BRB No. 99-0878 BLA

EARVIN LAYNE	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
KNOX CREEK COAL COMPANY	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioner	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

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

Richard A. Dean (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: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Employer appeals the Decision and Order on Remand-Awarding Benefits (93-BLA-0332) of Administrative Law Judge Clement J. Kichuk 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 case is before the Board for a second time.[2] On remand, the administrative law judge determined that this medical benefits only case was governed by the holding of the United States Court of Appeals for the Fourth Circuit, within whose jurisdiction this case arises, in *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d

[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).

[2] The instant medical benefits only claim was filed on October 5, 1979. Director's Exhibit 1. Employer initially conceded entitlement, agreed to pay medical benefits and further agreed to reimburse the Black Lung Disability Trust Fund for medical payments already made. Director's Exhibit 4. Subsequently, employer contested its responsibility to pay such bills and the case was eventually referred to Administrative Law Judge Robert S. Amery for a hearing. At the hearing, the Director, Office of Workers' Compensation Programs (the Director) withdrew the medical opinions of Drs. Spagnolo and Cander from the Director's Exhibit list, *see* Hearing Transcript at 6, although the opinions were referred to and relied upon in the opinion of Dr. Branscomb, which was still part of the record. Employer's Exhibit 3. In a Decision and Order issued August 31, 1993, Judge Amery concluded that, based on the opinions of Drs. Cander and Kabaria, claimant established that charges of $807.63 were necessary for the treatment of pneumoconiosis. While approving the medical bills, Judge Amery declined to order employer to repay the Trust Fund, concluding that, pursuant to the Board's holding in *Balaban v. Duquesne Light Co.*, 16 BLR 1-120 (1992), he did not have the jurisdiction to do so. Subsequent to an appeal by employer and a cross-appeal by the Director, the Board held that the administrative law judge did have jurisdiction to order reimbursement to the Trust Fund by employer. The Board also found that Judge Amery's weighing of the evidence was based on the discredited "true doubt" rule when he found that claimant established that the disputed medical expenses were necessary for the treatment of pneumoconiosis. The Board, however, rejected employer's assertion that Judge Amery erred in addressing the opinion of Dr. Cander, as the opinion which was included as a part of Dr. Branscomb's opinion was still part of the record. Finally, the Board held that Judge Amery did not err in denying employer's request for a medical examination. *Layne v. Knox Creek Coal Co.*, BRB Nos. 94-0453 BLA and 94-0453 BLA-A (Nov. 8, 1995)(unpub.). The Board subsequently denied a Motion for Reconsideration by employer. *Layne v. Knox Creek Coal Co.*, BRB Nos. 94-0453 BLA and 94-0453 BLA-A (Decision and Order on Reconsideration)(Sep. 30, 1997)(unpub). On April 27, 1999 Administrative Law Judge Clement J. Kichuk issued the Decision and Order on Remand from which employer now appeals.

492, 15 BLR 2-135 (4th Cir. 1991). After considering all of the evidence of record, the administrative law judge found that claimant established that the disputed medical services were necessary for the treatment of pneumoconiosis and accordingly concluded that employer was liable for medical benefits in the amount of $807.63. Accordingly medical benefits were awarded.

On appeal, employer contends that the administrative law judge erred: in addressing medical opinion evidence, specifically that of Dr. Cander, which was not part of the record and that consideration of such evidence constituted a denial of employer's due process rights, in failing to apply the proper standard in determining the reasonableness of claimant's medical bills, in failing to provide an adequate basis for according greatest weight to the opinion of Dr. Cander, and in creating an irrebuttable presumption in favor of claimant by his application of the law. Finally, employer asserts that the administrative law judge erred in denying employer the right to have claimant examined. Claimant has not filed a response brief. The Director, Office of Workers' Compensation Programs (the Director), responds and urges affirmance of the award of medical benefits. In reply, employer reiterates its contentions.

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 in demonstrating that medical expenses are necessary for the treatment of pneumoconiosis, claimant is entitled to a rebuttable presumption that his pulmonary disorders are caused or aggravated by his pneumoconiosis. *See Doris Coal*, 938 F.2d 492, 15 BLR 2-140. Once claimant affirmatively establishes entitlement to this presumption, employer can establish rebuttal by producing credible evidence that the treatment is for a pulmonary disorder apart from those previously associated with miner's disability, or is beyond that necessary to effectively treat the disorder, or is not for a pulmonary disorder at all. *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).

After careful consideration of the administrative law judge's Decision and Order, the arguments raised on appeal, and the relevant evidence of record, we conclude that the administrative law judge's decision awarding medical benefits is supported by substantial evidence and contains no reversible error. We reject employer's contention that the administrative law judge improperly considered Dr. Cander's medical opinion because the opinion had previously been withdrawn from the record. When this case was previously

before the Board, the Board held that Dr. Cander's opinion, which was included as part of another physician's opinion, was relevant evidence. *Layne*, slip op. at 6. Inasmuch as the Board's holding on this issue was not challenged by employer through either a motion for reconsideration or appeal to the United States Court of Appeals, we hold that the Board's previous holding in 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), and employer is, therefore, precluded from raising the issue before the Board at this time.

We further reject employer's assertion that the administrative law judge applied an incorrect standard of analysis in reviewing the reasonableness of claimant's medical bills. Contrary to employer's assertion, the holdings of the Fourth Circuit in *Ling*, *supra*, and *Salyers*, *supra*, do not mandate remand as intervening case law. These cases do not alter the standard enunciated by the Fourth Circuit in *Doris Coal*, rather they clarify the holding, specifically reiterating that the *Doris Coal* presumption may not be applied to shift the burden of proof from claimant to employer. *See Ling*, *supra*; *Salyers*, *supra*; *see generally 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). In the instant case, the administrative law judge, while not specifically addressing the holdings in *Ling* and *Salyers*, found that the evidence of record established claimant's entitlement to the *Doris Coal* presumption, *i.e.* the opinion of Dr. Cander that bronchodilator treatment was required to treat claimant's coal mine employment related condition and that claimant's pulmonary disorder arose from legal pneumoconiosis, Employer's Exhibit 3. Decision and Order on Remand at 11-13. The administrative law judge found that employer's contrary evidence was not sufficiently credible to rebut the presumption. Decision and Order at 13-15 and that the presence of claimant's evidence "did not shift his burden of proof as claimant prevailed on the basis of evidentiary persuasion." Decision and Order at 15-17. Accordingly, we conclude that the administrative law judge has complied with the standard enunciated in *Doris Coal*. *See Doris Coal*, *supra*; *Ling*, *supra*; *Salyers*, *supra*.

Furthermore, we reject employer's assertion that the administrative law judge improperly accorded greatest weight to the opinion of Dr. Cander over the other physicians' opinions as employer's assertion in this regard is tantamount to a request for the Board to reweigh the evidence which is outside the Board's scope of review. *See Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111 (1989). In according greatest weight to Dr. Cander's opinion, the administrative law judge, in a permissible exercise of his discretion, found that Dr. Cander's conclusions were the most "persuasive" of record, Decision and Order on Remand at 16, inasmuch as his opinion was best supported by the underlying documentation, *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989)(*en banc*); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Further, the administrative law judge permissibly accorded less weight to the opinion of Dr.

Tuteur, who concluded that claimant did not have pneumoconiosis and that there was insufficient evidence to determine whether claimant had or did not have any coal mine dust related impairment. Employer's Exhibit 1. *See Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1994); *see also Dehue Coal Co. v. Ballard*, 65 F.3d 1189, 19 BLR 2-304 (4th Cir. 1995); *Cort v. Director, OWCP*, 996 F.2d 1549, 17 BLR 2-166 (3d Cir. 1993); *Hutchens v. Director, OWCP*, 8 BLR 1-16 (1985). The administrative law judge also permissibly concluded that while Dr. Branscomb's conclusions that claimant's medical expenses were unrelated to coal dust exposure, Employer's Exhibits 1, 3, were "not to be taken lightly," Decision and Order on Remand at 14, the credibility of the physician's conclusions was ultimately undermined by the physician's assertion that additional medical testing was necessary to determine the affect of pneumoconiosis on claimant's respiratory symptoms. *See Justice v. Island Creek Coal Co.*, 11 BLR 1-91 (1988); *Revnack v. Director, OWCP*, 7 BLR 1-771 (1985). We, thus, affirm the administrative law judge's decision to accord greatest weight to the opinion of Dr. Cander. *See Doris Coal*; *see also Ondecko*.

Additionally, we reject employer's assertion that the administrative law judge erred in creating an irrebuttable presumption in favor of claimant by his application of the law. Contrary to employer's assertion, the administrative law judge, in a permissible exercise of his discretion as trier-of-fact, *see Kuchwara v. Director, OWCP*, 7 BLR 1-167 (1984), found that Dr. Spagnolo's opinion was not sufficient to establish rebuttal of the *Doris Coal* presumption since the physician specifically concluded that the medical bills of claimant could only be for the treatment of pneumoconiosis if it were determined that such pneumoconiosis was "severe enough by itself to have caused lung impairment at rest or exercise." Decision and Order on Remand at 14. In view of the fact that the administrative law judge found that Dr. Spagnolo's "condition" was satisfied, *i.e.*, claimant's pneumoconiosis was totally disabling, the administrative law judge properly concluded that the physician's conclusion was supportive of claimant's burden at 20 C.F.R. §725.701 by demonstrating medical services necessary for the treatment of pneumoconiosis. *See Doris Coal*, *supra*.

Lastly, we reject employer's assertion that a physical examination of claimant is mandated by the holdings in *Ling* and *Salyers*. As discussed *supra*, neither *Ling* nor *Salyers* constitutes intervening case law of a nature requiring remand and thus *Doris Coal* remains precedent in the instant case. Moreover, the decision to order an examination is one within the sound discretion of the administrative law judge and will not be disturbed by the Board absent a showing of an abuse of that discretion. *See generally Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173 (1999). Further, in view of our holding that *Ling* and *Salyers* does not compel a remand in this case, the issue of whether claimant can be required to undergo a new examination was addressed by the Board in it's previous Decision and Order in this case, *see Layne*, slip op. at 7, and thus constitutes the law of the case on this issue. *Williams*, *supra*; *Bridges*, *supra*. We, therefore, conclude that the administrative law judge properly

found that claimant established entitlement to the presumption set forth in *Doris Coal* and that employer has not rebutted the presumption and is liable for medical benefits in the amount of $807.63.

Accordingly, the administrative law judge's Decision and Order on Remand-Awarding Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge