BRB No. 99-0120 BLA

CLYDE MURPHY	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
Q & G COAL COMPANY, INCORPORATED	)	
	)	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 of Thomas M. Burke, Administrative Law Judge, United States Department of Labor.

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

Jeffrey S. Goldberg (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 appeals the Decision and Order (96-BTD-0004) of Administrative Law Judge Thomas M. Burke ordering the payment of medical expenses 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). Claimant was previously awarded benefits under

the Act.[1] The instant dispute focuses upon employer's liability for outstanding medical bills.[2] The administrative law judge found that claimant's submitted medical bills were necessary and reasonable for the treatment of claimant's pneumonoconiosis. The administrative law judge, therefore, found that employer was responsible for the payment of claimant's medical bills. On appeal, employer argues that the administrative law judge erred in finding employer liable for the payment of claimant's medical bills. Employer also argues that the administrative law judge erred in denying its motion for reimbursement of its reasonable expenses and fees incurred in preparing for Dr. Sherman's deposition and in the preparation of its motion to strike Dr. Sherman's report. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's award of medical benefits. In a reply brief, employer reiterates its previous contentions. Claimant has not filed a brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

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[1]Claimant filed a claim for benefits with the Department of Labor on September 5, 1973. Director's Exhibit 1. In a Decision and Order dated January 20, 1976, Administrative Law Judge Charles P. Rippey awarded benefits. Director's Exhibit 8. By Decision and Order dated January 18, 1978, the Board affirmed Judge Rippey's award of benefits. *Murphy v. Q and G Coal Co.*, BRB No. 76-0136 BLA (Jan. 18, 1978) (unpublished).

[2]The administrative law judge noted that a list of the medical bills at issue was admitted into evidence as Director's Exhibit 36. Decision and Order at 2. Director's Exhibit 36 consists of a two page document entitled "DCMWC Consultant's Review of RO Disputed Medical Treatment Bills."

Before turning our attention to the administrative law judge's specific findings in the instant case, we find it necessary to review the present state of the law regarding entitlement to medical benefits.[3] The United States Court of Appeals for the Fourth Circuit, within whose jurisdiction the instant case arises, has held that a miner meets his burden of showing that his medical expenses were necessary to treat pneumoconiosis if his treatment relates to any pulmonary condition resulting from or substantially aggravated by the miner's pneumoconiosis.[4] *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 496-497, 15 BLR 2-135, 2-140 (4th Cir. 1991). The Fourth Circuit has recognized that the proof needed is a medical bill for the treatment of a pulmonary or respiratory disorder and/or associated symptoms.[5] *Gulf & Western Industries v. Ling*, 176 F.3d 226, 233, 21 BLR 2-570, 2-583

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[3]Section 725.701(b) provides that the provider of medical benefits "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).

[4]Since most pulmonary disorders would be related to, or at least aggravated by, the presence of pneumoconiosis, the Fourth Circuit held that when a miner receives treatment for a pulmonary disorder, a presumption arises that the disorder was caused or at least aggravated by the miner's pneumoconiosis, making the employer liable for the medical costs. *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991).

[5]In *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999). *Ling*, the Fourth Circuit explained that:

> It by no means distorts the truth to postulate that, in the great majority of cases, the disorders and symptoms associated with the miner's disability will closely correspond to those for which he later receives treatment. Even where there is a less than perfect identity, however, the threshold creating the entitlement to benefits -- that the pulmonary condition treated be merely aggravated by the miner's pneumoconiosis – is low enough to permit a rational conclusion that a particular respiratory infirmity will likely be covered.
>
> Hence, rather than compel the miner to exhaustively document his claim for medical benefits, i.e., requiring him to again laboriously obtain all evidence that he can that his shortness of breath, wheezing, and coughing are still the result of pneumoconiosis, we have fashioned the [*Stiltner*] presumption as a shorthand method of proving the same thing. The proof needed is a medical bill for the treatment of a pulmonary or respiratory disorder and/or associated symptoms.

(4th Cir. 1999).

The Board has held that the party opposing the payment of medical benefits, in order to rebut the presumption set out in *Stiltner*, may show, by a reasoned medical opinion, (1) that the expenses in question were not reasonable for the treatment of any of claimant's pulmonary diseases (*i.e.*, a reasoned medical opinion which states that a certain type of treatment is excessive or simply not necessary for the treatment of claimant's pulmonary condition); or (2) the treatment is for a condition completely unrelated to claimant's pulmonary condition (*e.g.*, treatment for a heart condition, broken bone or back). *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995) (*en banc*) (Brown, J. concurring).

The Fourth Circuit has further held that:

> If the party opposing the claim produces credible evidence that the treatment rendered is for a pulmonary disorder apart from those previously associated with the miner's disability, or is beyond that necessary to effectively treat a covered disorder, the mere existence of a medical bill, without more, shall not carry the day. The burden of persuading the factfinder of the validity of the claim remains at all times with the miner.

Ling, 176 F.3d at 233, 21 BLR at 2-583.

In order to establish rebuttal, the party opposing payment may also produce credible evidence that the miner was treated for a pulmonary condition that had not manifested itself, to some degree, at the onset of his disability or for a preexisting pulmonary condition adjudged not to have contributed to his disability. *See General Trucking Corp. v. Salyers*, 175 F.3d 226, 21 BLR 2-570 (4th Cir. 1999).

In his consideration of the instant case, the administrative law judge found that claimant met his burden of production by producing copies of bills and medical records of treatment from November 1990 through January 1992. Decision and Order at 3. The administrative law judge noted that "the physicians concur that the treatment was appropriate for claimant's pulmonary condition." *Id.* at 7. The administrative law judge noted that

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Ling, 76 F.3d at 233, 21 BLR at 2-583.

employer attempted to show, through the opinions of Drs. Castle, Branscomb and Fino, that claimant's treatment was not for pneumoconiosis, but rather for asthma or asthmatic bronchitis not related to coal dust exposure. *Id.* The administrative law judge, however, found that employer failed to rebut the presumption that claimant's medical treatment was reasonable and necessary to treat his coal workers' pneumoconiosis. *Id.* at 7-9. The administrative law judge found that the opinions upon which employer relied to establish rebuttal were flawed by an assumption that claimant's pneumoconiosis was mild rather than disabling and an assumption that claimant's bronchial asthma could not have been aggravated by his coal dust exposure. *Id.* The administrative law judge, therefore, found that employer was responsible for the payment of claimant's medical expenses. *Id.* at 9.

Employer generally contends that the administrative law judge, in applying *Stiltner*, improperly shifted the burden of proof in the instant medical benefits case from claimant to employer. We disagree. The Fourth Circuit has held that the presumption set out in *Stiltner* does not improperly shift the burden of proof in medical benefit cases from the claimant to the party opposing the claim. *See Ling*, *supra*. The Fourth Circuit has further held that the *Stiltner* presumption is not contrary to the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). *Id.*

The administrative law judge properly recognized that claimant had the ultimate burden of proof to show by a preponderance of the evidence that his treatment was related to pneumoconiosis. Decision and Order at 3. In the instant case, the administrative law judge found that claimant met his initial burden of establishing that he received treatment for a pulmonary disorder. *Id.* Inasmuch as this finding is unchallenged on appeal, it is affirmed. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983).

Employer also argues that the administrative law judge erred in discrediting the opinions of Drs. Castle, Branscomb and Fino. The administrative law judge found that the opinions of Drs. Castle, Branscomb and Fino were flawed by their failure to acknowledge the disabling nature of claimant's pneumoconiosis and by their improper assumption that claimant's bronchial asthma could not be related to his coal dust exposure. Decision and Order at 7-9.

The administrative law judge properly questioned the reports of Drs. Castle and Branscomb because they failed to acknowledge the disabling nature of claimant's pneumoconiosis.[6] Although the administrative law judge acknowledged that Drs. Castle and

[6]The Director agrees with employer that the administrative law judge erred to the extent that he discredited Dr. Fino's opinion because Dr. Fino failed to acknowledge the disabling nature of claimant's pneumoconiosis. Dr. Fino explicitly stated that he understood that claimant had been found to "have a coal mine dust-related pulmonary condition which is

Branscomb did "not argue against the presence of pneumoconiosis severe enough to be disabling," the administrative law judge found that their opinions were "dependant [sic] on a finding of no disabling pneumoconiosis." Decision and Order at 7. The administrative law judge reasonably inferred that Drs. Castle and Branscomb based their opinions, at least in part, upon an erroneous belief that claimant's pneumoconiosis was not disabling.[7]

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causing a disability." Claimant's Exhibit 3. However, inasmuch as the administrative law judge provided an alternative proper basis for rejecting Dr. Fino's opinion, *see* discussion, *infra*, the administrative law judge's error is harmless. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984)

[7]Dr. Castle opined that claimant's prescribed medications were not "used to treat the mild degree of coal workers' pneumoconiosis present." Employer's Exhibit 1. In discussing the effect of coal dust exposure on emphysema, Dr. Castle merely acknowledged that coal dust exposure could cause a "small loss of function." *Id.* Dr. Castle further opined that while coal dust exposure can cause a form of bronchitis known as industrial bronchitis, it does "not cause any lasting impairment" and "does not persist for longer than a few months after termination of employment." *Id.*

Although Dr. Branscomb assumed that claimant had "at least early clinical coal workers' pneumoconiosis," he characterized claimant's clinical pneumoconiosis as "minimal." Claimant's Exhibit 2. Dr. Branscomb also opined that coal dust exposure "does not cause chronic bronchitis but rather can cause a temporary bronchitis while a person is

Consequently, we hold that the administrative law judge properly discredited the opinions of Drs. Castle and Branscomb concerning the reason for claimant's pulmonary treatment.

working." *Id.*

The administrative law judge also properly questioned the opinions of Drs. Castle, Branscomb and Fino because these doctors based their opinions on an unsupported assumption that asthmatic bronchitis is unrelated to coal dust exposure and, therefore, is insufficient to fall within the definition of legal pneumoconiosis.[8] Decision and Order at 8-9. Because the administrative law judge found that Drs. Castle, Branscomb and Fino made an improper assumption that claimant's asthmatic bronchitis could not be caused by coal dust exposure, the administrative law judge properly found that their opinions were insufficient to establish that claimant's medical treatment was not for the treatment of his pneumoconiosis. *See Robinson v. Director, OWCP*, 3 BLR 1-798.5 (1981) (Board recognizes that bronchial asthma, bronchitis and advanced asthma are conditions that could be considered pneumoconiosis if they are shown to arise out of coal mine employment); *see also Warth v. Southern Ohio Coal Co.*, 60 F.3d 173, 19 BLR 2-265 (4th Cir. 1995).

