BRB No. 00-0201 BLA

JESS SEALS	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GLEN COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand-Requiring Payment of Medical Benefits of Clement J. Kichuk, Administrative Law Judge, United States Department of Labor.

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

Sarah M. Hurley (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 McGRANERY, Administrative Appeals Judges, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Requiring Payment of Medical Benefits (89-BLA-1469) of Administrative Law Judge Clement J. Kichuk awarding medical

benefits 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 medical benefits only claim is before the Board for a second time. Claimant filed this medical benefits only claim on June 27, 1979. Director's Exhibit 1. Employer subsequently agreed to pay claimant's medical benefits. Director's Exhibit 3. On June 14, 1984, the Department of Labor (DOL) awarded claimant medical benefits. Director's Exhibits 3, 4. Subsequently, claimant forwarded his medical bills to employer, but employer declined to pay because it contended that claimant failed to show that the medical treatment he was receiving was related to pneumoconiosis. DOL requested payment from employer for medical treatment received by claimant, but employer again declined to pay. Director's Exhibits 9, 10, 14. DOL, therefore, forwarded the case to the Office of Administrative Law Judges for a hearing. The administrative law judge issued a Decision and Order ordering employer to pay all of the disputed medical bills. Subsequent to employer's appeal, the Board affirmed the administrative law judge's award of medical benefits. *Seals v. Glen Coal Co.*, 19 BLR 1-82 (1985)(*en banc*)(Brown, J., concurring). Employer, however, appealed the award of medical benefits to the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises. The Sixth Circuit vacated the award of medical benefits and remanded the case for further consideration. In *Glen Coal Co. v. Seals*, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998)(Boggs, J., concurring; Moore, J., concurring and dissenting), the Sixth Circuit declined to adopt the presumption set forth 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). Instead, the Sixth Circuit vacated the administrative law judge's findings rendered under the *Doris Coal* presumption and remanded the claim for further consideration.

On remand, the administrative law judge found that because the evidence of record affirmatively established that the disputed medical treatment was related to claimant's

[1] Part B recipients who file Part C claims subsequent to March 1, 1978, such as the instant claim, *see* Director's Exhibit 1, are limited to medical benefits only under the Black Lung Benefits Reform Act. 20 C.F.R. §725.701A; *see* 30 U.S.C. §924a; *Kosh v. Director, OWCP*, 8 BLR 1-168, 1-171 (1985), *aff'd* 791 F.2d 918 (3d Cir. 1986)(table). Claimant was originally found entitled to Part B benefits by the Social Security Administration. Director's Exhibit 2.

pneumoconiosis, claimant had established entitlement to medical benefits. On appeal, employer contends that the administrative law judge erred in finding that claimant established that his medical treatment was for pneumoconiosis. The Director, Office of Workers' Compensation Programs (the Director), responds and urges affirmance of the administrative law judge's Decision and Order. Claimant has not filed a brief in 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 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 & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In *Doris Coal*, the Fourth Circuit held that if a miner proves his entitlement to black lung benefits, he is entitled to a rebuttable presumption that his medical bills are related to the treatment of pneumoconiosis. *See Doris Coal, supra*; *see also Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999); *General Trucking Corp. v. Salyers*, 175 F.3d 322, 21 BLR 2-565 (4th Cir. 1999). In *Seals*, the Sixth Circuit held that the presumption established by the Fourth Circuit in *Doris Coal* was inconsistent with the law of the Sixth Circuit and that a decision based upon the holding in *Doris Coal* could not stand within the Sixth Circuit. The Sixth Circuit concluded that pursuant to the decision of the United States Supreme Court in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 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), the Fourth Circuit's holding in *Doris Coal* would destroy the desired uniformity of application of the Act by creating judicial presumptions available to claimants in some districts that would not be available in other districts. The Sixth Circuit also indicated that the Act sets up a two-stage process. In the first stage, the administrative law judge determines entitlement; in the second stage, the administrative law judge determines whether particular medical bills are related to the finding of entitlement. In the view of the Sixth Circuit, the *Doris Coal* presumption conflicts with the design of the Act inasmuch as it reshapes this two-stage process into a one-stage process, and opens the door for medical billings fraud. Accordingly, the Sixth Circuit held that once entitlement to benefits is established, the burden in the second stage of the proceedings remains with claimant to establish affirmatively that his medical treatment is related to totally disabling pneumoconiosis. *Seals* 147 F.3d at 514, 21 BLR at 2-411. The Sixth Circuit further recognized that, while employer can produce evidence that claimant's medical bills are not related to pneumoconiosis, he is precluded from arguing that the disease is not present. *Id*. Finally, the Sixth Circuit held that treatment which is "related to pneumoconiosis," as defined at 20 C.F.R. §725.701, is covered and that the term "ancillary pulmonary conditions" referred to in that section are conditions which require some connection and relatedness to pneumoconiosis. *Id*.

Employer contends that, in finding that claimant established entitlement to medical benefits, the administrative law judge simply adopted his prior rationale and thus again erred in presuming a connection between claimant's chronic obstructive pulmonary disease and coal dust exposure. Employer asserts that because the existence of legal pneumoconiosis was never established, it was error for the administrative law judge to conclude that employer made a stipulation to that effect. Employer further asserts that in finding that the medical opinions of record supported claimant's burden of proof, the administrative law judge erred in failing to determine whether the medical opinions he relied upon were reasoned and documented.

Specifically, employer asserts that the administrative law judge improperly relied on the opinion of Dr. Kanwal merely because he was claimant's treating physician. Employer further asserts that Dr. Kanwal's conclusion, that claimant's medical treatment was related to pneumoconiosis is not supported by any valid rationale and that Dr. Kanwal failed to address the impact of claimant's extensive smoking history. *See* Claimant's Exhibit 2. Additionally, employer asserts that the administrative law judge erred in crediting the opinion of Dr. McQuillan that claimant's treatment was for pneumoconiosis inasmuch as Dr. McQuillan failed to provide any bases for his conclusions. *See* Director's Exhibit 17. Likewise, employer argues that the administrative law judge improperly discredited the opinion of Dr. Branscomb that claimant's treatment was not for pneumoconiosis merely because the physician did not diagnose the existence of the disease. *See* Employer's Exhibit 9. Employer also contends that Dr. Branscomb's opinion is entitled to dispositive weight because he specifically recognized the presence of the disease and his credentials are superior to those of the other physicians of record.

In accordance with the holding of the Sixth Circuit in *Seals*, *supra*, the only issue before us at this time is whether claimant's medical expenses were for treatment of his totally disabling pneumoconiosis. The issue of whether claimant has established totally disabling pneumoconiosis is not before us at this time as the previous finding on this matter constitutes the law of the case. *See Williams v. Healy-Ball-Greenfield*, 22 BRBS 234 (1989); *Bridges v. Director, OWCP*, 6 BLR 1-988 (1984). Accordingly, we will not entertain any assertions raised by employer regarding the existence of claimant's totally disabling pneumoconiosis. *See Seals*, *supra*.

On remand, the administrative law judge determined that in 1984 employer "without objection or proceedings by a formal hearing agreed to pay the cost of black lung-related health care provided to Claimant." Decision and Order on Remand at 4. The administrative law judge further found that "[t]here is substantial evidence in the record that the treatment in question was related to [c]laimant's pneumoconiosis," and ordered "[e]mployer to reimburse [c]laimant for the medical treatment he received for his lung condition,...." Decision and Order on Remand 6, 8; *see* Employer's Exhibits 3, 5, 6, 8, 11.

Contrary to employer's assertions, the administrative law judge permissibly accorded greatest weight to the opinions of Dr. Kanwal, who was claimant's treating physician. *See* Claimant's Exhibits 1, 2; *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 17 BLR 2-16 (6th Cir. 1993); *see also Griffith v. Director, OWCP*, 49 F.3d 184, 19 BLR 2-111 (6th Cir. 1995). Dr. Kanwal opined that claimant's bronchodilator treatment was for claimant's pneumoconiosis and chronic obstructive pulmonary disease because both conditions "are related and the same person suffers from both and one aggravates the other." Claimant's Exhibit 2. The administrative law judge concluded that Dr. Kanwal's opinion was a well-reasoned and documented medical opinion as it was based on a thorough examination and further, that the physician's "actual treatment of the [c]laimant provided him with the unique access to [c]laimant's lung condition and enabled him to make a fuller assessment" of claimant's need for medical treatment related to coal workers' pneumoconiosis. Decision and Order on Remand at 7-8. Accordingly, the administrative law judge permissibly concluded that Dr. Kanwal's status as treating physician entitled his opinion to greater weight.[2] *See Tussey, supra*; *see also Griffith, supra*; *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989).

Additionally, contrary to employer's assertions, the administrative law judge permissibly accorded less weight to the opinion of Dr. Dahhan because of his conclusions that claimant did not suffer from pneumoconiosis and did not suffer from a totally disabling respiratory impairment. *See Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985); *see also Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Stark v. Director, OWCP*, 9 BLR 1-36 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *see generally Tussey, supra*; *Adams v. Director, OWCP*, 886 F.2d 818, 13 BLR 2-52 (6th Cir. 1989). As with the opinion of Dr. Dahhan, the administrative law judge also permissibly accorded little weight to the opinions of Dr. Branscomb as he failed to base his conclusion upon an accurate picture of claimant's health, *i.e.*, he had failed to recognize that claimant established a totally disabling respiratory impairment due to pneumoconiosis. *See Hutchens, supra*; *Stark, supra*; *Peskie, supra*; *Lucostic, supra*; *see generally Tussey, supra*; *Adams, supra*. The administrative law judge

[2] To the extent that the administrative law judge permissibly accorded greatest weight to the opinions of Dr. Kanwal, we not address the contentions regarding the administrative law judge's consideration of Dr. McQuillan's opinions. *See Kozele v. Rochester & Pittsburgh Coal Co.*, 6 BLR 1-378 (1983).

has, therefore, complied with the instructions set forth by the Sixth Circuit in that he has considered all of the relevant evidence and has permissibly concluded that such evidence affirmatively demonstrates that claimant's medical expenses were necessary to the treatment of his pneumoconiosis and ancillary pulmonary conditions and disability. *See* 33 U.S.C. §907(a); 20 C.F.R. §725.701; *Ondecko, supra*; *Seals, supra*.

Accordingly, the administrative law judge's Decision and Order on Remand-Requiring Payment of Medical Benefits is affirmed.

SO ORDERED.

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge