BRB No. 99-1307 BLA

JACK LESTER	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
FOUR L COAL COMPANY	)	DATE ISSUED: _____
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
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 - Award of Medical Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

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

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: HALL, Chief Administrative Appeals Judge, SMITH, Administrative Appeals Judge, and NELSON, Acting Administrative Appeals Judge.

PER CURIAM:

Employer appeals the Decision and Order - Award of Medical Benefits (98-BTD-0001) of Administrative Law Judge Daniel J. Roketenetz (the administrative law judge) on a claim for medical benefits 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). Pursuant to 20 C.F.R. §725.701(b) and the decisions of 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) and *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999), the administrative law judge found that the disputed medical bills in the amount of $7,407.97 were for treatment related to claimant's pneumoconiosis. The administrative law judge then indicated that claimant was entitled to reimbursement for these expenses and granted the claim for medical benefits. Decision and Order at 8.

On appeal, employer contends that claimant's coal dust exposure did not impact on his chronic obstructive pulmonary disease and thus did not necessitate the contested treatment for claimant's pulmonary condition. The Director, Office of Workers' Compensation Programs (the Director), responds, and seeks a remand of the case for reconsideration of Dr. Fino's opinion. In its reply brief, employer reiterates its position, and further notes that the administrative law judge erroneously indicated that claimant is entitled to reimbursement of his medical expenses. Employer notes that any reimbursement would be payable to the Trust Fund.

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[1]By Decision and Order dated January 4, 1995, Administrative Law Judge Julius A. Johnson awarded benefits under 20 C.F.R. Part 727, commencing March 1, 1980. Director's Exhibit 1. The Board affirmed this award in *Lester v. Four L Coal Co.*, BRB No. 95-0969 BLA (March 26, 1996)(unpublished). Director's Exhibit 2. The district director thereafter requested that employer reimburse the Black Lung Disability Trust Fund (Trust Fund) in the amount of $7,407.97 for medical treatment expenses incurred by claimant and paid by the Trust Fund. Director's Exhibit 3. Employer declined to pay. Employer argued that these medical expenses were not the result of treatment related to claimant's coal workers' pneumoconiosis and were billed by physicians who were convicted of fraud related to their treatment of patients with occupational pneumoconiosis. Director's Exhibits 4, 6.

[2]The regulation at 20 C.F.R. §725.701(b) provides, in pertinent part, that "A responsible operator, other employer, or where there is neither, the [Trust] 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 ancillary pulmonary conditions and disability require." 20 C.F.R. §725.701(b).

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

The Director seeks reimbursement to the Trust Fund from employer for medical expenses paid by the Trust Fund in the amount of $7,407.97. The Fourth Circuit held in *Stiltner* 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. *See Stiltner, supra.* The court has indicated that, since most pulmonary disorders are going to be related to or at least aggravated by the presence of pneumoconiosis, 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 party opposing the claim liable for medical costs. *See Ling, supra*. "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, 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 factfinder of the validity of the claim remains at all times with the miner." *Ling, supra*, 176 F.3d at 233, 21 BLR 2-583. In the case where the opposing party produces such credible evidence, the burden shifts to the miner to prove affirmatively by a preponderance of the evidence, that his medical bills are related to his pneumoconiosis. *Id.*

The administrative law judge found that the medical bills presented by claimant, as found reimbursable by Dr. Sherman, were sufficient to invoke the presumption set forth in *Stiltner* that claimant's treatment was related to his coal workers' pneumoconiosis. The administrative law judge found,

> The medical bills found valid by Dr. Sherman are for visits which refer to chronic obstructive pulmonary disease, coal workers' pneumoconiosis, bronchitis, and other respiratory conditions which, as *Doris Coal* and *Ling* point out, could merely be aggravated by the miner's coal mine dust exposure, and as such are reimbursable. I do not find the report of Dr. Fino sufficient to overcome this presumption.

