

BRB No. 99-1044 BLA

HASKELL U. ABELL, Deceased Miner	)	
	)	
Claimant	)	
v.	)	
	)	
OLD BEN COAL COMPANY	)	
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS'	)	DATE ISSUED:
COMPENSATION PROGRAMS, UNITED	)	
STATES DEPARTMENT OF LABOR	)	
	)	
Petitioner	)	DECISION and ORDER

Appeal of the Decision and Order of Rudolf L. Jansen, Administrative Law Judge, United States Department of Labor.

Sylvia D. Davis (Arter & Hadden LLP), Washington, D.C., for employer.

Jennifer U. Toth (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:

The Director, Office of Workers' Compensation Programs (the Director), appeals the Decision and Order (98-BTD-0002) of Administrative Law Judge Rudolf L. Jansen denying reimbursement for the 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). The miner was previously awarded benefits under the Act.<sup>1</sup> The instant dispute focuses upon employer's liability for reimbursement to the Black

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<sup>1</sup>The miner filed a claim for benefits with the Department of Labor on May 7, 1979.

Lung Disability Trust Fund [hereinafter, the Trust Fund] for specific medical treatment provided to the miner during his hospitalizations from September 1, 1982 through January 8, 1988.<sup>2</sup> The administrative law judge found that the Director failed to carry his “burden of proof or [his] burden of production with respect to the question of relatedness” of the medical bills to the treatment of the miner’s pneumoconiosis. Decision and Order at 12. Therefore, the administrative law judge found that employer was not responsible for reimbursement to the Trust Fund for any of the medical expenses and related items paid by the Trust Fund for the medical treatment of the miner. Decision and Order at 12.

On appeal, the Director asserts that the administrative law judge erred in failing to consider the notes and reports of Drs. Wells and Murthy, contained in Director’s Exhibit 3, which establish a connection between the medical expenses arising from the miner’s numerous hospitalizations and his pneumoconiosis. Director’s Brief at 11-12. The Director also contends that the evidence he submitted in support of the request for reimbursement from employer satisfies his burden of proof under both *Gulf & Western Industries v. Ling*, 176 F.3d 226, 21 BLR 2-570 (4th Cir. 1999) and *Seals v. Glen Coal Co.*, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998)(Boggs, J., concurring; Moore, J., concurring and dissenting), reversing and remanding, *Seals v. Glen Coal Co.*, 19 BLR 1-80 (1995)(en banc)(Brown, J., concurring). Director’s Brief at 11 n.6. Lastly, the Director asserts that the strength of these medical notes and reports is unaffected by the contrary opinions of Drs. Fino and Branscomb. Director’s Brief at 13. Employer responds, asserting that the administrative law judge’s Decision and Order denying reimbursement for medical benefits to the Trust Fund should be affirmed.

The Board's scope of review is defined by statute. If the administrative law judge's

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Director’s Exhibit 1. The miner died on January 13, 1988. Director’s Exhibit 1. In a Decision and Order dated January 17, 1989, Administrative Law Judge Robert E. Kendrick awarded benefits. Director’s Exhibit 1. By Decision and Order dated April 21, 1992, the Board affirmed Judge Kendrick’s award of benefits. Director’s Exhibit 2.

<sup>2</sup>The parties agree that the amount in dispute is \$39,002.25. However, employer disputes those expenses were connected to the treatment of the miner’s pneumoconiosis.

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).

Before analyzing the evidence regarding the medical expenses in this case, the administrative law judge acknowledged that this case arises within the jurisdiction of the United States Court of Appeals for the Seventh Circuit. Decision and Order at 6. Noting that the Seventh Circuit court has yet to address the issue of the responsibility for reimbursement of medical expenses, the administrative law judge reiterated the holdings of the Fourth Circuit court in *Doris Coal Co. v. Director, OWCP [Stiltner]*, 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991) and the Sixth Circuit court in *Seals* regarding this issue. Decision and Order at 6-8. The administrative law judge stated that “he fully agree[d] with the reasoning used by the Sixth Federal Circuit,” and, accordingly, determined that he would apply the analysis of the Sixth Circuit court as outlined in *Seals*. Decision and Order at 6-7.

The record consists of Director’s Exhibit 3 which is over three hundred pages of medical records outlining medical procedures, treatments, and drugs given to the miner during his hospitalizations from September 1, 1982 through January 8, 1988. Director’s Exhibit 3. Included in these medical records are notations made by Drs. Wells and Murthy, who treated the miner for several years prior to his death in 1988. Director’s Exhibit 3. The record also contains the opinions of Drs. Sherman, Fino, and Branscomb who reviewed the medical records to determine if any expenses incurred were reasonable and necessary for the treatment of pneumoconiosis. Dr. Sherman, who is Board-certified in internal medicine and pulmonary disease, found that in addition to cigarette smoking, the miner’s coal dust exposure had a significant causal relationship to his chronic obstructive pulmonary disease. Director’s Exhibit 10. Therefore, Dr. Sherman concluded that because the medical bills submitted related to the care of the miner’s chronic obstructive pulmonary disease, they should be reimbursable. Director’s Exhibit 10. Drs. Fino and Branscomb opined, in their medical reports and at their depositions, that the miner’s chronic obstructive pulmonary disease was not caused or aggravated by his coal dust exposure. Director’s Exhibit 11; Employer’s Exhibit 1, 3, 4. Therefore, Drs. Fino and Branscomb concluded that the medical charges submitted were not reasonable or necessary for the treatment of a coal mine dust induced pulmonary condition, and, accordingly, are not reimbursable. Director’s Exhibit 11; Employer’s Exhibit 1, 3, 4. Administrative Law Judge Robert E. Kendrick’s Decision and Order awarding benefits is also in the record. Director’s Exhibit 1. Judge Kendrick’s Decision and Order refers to earlier opinions of Drs. Wells and Murthy, which are not in the present record, and which found the miner’s chronic obstructive pulmonary disease was due to his cigarette smoking and coal dust inhalation. Director’s Exhibit 1 at 13, 20.

In discussing the evidence related to the medical bills, the administrative law judge initially noted that included in the record is about four hundred pages of medical documents

detailing separate medical procedures, treatments, and medications. Decision and Order at 4. The administrative law judge further stated that there are no “supporting materials” from the physicians who performed the services outlined in these numerous pages “other than as noted in [Judge Kendrick’s] Decision and Order.” *Id.* Later in his Decision and Order, the administrative law judge added that the record does not contain any “hospital records or care and treatment records” from the miner’s treating physicians, specifically Drs. Wells and Murthy, explaining the nature of the services they provided. Decision and Order at 9-10. Moreover, the administrative law judge noted that in the statements by Dr. Wells included in Judge Kendrick’s Decision and Order, he clearly finds pneumoconiosis to be a component of the miner’s health problems, but does not indicate to what extent the medical costs incurred were a result of the pneumoconiosis. Decision and Order at 11.

The administrative law judge found that an evaluation of the medical opinions discloses that the issue in this case is whether the miner’s totally disabling coal workers’ pneumoconiosis contributed to the development of his chronic obstructive pulmonary disease. Decision and Order at 10. The administrative law judge noted that Dr. Sherman concluded, after reviewing the medical bills, that the coal workers’ pneumoconiosis did have an effect on the miner’s chronic obstructive pulmonary disease, and Drs. Fino and Branscomb found that it did not. Decision and Order at 10.

After noting that the Director “failed to comply with its own regulations,<sup>3</sup> has offered no supporting data concerning any of the treatments provided, and has introduced no statements from the physicians who directed the hospitalizations or who treated the miner,” the administrative law judge concluded that the Director has neither carried its burden of proof nor its burden of production on the issue of relatedness in this case. Decision and Order at 12. The administrative law judge further stated that:

[t]here is no question in my mind but that a good part of these expenses are related to the miner’s totally disabling pneumoconiosis and ought to have been

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<sup>3</sup>The Director noted that he would not address the administrative law judge’s finding that the procedures outlined in the regulations were not followed because the administrative law judge’s denial of reimbursement was based solely on his finding that the Director did not meet his burden of proof in establishing that the miner’s medical expenses were related to his coal workers’ pneumoconiosis. Director’s Brief at 9 n.5.

paid by the Responsible Operator. However, based upon this record, the [Director] has wholly failed to carry its burden of proof.

Decision and Order at 12.

The Director, citing *Shelton v. Director, OWCP*, 899 F.2d 690, 13 BLR 2-444 (7th Cir. 1990), asserts that the administrative law judge's denial of his request for reimbursement must be vacated because the administrative law judge failed to consider all the relevant evidence. Director's Brief at 12. To support his assertion, the Director points to the hospital billing records to establish a connection between the expenses listed and the treatment of the miner's pneumoconiosis from September 1982 through January 1988. Director's Brief at 11-12. Specifically, the Director refers to the numerous "pages of reports and notes written by Drs. Wells and Murthy meticulously chronicling their treatment of [the miner] during his eighteen hospitalizations," and contends that the administrative law judge failed to consider this evidence. Director's Brief at 12.

The Director's contention has merit. The hospital billing records do contain various notations by Drs. Wells and Murthy detailing the course of medical treatment they rendered on the miner. Director's Exhibit 3. Additionally, these documents contain numerous health insurance claim forms where black lung (sometimes very faintly) is listed under "diagnosis." Director's Exhibit 3 at 2, 27-29, 33, 47-50, 127, 138-139. Inasmuch as the administrative law judge failed to consider this relevant evidence, we vacate his denial of reimbursement and instruct him to reconsider all of the evidence pertaining to the miner's medical expenses on remand. See 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a) by means of 33 U.S.C. §919(d) and 5 U.S.C. §554(c)(2); *Shelton, supra*; *Wojtowicz v. Duquesne Light Co.*, 12 BLR 1-162 (1989); *Tenney v. Badger Coal Co.*, 7 BLR 1-589, 1-591 (1984).

Accordingly, the administrative law judge's Decision and Order denying reimbursement to the Trust Fund by employer for medical expenses paid is vacated, and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

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BETTY JEAN HALL, Chief  
Administrative Appeals Judge

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ROY P. SMITH  
Administrative Appeals Judge

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MALCOLM D. NELSON, Acting  
Administrative Appeals Judge