

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-002953-WC

NEW HARLAN BLOCK COAL COMPANY,
INC.

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-93-21766

WALTER A. BALTHIS;
SPECIAL FUND;
HON. LLOYD R. EDENS,
ADMINISTRATIVE
LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

GUIDUGLI, JUDGE: New Harlan Block Coal Company, Inc. (New Harlan) appeals from an opinion of the Workers' Compensation Board (Board) which affirmed the opinion, order and award of the Administrative Law Judge (ALJ). The ALJ found upon reopening that claimant, Walter Balthis (Balthis), is totally disabled due to coal workers pneumoconiosis. New Harlan argues before this

Court, as it did before the Board, that the ALJ erred in assessing the medical evidence in determining that Balthis had sustained his burden of proof that he suffered from Category 2 coal workers pneumoconiosis. We affirm.

The Board's opinion rendered October 24, 1997, succinctly and concisely sets forth the facts, issues presented and applicable standard of review and thus, we adopt it, in part, as our own:

Balthis filed a claim for retraining incentive benefits ("RIB") on June 8, 1993. He settled his claim in an agreement which was approved by an Administrative Law Judge on October 6, 1993. After 22 years in the coal mining industry, he last worked on August 27, 1993. Balthis filed his claim for increased benefits on January 4, 1995. Apparently, he applied for employment with Jericol Mining Company, Inc. in February 1994 and a pre-employment physical revealed Stage II coal workers' pneumoconiosis.

On reopening, Balthis submitted evidence from Dr. J. D. Miller, an internal medicine specialist, who examined him for pre-employment physical at the request of Jericol Mining on February 17, 1994. An x-ray taken that date revealed Category 2/2 coal workers' pneumoconiosis. On May 2, 1994, Dr. Miller performed an examination at the request of Balthis' counsel. In addition to the February 17, 1994 x-ray, he performed pulmonary function studies on May 2, 1994 which revealed an FVC of 66% of predicted and an FEV1 of 79% of predicted. Furthermore, Dr. Miller interpreted an August 2, 1994 x-ray taken at the request of Dr. William Anderson as showing Category 2/2 coal workers' pneumoconiosis.

Balthis also submitted the Form 108 of Dr. Anderson which revealed x-ray results of Category 2/2 pneumoconiosis. Dr. Anderson's

ventilatory studies were invalid due to excessive variation.

New Harlan relied on medical evidence from Dr. Robert W. Powell and Dr. Emery Lane. Dr. Powell interpreted a February 23, 1993 x-ray showing Category 1/1 pneumoconiosis. He interpreted a February 17, 1994 x-ray as showing no evidence of the disease. He offered the opinion that simple coal workers' pneumoconiosis does not progress without additional exposure, nor does it disappear. He explained that the difference between the February 23, 1993 x-ray which showed Category 1 coal workers' pneumoconiosis and the February 17, 1994 which showed no evidence of the disease was due perhaps to a condition which mimics pneumoconiosis.

Dr. Emery Lane examined Balthis on August 3, 1993 at which time he interpreted chest x-rays as showing Category 1/1 pneumoconiosis and pulmonary function studies with an FVC of 83.6% of predicted and an FEV1 of 78.1% of predicted. Dr. Lane also interpreted a February 22, 1993 chest x-ray as showing Category 1/1 pneumoconiosis and on April 12, 1993 chest x-ray as unreadable. He read an April 3, 1995 chest x-ray as showing Category 1/0 coal workers' pneumoconiosis had not progressed.

The Special Fund submitted evidence from Dr. Betty Joyce who examined Balthis on June 23, 1995. A chest x-ray taken at that time showed Category 1/0 coal workers' pneumoconiosis. Pulmonary function studies yielded a pre-bronchodilator result of an FVC of 79.4% of predicted and an FEV1 of 74.1% of predicted. Post-bronchodilator results were an FVC of 80% of predicted and an FEV1 of 77% of predicted.

The ALJ reviewed the lay and medical testimony in the record noting that Balthis had testified he spent a substantial portion of his work history as a helper on a Wilcox miner. He further noted that Balthis stated the last two years of his work for New Harlan had been next to the machine shoveling coal. The ALJ chose to rely on the testimony of Dr.

Miller that Balthis had Category 2 coal workers' pneumoconiosis. Based on the findings in the original claim, the ALJ concluded that Balthis' pneumoconiosis had progressed from Category 1 to Category 2. He further found a progression of Balthis' respiratory impairment based on an FEV1 reading as less than 80% of predicted normal. Therefore, pursuant to KRS 342.125(2) and KRS 342.732(1)(d), he found Balthis to be totally occupationally disabled.

On appeal, New Harlan argues in essence that the ALJ should have relied on the medical testimony of its doctors and in its brief before this Board, does not mention the medical evidence as found by Dr. Miller.¹

As is well-known, the ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance, and inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). When the medical evidence is conflicting, it is the sole authority of the ALJ to choose whom and what to believe. Caudill v. Maloney's discount Stores, Ky., 560 S.W.2d 15 (1977). Clearly, it is within the province of the ALJ to believe the testimony of Dr. Miller which showed Category 2 coal workers' pneumoconiosis. Furthermore, there was evidence based on the pulmonary function studies to support a finding of increased pulmonary deficiency.

As recognized by the ALJ and recently affirmed by the Supreme Court in Nantz v. Del Coal, (96-CA-619-WC), rendered June 30, 1997 and ordered not to be published, under KRS 342.125(2), the reopening statute which applied to this claim, a reopening of a RIB award is permitted only upon a finding of both a progression of the disease by x-ray evidence and the development of respiratory impairment due to pneumoconiosis.

¹ In its brief to this Court, New Harlan does mention Dr. Miller's medical report in a three-sentence paragraph.

In conclusion, the ALJ's award of benefits pursuant to KRS 342.732(1)(d) is supported by evidence of both a progression of coal workers' pneumoconiosis by x-ray and a worsening of the breathing impairment. Inasmuch as the two-prong test of KRS 342.125(2) has been met and is supported by evidence in the record, the ALJ's decision may not be disturbed on appeal.

Accordingly, the Opinion, Order and Award rendered by Hon. Lloyd R. Edens, Administrative Law Judge, is hereby **AFFIRMED** and the appeal by New Harlan Block Coal Company, Inc. is hereby **DISMISSED**.

As to the remaining two (2) issues raised by appellant in its brief, they were not raised before the ALJ or the Board and thus cannot be raised for the first time before this Court. Additionally, it should be noted that the third issue raised by New Harlan relies upon what it calls the "new law" which is not applicable to the case before us.

For the foregoing reasons, the decision of the Board is affirmed.

ALL CONCUR.

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