BRB No. 03-0547 BLA

GLENDA HAMILTON (o/b/o ART V. STANLEY (Deceased))	)	
Claimant-Respondent	)	
v.	)	DATE ISSUED: 05/28/2004
BETTY B 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 Daniel F. Solomon, Administrative Law Judge, United States Department of Labor.

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

Helen H. Cox (Howard Radzely, 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 HALL, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order (02-BTD-0002) of Administrative Law Judge Daniel F. Solomon 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).[1] The miner was previously awarded benefits under the Act.[2] This appeal

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[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 726 (2002). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

[2]The miner filed an initial claim for benefits on May 7, 1979. Director's Exhibit 2. After this claim was administratively denied on October 16, 1980, claimant filed a second claim on September 16, 1981. Director's Exhibit 1. In a Decision and Order dated July 27, 1987, Administrative Law Judge George A. Fath denied benefits, applying the criteria of 20 C.F.R. Part 718 (2000) based on the filing date of the September 1981 claim. Claimant appealed. The Director, Office of Workers' Compensation Programs (the Director), cross-appealed Judge Fath's decision, contending that Judge Fath erred in failing to consider the September 16, 1981 claim as a request for modification of the denied 1979 claim, and in consequently failing to consider entitlement under 20 C.F.R. Part 727 (2000). In a Decision and Order dated February 26, 1990, the Board held that it need not consider claimant's arguments as to Judge Fath's findings under 20 C.F.R. Part 718 (2000) because Judge Fath should have considered the claim under 20 C.F.R. Part 727 (2000). *Stanley v. Betty B Coal Co.*, BRB Nos. 87-2105 BLA and 87-2105 BLA-A (Feb. 26, 1990)(unpublished). The Board remanded the case for consideration of the claim under 20 C.F.R. Part 727 (2000). *Id.* By Decision and Order on Remand dated October 29, 1991, Judge Fath found invocation of the interim presumption under 20 C.F.R. §727.203(a)(2), (a)(3) (2000), and determined that rebuttal of the interim presumption was not established under 20 C.F.R. §727.203(b)(1)-(4) (2000). Accordingly, benefits were awarded. Employer appealed. The Board affirmed the award of benefits, but remanded the case for the administrative law judge to determine the basis for modification -- *i.e.*, whether modification was established based on a change in conditions or on a mistake in a determination of fact -- and to determine the correct date for the commencement of benefits. *Stanley v. Betty B Coal Co.*, BRB No. 92-0590 BLA (Apr. 19, 1994)(unpublished). In a Decision and Order on Remand dated July 29, 1994, Judge Fath explained that a change in conditions formed the basis for his finding that modification was established, and determined that the date of onset of total disability due to pneumoconiosis was September 1, 1981, the beginning of the month in which claimant filed his request for modification. Employer appealed. The Board affirmed Judge Fath's Decision and Order on Remand. *Stanley v. Betty B Coal Co.*, BRB No. 97-0295 BLA (Oct. 23,

focuses upon whether employer should be required to reimburse the Black Lung Disability Trust Fund (Trust Fund) for payment of the miner's medical bills.

In his Decision and Order, dated April 28, 2003, the administrative law judge ordered employer to reimburse the Trust Fund a total of $127,688.10, representing an amount for reasonable and necessary medical treatment previously provided to the miner. The administrative law judge also ordered the district director to calculate and assess any interest due and owing. On appeal, employer contends that the administrative law judge erred in finding the medical expenses reimbursable. The Director, Office of Workers' Compensation Programs (the Director), responds in support of the administrative law judge's Decision and Order. In a reply brief, employer reiterates several contentions raised in its Petition for Review and brief.

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).

The regulation at 20 C.F.R. §725.701(b) 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 disability requires." 20 C.F.R. §725.701(b).

The regulation at 20 C.F.R. §725.701(e) further provides:

> If a miner receives a medical service or supply as described in [Section 725.701], 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

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1997)(unpublished). Upon employer's subsequent request for reconsideration, the Board reaffirmed its decision affirming the award of benefits. *Stanley v. Betty B Coal Co.*, BRB No. 97-0925 BLA (Sept. 30, 1998)(unpublished). Employer thereafter filed an appeal with the United States Court of Appeals for the Fourth Circuit, which affirmed the award of benefits. *Betty B Coal Company v. Director, OWCP* [*Stanley*], 194 F.3d 491, 22 BLR 2-1 (4th Cir. 1999). The award became final when employer took no further action.

