BRB No. 98-1065 BLA

BERT CASE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
BEBE COAL CORPORATION	)	DATE ISSUED:
	)	
and	)	
	)	
OLD REPUBLIC INSURANCE COMPANY	)	
	)	
Employer/Carrier-Respondents	)	
	)	
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 - Denial of Medical Benefits of Daniel J. Roketenetz, Administrative Law Judge, United States Department of Labor.

Stephen A. Sanders (Appalachian Research and Defense Fund of Kentucky, Incorporated), Prestonsburg, Kentucky, for claimant.

Lawrence C. Renbaum (Arter & Hadden), Washington, D.C., for employer.

Edward Waldman (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, BROWN and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant appeals the Decision and Order On Remand - Denial of Medical Benefits (93-BTD-37) of Administrative Law Judge Daniel J. Roketenetz on a claim for Medical Benefits Only (MBO) 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). This case is before the Board for the second time.[1] Originally, in a Decision and Order issued on June 13, 1995, the administrative law judge denied reimbursement for $672.20 of medical expenses sought by claimant as they were not covered under the Act and denied reimbursement for $12,092.42 of medical expenses sought by claimant as they had been submitted to Medicare for payment and, therefore, were precluded from reimbursement pursuant to 20 C.F.R. §725.701A(h). The administrative law judge awarded partial medical benefits for the remaining $4,068.48 in medical expenses for which claimant sought reimbursement. Although the instant case arises within the jurisdiction of the United States Court of Appeals for the Sixth Circuit, the administrative law judge applied the presumption enunciated by 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), *aff'g in part and rev'g in part Stiltner v. Doris Coal Co.*, 14 BLR 1-116 (1990)(*en banc*)(Brown, J., dissenting; McGranery, J., concurring and dissenting) in awarding partial medical benefits, *i.e.*, when a miner

[1] Claimant was awarded benefits under Part B by the Social Security Administration, Director's Exhibit 3, and subsequently filed a claim for Medical Benefits Only (MBO) on July 10, 1979, Director's Exhibit 1. On April 4, 1986, employer signed an Agreement to Pay Benefits, agreeing that claimant met the standards of total disability under the Act and agreeing to pay medical benefits for reasonable medical charges directly resulting from treatment of coal workers' pneumoconiosis, Director's Exhibit 10. Claimant subsequently submitted medical bills to employer for payment, but employer refused to pay, contending that the medical charges were not for the treatment of coal workers' pneumoconiosis, Director's Exhibits 12-13, 17-18, 21, 26, 32. Claimant then submitted his medical bills to Medicare for payment, Hearing Transcript at 52, and sought reimbursement from employer for $16,833.10 in medical expenses that claimant had incurred, Director's Exhibit 3.

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 incurred. To rebut the presumption of liability, employer must show that the medical expenses were not reasonable for the treatment of the miner's pulmonary condition or that the treatment was for a condition completely unrelated to the miner's pulmonary condition, *id*.

On appeal, the Board initially held that while employer has a right to challenge the reasonableness and necessity of claimant's medical treatment for his pulmonary disorder, this challenge cannot include the issue of causation, an element of entitlement which the Board held that employer had conceded when employer signed the Agreement to Pay Medical Benefits, citing *Seals v. Glen Coal Co.*, 19 BLR 1-82 (1995)(*en banc*)(Brown, J., concurring). *Case v. Bebe Coal Corp.*, BRB Nos. 95-1792 BLA-A (July 30, 1997)(unpub.). The Board held that, because the definition of pneumoconiosis includes both clinical pneumoconiosis and pneumoconiosis as more broadly defined by the Act and regulations, *see* 30 U.S.C. §902(b); 20 C.F.R. §718.201, employer had agreed, by signing the Agreement to Pay Medical Benefits, that claimant's pneumoconiosis either caused or, at least, aggravated his disabling chronic obstructive pulmonary disease. Thus, although the Board affirmed the administrative law judge's award of partial medical benefits for $4,068.48 in medical expenses , and affirmed the administrative law judge's denial of reimbursement for $672.20 of medical expenses sought by claimant as not covered under the Act, it reversed the administrative law judge's finding that the additional $12,092.48 in medical bills submitted by claimant were precluded from reimbursement pursuant to Section 725.701A(h) because they were covered by or associated with claimant's Medicare coverage. The Board held that, because copayments and deductibles are expenses that claimant must pay beyond the costs of treatment paid by Medicare or insurance, Section 725.701A(h) does not preclude claimant from recovering his deductible and copayment expenses on medical bills incurred both before and after the filing of a claim for Medical Benefits Only. Thus, the Board remanded the case for the administrative law judge to determine whether the $12,092.48 in medical bills, submitted by claimant for reimbursement, were copayments and deductibles that claimant must pay or had paid, or were bills actually paid by Medicare and, therefore, precluded from reimbursement under Section 725.701A(h).

On remand, the administrative law judge noted that the record contained statements of medical bills submitted by claimant indicating that claimant was responsible for the difference between the costs approved by Medicare for services provided and the amount that Medicare had actually paid for the services. Thus the administrative law judge found that claimant had "a hypothetical obligation" to pay these differences. However, the administrative law judge found that there was no evidence in the record establishing that claimant ever paid these obligations, that claimant owed payment to any medical provider for these obligations, or that payment of these obligations was ever pursued by a medical

provider. Thus, the administrative law judge found that claimant failed to establish that he was entitled to reimbursement from employer for the $12,092.48 in medical costs at issue on remand.

On appeal, claimant contends that the administrative law judge erred in finding that claimant was not entitled to reimbursement for $12,092.48 in medical costs. Employer responds, urging affirmance of this. The Director, Office of Workers' Compensation Programs (the Director), as a party-in-interest, also responds, contending that the fact that Medicare did not cover the medical expenses at issue, by itself, is not sufficient to entitle claimant to reimbursement.

In addition, in light of the new standard enunciated by the Sixth Circuit Court in *Glen Coal Co. v. Seals*, 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 1-82 (1995)(*en banc*)(Brown, J., concurring), issued subsequent to the Board's prior Decision and Order, employer contends in its response brief that the Board should vacate its affirmance of the administrative law judge's award of partial medical benefits of $4,068.48 for the reimbursement of medical expenses and remand the case for reconsideration. Similarly, in light of the intervening case-law set forth in *Seals, supra*, the Director has filed a motion to remand the case.

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 medical benefits only claims, claimant is required to establish entitlement to benefits and then to establish that the medical treatment provided is reasonable and necessary for the treatment of pneumoconiosis and ancillary pulmonary conditions. *See* 33 U.S.C. §907(A); 20 C.F.R. §725.701 *et seq.*; *Lute v. Split Vein Coal Co.*, 11 BLR 1-82 (1987).

In its prior Decision and Order affirming the administrative law judge's award of partial medical benefits of $4,068.48 for the reimbursement of medical expenses incurred by claimant, the Board held that the right to challenge the reasonableness and necessity of claimant's medical treatment does not include the issue of causation based, in part, on the Board's holding in *Seals*, 19 BLR at 1-82 (holding that a physician's opinion, that the treatment of a miner's pulmonary condition was not related to his coal workers' pneumoconiosis, was irreconcilable with the presumption set forth by the Fourth Circuit Court in *Stiltner*). Subsequent to the issuance of the Board's prior Decision and Order, however, the Board's holding in the *Seals* case was reversed by the Sixth Circuit Court in *Glen Coal Co. v. Seals*, 147 F.3d at 502, 21 BLR at 2-398. The Sixth Circuit Court held that the presumption enunciated by the Fourth Circuit Court in *Stiltner*, that the treatment for pneumoconiosis and ancillary pulmonary conditions effectively meant treatment for any and all pulmonary disease, shifted the burden of production from claimant to employer in

relating medical expenses to pneumoconiosis and was therefore inconsistent with the law of the Sixth Circuit. *See Glen Coal Co. v. Seals*, 147 F.3d at 502, 21 BLR at 2-398. The Sixth Circuit Court held that the second stage in the two-step process of establishing the right to reimbursement for medical expenses in medical benefits only claims (*i.e.*, the first being the establishment of the elements of entitlement) required claimant to establish that his medical bills were related to his pneumoconiosis by a preponderance of the evidence, *see Lute, supra*.

Although the Board's previous holding stands as law of the case on this issue, *see Brinkley v. Peabody Coal Co.*, 14 BLR 1-147 (1990); *Williams v. Healy-Ball-Greenfield*, 22 BRBS 234, 237 (1989)(2-1 opinion: with Brown, J., dissenting),[2] the Board has the power to reconsider its first decision, *see Williams, supra*; *see also Messenger v. Anderson*, 225 U.S. 436, 444 (1912), where there has been a change in the underlying factual situation, intervening controlling authority demonstrates the initial decision was erroneous, or the first decision was clearly erroneous and to let it stand would constitute manifest injustice, *see Williams, supra*. Consequently, in light of the Sixth Circuit Court's holding in *Glen Coal Co. v. Seals*, 147 F.3d at 502, 21 BLR at 2-398, employer has demonstrated an exception to the law of the case doctrine. Thus, we vacate our prior holding in this case affirming the administrative law judge's award of partial medical benefits of $4,068.48 for the reimbursement of medical expenses and remand the case for reconsideration of the relevant evidence in accordance with the standard enunciated by the Sixth Circuit Court in *Seals*. On remand, the administrative law judge should reopen the record for further development of evidence relevant to the new standard enunciated by the Sixth Circuit Court in *Seals*, *see Krizner v. United States Steel Mining Co., Inc.*, 17 BLR 1-31 (1992)(Brown, J., concurring; Smith, J., dissenting); *Lynn v. Island Creek Coal Co.*, 11 BLR 1-146 (1989); *see also Tackett v. Benefits Review Board*, 806 F.2d 640, 10 BLR 2-93 (6th Cir. 1986).

[2] The law of the case doctrine is a discretionary rule of practice, based on the policy that when an issue is litigated and decided, that decision should be the end of the matter, such that it is the practice of courts generally to refuse to reopen in a later action what has been previously decided in the same case, *see Brinkley*, *supra*; *Williams*, *supra*.

Next, we turn to claimant's contention that the administrative law judge erred in finding that he was not entitled to reimbursement for the other $12,092.48 in medical costs because he did not prove that he had actually paid the medical bills. Claimant argues that the $12,092.48 for which he seeks reimbursement is not, as the administrative law judge characterized, a "hypothetical" obligation, but includes the amount of medical expenses incurred by him for which he is responsible. In addition, claimant contends that the administrative law judge erred in finding no evidence in the record that claimant owes payment to any medical provider for these obligations, as claimant testified that he has received several notices from collection agencies about unpaid medical bills, *see* Hearing Transcript at 52.[3] The Director contends that the mere fact that Medicare did not cover the medical expenses at issue, by itself, is not sufficient to entitle claimant to reimbursement and contends that the administrative law judge properly inquired into whether claimant actually paid or had a legal obligation to pay the medical expenses at issue. The Director declined, however, to respond to claimant's contention that he did, in fact, have a legal obligation to pay these medical expenses. In response to claimant's contention that the administrative law judge erred in finding claimant not entitled to reimbursement because he also did not prove that he had actually paid the medical bills, the Director contends that claimant is entitled to reimbursement under Section 725.701A(h) only to the extent that he submits "documented proof of... the fact that the cost was paid by the miner," *see* 20 C.F.R. §725.701A(h).

Contrary to the Director's contention, however, proof that the medical costs for which a claimant seeks reimbursement were "paid by the miner" is only required under Section 725.701A(h) for costs incurred "before the filing of a claim," *see* 20 C.F.R. §725.701A(h), whereas the medical costs for which claimant seeks reimbursement, in this case, were incurred after claimant filed his claim, *see* Director's Exhibits 1, 3. While the provisions of Section 725.701A(h) include medical bills incurred both before and after the filing of a claim, Section 725.701A(h) does not specifically address reimbursement for medical bills incurred after filing, but merely states that medical benefits are "provided from the date of filing, except that such benefits may also include payments for any reimbursed medical treatment costs incurred personally by such miner during the period from January 1, 1974, to the date of filing," *see* 20 C.F.R. §725.701A(h). The comments accompanying promulgation of Section 725.701A(h) state that medical benefits are paid from the date of filing and that "a miner may be reimbursed for out-of-pocket medical treatment expenses incurred after

[3] In addition, claimant testified that both he and Medicare have paid his medical bills, and that some bills have not been paid because he can't afford to pay them, *see* Hearing Transcript at 35-36.

January 1, 1974, if documented proof of any such expense is provided," *see* 43 Fed. Reg. No. 161 at 36,816 (Aug. 18, 1978).

The record contains numerous Medicare "Explanation of Medical Benefits" statements regarding medical bills submitted by claimant to Medicare which state that "[y]ou [claimant] are responsible for the difference between the approved amount and the Medicare payment," *see* Director's Exhibit 3. Contrary to the administrative law judge's finding, we hold that the Medicare "Explanation of Medical Benefits" statements submitted by claimant are sufficient to establish "unreimbursed medical treatment costs incurred personally" by claimant after the filing of his claim under Section 725.701A(h), thereby establishing claimant's legal obligation to pay the $12,092.48 in medical expenses at issue. Consequently, we vacate the administrative law judge's finding that claimant is not entitled to reimbursement for this amount and remand the case for the administrative law judge to reconsider the relevant evidence regarding the $12,092.48 in unreimbursed medical expenses incurred by claimant in accordance with the standard enunciated by the Sixth Circuit Court in *Seals*, *supra*. The administrative law judge should also reopen the record on remand for further development of evidence regarding the $12,092.48 in medical expenses relevant to the new standard enunciated by the Sixth Circuit Court in *Seals*, *see Krizner*, *supra*; *Lynn*, *supra*; *see also Tackett*, *supra*.

Finally, employer again raises the same contentions that it previously advanced and which were already addressed by the Board in its prior Decision and Order regarding whether Section 725.701A(h) precludes claimant from recovering his deductible and copayment expenses from medical bills incurred after the filing of his claim and submitted to Medicare, but does not cite to any intervening case law issued since the Board's prior Decision and Order on this issue. Thus, inasmuch as the Board's previous holding stands as law of the case on this issue, and no exception to that doctrine has been demonstrated by employer herein, *see Brinkley*, *supra*; *Williams*, *supra*, we reject employer's contention in this regard.

Accordingly, the Decision and Order On Remand - Denial of Medical Benefits of the administrative law judge is vacated and the case is remanded for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

JAMES F. BROWN
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge