, BRB No. 97-1061 BLA (Sep. 17, 1998)(unpub.).

Thereafter, the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, granted employer's motion to remand the case for the administrative law judge to review the case in light of three decisions, *General Trucking Corp. v. Salyers*, 175 F.3d 233, 21 BLR 2-565 (4th Cir. 1999); *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999); *Clinchfield Coal Co. v. Fuller*, 180 F.3d 622, 21 BLR 2-654 (4th Cir. 1999), issued subsequent to the decisions and orders by the administrative law judge and the Board. *Knox Creek Coal Co. v. Lester*, No. 98-2654 (4th Cir. Aug. 4, 1999)(unpub.).

On remand, the administrative law judge found that the previous decision awarding medical benefits is in complete accord with the decisions in *Ling* and *Stiltner* and again, found that Dr. Sherman's opinion was more persuasive and thus, entitled to greater probative weight. Accordingly, the administrative law judge awarded payment for the listed medications.

On appeal, employer argues that the administrative law judge misinterpreted controlling authority regarding Section 725.701 (2000) by shifting the burden of proof to employer, impermissibly discredited Dr. Branscomb's opinion, and failed to properly evaluate Dr. Sherman's opinion. The Director, Office of Worker's Compensation Programs (the Director) responds, urging affirmance of the award of medical benefits. Claimant, who is without the assistance of counsel, has not responded to this appeal. Employer has filed a reply brief, arguing that the analysis of the Director, like that of the administrative law judge, shifts the burden of proof to employer despite the Fourth Circuit court's declarations that this violates the holding in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 18 BLR 2A-1 (1994), *aff'g sub nom. Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 17 BLR 2-64 (3d Cir. 1993).

Pursuant to a lawsuit challenging revisions to forty-seven of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief and stayed, for the duration of the lawsuit, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determines that the regulations at issue in the lawsuit will not affect the outcome of the case. *National Mining Association v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The instant case involves a claim for medical benefits only,[3] for which the pertinent regulation set forth at Section 725.701 (2000) has undergone significant revision. Although subsections (a)-(d) remain unchanged, subsections (e) and (f) containing two new provisions have been added to Section 725.701 which in effect, codify Fourth Circuit case law. Section 725.701(e) states:

> 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 effectively treat a covered disorder, or was not for a pulmonary disorder at all.

20 C.F.R. §725.701(e); *see Salyers*, *supra*; *Ling*, *supra*; *Stiltner*, *supra*. Section 725.701(f) reads:

> 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 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 [20 C.F.R.] §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.

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[3] Medical benefits are awarded when "[a] responsible operator, other employer, or where there is neither, the fund, 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 disability requires." 20 C.F.R. §725.701(b).

20 C.F.R. §725.701(f); *see Ling, supra*; *Glen Coal Co. v. Seals,* 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998).

In the present case, the Board established a briefing schedule by order issued on March 2, 2001, to which the Director and employer have responded. The Director's brief, dated March 21, 2001, asserts that although Section 725.701 (2000) underwent significant revision, "the correctness of the (administrative law judge's) interpretation of the controlling precedent and his assessment of the medical opinion evidence under the old regulation is equally applicable to, and reviewable under, the revised regulation because the revisions to this regulation essentially codify the Fourth Circuit decisional law." Director's Supplemental Brief at 2. Likewise, employer asserts, in its brief dated March 26, 2001, that the pertinent revised regulations do not affect the disposition of this case inasmuch as the new Section 725.701(e) establishes a presumption consistent with Fourth Circuit law, that the administrative law judge's errors still require that the case be remanded, and that the new Section 725.701(f) does not affect the outcome of the case because there is no treating physician's opinion of record. Hence, the Director and employer both agree, albeit for different reasons, that the Board need not hold this case in abeyance and may render a decision. Claimant has not filed a response to the Board's order. Based on the briefs submitted by the parties and our review, we hold that the disposition of this case is not impacted by the challenged regulations and will proceed to adjudicate the merits of this appeal.

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 the 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'Keeffe v. Smith, Hinchman and Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Initially, employer recognizes that claimant is entitled to the presumption that respiratory treatment is related to pneumoconiosis, but argues that it "does not have to win the credibility contest at this stage" to overcome the presumption because employer's production of evidence demonstrating that the treatment is not related to pneumoconiosis shifts the burden back to claimant to prove by a preponderance of the evidence that the treatment is related to pneumoconiosis. Employer's Brief at 9. More specifically, employer contends that its proffer of Dr. Branscomb's opinion, that claimant's treatment was for a pre-existing non-occupational pulmonary disease, satisfies its burden of production and shifts the burden back to claimant to prove otherwise. Employer's argument lacks merit.

Section 725.701(e) sets forth the standard for rebuttal and practically reads *verbatim* to the requirement in *Ling* that "[t]he 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 effectively treat a covered disorder, or was not for a pulmonary disorder at all." 20 C.F.R. §725.701(e) [emphasis added]; *Ling*, 176 F.3d at 233, 21 BLR at 2-583; *Salyers*, 175 F.3d at 324, 21 BLR at 2-569 (employer contesting medical benefits award may rebut presumption by "adducing sufficient *credible* evidence") [emphasis added]. Therefore, contrary to employer's argument, it must provide sufficient "credible" evidence to rebut the presumption that claimant's receipt of a medical service or supply for any pulmonary disorder is caused or aggravated by pneumoconiosis. Failure to provide such precludes rebuttal. 20 C.F.R. §725.701(e). Consequently, the administrative law judge did not shift the burden of proof from claimant to employer, but permissibly found that Dr. Branscomb's opinion was not credible because this opinion contained infirmities that undermined the doctor's conclusions. [2000] Decision and Order at 4; *Salyers*, *supra*; *Ling*, *supra*.

Employer contends further that the administrative law judge's decision is contrary to the law of issue preclusion because the issue of the existence of legal pneumoconiosis has not been previously litigated, and therefore, the administrative law judge erred by precluding employer from challenging claimant's medical expenses on this basis. We disagree. The doctrine of issue preclusion, also known as collateral estoppel, refers to the effect of a judgment of law or fact that has been actually litigated and decided in the initial action and only applies if the issue sought to be precluded is the same as that decided in the previous action. *Freeman United Coal Mining Co. v. Director, OWCP [Forsythe]*, 20 F.3d 289, 18 BLR 2-189, 2-195 (7th Cir. 1994). However, it is well established that if an issue is ascertainable while the case is pending and is not properly raised or challenged, the issue is waived. *See Bracher v. Director, OWCP*, 14 F.3d 1157, 18 BLR 2-97 (7th Cir. 1994); *Kott v. Director, OWCP*, 17 BLR 1-9, 1-13 (1992); *Mullins v. Director, OWCP*, 11 BLR 1-132, 1-134 (1988) (*en banc*)("... disability, causation, pneumoconiosis, and length of coal mine employment are all issues which can be conceded through inadvertence despite their determinative role in the outcome of a claim"); *Thornton v. Director, OWCP*, 8 BLR 1-277 (1985). Thus, employer's agreement to pay benefits in April 1984 constitutes employer's withdrawal of controversion and waiver on all issues of entitlement. *See e.g., Pendley v. Director, OWCP*, 13 BLR 1-23, 1-24 (1989)(*en banc*). Hence, we reject employer's contention.

Employer similarly argues that the administrative law judge "ignored" the holding in *Fuller*[4] in accordance with the Fourth Circuit court's remand instructions. Specifically,

[4] In *Fuller*, the court discussed the longstanding difficulty administrative law judges and parties have in distinguishing "clinical" and "legal" pneumoconiosis. The court held that Section 718.201 (2000) "encompasses a wide variety of conditions; among those are diseases whose etiology is not the inhalation of coal dust, but whose respiratory and pulmonary

employer asserts that the administrative law judge improperly broadened the terms of the agreement to pay benefits by finding that employer conceded the existence of legal pneumoconiosis rather than clinical pneumoconiosis only, and in doing so, improperly discredited Dr. Branscomb's opinion as contrary to the concession of legal pneumoconiosis. Employer's argument lacks merit. In the Decision and Order, the administrative law judge cited all three decisions that were specified in the remand instructions of the court's decision. [2000] Decision and Order at 1. Contrary to employer's argument, there is no reason, nor has employer raised one, to demonstrate that the administrative law judge "ignored" the holding in *Fuller*. Moreover, notwithstanding employer's admitted concession of the existence of "clinical" pneumoconiosis, employer's agreement to pay benefits clearly states that employer "agrees to accept the Department of Labor's Initial Determination that the claimant meets the standards of total disability under the Black Lung Benefits Act," *i.e.*, employer agrees that claimant is totally disabled due to pneumoconiosis. *See Ling*, 176 F.3d at 233, 21 BLR at 2-583 (miners are not compelled to "exhaustively document" their medical benefits only claims inasmuch as miner has previously established "disability as the result of legal pneumoconiosis, comprising one or more pulmonary disorders"); Director's Exhibit 2; [2000] Decision and Order at 4. Consequently, we reject employer's argument.

Employer asserts that the administrative law judge relied on impermissible reasons to discredit the opinion of Dr. Branscomb, who opined that the medical services provided were for the treatment of claimant's pre-existing chronic obstructive pulmonary disease caused by cigarette smoking and hereditary asthma. We disagree. The administrative law judge, within a proper exercise of his discretion, found that Dr. Branscomb's opinion was less persuasive based on Dr. Branscomb's failure to adequately explain his conclusion that claimant's respiratory impairment was due entirely to a cigarette smoking history of ten cigarettes a day for six years before quitting in 1939 notwithstanding claimant's thirty-one year history of coal mine employment. *See Allen v. Island Creek Coal Co.*, 21 BLR 1-1, 1-3 (1996), *aff'g on recon.*, 15 BLR 1-32 (1991); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Carpeta v. Mathies Coal Co.*, 7 BLR 1-145, 1-147 n.2 (1984); [2000] Decision and Order at 4. The administrative law judge reasonably found that Dr. Branscomb's failure to state in his report that claimant was totally disabled by a respiratory or pulmonary disease further supported his opinion that claimant does not suffer from legal pneumoconiosis, a

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symptomatology have nonetheless been made worse by coal dust exposure." *Fuller*, 180 F.3d at 625, 21 BLR at 2-661; *Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 175, 19 BLR 2-265, 2-269 (4th Cir. 1995); *see Ling*, *supra*; *Stiltner*, *supra*. The court held further that Section 718.201 (2000) does not require these diseases to attain the status of an "impairment" to be classified as "pneumoconiosis" as defined under the Act, but rather, "the definition is satisfied whenever one of these diseases is present in the miner at a detectable level." *Fuller*, 180 F.3d at 635, 21 BLR at 2-662.

conclusion, however, which contradicts the agreement of the parties that claimant is totally disabled due to pneumoconiosis as defined in the Act, and therefore, further undermines the probative value of his opinion. *See Island Creek Coal Co. v. Holdman*, 202 F.3d 873, 882, 22 BLR 2-25, 2-42 (6th Cir. 2000)("administrative law judge overseeing Black Lung Act claims may discredit medical expert testimony that contains equivocations about the etiology of a disease"); *Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997)(administrative law judge does not have to accept opinion or theory of any given medical expert, but may weigh medical evidence and draw his/her own conclusions). Accordingly, we reject employer's contention inasmuch as the administrative law judge's discounting of Dr. Branscomb's opinion is rational and supported by substantial evidence.

Employer finally argues that the administrative law judge impermissibly failed to assess whether Dr. Sherman's opinion is sufficient to establish the requisite causal connection between claimant's pulmonary treatment and pneumoconiosis. We disagree. The administrative law judge rationally determined that the opinion of Dr. Sherman, who opined that the medications listed in his report were for the treatment of chronic obstructive pulmonary disease and chronic bronchitis, pulmonary conditions which are manifestations of legal pneumoconiosis, was more persuasive than the opinion of Dr. Branscomb and therefore, entitled to greater probative weight. *See* 20 C.F.R. §725.701(e); *Salyers*, *supra*; *Ling*, *supra*; *Seals*, *supra*; *Allen*, *supra*; [2000] Decision and Order at 4. Hence, we reject employer's argument.

Accordingly, we affirm the administrative law judge's determination that there is no credible evidence of record to establish that claimant's medical expenses were for the treatment of a pulmonary disorder apart from those previously associated with claimant's disability, were beyond those necessary to effectively treat a covered disorder, that were not for a pulmonary disorder at all, or were for a pulmonary condition that had not manifested itself to some degree at the onset of his disability, inasmuch as this finding is rational and supported by substantial evidence. *See Ling, supra*; *Stiltner, supra*; [2000] Decision and Order at 4. Consequently, we affirm the administrative law judge's finding that employer failed to satisfy its burden of establishing rebuttal of the presumption at Section 725.701(e). *See* 20 C.F.R. §725.701(e), (f).

Accordingly, the Decision and Order on Further Remand from U.S. Court of Appeals for the Fourth Circuit of the administrative law judge is affirmed.

SO ORDERED.

ROY P. SMITH

Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

J. DAVITT McATEER
Administrative Appeals Judge