U.S. Department of Labor

Benefits Review Board
P.O. Box 37601
Washington, DC 20013-7601

BRB No. 14-0227 BLA

WAYNE ISON	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ENTERPRISE MINING COMPANY, LLC	)	
	)	
and	)	
	)	
BIRMINGHAM FIRE INSURANCE COMPANY/CHARTIS	)	DATE ISSUED: 06/15/2015
	)	
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 Medical Benefits of Alice M. Craft, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Citizens' Law Center, Inc.), Whitesburg, Kentucky, for claimant.

H. Brett Stonecipher and Matthew J. Zanetti (Fogle, Keller Purdy, PLLC), Lexington, Kentucky, for employer/carrier.

Emily Goldberg-Kraft (M. Patricia Smith, Solicitor of Labor; Rae Ellen James, 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: HALL, Chief Administrative Appeals Judge, BOGGS and GILLIGAN, Administrative Appeals Judges.

PER CURIAM:

Employer/carrier (employer) appeals the Decision and Order Awarding Medical Benefits (2012-BTD-1) of Administrative Law Judge Alice M. Craft, ordering the payment of medical bills on a claim filed pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2012) (the Act).

This case involves a miner's claim filed on July 24, 2009. The district director issued a Proposed Decision and Order Awarding Benefits on March 11, 2010. Specifically, based on Dr. Rasmussen's uncontradicted medical report, the district director found that claimant established the existence of both clinical pneumoconiosis, and legal pneumoconiosis, in the form of interstitial pulmonary fibrosis caused, in part, by coal mine dust exposure.[1] Director's Exhibit 28. The district director further found that claimant established that both clinical pneumoconiosis and legal pneumoconiosis are material contributing causes of his totally disabling chronic lung disease. *Id.* Employer initially contested claimant's entitlement but, on May 31, 2011, filed a Notice of Withdrawal of Resistance, in which it "conced[ed] entitlement to benefits as outlined in the Proposed Decision and Order awarding benefits." Director's Exhibit 3. As a result, the district director issued an Award of Benefits on June 9, 2011. Director's Exhibit 4.

On September 1, 2011, claimant's physicians requested approval from the district director for a bilateral lung transplant. The district director forwarded the request to employer's insurance carrier for consideration. Employer disputed coverage for the lung transplant and, on January 20, 2012, the district director forwarded the case to the Office of Administrative Law Judges for a hearing. While his case was pending, on January 25, 2012, claimant underwent a successful bilateral lung transplant.

Following a hearing, the administrative law judge issued her March 25, 2014 Decision and Order Awarding Medical Benefits. The administrative law judge found that, as claimant's bilateral lung transplant constituted treatment for a pulmonary disorder, claimant invoked the rebuttable presumption, at 20 C.F.R. §725.701(e), that his pulmonary disorder was caused by, or aggravated by, his pneumoconiosis. The administrative law judge further found that employer did not rebut the presumption. Accordingly, the administrative law judge ordered employer to pay all medical expenses arising from claimant's bilateral lung transplant, including, but not limited to, the transplant surgery, accompanying procedures, and follow-up care.

[1] The district director also based his clinical pneumoconiosis determination on an x-ray reading by Dr. Broudy. Director's Exhibit 28.

On appeal, employer challenges the administrative law judge's finding that employer failed to rebut the presumption that claimant's bilateral lung transplant was for a pulmonary disorder either caused or aggravated by pneumoconiosis. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond, urging affirmance of the administrative law judge's award of medical benefits.[2]

The Board's scope of review is defined by statute. The administrative law judge's Decision and Order must be affirmed if it is rational, supported by substantial evidence, and 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).

Because claimant invoked the Section 725.701 presumption that his treatment, a bilateral lung transplant, was for a disorder caused or aggravated by pneumoconiosis, 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,[3] 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* 65 Fed. Reg. 79,920, 80,022 (Dec. 20, 2000). However, "[e]vidence that the miner does not have pneumoconiosis or is not totally disabled by pneumoconiosis . . . is insufficient to defeat a request for coverage of any medical service or supply under this subpart." 20 C.F.R. §725.701(f). The administrative law judge found that employer failed to establish rebuttal by any method.

In evaluating whether employer established rebuttal, the administrative law judge considered the medical opinions of Drs. Broudy and Caffrey.[4] The administrative law

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[2] We affirm, as unchallenged on appeal, the administrative law judge's finding that claimant invoked the presumption that his lung transplant constituted treatment for a pulmonary disorder caused by, or aggravated by, his pneumoconiosis, pursuant to 20 C.F.R. §725.701(e). *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983).

[3] With respect to the first rebuttal method, the presumption may be rebutted by establishing that "the service provided treated a condition which became manifest after the underlying adjudication of entitlement, or that it treated a preexisting pulmonary condition adjudged not to have contributed to disability." 65 Fed. Reg. 79,920, 80,022 (Dec. 20, 2000).

[4] The administrative law judge also considered the 2003 medical opinion of Dr. Jarboe, who stated that he was unable to identify any respiratory disease or impairment, and the more recent opinions of Drs. Zavala and Rasmussen, who concluded that claimant's totally disabling coal workers' pneumoconiosis and pulmonary fibrosis

judge noted that, prior to claimant's lung transplant surgery, Dr. Broudy examined claimant and diagnosed both advanced simple coal workers' pneumoconiosis and legal pneumoconiosis. Decision and Order at 11-13, 17; Employer's Exhibits 1, 3. Dr. Broudy opined that the proposed lung transplant, and preoperative heart catheterization and testing, constituted reasonable treatment for claimant's severe respiratory impairment. Decision and Order at 13-14, 17; Employer's Exhibit 3. Following claimant's transplant surgery, Dr. Caffrey reviewed ten lung tissue slides and diagnosed "interstitial lung disease with inflammation and fibrosis with honeycomb changes, bilateral (findings suggestive of usual interstitial pneumonia [UIP])." Employer's Exhibit 4 at 2. Dr. Caffrey stated that the slides he reviewed did not show any lesions of simple or complicated coal workers' pneumoconiosis. *Id*. Thereafter, Dr. Broudy reviewed Dr. Caffrey's report, and in a supplemental opinion dated July 26, 2012, stated that "idiopathic pulmonary fibrosis [was] the cause of [claimant's] respiratory disease and severe pulmonary impairment." Employer's Exhibit 5. Dr. Broudy concluded that neither coal workers' pneumoconiosis nor silicosis caused claimant's impairment, as there was no evidence of either disease. *Id.*

Because Section 725.701(f) provides that the issue of the existence of pneumoconiosis is not to be relitigated, the administrative law judge found that, to the extent Drs. Caffrey and Broudy opined that claimant does not suffer from pneumoconiosis, their opinions were insufficient to rebut the presumption that claimant's lung transplant was necessitated by his pneumoconiosis. Decision and Order at 17, *citing* 20 C.F.R. §725.701(f). Further, the administrative law judge discounted Dr. Broudy's opinion because Dr. Broudy did not address his earlier diagnosis of legal pneumoconiosis, or explain why claimant's lung transplant surgery was not necessitated by legal pneumoconiosis. Decision and Order at 18. Thus, the administrative law judge found that employer failed to rebut the presumption that claimant's lung transplant constituted medical treatment for his pneumoconiosis and attendant disability.

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necessitated a lung transplant. The administrative law judge discounted the opinion of Dr. Jarboe, as too remote in time. Decision and Order at 17. The administrative law judge further found that the opinions of Drs. Zavala and Rasmussen do not assist employer in rebutting the presumption, but rather, support the conclusion that claimant's lung transplant was necessitated by his pneumoconiosis. *Id.* at 18. As these findings are unchallenged on appeal, they are affirmed. *See Skrack*, 6 BLR at 1-711.

Employer asserts that the administrative law judge erred in finding the opinion of Dr. Broudy insufficient to establish rebuttal of the Section 725.701 presumption.[5] Employer initially asserts that, in discounting Dr. Broudy's opinion because he did not address his earlier diagnosis of legal pneumoconiosis, or explain why claimant's lung transplant surgery was necessitated by legal pneumoconiosis, the administrative law judge failed to recognize that Dr. Broudy did not believe that claimant had any form of pneumoconiosis. Employer's Brief at 7-8. Contrary to employer's arguments, as the administrative law judge properly recognized, "[e]vidence that a miner does not have pneumoconiosis . . . is insufficient to defeat a request for coverage" of medical treatment services. 20 C.F.R. §725.701(f); Decision and Order at 17.

Employer next contends that the administrative law judge erred by failing to analyze whether claimant's lung transplant constituted treatment "for a pulmonary disorder apart from those previously associated with [claimant's] disability." Employer's Brief at 6, *citing* 20 C.F.R. §725.701(e). Specifically, employer asserts that Dr. Broudy's supplemental opinion that idiopathic pulmonary fibrosis is the cause of claimant's severe respiratory impairment supports employer's rebuttal burden.[6] Employer's contention lacks merit.

As the Director correctly asserts, the district director's Proposed Decision and Order awarding benefits specified that the basis of claimant's award was total disability due to both clinical pneumoconiosis, and legal pneumoconiosis, in the form of interstitial pulmonary fibrosis caused, in part, by coal mine dust exposure. Director's Brief at 4; Director's Exhibit 28. Moreover, as the administrative law judge recognized, in its May 20, 2011 Notice of Withdrawal of Resistance, employer conceded claimant's entitlement to benefits "as outlined in the Proposed Decision and Order awarding benefits." Decision and Order at 17; Director's Exhibit 3. Thus, as claimant's interstitial pulmonary fibrosis was found to be legal pneumoconiosis, for which claimant was awarded benefits, claimant's interstitial pulmonary fibrosis is not a "pulmonary disorder apart from those previously associated with [claimant's] disability . . . ." 20 C.F.R. §725.701(e); Director's Exhibits 3, 28. Therefore, there is no merit to employer's contention that the administrative law judge "erred by failing to analyze whether the claimant's lung

[5] As employer does not challenge the administrative law judge's finding that Dr. Caffrey's opinion is insufficient to establish rebuttal pursuant to 20 C.F.R. §725.701, the finding is affirmed. *See Skrack*, 6 BLR at 1-711.

[6] Employer does not assert that claimant's lung transplant constituted treatment beyond that necessary to treat his pulmonary disorder, or that it was not for treatment of a pulmonary disorder at all. 20 C.F.R. §725.701(e).

transplant was the result of idiopathic fibrosis instead of pneumoconiosis." Employer's Brief at 6.

As employer raises no other arguments with respect to the administrative law judge's decision, we affirm the administrative law judge's determination that employer failed to rebut the presumption that claimant's bilateral lung transplant and associated testing and procedures, including his heart catheterization, were necessary treatment for a pulmonary disorder caused or aggravated by pneumoconiosis, pursuant to 20 C.F.R. §725.701. Decision and Order at 19. Thus, we affirm the administrative law judge's decision that employer is required to pay all costs of medical treatment arising from claimant's bilateral lung transplant surgery, including all related procedures and follow-up care. *See Kenner v. Tenn. Consol. Coal Co.*, 22 BLR 1-287, 1-292 (2003) (holding that it is within the discretion of the fact-finder to determine whether a lung transplant constitutes a covered procedure under the Act and regulations).

Accordingly, the administrative law judge's Decision and Order Awarding Medical Benefits is affirmed.

SO ORDERED.

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BETTY JEAN HALL, Chief
Administrative Appeals Judge

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JUDITH S. BOGGS
Administrative Appeals Judge

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RYAN GILLIGAN
Administrative Appeals Judge