

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002497-WC

R.C.D. TRUCKING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-92-048686

REEVIS CARROLL;
ROBERT WHITTAKER,
DIRECTOR OF SPECIAL FUND;
HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: RCD Trucking (RCD) appeals from an opinion and award rendered May 26, 1998, in which the ALJ granted a reopening petition brought by Reevis Carroll. Finding no reversible error, we affirm.

Carroll worked as a truck driver and a rock picker for RCD from 1981 until February 7, 1992, during which time he had multiple

exposure to coal dust. Prior to that time, he worked for almost twelve (12) years in a concrete factory, a foundry, and an underground coal mine, where he was exposed to cement, iron, and coal dust. On December 10, 1992, Carroll filed a claim for total disability due to the occupational disease of coal workers' pneumoconiosis. His claim against RCD was settled at the prehearing conference level for a fifty percent (50%) occupational disability. The Special Fund did not participate in that settlement.

During the pendency of this claim, three (3) physicians diagnosed Carroll as having category 1 pneumoconiosis. Two (2) of the doctors attributed his disease to exposure to a combination of coal, rock, and sand dust, while the third physician gave no opinion as to causation. Three (3) other doctors found no occupational disease or pneumoconiosis. The relevant medical evidence was summarized as follows:

<u>Physician</u>	<u>X-Ray</u>	<u>FVC</u>	<u>FEV1</u>
Anderson	1/0	82%	77%
Myers	1/1	80%	78%
Lane	1/1	---	---
Dahhan	0/0	88%	76%
Dineen	0/0	100%	85%
Vuskovich	0/0	84%	81%

On September 20, 1993, the ALJ entered an Opinion and Award in favor of Carroll. In so doing, the ALJ, on his own motion, amended Carroll's application to a claim for mixed dust exposure and

decided Carroll's claim pursuant to KRS 342.316. The Special Fund appealed, and the Board reversed this determination. The Board found that the 1987 restructuring of the Workers' Compensation Act required the claim to be prosecuted pursuant to KRS 342.732. Both this Court and the Supreme Court affirmed the Board, holding as follows:

The General Assembly developed a statutory system in the Workers' Compensation Act of 1987 in which the industry that creates the bulk of the burden bears the brunt of the liability. See Kentucky Harlan Coal Co. v. Holmes, Ky., 872 S.W.2d 446 (1994); Also see KRS 342.1201. The General Assembly also imposed an additional Special Fund Assessment against employers engaged in the severance and processing of coal. KRS 342.1201(6) and KRS 342.122(1)(b).

KRS 342.732 created a statutory presumption regarding the establishment of occupational disability where coal is a medically significant exposure. Cf. Newberg v. Reynolds, Ky., 831 S.W.2d 170 (1992). The passage of this statute, in conjunction with the overall system of the legislature in revamping the entire Workers' Compensation Act in 1987 indicated an intent on the part of the legislature that where coal is a medically significant cause after the effective date of KRS 342.732, then the occupational disability is to be decided pursuant to that statute and not the more general KRS 342.316 on occupational disease.

Here the finding by the ALJ that Carroll suffers from mixed dust pneumoconiosis is an implicit finding that his exposure to coal dust was a significant cause of this disease. Such a conclusion is supported by the medical opinions of Drs. Meyers and Anderson. The finding of a Category I pneumoconiosis is unchallenged on appeal and is supported by substantial evidence. The pulmonary function studies do not entitle Carroll to an award greater than retraining incentive benefits.

The facts of this case clearly bring his claim within the purview of KRS 342.732.

In Kentucky Harlan, supra, there was medical evidence that the employee sustained a mixed-type pneumoconiosis relating to exposure to sand, coal and iron dust and also medical proof that he suffered pure coal workers' pneumoconiosis. Kentucky Harlan stated that in cases where workers have mixed exposure to both coal dust and other dust, KRS 342.732 would apply if the inhalation of coal dust was a substantial medical cause of any respiratory impairment.

Accordingly, it is our opinion that the legislature intended to make KRS 342.732, rather than KRS 342.316, the sole remedy in cases where not only was coal dust the last exposure after the effective date of KRS 342.732, but it was also a medically significant cause of the disease. The coal dust exposure still must be a substantial cause of pneumoconiosis in order to come within the range of KRS 342.732.

Carroll v. Whittaker, Ky., No. 95-SC-276-WC (Not-To-Be-Published Opinion rendered June 20, 1996).

On June 4, 1994, Carroll filed a motion to reopen his claim, alleging a progression of his pneumoconiosis. The claim was assigned to an arbitrator, who denied the motion, finding insufficient evidence to support reopening. Carroll then sought a *de novo* review of his motion to reopen before an ALJ. In support of reopening, Carroll submitted a report and supplement from Dr. Harold Bushey. In response, RCD submitted medical reports from Dr. Matt Vuskovich and Dr. A. Dahhan. The ALJ summarized the medical evidence in Carroll's claim on reopening as including:

<u>Physician</u>	<u>X-Ray</u>	<u>FVC</u>	<u>FEV1</u>	<u>Causation</u>
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Bushey	2/1, q, T-5 zones	3.08 liters	2.75 liters	
Vuskovich	0/0	62%	59%	Smoking and heart disease
Dahhan	Negative	---	---	

The ALJ noted the prior finding, that Carroll's decreased breathing was due to his exposure to occupational dust, had never been reversed. Consequently, the ALJ concluded this finding was *res judicata* with regard to causation. Based upon this evidence, the ALJ found that Carroll's pneumoconiosis had progressed from the previously diagnosed Category 1/1 to Category 2/1. The ALJ also concluded that the 1996 amendments to KRS 342.125 were not retroactive. Finally, the ALJ found that RCD was entitled to credit for previous payments of retraining incentive benefits. The Board affirmed the ALJ. RCD now appeals to this Court.

The first issue in this case is whether the ALJ erred in failing to apply the 1996 amendment to KRS 342.125(5)(a). RCD argues that the time limitations were applicable to Carroll's claim even though his last exposure to coal dust occurred in 1992. The Board disagreed, stating that, although the General Assembly designated other portions of KRS 342.125 as remedial, it did not so designate Section 125(5)(a). The Board also concluded that the additional requirements of KRS 342.125(5)(a) are substantive in nature and are not to be retroactively applied.

We agree with the Board's analysis finding that KRS 342.125(5)(a) should not be retroactively applied. KRS 446.080(3) provides that "no statute shall be construed to be retroactive, unless expressly so declared." The law in effect on the date of injury generally determines the rights of the injured worker and the obligations of the defendant regarding income benefits for that injury. Maggard v. International Harvester, Inc., Ky., 508 S.W.2d 777 (1974). However, legislation has been applied to causes of action arising before its effective date in certain instances where the courts have determined that the provision was remedial or procedural in nature and that retroactive application of the provision was consistent with the legislative intent. Benson's Inc. v. Fields, Ky., 941 S.W.2d 473 (1997). The Kentucky Supreme Court explained this distinction in Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33 (1991):

A retrospective law, in a legal sense, is one which takes away or impairs vested rights acquired under existing laws, or which creates a new obligation and imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past. Therefore, despite the existence of some contrary authority, remedial statutes, or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of such rights, do not normally come within the legal conception of a retrospective law, or the general rule against the retrospective operation of statutes. In this connection it has been said that a remedial statute must be so construed as to make it effect the evident

purpose for which it was enacted, so that if the reason of the statute extends to past transactions, as well as to those in the future, then it will be so applied although the statute does not in terms so direct, unless to do so would impair some vested right or violate some constitutional guaranty.

Id. at 36; quoting, 73 Am.Jur.2d Statutes § 354 (1974).

Section 125(5) (a) was enacted by the legislature in 1996 as part of the sweeping changes in the workers' compensation laws. The legislature set out certain statutes which it wished to be applied retroactively, and KRS 342.125(5) was not so listed. In contrast, the legislature specifically set out that KRS 342.125(8) was to be applied retroactively.

In addition, the 1996 amendment to KRS 342.125(5) (a) requires a reopening claimant to show a progression of pneumoconiosis on x-ray and development of respiratory impairment due to that pneumoconiosis, and, in addition, it also requires two (2) additional years of employment in Kentucky where the employee was continuously exposed to the hazards of the disease. The showing of additional exposure after the entry of the original award is a new substantive requirement for a claimant on reopening. Given the substantive import of the statute, we find that it is not remedial in nature, nor is it consistent with the beneficent purpose underlying the Workers' Compensation legislation in effect at the time of the injury. Therefore, the ALJ and the Board correctly held that KRS 342.125(5) (a) cannot be accorded retroactive application.

Most of RCD's remaining grounds of error involve the ALJ's reliance on Dr. Bushey's report as a basis for granting Carroll's motion to reopen. RCD first argues that Dr. Bushey's ILO Classification report was not submitted in a timely manner, and that the ALJ abused his discretion in allowing the supplemental report to be filed late. KRS 342.316(2)(a) requires that the physician's report be accompanied by the latest ILO Classification report. Moreover, the parties agree that the ILO Classification report was not filed within the proof deadline. Thus, RCD asserts that since the ILO Classification report was not timely submitted, Dr. Bushey's entire report should not have been admitted and could not form the basis of an award on reopening.

The Board disagreed, finding that the ALJ did not abuse his discretion by allowing a late filing of the ILO Classification report since the medical report and the x-ray interpretation from Dr. Bushey were timely submitted. We are concerned that the record does not show compliance with the regulation for allowing extensions of proof time. 803 KAR 25:010 § 16. Nonetheless, we agree with the Board that under the circumstances of this case, the ALJ's decision to allow the untimely filing of the ILO Classification report was not an abuse of discretion.

RCD further argues that the Board erred in relying on Dr. Bushey's report and in finding that Carroll had met the statutory requirements for reopening. In our consideration of these matters,

we are mindful of the standard for appellate review of decisions by the ALJ and the Board. The ALJ, as finder of fact, has the authority to determine the quality, character, and substance of the evidence presented. Paramount Foods v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). When the decision of the fact-finder favors the party with the burden of proof, that decision will ordinarily be upheld on appeal if there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). The purpose of the Board's review of a decision by an ALJ is to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). The function of further review of the Board in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedents, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Id. at 688.

RCD raises several evidentiary issues regarding the sufficiency of Dr. Bushey's report. RCD argues that Dr. Bushey's report was improperly admitted because it did not comply with KRS 342.316(3)(b)1 and the quality control criteria set forth in the AMA Guide to the Evaluation of Permanent Impairment. Along similar

lines, RCD also contends that Dr. Bushey's report was improperly admitted because the testing protocol contained in KRS 342.316(3) b)1 & 2 had not been established. In support of these contentions, RCD refers us to Fields v. Carbon River Coal Company, Ky. App., 920 S.W.2d 880 (1996); and Miller v. Arch of Kentucky, Inc., 918 S.W.2d 748 (1996).

Unlike the circumstances in Fields and Miller, RCD does not clearly set out how Dr. Bushey's report fails to satisfy the AMA Guidelines and the testing protocols. Rather, RCD merely asserts that Carroll failed to establish that Dr. Bushey followed the AMA Guidelines and the testing protocols. However, the Board found that "the ALJ properly had before him x-ray evidence meeting the standards of KRS 342.316."

In Western Baptist Hospital v. Kelly, supra, our Supreme Court noted that the Board's function is "to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result. These are judgment calls. No purpose is served by second-guessing such judgment calls, let alone third-guessing them." Id. at 687. While this Court is not obliged to defer to the Board in matters of law, the ALJs and the Board are considerably more qualified than we to determine the quality of medical evidence. Consequently, we believe that RCD bears the burden of clearly establishing that Dr. Bushey's

report did not comply with the AMA Guidelines. Based upon the record, we cannot find the Board's rulings on these evidentiary matters were an abuse of discretion.

RCD argues that Dr. Bushey's report was insufficient to establish a progression of pneumoconiosis because he had never previously examined Carroll, nor had he interpreted any of the x-rays which had been made in Carroll's prior claim. RCD also argues that there was insufficient evidence to support the ALJ's conclusion to show both a progression of pneumoconiosis and the progression of respiratory impairment. The finder of fact has authority to believe part of the evidence and to disbelieve other parts even if it comes from the same witness. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977) Thus, the fact that Dr. Bushey had never previously examined Carroll or reviewed the x-rays from the prior claim is not determinative, so long as the evidence as a whole supports the ALJ's conclusion. Likewise, Dr. Bushey's failure to properly state the FVC and FEV1 values as percentages of the predicted values is not fatal to Carroll's claim because the values given in Dr. Vuskovich's report clearly show a decline in the FVC and FEV1 values from the time of the prior adjudication. Although the evidence regarding the progression of Carroll's previously diagnosed pneumoconiosis and the progression of his respiratory impairment was conflicting, we are persuaded that the ALJ's conclusion on these issues was supported by evidence of substance.

We further agree with the ALJ and the Board that Carroll proved that his decreased breathing capacity at the time of reopening was caused by his occupational exposure to coal dust. However, we take issue with some of their reasoning on this point. The ALJ and a majority of the Board found the prior finding that Carroll suffered from work-related pneumoconiosis was conclusive as to causation in this proceeding. Concerning the prior finding that causation for Carroll's pneumoconiosis had been established, we agree that this determination is *res judicata* in the present proceeding. However, *res judicata* does not apply if the issue is claimant's physical condition or degree of disability at two (2) different times. Woodbridge INOAC, Inc. v. Downs, Ky. App., 864 S.W.2d 306, 307 (1993).

In Campbell v. Universal Mines, Ky., 963 S.W.2d 623 (1998), the Kentucky Supreme Court held that the plain language of KRS 342.125(2)(a) requires a *prima facie* showing of both a progression of the disease and either the development or the progression of a respiratory impairment in order for a worker to prevail on a motion to reopen a RIB award. A worker is not required to show both category 2 pneumoconiosis and compensable respiratory impairment in order to reopen, but only a progression of the disease and a development or progression of impairment, so long as either the disease or the impairment has progressed to the point of compensability. Id. at 625.

However, Campbell v. Universal Mines only refers to the proof necessary for a claimant to establish a *prima facie* case for reopening. Once the claimant establishes a *prima facie* case, the burden of going forward shifts to the party opposing the reopening. If the *prima facie* case is not rebutted, then the finder of fact may presume that the claimant's previously diagnosed pneumoconiosis has progressed to a compensable level as a result of his or her work-related exposure. However, the claimant retains the ultimate burden of proving that a significant change in occupational disability has occurred, and that the disability is a result of the disease which was the subject of the original award.

Nonetheless, it is beyond doubt that pneumoconiosis is a progressive disease which may worsen, but does not improve. Begley v. Mountain Top, Inc., Ky., 968 S.W.2d 91, 96 (1998). In the present case, Dr. Vuskovich, who testified on behalf of RCD, attributed the progression of the breathing impairment to Carroll's smoking habit and to cardiovascular disease. However, the ALJ chose not to believe Dr. Vuskovich's opinion as to causation. While Dr. Bushey did not give an opinion regarding the cause of the progression of Carroll's pneumoconiosis, the ALJ was entitled to infer that Carroll's pneumoconiosis has progressed as a result of his work-related exposure. Although the evidence was conflicting, we find sufficient evidence to support the ALJ's conclusion.

Accordingly, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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