> 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).

The administrative law judge considered the miner's medical bills and Dr. Sherman's analysis of the bills and found, based on Dr. Sherman's opinion, that claimant established invocation of the rebuttable presumption that the pulmonary disorder for which the miner received treatment was caused, or at least aggravated by, the miner's pneumoconiosis pursuant to Section 725.701(e), making employer liable for reimbursement to the Trust Fund of $127,688.10, the costs which the administrative law judge determined were associated with treatment of the miner's pulmonary disorder. While crediting Dr. Sherman's opinion as supportive of invocation of the presumption, the administrative law judge found that employer did not establish rebuttal of the presumption, according less weight to the opinions of Drs. Tuteur and Castle, which indicate that none of the treatment for which the Director seeks reimbursement to the Trust Fund was caused or aggravated by pneumoconiosis.

In challenging the administrative law judge finding that claimant established invocation of the presumption that the miner's medical treatment was necessary to treat the miner's pneumoconiosis, employer argues that the administrative law judge improperly credited Dr. Sherman's medical opinion without determining whether the doctor's opinion was well-reasoned and documented. Employer contends that Dr. Sherman's opinion is merely a boilerplate opinion which the administrative law judge should have rejected. Asserting that Dr. Sherman did not conduct a comprehensive review of the medical records in this claim, employer argues that Dr. Sherman erroneously based his opinion, that the miner's treatment for chronic obstructive pulmonary disease was related to pneumoconiosis, on an incorrect assumption that the miner had established pneumoconiosis. Employer argues that the miner in fact never established the presence of pneumoconiosis because benefits were awarded pursuant to the interim regulations at 20 C.F.R. Part 727 (2000). Employer emphasizes that invocation of the presumption of total disability due to pneumoconiosis was based, not upon evidence of pneumoconiosis, but upon pulmonary function study and arterial blood gas study evidence indicating that the miner was totally disabled.

Employer's contentions with regard to the administrative law judge's finding that claimant established invocation of the presumption under Section 725.701 lack merit. In the amended regulations at 20 C.F.R. §725.701, which

became effective on January 19, 2001, and which apply to all claims, the Department of Labor codified the presumption and rebuttal methods which the United States Court of Appeals for the Fourth Circuit had adopted in *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), and *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999). 65 Fed. Reg. at 80022 (Dec. 20, 2000). In *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), the court 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, his pneumoconiosis. *Stiltner*, 938 F.2d at 492, 15 BLR at 2-135. Since most pulmonary disorders would be related to, or at least aggravated by, the presence of pneumoconiosis, the court 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. *Id*.; 20 C.F.R. §725.701(e).

In *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999), the court held that the proof needed is a medical bill for the treatment of the pulmonary or respiratory disorder and/or associated symptoms. The court acknowledged that "the miner's burden of proving his claim is not onerous," explaining that:

> …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.

Ling, 176 F.3d at 233, 21 BLR at 2-583. In this case, the administrative law judge properly accorded significant weight to Dr. Sherman's report inasmuch as it contains analysis of the bills for the miner's treatment, contains a review of the hospital records that depict the miner's condition when the bills were generated, and contains a description of the miner's medical status during the periods in question. *Id*; Decision and Order at 24; Director's Exhibit 50. Contrary to employer's contention that the administrative law judge summarily relied upon Dr. Sherman's report, the administrative law judge properly analyzed the report, determining that certain items were not reimbursable because Dr. Sherman did not fully evaluate them and render the same level of analysis which he did for other entries in which he explained that the charges were related to the miner's

pulmonary disorder.[3] Decision and Order at 24-25; Director's Exhibit 51. Employer's primary contention that Dr. Sherman's report should have been discounted because the miner never established that he had pneumoconiosis amounts to an attempt to relitigate the merits of the case, which is proscribed by the regulations. In promulgating Section 725.701(f), the Department of Labor stated that the regulation precludes this defense:

> The operator cannot escape liability by trying to prove the medical service cannot pertain to disabling pneumoconiosis because the miner was disabled *solely* from smoking or some other non-occupational cause. Once the miner establishes [s]he is entitled to disability benefits, no element of entitlement can be relitigated or otherwise questioned via the medical benefits litigation.

65 Fed. Reg. at 80022 (Dec. 20, 2000). Accordingly, we affirm the administrative law judge's decision to accord significant weight to Dr. Sherman's opinion to find invocation of the presumption established under Section 725.701(b).[4]

Employer also contends that, in finding that employer did not establish rebuttal of the presumption, the administrative law judge erred by summarily

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[3]Employer suggests that, even assuming that the presumption was properly invoked, charges related to treatment during a January 3, 1985 hospitalization and for an emergency room visit on December 11, 1991 were in no way related to a pulmonary disorder and were therefore improperly charged to employer. This contention lacks merit. Dr. Sherman specified that certain of the charges for the January 3, 1985 hospitalization were related to a cardiac diagnosis and were unreimbursable. Director's Exhibit 52. In addition, as the administrative law judge correctly found, Dr. Sherman's itemization of treatment costs that he deemed reimbursable did not include charges for any treatment rendered on December 11, 1991. Decision and Order at 24; Director's Exhibit 51.

[4]There is no merit to employer's contention that the *Stiltner* presumption, as incorporated into the regulations at 20 C.F.R. §725.701(e), (f) is invalid in light of the United States Supreme Court's decision in *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003). In *Nord*, the Supreme Court rejected a treating physician rule in the context of litigation under the Employment Retirement Income Security Act (ERISA) because neither ERISA nor the Secretary of Labor's implementing regulations of ERISA require deference to a treating physician's opinion. The Supreme Court's decision in *Nord* has no bearing on the issues in this case.

discounting the opinions of Drs. Castle and Tuteur, which indicate that much of the miner's treatment was related to the miner's heart failure and other non-respiratory conditions, and that the miner's pulmonary care was precipitated by cigarette smoking, not the miner's presumed pneumoconiosis. Employer contends that the administrative law judge should have credited these opinions as well-reasoned and documented since Drs. Castle and Tuteur conducted comprehensive reviews of the miner's medical history, and thoroughly considered the progress reports, objective testing and treatment notes related to the miner's hospitalizations. We disagree. While the Fourth Circuit held in *Ling* that, notwithstanding the fact that the miner's burden of production is not an onerous one, "it does not follow that [the miner's burden of proving his claim] is non-existent or that it is has somehow shifted to the employer,"[5] the administrative law judge in this case properly gave less weight to the opinions of employer's experts, Drs. Castle and Tuteur. The weight of the evidence, and determinations concerning the credibility of medical experts and witnesses is for the administrative law judge. *Mabe v. Bishop Coal Co.*, 9 BLR 1-67 (1986); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). The administrative law judge properly found the reports of Drs. Castle and Tuteur are not credible because the doctors were in denial that the record established that the miner had pneumoconiosis. Decision and Order at 28; Director's Exhibit 62. The administrative law judge thus concluded that employer was using both doctors' reports to relitigate the underlying claim, and therefore properly discounted the probative value of the reports regarding rebuttal under Section 725.701(e). 20 C.F.R. §725.701(e), (f); Decision and Order at 28-19; Director's Exhibit 62. Accordingly, we affirm the administrative law judge's finding that employer did not establish rebuttal of the presumption that the miner's pulmonary disorder was caused, or at least aggravated by, the miner's pneumoconiosis.

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

> 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 treat a covered disorder, or is not for a pulmonary disorder at all, the mere existence of a medical bill, without more, shall not carry the day. The burden of persuading the fact-finder of the validity of the claim remains at all times with the miner.

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

Accordingly, the administrative law judge's Decision and Order ordering the repayment of medical expenses is affirmed.

SO ORDERED.

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NANCY S. DOLDER, Chief
Administrative Appeals Judge

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ROY P. SMITH
Administrative Appeals Judge

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BETTY JEAN HALL
Administrative Appeals Judge