BRB No. 00-0296 BLA
and 00-0296 BLA-A

GEORGE LING	)	
	)	
Claimant	)	
	)	
v.	)	
	)	
GULF & WESTERN INDUSTRIES	)	DATE ISSUED:_____
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
	)	
Employer/Carrier-Respondents	)	
Cross-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
	)	
Petitioner	)	
Cross-Respondent	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Payment of Medical Benefits of George A. Fath and the Decision and Order on Remand and Order Denying Motion for Reconsideration of Stuart A. Levin, Administrative Law Judges, United States Department of Labor.

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

Helen H. Cox (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:

The Director, Office of Workers' Compensation Programs (the Director), appeals and Employer/carrier (employer) cross-appeals the October 1, 1999 Decision and Order on Remand and the November 8, 1999 Order Denying Motion for Reconsideration (93-BTD-0021) of Administrative Law Judge Stuart A. Levin returning the case to the Board for its review of the January 11, 1995 Decision and Order Awarding Payment of Medical Benefits (93-BTD-0021) of Administrative Law Judge George A. Fath ordering 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).

Claimant was previously awarded benefits under the Act.[1] The instant dispute focuses upon employer's liability for outstanding medical bills.[2] Administrative Law Judge George A. Fath found that claimant's submitted medical bills, with the exception of those related to his hospitalization in September of 1980, were necessary and reasonable for the treatment of claimant's pneumonoconiosis. Judge Fath, therefore, found that employer was responsible for the payment of these medical bills. By Decision and Order dated February 21, 1997, the Board affirmed

[1]Claimant filed a claim for benefits with the Department of Labor on September 25, 1973. Director's Exhibit 1. In a Decision and Order dated December 5, 1983, Administrative Law Judge Nicodemo DeGregorio awarded benefits. Director's Exhibit 16. Although employer filed a Notice of Appeal with the Board, employer subsequently requested that its appeal be dismissed. Director's Exhibits 17, 18. By Order dated December 5, 1983, the Board granted employer's motion and dismissed its appeal. *Ling v. Gulf and Western Industries, Inc.*, BRB No. 83-1222 BLA (Dec. 5, 1983) (Order) (unpublished).

[2]Claimant submitted medical bills for hospital stays and pharmaceutical needs in 1980, 1989, 1993 and 1994. Director's Exhibits 20, 21; Claimant's Exhibits 1-4.

Judge Fath's award of medical benefits.[3] *Ling v. Gulf & Western Industries*, BRB No. 95-1021 BLA (Feb. 21, 1997)(unpublished). Employer subsequently filed an appeal with the United States Court of Appeals for the Fourth Circuit.

[3]Inasmuch as it was unchallenged on appeal, the Board affirmed Judge Fath's finding that employer was not responsible for claimant's medical bills related to his September 1980 hospitalization. *Ling v. Gulf & Western Industries*, BRB No. 95-1021 BLA (Feb. 21, 1997)(unpublished).

By Decision and Order dated March 19, 1999, the United Stated Court of Appeals for the Fourth Circuit rejected employer's contention that the presumption set out in *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991)[4] improperly shifted the burden of proof in medical benefit cases from the claimant to the party opposing the claim. *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999). The Fourth Circuit also rejected employer's contention that the *Stiltner* presumption was contrary to the Supreme Court's decision in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 512 U.S. 267, 18 BLR 2A-1 (1994). *Id.* The Fourth Circuit, however, noted that Board, in its consideration of the instant case, improperly construed the *Stiltner* presumption as shifting the burden of proof to employer.[5] *Id*. Although the Fourth Circuit observed that the Board may have reached the same result had it correctly applied the *Stiltner* presumption, the Fourth Circuit nevertheless thought it prudent to remand the claim to the Board for its reconsideration. *Id.* The Fourth Circuit, therefore, remanded that claim to the Board for further proceedings consistent with its opinion. *Id.*

By Order dated June 2, 1999, the Board remanded the case to the Office of Administrative Law Judges for further consideration consistent with the Fourth Circuit's *Ling* decision. *Ling v. Gulf & Western Industries*, BRB No. 95-1021 BLA (June 2, 1999) (Order) (unpublished).

On remand, Administrative Law Judge Stuart A. Levin found that the Fourth Circuit's opinion in *Ling* did not require any further fact-finding by an administrative law judge. Judge Levin, therefore, ordered that the instant case be returned to the Board for appropriate review. Judge Levin subsequently denied the Director's motion for reconsideration.

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[4]In *Stiltner*, the Fourth Circuit 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 the miner's pneumoconiosis. *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991). 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.*

[5]The Fourth Circuit noted that the Board stated that: "We disagree with employer's argument that the administrative law judge erred in shifting the burden of proof to employer." *Gulf & Western Industries v. Ling*, 176 F.3d 226, 2325, 21 BLR 2-570, 2-586 (4th Cir. 1999).

After filing a Notice of Appeal with the Board, the Director filed a "Motion to Determine Jurisdiction and Clarify Which ALJ Decision is Subject to Review." In its cross-appeal, employer argues that Judge Fath's Decision and Order awarding medical benefits must be vacated. Employer has also filed a motion to dismiss the Director's appeal, arguing, *inter alia*, that the Director failed to timely file his Petition for Review and supporting brief. Claimant has not filed a brief.

The Board must affirm the findings of the administrative law judge if they are supported by substantial evidence, are rational, and are 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).

We initially acknowledge that our Order dated June 2, 1999 was in error. Upon further review of the Fourth Circuit's *Ling* decision, it is clear that the Fourth Circuit remanded the instant case to the Board for its reconsideration of Judge Fath's Decision and Order. Consequently, we should not have remanded the instant case to the Office of Administrative Law Judges. We, therefore, vacate Judge Levin's Decision and Order on Remand and Judge Levin's Order Denying Motion for Reconsideration.

Before turning our attention to Judge Fath's specific findings in the instant case, we find it necessary to review the present state of the law regarding entitlement to medical benefits. As noted, *supra*, the United States Court of Appeals for the Fourth Circuit has 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 the miner's pneumoconiosis. *Stiltner*, 938 F.2d at 496-497, 15 BLR at 2-140. The Fourth Circuit has recognized that the proof needed is a medical bill for the treatment of a pulmonary or respiratory disorder and/or associated symptoms.[6] *Ling*, 176 F.3d at

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[6]In *Ling*, the Fourth Circuit explained that:

> It by no means distorts the truth to postulate that, in the great majority of cases, the disorders and symptoms associated with the miner's disability will closely correspond to those for which he later receives treatment. Even where there is a less than perfect identity, however, the threshold creating the entitlement to benefits -- that the pulmonary condition treated be merely aggravated by the miner's pneumoconiosis – is low enough to permit a rational conclusion that a particular respiratory infirmity will likely be covered.

233, 21 BLR at 2-583.

The Board has held that the party opposing payment of medical benefits, in order to rebut the presumption set out in *Stiltner*, may show, by a reasoned medical opinion, (1) that the expenses in question were not reasonable for the treatment of any of claimant's pulmonary diseases (*i.e.*, a reasoned medical opinion which states that a certain type of treatment is excessive or simply not necessary for the treatment of claimant's pulmonary condition); or (2) the treatment is for a condition completely unrelated to claimant's pulmonary condition (*e.g.*, treatment for a heart condition, broken bone or back). *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995) (*en banc*) (Brown, J. concurring).

The Fourth Circuit has further held that:

> 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

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> Hence, 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, 76 F.3d at 233, 21 BLR at 2-583.

> necessary to effectively treat a covered disorder, 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, 176 F.3d at 233, 21 BLR at 2-583.

In order to establish rebuttal, the party opposing payment may also produce credible evidence that the miner was treated for a pulmonary condition that had not manifested itself, to some degree, at the onset of his disability or for a preexisting pulmonary condition adjudged not to have contributed to his disability. *See General Trucking Corp. v. Salyers*, 175 F.3d 226, 21 BLR 2-570 (4th Cir. 1999).

In its consideration of the instant case, the Fourth Circuit noted that claimant had submitted medical bills evidencing treatment for respiratory ailments, having arrived at the hospital complaining of coughing, wheezing, and shortness of breath. *See Ling*, *supra*. The Fourth Circuit further noted that claimant's breathing difficulties were attributed by his physician to specific pulmonary disorders, *i.e.*, chronic obstructive pulmonary disease and clinical pneumoconiosis. *Id.* The Fourth Circuit, therefore, held that the Board correctly recognized that this diagnosis was sufficient to invoke the *Stiltner* presumption that claimant's pulmonary condition -- the diseases with which he was afflicted, manifested in symptoms of respiratory distress -- was related to, or at least aggravated by, his legal pneumoconiosis. *Id.*

Upon review of Judge Fath's findings, we are satisfied that Judge Fath applied the *Stiltner* presumption in a manner that did not impermissibly shift the burden of proving the miner's claim to employer. Judge Fath effectively found that employer failed to produce credible evidence that claimant's pulmonary condition was not related to, or aggravated by, his legal pneumoconiosis. Judge Fath specifically found that Drs. Hippensteel and Fino failed to address the relevant issue; *i.e.*, whether claimant received treatment for symptoms related to his pneumoconiosis. Decision and Order at 4-5.

Judge Fath also permissibly determined that Dr. Branscomb did not provide a sufficient basis for rebuttal.[7] Decision and Order at 5. Dr. Branscomb's opinion

[7]Judge Fath noted that Dr. Branscomb opined that claimant suffered from chronic obstructive pulmonary disease (chronic asthmatic bronchitis) secondary to smoking. Decision and Order at 5. Noting that the regulations are broad enough to include chronic obstructive pulmonary disease as an ancillary condition to pneumoconiosis, Judge Fath found that Dr. Branscomb's attempt to distinguish

does not establish that the treatment rendered was for a pulmonary disorder apart from one previously associated with the miner's disability, or was beyond that necessary to effectively treat a covered disorder. *See* Post-Hearing Exhibit 2. Inasmuch as it is based upon substantial evidence, we affirm Judge Fath's finding that employer failed to establish rebuttal of the *Stiltner* presumption.

Accordingly, Administrative Law Judge Stuart A. Levin's Decision and Order on Remand and Order Denying Motion for Reconsideration are vacated, and Administrative Law Judge George A. Fath's Decision and Order Awarding Payment of Medical Benefits is affirmed.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge

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chronic bronchitis, chronic asthma and asthmatic bronchitis from pneumoconiosis was unpersuasive. *Id.*