Decision and Order at 7. In this regard, the administrative law judge noted, "there is nothing in the record which reveals that Dr. Fino ever personally examined the Claimant." *Id.* The administrative law judge further found that Dr. Fino's opinion that claimant's obstructive lung disease was not attributable to claimant's coal mine employment because his lung

function was normal at the time claimant left the coal mines and claimant had no further coal mine dust exposure, Employer's Exhibit 1, was outweighed by the medical opinions of record which indicate a connection between claimant's treatment for respiratory and pulmonary problems and his pneumoconiosis. *Id.*

Employer indicates that it does *not* contend that claimant is not entitled to the presumption set forth in *Stiltner* but rather, argues that the administrative law judge erred in discrediting employer's evidence to resolve the parties' disagreement as to whether claimant's coal dust exposure had any impact on his chronic obstructive pulmonary disease for which claimant sought treatment. Employer's Reply Brief at 2. Employer asserts that it produced evidence, including Dr. Fino's opinion, showing no connection between claimant's treatment for chronic obstructive pulmonary disease and his coal mine dust exposure. Employer argues that the administrative law judge erred in discrediting this evidence based on the administrative law judge's "belie[f] that all pulmonary conditions must be at least aggravated by pneumoconiosis. ALJ slip op. at 7. The judge was not entitled to make an inference of relatedness to resolve the conflict in the evidence." Employer's Reply Brief at 2. In this regard, employer asserts that claimant established only clinical pneumoconiosis and not legal pneumoconiosis in his claim for benefits. The Director contends that the administrative law judge correctly determined that claimant satisfied his initial burden under *Stiltner* and *Ling*. The Director argues, "Claimant presented medical bills for treatment of his pulmonary disorder and the record contains Dr. Sherman's credible opinion that $7,407.97 of these expenses were attributable to the treatment of claimant's clinical and legal pneumoconiosis." Director's Brief at 3. The Director argues, however, that the administrative law judge's reason for discounting Dr. Fino's opinion that the disputed treatment was for chronic obstructive pulmonary disease with bronchospasm which claimant developed after he left the coal mines and which, therefore, cannot be attributable to claimant's inhalation of coal mine dust absent further exposure to coal mine dust, Employer's Exhibit 1, namely, because Dr. Fino did not examine claimant, cannot be affirmed in light of the Fourth Circuit's decisions in *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997) and *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998). In this regard, the Director argues, "As a consulting physician, Dr. Fino was as

[3]In *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 BLR 2-269 (4th Cir. 1997), the United States Court of Appeals for the Fourth Circuit held that by relying upon a "head count" of the testifying physicians and invocation of a rule of absolute deference to treating and examining physicians, the administrative law judge failed to fulfill his statutory obligation to consider all of the relevant evidence of record. Further, in *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), the court held that the administrative law judge erred in completely disregarding the opinions of Drs. Fino and Sobieski, despite the fact that he found them to be "of high quality," simply because they did not examine the claimant.

capable as Dr. Sherman of providing a credible medical opinion regarding the compensability of claimant's medical bills. Thus, the case must be remanded to the ALJ for reconsideration of Dr. Fino's opinion." Director's Brief at 3.

As an initial matter, neither employer nor the Director challenges the administrative law judge's determination that claimant met his initial burden to present evidence of treatment for a respiratory or pulmonary condition sufficient to invoke the presumption set forth in *Stiltner*. We, therefore, affirm the administrative law judge's determination that the presumption that the conditions for which claimant sought treatment were caused or at least aggravated by his pneumoconiosis was invoked pursuant to *Stiltner*. *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710 (1983). The issue, therefore, is whether employer produced credible evidence that the treatment sought by claimant was for conditions not previously associated with his disability due to pneumoconiosis. *Ling, supra*.

The record refutes employer's contention that the administrative law judge discredited Dr. Fino's opinion based on the administrative law judge's "belie[f] that all pulmonary conditions must be at least aggravated by pneumoconiosis." Employer's Reply Brief at 2. The record shows that the administrative law judge discredited Dr. Fino's opinion, upon which employer relies to rebut the presumption and shift the burden of proof to claimant to prove that his medical bills are related to his pneumoconiosis, *see Ling, supra*, based on the fact that Dr. Fino never examined claimant. Decision and Order at 7. The record further shows, however, that Dr. Sherman, upon whose opinion the administrative law judge relied in finding that the disputed bills were compensable, likewise did not examine claimant. In view of the fact that neither Dr. Fino nor Dr. Sherman examined claimant and the administrative law judge provided no reason to differentiate between the two physicians' reports on this basis, the administrative law judge's discrediting of Dr. Fino's opinion cannot stand. *See generally, Akers, supra; Hicks, supra.* Given the administrative law judge's error, we vacate the administrative law judge's determination that Dr. Fino's opinion is insufficient to rebut the presumption that the conditions for which claimant sought treatment were caused or at least aggravated by his pneumoconiosis, and we remand the case for reconsideration.

Employer further asserts that Dr. Sherman provided no support for his opinion that claimant's chronic obstructive pulmonary disease is related to his coal mine employment. Employer's assertion lacks merit. The record shows that Dr. Sherman provided ample documentation, including his medical findings on review of claimant's records and several references to medical treatises, in support of his opinion that claimant's chronic obstructive pulmonary disease is related to his coal mine employment and thus, that any corresponding treatment is compensable. Director's Exhibit 12. As discussed herein, *see* discussion *supra*, the record also shows, however, that like Dr. Fino, Dr. Sherman did not examine claimant. In addressing these conflicting medical opinions on remand, the administrative law judge must explain why Dr. Fino was not as capable as Dr. Sherman of rendering a credible

opinion regarding the compensability of claimant's medical bills.

On remand, the administrative law judge must determine the pertinent issue of whether employer has met its burden to produce credible evidence that the treatment sought by claimant was for conditions not previously associated with his disability due to pneumoconiosis. *Ling, supra.* Employer's assertion that claimant established only clinical pneumoconiosis and not legal pneumoconiosis in his claim for benefits is not germane to this issue and thus, we decline to address it further.

Employer also contends that the administrative law judge committed reversible error in not recognizing that several of the physicians who treated claimant have been convicted of fraud relevant to their treatment of patients with occupational pneumoconiosis. In support of its argument, employer refers to exhibits which are apparently part of the record in claimant's claim for benefits, and also attaches documentation of the criminal conviction of Dr. Modi. The Director argues that it is of no consequence that the record contains opinions rendered by physicians who have been convicted of fraud as the administrative law judge based the award of medical benefits on Dr. Sherman's credible opinion. The Director nevertheless asserts that, on remand, the administrative law judge should address this issue.

The question of whether a conviction affects a physician's credibility to render a medical opinion is a matter to be resolved by the administrative law judge. *See generally Lane v. Union Carbide Corp.*, 105 F.3d 166, 21 BLR 2-34 (4th Cir. 1997); *see also Peabody Coal Co. v. Benefits Review Board*, 560 F.2d 797, 1 BLR 2-133 (7th Cir. 1977); *Brown v. Director, OWCP*, 7 BLR 1-730 (1985). In light of our remand for reconsideration of the medical opinions of Drs. Fino and Sherman, we further remand the case for the administrative law judge to make such credibility findings as are necessary to the resolution of all issues *sub judice*. We note that only Drs. Sherman and Fino reviewed claimant's medical opinions to render an opinion relevant to the issue of the compensability of the contested treatment rendered claimant, and that these physicians reviewed the medical opinions of Drs. Modi, Baxter and Berry in reaching their respective opinions. Director's Exhibits 10-12; Employer's Exhibit 1.

Accordingly, the administrative law judge's Decision and Order is affirmed in part, and vacated in part, and the case is remanded to the administrative law judge for further consideration consistent with this decision.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

MALCOLM D. NELSON, Acting
Administrative Appeals Judge