

RENDERED: September 4, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

No. 1997-CA-003200-WC

CONARD ISAAC

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-96-04099

MISTY K MINING COMPANY, INC.;
SPECIAL FUND;
HON. J. LONDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: BUCKINGHAM, GUIDUGLI and HUDDLESTON, Judges.

GUIDUGLI, JUDGE: Conard Isaac (Isaac) appeals from an opinion of the Workers' Compensation Board (Board) affirming an opinion and order of the Administrative Law Judge (ALJ) dismissing his claim of occupational disability due to an occupational lung disease. We affirm.

On August 8, 1995, Isaac filed a claim for retraining incentive benefits (RIB). On September 6, 1995, Isaac filed another claim alleging occupational hearing loss. These two claims were consolidated by order of the ALJ on March 11, 1996. At that time, claimant also moved to amend the RIB claim to allege a compensable occupational lung disease resulting in occupational disability. This claim was consolidated with all other pending claims. At a prehearing conference held on September 10, 1996, the hearing loss claim was settled. The remaining claims were assigned to an ALJ for hearing.

In an opinion and award entered on September 16, 1997, the ALJ found that Isaac had been working in the coal mines since 1955. He had worked in underground mines and was exposed to coal dust on a daily basis. Isaac's last day of work and his last day of exposure to coal dust was August 13, 1994. Isaac was not a smoker. The ALJ also reviewed the multitude of medical reports of Drs. Lane, Skolnick, Powell, Jarboe and Vuskovich. The ALJ summarized the medical evidence as follows:

Judah L. Skolnick, M.D. read a July 14, 1995 X-ray taken at Pikeville Radiology as being grade 3 in quality but as showing p/p opacities in both mid lung zones, category 1/0. Emery Lane, M.D. read that same X-ray in exactly the same manner. He also read July 10, 1995 X-ray taken at the Sandy Valley Radiology as being grade 1 in quality and as showing p/p opacities in the right upper and both mid lung zones, category 1/0.

Thomas M. Jarboe, M.D. read a November 9, 1995 X-ray taken at Pikeville Radiology. It was read as grade 1 in quality and as being completely negative. Robert W. Powell, M.D.

examined and evaluated Plaintiff on January 23, 1996. An X-ray Dr. Powell took that day was read as grade 1 in quality and as 0/0. He performed pulmonary function studies on Plaintiff which resulted in an FVC of 70% of predicted and an FEV-1 of 81% of predicted. However, he noted that maximal voluntary effort was not achieved. Dr. Powell's impression was that there was no radiographic evidence of coal workers pneumoconiosis, there was no respiratory impairment but there was probable coronary artery disease.

Special Fund had Plaintiff evaluated by Matt Vuskovich, M.D. on May 24, 1996. An X-ray Dr. Vuskovich took that day was read as grade 1 in quality and as showing q/q opacities in all six lung zones, category 1/1. Pulmonary function studies performed by Dr. Vuskovich resulted in an FVC of 83% of predicted and an FEV-1 of 73.9% of predicted.

Defendant Employer had Plaintiff examined by Dr. Jarboe and took Dr. Jarboe's deposition on August 28, 1996. Dr. Jarboe examined Plaintiff on July 26, 1996, took an X-ray that day and also performed a pulmonary function study. The X-ray was read as grade 1 in quality and as 0/0. The pulmonary function study resulted in an FVC of 95% of predicted and an FEV-1 of 85% of predicted. Although Dr. Jarboe admitted, upon cross-examination, that his several trials at the pulmonary function study produced results that were not within 5% of each other, the maximal effort resulted in the readings reported which show, at the very least, adequate pulmonary function. He testified that Plaintiff probably could have done better on the pulmonary function but there is no way that his pulmonary function could have been less than what was represented in the best result.

Based upon the evidence the ALJ awarded Isaac RIB benefits but denied his claim for pulmonary impairment. Isaac appealed to the Board arguing that claimant's pneumoconiosis when combined with his age, education, background and work experience

results in a 100% occupational disability. The Board rejected Isaac's arguments and dismissed his occupational disability claim based upon the medical evidence and KRS 342.732. Specifically, the Board stated:

The medical evidence from Drs. Lane and Skolnick convinced the ALJ that Isaac had sustained his burden of proof to establish the existence of the disease of coal workers' pneumoconiosis. The existence of the disease is not at issue. However, a variety of pulmonary function studies were performed and submitted into evidence. Dr. Powell performed pulmonary function studies and found the FVC to be 70% of predicted and the FEV-1 to be 81% of predicted. He did not believe that maximum effort had been achieved. Dr. Vuskovich performed pulmonary function studies and found the FVC to 83% of predicted and the FEV-1 to be 73.9% of predicted. Dr. Thomas Jarboe performed pulmonary function studies and found the FVC to be 95% of predicted and the FEV-1 to be 85% of predicted. He acknowledge in his disposition that the reports were not within 5% of each other, but he further testified that these tests revealed less than maximum voluntary effort on the part of Isaac. Dr. Jarboe further testified that an individual could not "fake" high and, therefore, his findings would establish at the very least no pulmonary impairment.

In reaching his conclusion, the ALJ ultimately relied upon Dr. Powell's FEV-1, which was 81% of predicted, and Dr. Vuskovich's FVC finding of 83% of predicted. In accordance with KRS 342.732(1)(a), the ALJ had no discretion to pick and choose from the pulmonary function studies and although there was evidence in the record of an FVC below 80% of predicted and an FEV-1 below 80% of predicted, the statutory provision obligated the ALJ to select the highest FVC and FEV-1 of record. While it is within the ALJ's discretion to rely on either the FVC or FEV-1, he has no discretion when it comes to choosing the highest value. See, for

example, Newburg vs. Price, Ky., 868 SW2d 92 (1993); Varney vs. Newburg, Ky., 860 SW2d 752 (1993); and Wright vs. Hopwood Mining, Ky., 832 SW2d 884 (1992). Therefore, in our opinion, once the ALJ determined that Isaac had satisfied his burden of proof to establish the existence of the disease of coal workers' pneumoconiosis, his discretion was then limited and he was obligated to rely upon the highest FVC value and the highest FEV-1 value, which in this case were both above 80% of predicted, limiting benefits to KRS 342.732(1) (a).

The ALJ is obligated by law to rely upon the highest FVC value and the highest FEV-1 value. The record abounds with medical evidence to support the finding of the ALJ. As was stated in Special Fund v. Francis, Ky., 708 S.W.2d 641, 641 (1986), "in order to reverse the findings of the Workers' Compensation Board unfavorable to the claimant and upon which he had the burden of proof, the test is whether the evidence compelled a finding in his favor." Isaac has not shown that the ALJ made an error in assessing the evidence, therefore, the Board's decision is affirmed.

ALL CONCUR.

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