BRB No. 09-0164 BLA

JAMES HARRIS (On behalf of the estate of CHARLES HARRIS)	)	
Claimant-Respondent	)	
v.	)	
SHAMROCK COAL COMPANY, INCORPORATED	)	DATE ISSUED: 11/19/2009
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 – Award of Medical Benefits of Administrative Law Judge Larry S. Merck, United States Department of Labor.

Phyllis L. Robinson, Manchester, Kentucky, for claimant.

Todd P. Kennedy (Jones, Walters, Turner & Shelton PLLC), Pikeville, Kentucky, for employer.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order – Award of Medical Benefits (2007-BTD-2) of Administrative Law Judge Larry S. Merck (the administrative law judge), ordering the payment of medical expenses on a claim filed on July 21, 2005, 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 administrative law judge found that claimant was entitled to reimbursement in the amount of $1,548.71, pursuant to 20 C.F.R. §725.701, because employer failed to rebut the presumption, at 20 C.F.R. §725.701(e), that the disorder for which the miner received treatment was caused or aggravated by his pneumoconiosis. Accordingly, the administrative law judge awarded benefits.

On appeal, employer argues that, contrary to the administrative law judge's findings, the medical evidence submitted is more than sufficient to rebut the presumption, at 20 C.F.R. §725.701(e), that the miner's treatments on June 22, 2004, August 12, 2004, August 24, 2004, November 5, 2004, and January 10-17, 2005, were for a pulmonary disorder either caused or aggravated by pneumoconiosis. In addition, employer argues that once the presumption is rebutted, the weight of the evidence supports a finding that the medical expenses at issue are not reimbursable under the Act. Claimant responds, urging affirmance of the administrative law judge's Decision and Order. The Director, Office of Workers' Compensation Programs, has not filed a response brief in this appeal.

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

> 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

[1] The miner, Charles Harris, was previously awarded benefits under the Act. Director's Exhibit 3. While the current claim was pending, the miner died on May 3, 2006, and his son, James Harris, is pursuing the claim as executor of the miner's estate. Claimant's Exhibit 1.

> 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 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).

In evaluating the request for reimbursement, the administrative law judge considered the medical opinions of Drs. Caffrey, Broudy, and Fino. After a review of Dr. Caffrey's initial report, the administrative law judge afforded his opinion "very little weight" because he found that Dr. Caffrey addressed only whether the miner had pneumoconiosis and not whether the miner's medical bills were related to treatment for pneumoconiosis. Decision and Order 6; *see* Employer's Exhibit 1. The administrative law judge stated that Dr. Caffrey's focus on the existence of pneumoconiosis was contrary to the regulations that provide: "[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." Decision and Order at 6, *quoting* 20 C.F.R. §725.701(f). In addition, after a review of Dr. Caffrey's supplemental report, the administrative law judge again stated that he afforded "little probative weight" to Dr. Caffrey's opinion because he determined that it was based on a "premise that [the] [m]iner did not suffer from pneumoconiosis and that there is no treatment per se for pneumoconiosis." Decision and Order at 8; *see* Employer's Exhibit 2. The administrative law judge stated that this was contrary to the previous decision of Administrative Law Judge Thomas F. Phalen, Jr., in the living miner's claim, finding that the miner suffered from pneumoconiosis. Decision and Order at 8.

Further, the administrative law judge determined that, even if he considered Dr. Caffrey's statements about the miner's CT and PET scans,[2] he would still find that they were "insufficient to rebut the presumption that the expenses were for treatment of a pulmonary disorder caused or aggravated by [the] [m]iner's pneumoconiosis." Decision

[2] Dr. Caffrey stated that the miner's CT and PET scans suggested the presence of mediastinal and hilar lymph node enlargement but did not include a definite diagnosis regarding the cause of the enlarged lymph nodes. Employer's Exhibit 2. Dr. Caffrey also indicated that the miner's CT scan on August 12, 2004, was interpreted as revealing questionable changes for carcinoma and the follow-up PET scan on August 24, 2004, showed suspicion of malignant disease and possible metastatic disease stemming from the miner's previous cancer of the urinary bladder. Employer's Exhibit 1.

and Order at 8. The administrative law judge found that Dr. Caffrey's statement, that the miner's lung mass was caused by his urinary bladder cancer, was not "definitive enough to form a well-reasoned opinion as to whether [the] [m]iner's treatment was for a pulmonary disorder that was not caused by or aggravated by his pneumoconiosis." *Id*. Because he found that Dr. Caffrey's opinion "was equivocal and failed to accept that [the] [m]iner suffered from pneumoconiosis[,]" the administrative law judge again stated that he afforded it "little probative weight." *Id*. at 8-9.

Regarding Dr. Broudy's initial and supplemental reports, the administrative law judge determined that "Dr. Broudy's opinion improperly focuses on whether the treatment notes and medical records diagnose pneumoconiosis." Decision and Order at 10; *see* Employer's Exhibits 3, 4. The administrative law judge reiterated that the existence or diagnosis of pneumoconiosis is not the issue of the case. While the administrative law judge acknowledged that Dr. Broudy provided another explanation for the medical expenses,[3] he found that Dr. Broudy failed to "give a reasoned explanation why the potential lung neoplasm was not caused or aggravated by [the] [m]iner's pneumoconiosis." Decision and Order at 10. Therefore, the administrative law judge found Dr. Broudy's opinion to be not well-reasoned, and afforded it "little probative weight." *Id*.

The administrative law judge noted that Dr. Fino only reviewed a series of invoices when forming his opinion.[4] Decision and Order at 11; *see* Employer's Exhibit 5. As a result, the administrative law judge determined that Dr. Fino's opinion was based on inadequate information since "[h]e reviewed only cursory descriptions of [the] [m]iner's medical expenses, which included no explanations for why the tests and procedures were performed." Decision and Order at 12. Consequently, the administrative law judge gave Dr. Fino's opinion "little probative weight." *Id*.

Based on these findings, the administrative law judge determined that employer failed to rebut the presumption that the miner's treatments were for a pulmonary disorder either caused or aggravated by pneumoconiosis. 20 C.F.R. §725.701(e). Therefore, the

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[3] Dr. Broudy concluded that there was no medical evidence that the miner's impairment was related to coal dust exposure or coal workers' pneumoconiosis. Employer's Exhibits 3, 4. In addition, Dr. Broudy opined that the procedures at issue were performed to rule out a lung neoplasm and not for the treatment, cure, or relief of pneumoconiosis. *Id*.

[4] Dr. Fino stated that he "reviewed a series of invoices" in preparing his opinion. Employer's Exhibit 5. The invoices listed in his report were dated August 12, 2004, August 24, 2004, November 5, 2004, and January 17, 2005. *Id*.

administrative law judge found that employer is liable for the reimbursement of the miner's medical expenses in the amount of $1,548.71. Decision and Order at 12-13.

Employer concedes that Dr. Caffrey "focused on conditions other than pneumoconiosis[,]" but argues that this does not affect whether Dr. Caffrey's report is well-reasoned. Employer's Brief at 4. In addition, employer states that Dr. Caffrey's qualifications should "argue against any interpretation of his analysis in this matter as being unreasoned." *Id*. Employer further alleges that Dr. Caffrey did not base his findings on whether the miner had pneumoconiosis but only concluded that the medical services received by the miner were not for a pulmonary disorder associated with pneumoconiosis. Regarding Dr. Broudy, employer argues that his finding, that the medical records do not support a diagnosis that the miner had pneumoconiosis, supports his opinion that the medical services at issue were performed due to the suspicion of a neoplasm and not for the treatment of pneumoconiosis. Employer also alleges that, contrary to the administrative law judge's statement that Dr. Broudy failed to give a reasoned explanation as to why the potential neoplasm was not caused or aggravated by pneumoconiosis, the "entire tenor" of Dr. Broudy's report explains that the neoplasm is not related to pneumoconiosis. Employer's Brief at 7.

We reject employer's contentions that the weight accorded the opinions of Drs. Caffrey and Broudy, by the administrative law judge, is not supported by substantial evidence. In promulgating Section 725.701(f), the Department of Labor stated:

> [T]he 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. Consequently, the operator and its physician must accept that the miner has a totally disabling respiratory or pulmonary impairment, and that pneumoconiosis, as defined in §718.201, is a substantially contributing cause of that impairment.

65 Fed. Reg. at 80022 (Dec. 20, 2000) (emphasis in original). Consequently, the administrative law judge properly accorded less weight to the opinions of Drs. Caffrey and Broudy because they improperly questioned whether the miner had pneumoconiosis and whether the miner was totally disabled due to pneumoconiosis. *See Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999); *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991)..

In addition, employer fails to explain how Dr. Caffrey's qualifications[5] can render credible an opinion that is found to be equivocal and not reasoned. The administrative law judge, as the finder-of-fact, reasonably determined that the underlying documentation and data were inadequate to support the physician's findings. *Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *see* Decision and Order at 6, 8-9. Further, while employer argues that the "entire tenor" of Dr. Broudy's report revealed that the neoplasm is not related to pneumoconiosis, the administrative law judge permissibly determined that Dr. Broudy failed to provide a reasoned explanation for this assertion. *Clark*, 12 BLR at 1-155. Accordingly, the administrative law judge acted within his discretion in finding that the opinions of Drs. Caffrey and Broudy were entitled to little probative weight.

Employer also alleges that while Dr. Fino did not review all of the medical records, he reviewed a description of the medical procedures in forming his opinion that the services were not related to pneumoconiosis. However, contrary to employer's contention, it is not evident from the record that Dr. Fino reviewed such descriptions. Dr. Fino provided in his report that he "reviewed a series of invoices" and there is no indication from his notations that additional information was considered. *See* Employer's Exhibit 5. As a result, the administrative law judge rationally assigned "little probative weight" to Dr. Fino's opinion because it was based on inadequate information. *Sabett v. Director, OWCP*, 7 BLR 1-299 (1984).

Further, employer states that "[i]t is notable that [the administrative law judge] did not reference the opinion of Dr. Gary Miller in this case." Employer's Brief at 5. Employer argues that Dr. Miller's questionnaire,[6] where he evaluated whether the medical bills at issue were performed for the treatment of a covered pulmonary condition, supports employer's position. Employer cites portions of Dr. Miller's response where he allegedly stated that some of the medical expenses were "done for a lung mass ? cancer" and that the hospital admission was "done for possible lung cancer" as support for the conclusion that "Dr. Miller notes that the treatment was done for the suspicion of cancer treatment." *Id.*

[5] Dr. Caffrey is a Board-certified clinical and anatomical pathologist. Employer's Exhibit 2.

[6] On January 4, 2007, Dr. Miller conducted a pulmonary/medical consultant review of the disputed medical treatment bills at the request of the Department of Labor. He concluded that all of the medical services "[were] rendered as treatment of covered pulmonary condition(s), and . . . consider[ed] them reimbursable under the Black Lung Program." Director's Exhibit 12.

We find that employer's arguments regarding the administrative law judge's failure to consider the "opinion" of Dr. Miller are without merit. Dr. Miller ultimately concluded that the medical services at issue were performed for the treatment of a pulmonary condition covered by the Act, and, therefore, are reimbursable. *See* Director's Exhibit 12. As such, Dr. Miller's review of the invoices does not support employer's argument that the procedures were not provided for a covered respiratory or pulmonary impairment.

Consequently, we affirm the administrative law judge's determination that employer failed to rebut the presumption, at 20 C.F.R. §725.701(e), that the miner's medical services were related to his pneumoconiosis. Further, we affirm the administrative law judge's decision to order employer to reimburse claimant in the amount of $1,548.71 for the miner's medical expenses.

Accordingly, the administrative law judge's Decision and Order – Award of Medical Benefits 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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REGINA C. McGRANERY
Administrative Appeals Judge