Moreover, we note that there is no evidence that claimant's asthmatic bronchitis did not contribute to his pulmonary disability. In fact, Administrative Law Judge Charles P. Rippey, in awarding benefits, did not render specific findings as to what pulmonary conditions contributed to claimant's disability.[9] The opinions of Drs. Castle, Branscomb and

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[8]Dr. Castle opined that claimant's bronchial asthma was not a condition caused by, related to, or substantially aggravated by coal mine dust exposure. Claimant's Exhibit 1. Dr. Castle, therefore, opined that "bronchial asthma" did not meet the criteria of the legal definition of coal workers' pneumoconiosis. *Id.*

Dr. Branscomb opined that claimant suffered from allergic bronchial asthma. Claimant's Exhibit 2. However, Dr. Branscomb opined that there were "no medical circumstances to indicate [that claimant's] asthma was caused or irritated by either his pneumoconiosis or by dust." *Id.* Dr. Branscomb opined that claimant's asthma was caused by "an abnormal constitutional allergic tendency of the bronchi to go into spasm" and "has nothing to do with coal dust or pneumoconiosis." *Id.*

Dr. Fino opined that claimant was not treated for a coal mine dust-related condition, but rather was treated for an asthmatic or asthmatic bronchitis condition. Claimant's Exhibit 3. Dr. Fino opined that claimant's bronchitis was not related to the inhalation of coal mine dust. *Id.*

[9]In his 1976 Decision and Order, Judge Rippey found that the "positive [x]-ray findings...., coupled with claimant's history of exposure to coal dust throughout his almost thirty years of coal mine employment, justify a finding that the claimant has pneumoconiosis...." Director's Exhibit 8. Judge Rippey further found that claimant was totally disabled. *Id.* Judge Rippey also found that claimant was entitled to a presumption that his pneumoconiosis arose out of his coal mine employment. *Id.* Judge Rippey,

Fino are also insufficient to establish that the treatment rendered 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.

Employer contends that the administrative law judge erred in his consideration of the opinions of Drs. Michos and Modi. However, inasmuch as these opinions are not supportive of a finding of rebuttal, the administrative law judge's error, if any, in his consideration of these opinions is harmless. *Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984). Inasmuch as it is based upon substantial evidence, we affirm the administrative law judge's finding that employer failed to establish rebuttal of the *Stiltner* presumption. Consequently, we affirm the administrative law judge's finding that employer is responsible for the payment of claimant's medical expenses.

Employer, however, argues that the administrative law judge erred in failing to identify the medical bills for which employer is responsible. The administrative law judge ordered employer to pay claimant:

> for the past treatments listed at Director's Exhibit 36, that is, the two pages that were attached to Dr. Cander's report and titled "DCMWC Consultants Review of RO [D]isputed Medical Treatment Bills," insofar as those bills have not been paid previously by Medicare or the claimant's health insurance provider.

Decision and Order at 9-10.

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therefore, found that claimant was "totally disabled by reason of pneumoconiosis arising out of his coal mine employment." *Id.*

The Director agrees with employer and has requested that the case be remanded for the introduction of evidence concerning which treatment bills have not been paid. Inasmuch as it is unclear which medical expenses have already been paid by Medicare or other insurance,[10] we remand the case to the administrative law judge with instructions to identify which of the medical expenses delineated in Director's Exhibit 36 are employer's responsibility.

Finally, we reject employer's contention that the administrative law judge erred in denying its motion for the reasonable expenses and fees incurred in preparing for Dr. Sherman's deposition and in the preparation of its motion to strike Dr. Sherman's report. Section 928(a) provides that "[A] reasonable attorney's fee against the employer or carrier ... shall be paid directly by the employer or carrier to the attorney for the claimant." 33 U.S.C. §928(a), as incorporated by 30 U.S.C. §932(a). Under Section 928(a), an award of attorneys' fees is "in addition to the award of compensation." *Id.* Based on the express language of the statute, only a "person seeking benefits" may assert an attorneys' fee claim. *Id.* The statute does not provide for an award of attorneys' fees to an employer or carrier. *See generally Equitable Equipment Co. v. Director, OWCP [Jourdan]*, 191 F.3d 630, 33 BRBS 167(CRT) (5th Cir. 1999).

[10]The administrative law judge acknowledged that the "record is unclear about whether some or all of the bills listed in the attachment to Dr. Cander's report were paid by [claimant's] insurance coverage." Decision and Order at 2.

Accordingly, the administrative law judge's Decision and Order ordering the payment of medical expenses is affirmed in part and modified in part, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge