

RENDERED: July 17, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-3216-WC

ROBERT A. PETERSON

APPELLANT

V. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-96-008103

MANALAPAN MINING COMPANY; SPECIAL FUND;
HON. SHEILA LOWTHER, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: COMBS, KNOPF, and KNOX, Judges.

COMBS, JUDGE: Robert Peterson (Peterson) appeals from the opinion of the Workers' Compensation Board (Board) affirming the decision of the Administrative Law Judge (ALJ), which dismissed his occupational disease claim. Peterson contends that the ALJ's decision was based on substandard evidence and that it was arbitrary and erroneous. We disagree and affirm the decision of

the Workers' Compensation Board.

Peterson has been exposed to coal dust as an underground coal miner for seventeen years and has been employed by Manalapan Mining Company (Manalapan) for the past eight years. Peterson quit his job with Manalapan on November 27, 1996, due to difficulty in breathing and filed for an adjustment of occupational disease claim on December 2, 1996. He claimed that he had coal workers' pneumoconiosis as a result of the inhalation of coal dust while employed by the defendant, Manapalan; he also named the Special Fund as a party-defendant.

Peterson submitted medical evidence from Drs. William H. Anderson and John E. Myers. Dr. Anderson reviewed an x-ray dated November 16, 1993, as positive for pneumoconiosis, category 1/1, and reported that the x-ray film was quality grade one. Dr. Myers reviewed an x-ray dated November 26, 1996, and reported positive for pneumoconiosis, category 1/1, and film quality one.

Manapalan and the Special Fund submitted medical evidence from Drs. Emery Lane, Robert Powell, and A. Dahhan. Drs. Lane and Powell reviewed an x-ray dated January 29, 1997, as negative for pneumoconiosis; both doctors also reported that the film quality was of grade two. However, Dr. Dahhan interpreted the January 29, 1997 x-ray as negative -- but reported film quality as grade one.

On August 29, 1997, the ALJ issued an order dismissing Peterson's claim. Specifically, the ALJ found that Peterson failed to meet his burden of establishing the existence of coal

workers' pneumoconiosis. The ALJ relied upon the medical evidence submitted from Drs. Powell and Lane, which she found to be credible and persuasive. The ALJ found both doctors to be well qualified and both had reviewed the most recent x-ray. Peterson then filed an appeal with the Board. On December 8, 1997, the Board affirmed the ALJ's order. This appeal followed.

On appeal, Peterson argues that the ALJ erred in relying upon the reports of physicians who based their opinions on substandard evidence -- x-rays with a film quality of grade two. Peterson argues that the ALJ should have relied on the reports of Drs. Anderson and Myers, who reviewed x-rays with film quality one. We disagree.

The plaintiff bears the burden of proof and the risk of non-persuasion. Roark v. Alva Coal Corp., Ky., 371 S.W.2d 856 (1963). In cases where the claimant has failed to meet his burden of proof, the question before the appellate court is whether the evidence was so overwhelming that it compelled a finding in his favor. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Compelling evidence is defined as evidence which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. Reo Mechanical v. Barnes, Ky. App., 691 S.W.2d 226 (1985).

In this case, the ALJ thoroughly weighed the evidence presented. She was aware of the differences in film quality and the differences in the dates of x-rays. The ALJ, as the finder of fact, and not the reviewing court, has the authority to

determine the quality, character, and substance of the evidence presented. Paramount Foods, Inc., v. Burkhardt, Ky., 695 S.W.2d 419 (1985). When there is conflicting medical testimony, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 124 (1977).

The Court of Appeals can not substitute its judgment for that of the ALJ concerning the weight of the evidence or questions of fact. KRS 342.285(3). We cannot say in addressing this issue the ALJ "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 687-688 (1992).

In summary, we cannot conclude as a matter of law that the evidence compels a different finding. The ALJ's findings are supported by substantial evidence, and the Board did not err in affirming the ALJ's order. Therefore, we affirm the opinion of the Board.

ALL CONCUR.

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