BRB No. 01-0276 BLA

WILLIAM H. CORNETT	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
ARCH OF KENTUCKY, INCORPORATED	)	DATE ISSUED:
	)	
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 - Ordering Payment of Medical Bills of Thomas F. Phalen, Jr., Administrative Law Judge, United States Department of Labor, and the Order Granting Employer's Motion to Compel Medical Release Authorization and Response to Interrogatories and Denying Motion to Compel Medical Examination of Joseph E. Kane, Administrative Law Judge, United States Department of Labor.

James D. Holliday, Hazard, Kentucky, for claimant.

Ronald D. Gilbertson (Bell, Boyd & Lloyd PLLC), Washington, D.C., for employer.

Barry H. Joyner (Howard M. Radzely, Acting 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 DOLDER, Administrative Appeals Judges.
PER CURIAM:

Employer appeals the Decision and Order - Ordering Payment of Medical Bills of Administrative Law Judge Thomas F. Phalen, Jr. and the Order Granting Employer's Motion to Compel Medical Release Authorization and Response to Interrogatories and Denying Motion to Compel Medical Examination of Administrative Law Judge Joseph E. Kane (99-BDT-0007) on a claim for medical benefits 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] Judge Phalen (the administrative law judge) ordered employer to reimburse the Black

[1]The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 65 Fed. Reg. 80,045-80,107 (2000)(to be codified at 20 C.F.R. Parts 718, 722, 725, and 726). All citations to the regulations, unless otherwise noted, refer to the amended regulations.

Pursuant to a lawsuit challenging revisions to 47 of the regulations implementing the Act, the United States District Court for the District of Columbia granted limited injunctive relief for the duration of the lawsuit, and stayed, *inter alia*, all claims pending on appeal before the Board under the Act, except for those in which the Board, after briefing by the parties to the claim, determined that the regulations at issue in the lawsuit would not affect the outcome of the case. *National Mining Ass'n v. Chao*, No.

Lung Disability Trust Fund (the Trust Fund) for the payment of medical bills incurred by claimant[2] from February 22, 1996 to May 28, 1997 in the amount of $18,133.88, pursuant to his finding that these hospitalization, treatment and medication expenses were for the treatment of claimant's pneumoconiosis.

On appeal, employer contends that the administrative law judge erred in finding that the disputed medical expenses were related to the treatment of claimant's pneumoconiosis and thus were reimbursable. Employer also challenges the February 2, 2000 Order in which Administrative Law Judge Joseph E. Kane, *inter alia*, denied employer's request to compel claimant to undergo a medical examination. Claimant and the Director, Office of Workers' Compensation Programs (the Director), respond and urge affirmance of the decision below.

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 by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). The Board subsequently issued an order requesting supplemental briefing in the instant case. On August 9, 2001, the District Court issued its decision upholding the validity of the challenged regulations and dissolving the February 9, 2001 order granting the preliminary injunction. *National Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001).

[2]On October 19, 2001, the Board received a copy of the district director's October 15, 2001 letter to claimant's wife, acknowledging notice of claimant's death on October 4, 2001.

We first address the parties arguments, included in their appellate briefs, in response to the Board's Order dated March 30, 2001, requesting supplemental briefing in accordance with the Order of the United States District Court for the District of Columbia in *National Mining Ass'n v. Chao*, No. 1:00CV03086 (D.D.C. Feb. 9, 2001)(order granting preliminary injunction). Employer notes that the revised regulation at 20 C.F.R. §725.701(e)[3] codifies the rebuttable presumption espoused 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)(in a medical benefits case any pulmonary disorder for which treatment is required is presumed to be caused or aggravated by the miner's pneumoconiosis), and that the United States Court of Appeals for the Sixth Circuit, within whose jurisdiction this case arises, *see Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*), declined to adopt this presumption in *Seals v. Glen Coal Co.*, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998)(Boggs, J., concurring; Moore, J., concurring and dissenting).[4] Employer argues that application of the revised regulation at 20 C.F.R. §725.701(e) will alter the outcome of the case because the presumption did not apply to cases arising within the jurisdiction of the Sixth Circuit prior to the promulgation of the revised regulation. Employer further asserts that the presumption is not supported in the Act and should be deemed to be invalid. Employer requests a stay pending a decision as to the validity of the amended regulations.

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[3]20 C.F.R. §725.701(e) provides:

> If a miner receives a medical service or supply, as described in this section, for any pulmonary disorder, there shall be a rebuttable 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 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.

[4]In *Seals v. Glen Coal Co.*, 147 F.3d 502, 21 BLR 2-398 (6th Cir. 1998)(Boggs, J., concurring; Moore, J., concurring and dissenting), the United States Court of Appeals for the Sixth Circuit held that the presumption discussed by the Fourth Circuit in *Doris Coal Co. v. Director, OWCP* [*Stiltner*], 938 F.2d 492, 15 BLR 2-135 (4th Cir. 1991), although not inconsistent with the United States Supreme Court's decision in *Director, OWCP v. Greenwich Collieries [Ondecko]*, 114 S.Ct. 2251, 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) or the Administrative Procedure Act, 5 U.S.C. §557(c)(3)(A), as incorporated by 5 U.S.C. §554(c)(2), 33 U.S.C. §919(d) and 30 U.S.C. §932(a), destroys the desired uniformity in the Act and is inconsistent with the law of the United States Court of Appeals for the Sixth Circuit.

The Director contends that employer's argument that the application of the revised regulation at 20 C.F.R. §725.701(e) would alter the outcome of the case must fail as the administrative law judge properly found that the medical expenses at issue were reimbursable without employing any presumption. The Director further responds in support of the validity of the revised regulation at 20 C.F.R. §725.701(e), but argues that the Board need not reach this issue.

In response to the Board's March 30, 2001 Order, claimant states that he does not wish to waive any right he may have regarding the revised regulations and, consequently, is taking the position that the revised regulations apply to claims pending prior to January 20, 2001 and to claims filed on January 20, 2001 and thereafter.

The decision of the United States District Court for the District of Columbia in *United Mining Ass'n v. Chao*, 160 F.Supp.2d 47 (D.D.C. 2001) renders moot the parties' arguments regarding the impact of the new regulations. The court in *Chao* upheld the validity of, *inter alia*, the revised regulation at 20 C.F.R. §725.701, which includes the presumption that, in a medical benefits case, any pulmonary disorder for which treatment is required is caused or aggravated by the miner's pneumoconiosis. *Chao*, *supra*, at 38, 46, 52, 77-78. Further, we hold that in the instant case, the fact that claimant is entitled to the benefit of the presumption provided at 20 C.F.R. §725.701(e) does not change employer's burden to defend against the compensability of these disputed expenses. *See* 20 C.F.R. §725.701(e). Based on the foregoing, we deny employer's request for a stay and reject its argument that the revised regulation at 20 C.F.R. §725.701 is not valid.

We now address employer's contention that the administrative law judge erred in relying on Dr. Sherman's opinion to find that claimant met his burden of establishing that his medical expenses were incurred for treatment of his pneumoconiosis. Employer argues that despite the administrative law judge's recognition of the fact that claimant's hospital records did not reflect treatment for pneumoconiosis, he irrationally inferred that the conditions addressed were the same conditions as diagnosed by Drs. Baker and Breeding "and credited by [Administrative Law Judge Edward J. Murty, Jr.]."[5] Employer's Brief at 8.

[5]By Decision and Order dated August 10, 1995, Administrative Law Judge Edward J. Murty, Jr. awarded benefits under 20 C.F.R. Part 718. He found, *inter alia*, as follows:

> All three examining physicians found Mr. Cornett to be totally disabled by his pulmonary problems. There are problems with all three. Dr. Dahhan's opinion is based on invalid pulmonary function results. Dr. Baker's objective test results are well below the later values seen by Dr. Breeding. The coal company has not exercised its right to have an examination of

Employer's contentions lack merit. The administrative law judge permissibly accorded less weight to Dr. Branscomb's opinion, that although claimant had clinical pneumoconiosis by x-ray, the only symptomatic pulmonary disease claimant had was chronic obstructive pulmonary disease which resulted from his smoking, Employer's Exhibits 1, 9, based on the administrative law judge's finding that it was contrary to Judge Murty's finding that claimant had chronic bronchitis related to his coal mine employment and was totally disabled by it. *See Seals, supra*, 147 F.2d 514. Specifically, the administrative law judge rationally determined that because Judge Murty had previously found that claimant suffered from legal pneumoconiosis, namely chronic bronchitis arising out of coal mine employment, Dr. Branscomb's finding that claimant did not have legal pneumoconiosis has no validity in this case because, under *Seals*, employer cannot challenge, in this medical benefits case, the previously determined fact that claimant has pneumoconiosis. *Id.*

Employer next contends that the administrative law judge erred in "deferring" to the credentials of Dr. Sherman, whose *curriculum vitae* is not a part of the record. Employer argues that the administrative law judge's use of a source outside the record, namely the internet, to verify Dr. Sherman's credentials "does not represent a proper judicial notice of Dr. Sherman's qualifications." Employer's Brief at 8, 9. Employer also asserts that Dr.

> claimant. It presented no evidence to contradict the opinion of Dr. Baker, nor did it question Dr. Breeding when provided the opportunity for cross examination at his deposition. William Cornett has produced enough evidence of total disability caused by chronic bronchitis which is partly the result of coal dust exposure in the nation's coal mines to merit an award.

Director's Exhibit 4. Judge Murty subsequently awarded attorney's fees to claimant's counsel. The Board affirmed Judge Murty's award of benefits, and remanded the case for further consideration of claimant's counsel's fee petition. *Cornett v. Arch of Kentucky, Inc.*, BRB No. 95-2118 BLA (Oct. 31, 1996)(unpub.).

Branscomb is "highly qualified" in internal medicine and there is no basis in the record for the administrative law judge to favor Dr. Sherman's credentials over those of Dr. Branscomb, which are of record, *see* Employer's Exhibit 1. Citing *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 21 BLR 2-323 (4th Cir. 1998), employer thus argues that the administrative law judge failed to properly consider the relative qualifications of Drs. Branscomb and Sherman.

Contrary to employer's contention, the administrative law judge did not compare Dr. Sherman's credentials with those of Dr. Branscomb and thus did not find Dr. Sherman's credentials to be superior.[6] Rather, the administrative law judge found, within his discretion, that:

> Dr. Sherman's assessment is well reasoned, and I defer to his credentials of being board certified in internal medicine, critical care medicine, and pulmonary disease.[footnote omitted].

Decision and Order at 14; *see Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988). The administrative law judge had previously noted that Dr. Branscomb was board certified in internal medicine. Decision and Order at 13. While the United States Court of Appeals for the Fourth Circuit held in *Hicks*, upon which decision employer relies, that it was error for the administrative law judge to ignore the relative qualifications of the medical experts, this case arises outside the jurisdiction of the Fourth Circuit. Ultimately, the fact that the administrative law judge did not compare these physicians' relative qualifications is not dispositive as the administrative law judge properly accorded less weight to Dr. Branscomb's opinion because he found that it was contrary to the underlying award of benefits in this case, *see Seals, supra*. *See* discussion, *infra*.

Further, an administrative law judge may take judicial notice of a fact if substantial prejudice will not result and the parties are given an adequate opportunity to show to the contrary. *Maddaleni v. The Pittsburgh & Midway Coal Mining Co.*, 14 BLR 1-135 (1990); *Onderko v. Director, OWCP*, 14 BLR 1-2 (1989); *Simpson v. Director, OWCP*, 9 BLR 1-99 (1986); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985); *Calfee v. Director, OWCP*, 8 BLR 1-7 (1985); *Pruitt v. Amax Coal Co.*, 7 BLR 1-544 (1984). In the instant case, the administrative law judge did not give the parties an opportunity to show to the contrary when he verified Dr. Sherman's credentials based on a source outside the record. The

[6]Employer does not specifically assert that Dr. Branscomb's credentials are superior to those of Dr. Sherman. Employer's Brief at 8, 9.

administrative law judge thus erred. However, employer does not disagree with, or otherwise dispute, the administrative law judge's finding that Dr. Sherman is board certified in internal medicine, with subspecialties in critical care and pulmonary disease. *See* Employer's Brief at 8, 9. Furthermore, because the administrative law judge did not rely on Dr. Sherman's credentials to credit his opinion over Dr. Branscomb's contrary opinion, employer cannot, and does not, argue prejudice. Based on the foregoing, we hold that the administrative law judge's error in relying on a source outside the record to verify Dr. Sherman's credentials is harmless as it cannot affect the outcome of the case. *See Larioni v. Director, OWCP*, 6 BLR 1-1276 (1984).

Employer next contends that the administrative law judge failed to explain his finding that Dr. Sherman's assessment of the compensability of the disputed medical bills was well reasoned. Employer asserts that Dr. Sherman appears to have presumed that any chronic obstructive pulmonary disease is a manifestation of coal workers' pneumoconiosis and thus, that any corresponding treatment was reimbursable. Employer asserts that Dr. Sherman's report is not reasoned and documented, and argues that there is no credible evidence which meets claimant's burden to establish the occupational relatedness of the conditions for which he received treatment.

The revised regulation at 20 C.F.R. §725.701(e) is applicable to all claims. *See* 20 C.F.R. §725.2. Claimant is, therefore, entitled to the rebuttable presumption that *any* pulmonary disorder for which he was treated was caused or aggravated by his pneumoconiosis. *See* 20 C.F.R. §725.701(e). The issue thus becomes whether employer has produced credible evidence that the treatment provided claimant was for a pulmonary disorder apart from those previously associated with the miner's disability, or was beyond that necessary to treat effectively a covered disorder, or was not for a pulmonary disorder at all. 20 C.F.R. §725.701(e). In the instant case, employer relies on Dr. Branscomb's opinion, that claimant's clinical pneumoconiosis is asymptomatic and that his chronic obstructive pulmonary disease is due to smoking, Employer's Exhibits 1, 9, to defeat the award of any medical benefits. Because Dr. Sherman opined that most of the disputed bills were related to the treatment of claimant's pneumoconiosis and thus were reimbursable, his opinion is not germane to employer's burden to produce credible evidence showing that the treatment provided claimant was for pulmonary disorders not previously associated with claimant's disability. *See* 20 C.F.R. §725.701(e). Accordingly, we decline to address further employer's arguments in support of its contention that the administrative law judge should not have credited Dr. Sherman's report.

Employer next contends that the administrative law judge erred in according less weight to Dr. Branscomb's opinion. Employer asserts that, contrary to the administrative law judge's suggestion, Dr. Branscomb's opinion does not contradict the opinions of Drs. Baker and Breeding that claimant had chronic bronchitis related to his coal mine employment,

because Dr. Branscomb acknowledged the presence of clinical pneumoconiosis but concluded that the treatment in question was not related to pneumoconiosis. Employer reiterates its argument that there is no support in the record for the administrative law judge's "inference" that the diseases for which claimant received treatment are the same diseases Judge Murty found to exist in awarding benefits.

Employer's contentions lack merit. The administrative law judge provided valid reasons for discrediting Dr. Branscomb's opinion that claimant's clinical pneumoconiosis was not causing him any disability, and that his chronic obstructive pulmonary disease was caused by smoking and was the condition for which claimant received treatment. The majority of the disputed medical bills detail treatment for chronic bronchitis *and* chronic obstructive pulmonary disease. In finding that the majority of the disputed bills were reimbursable, the administrative law judge referred to the fact that Judge Murty's award of benefits was based on a finding that claimant had chronic bronchitis related to his coal mine employment and was totally disabled by it. He continued:

> Accordingly, since chronic bronchitis is one form of chronic obstructive pulmonary disease, I infer that the chronic obstructive pulmonary disease and bronchitis referenced in the disputed medical bills is the same condition Judge Murty relied upon to conclude that Mr. Cornett suffers from legal pneumoconiosis. As a result, I find Dr. Branscomb's opinion contrary to the Act. *See Seals*, 147 F.3d 502.

Decision and Order at 13. Notwithstanding the administrative law judge's use of the word "infer," he rationally found:

> [A]lthough the treating physicians did not state in their hospital records that the chronic obstructive pulmonary disease for which they were treating Mr. Cornett was related to his coal dust exposure, I rely on Judge Murty's finding to that effect. As a corollary, Dr. Sherman's opinion is sufficient to meet the burden that these treatments were for the treatment of pneumoconiosis.

Decision and Order at 14. The administrative law judge's findings are supported by substantial evidence, namely Dr. Sherman's opinion that chronic obstructive pulmonary disease is a manifestation of coal workers' pneumoconiosis, *see e.g.* Director's Exhibit 17 at 5, and that the majority of the treatment provided claimant was for his pneumoconiosis, *see* Director's Exhibit 17. The administrative law judge noted Dr. Branscomb's disagreement with Dr. Sherman's findings, Employer's Exhibit 1, and indicated, within his discretion, that he found more persuasive Dr. Sherman's opinion, noting that it was bolstered by Dr. Breeding's opinion that the bills he reviewed appeared to all be related to claimant's pneumoconiosis with the exception of the heart catheterizaton performed by Dr. Jones,

Director's Exhibit 15. *See generally Worley v. Blue Diamond Coal Co.*, 12 BLR 1-20 (1988); Decision and Order at 14.[7] Based on the facts of this case, and given the administrative law judge's findings, we affirm the administrative law judge's award of medical benefits and reject employer's challenge thereto.

[7]Moreover, the administrative law judge's finding is consistent with the revised regulation at 20 C.F.R. §718.201(a)(2), recognizing that exposure to coal mine dust may cause restrictive or obstructive pulmonary diseases.

Employer next contends that Judge Kane erred in denying employer's motion to compel a physical examination of claimant. Judge Kane found that employer had offered no explanation as to why an examination of claimant was necessary. Judge Kane thus found that employer failed to establish that its request was reasonable and that claimant's refusal to submit to a medical examination was unreasonable, *see Selak v. Wyoming Pocahontas Land Co.*, 21 BLR 1-173, 1-177, 178 (1999)(a miner may be ordered to submit to a physical examination requested by employer if employer demonstrates that its request is reasonable under the circumstances and that the miner's refusal to submit to a physical examination is unreasonable.) In this regard, Judge Kane recognized that *Selak* involved a modification proceeding in which a claimant's current medical condition may be at issue. He noted that the instant case involved the sole issue of the compensability of medical treatment expenses, and found that under *Seals*, employer could offer evidence that the disputed medical bills were not related to claimant's pneumoconiosis but could not offer evidence controverting any element of entitlement. Judge Kane stated that although *Selak* sets forth the criteria for compelling a miner to submit to a re-examination in a modification proceeding, he saw no reason why the same criteria should not be used to determine whether a miner should be compelled to submit to a re-examination in a medical benefits case. Judge Kane thus denied employer's request to compel claimant to submit to a medical examination. Employer argues that because *Selak* involved a modification proceeding, it is inapposite and Judge Kane erred in relying on it. Employer, citing, *inter alia*, the Board's 1991 decision in *Allen v. Island Creek Coal Co.*, 21 BLR 1-1 (1996), *aff'g on reconsideration*, 15 BLR 1-32 (1991),[8] asserts that it is entitled to a medical examination of claimant to determine whether the treatment rendered him was related to his pneumoconiosis, especially in light of the administrative law judge's determination that the hospital records reflect treatment for the same condition as found by Judge Murty and in the event employer must overcome application of the presumption provided at 20 C.F.R. §725.701(e). Employer specifically asserts that if the burden has now shifted to employer, it must be given a full and fair opportunity to meet that burden. Employer requests a remand of the case for supplementation of the record based on a new examination of claimant, in the event the Board does not reverse outright the administrative law judge's award of medical benefits.

We affirm Judge Kane's denial of employer's motion to compel claimant to undergo a

[8]In *Allen v. Island Creek Coal Co.*, 21 BLR 1-1 (1996), *aff'g on reconsideration*, 15 BLR 1-32 (1991), the Board held that the Act and its implementing regulations do not preclude employer from requesting an employer-sponsored examination of claimant in order to dispute questionable medical bills submitted for reimbursement. After liability is established and a demand for reimbursement is proffered, the regulations provide for a dispute resolution process, virtually identical to the claims process, in which employer is granted full opportunity to defend against questionable claims for reimbursement.

physical examination. Employer does not have an absolute right to compel claimant to respond to discovery requests or other requests for medical evidence and Judge Kane, in the instant case, acted within his discretion in finding that employer had proffered no explanation as to why an examination of claimant was necessary and thus, employer failed to establish that its request was reasonable and that claimant's refusal to submit to a medical examination was unreasonable. *See generally Stiltner v. Wellmore Coal Corp.*, 22 BLR 1-37 (2000)(Decision and Order on Reconsideration *En Banc*); *Selak, supra; Allen, supra*. In *Allen*, the Board specifically held that when a claimant refuses to undergo a medical examination in a medical benefits dispute, the burden is on the employer to show that the refusal is unreasonable. *Id.* Given the facts of this case, substantial evidence supports Judge Kane's determination that employer did not establish that its request was reasonable or that claimant's refusal to undergo a physical examination was unreasonable. We thus reject employer's challenge to Judge Kane's denial of its motion to compel claimant to undergo a physical examination.

Based on the foregoing, we affirm the administrative law judge's award of medical benefits in the amount of $18,133.88, reimbursable to the Trust Fund. We further affirm Judge Kane's denial of employer's motion to compel claimant to undergo a physical examination.

Accordingly, we affirm the administrative law judge's Decision and Order - Ordering Payment of Medical Bills. We also uphold Judge Kane's Order Granting Employer's Motion to Compel Medical Release Authorization and Response to Interrogatories and Denying Motion to Compel Medical Examination.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

NANCY S. DOLDER
Administrative Appeals Judge