

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002387-WC

MALCOLM MORGAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. NO. 90-07602

WHITAKER COAL CORPORATION;
ROBERT L. WHITTAKER, DIRECTOR OF
THE SPECIAL FUND; IRENE STEEN, ALJ;
AND THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: Malcolm Morgan appeals from a September 13, 2000, decision of the Workers' Compensation Board dismissing his petition for pneumoconiosis-related disability benefits. Morgan contends that the Administrative Law Judge (ALJ) and the Board both misconstrued compelling evidence that a worsening of his disability is the result of that work-related lung disease. Convinced that the evidence does not compel a decision in Morgan's favor, we affirm.

The parties have apparently stipulated that Morgan, who was born in January 1930, was exposed to the hazards of respirable industrial coal dust for approximately twenty years. His date of last exposure was January 12, 1990, while in the employ of appellee Whitaker Coal Company. Alleging that he had contracted pneumoconiosis, he filed a claim that same year for disability benefits. In April 1990 and November 1990 respectively, he settled his claim with his employer and with the Special Fund. The settlement was based on a purported 80% disability. There is also no dispute that for many years, until he was about forty years old, Morgan smoked heavily. He suffered from smoking-related lung cancer, and in 1988 underwent the removal of his left lung as a cancer treatment.

In 1996, alleging that his disability had become total, Morgan sought to reopen his settlement. His petition was denied. Even if his condition had worsened, the ALJ determined, Morgan had failed to show that the worsening was the result of pneumoconiosis. It was more likely, the ALJ believed, a consequence of his lung cancer and the loss of his lung. Both the Board and this court affirmed the ALJ's determination.

Thereupon, in the fall of 1998, Morgan filed a new petition to reopen. He supported this petition, the action underlying the current appeal, with a new pulmonary evaluation by Dr. Glen Baker and with deposition testimony by the surgeon who performed the 1988 lung-removal surgery, Dr. A. J. Hiller. Dr. Baker opined that Morgan's lung condition had become totally disabling and that it was likely the result of both smoking and

exposure to coal dust. Dr. Hiller testified that, although the post-operative reports did not mention it, focusing instead on the cancer, the examination of Morgan's removed lung had indeed revealed signs of emphysema and chronic bronchitis. These conditions, Dr. Hiller opined, contributed to Morgan's disability. They were also the likely result, at least in part, of his occupational exposure to dust and fumes.

Against this evidence, Whitaker introduced the report of Dr. Ben Branscomb, who reviewed the entire record. According to Dr. Branscomb, the several x-rays that had been made of Morgan's lung and the conflicting interpretations of those x-rays did not support a diagnosis of coal-workers' pneumoconiosis or any other work-related disease. They showed, rather, the effects of smoking and the effects of compensation--of Morgan's remaining lung trying to make up for the loss of its fellow. The ALJ found Dr. Branscomb's report persuasive. Based largely on his report and on the fact that none of the lab reports generated shortly before or after Morgan's surgery mentioned pneumoconiosis or the conditions to which Dr. Hiller referred in his deposition, the ALJ concluded that "Plaintiff [Morgan] does not . . . have the disease of Coal Workers' Pneumoconiosis."

Morgan appealed to the Board. He argued that Dr. Hiller's testimony and the fact that his condition had worsened despite his not having smoked for more than twenty years conclusively established the existence of pneumoconiosis, or at least of a work-related, progressive impairment of his lung, and thus that the ALJ's conclusion to the contrary was clearly

erroneous. The Board disagreed. It noted that two other doctors, in addition to Dr. Branscomb, had opined either that Morgan did not have pneumoconiosis or that his impairment stemmed entirely from his smoking and the loss of his lung. Together with Dr. Branscomb's testimony, these opinions, the Board believed, created a genuine conflict in the evidence, which was for the ALJ to resolve. It is from this ruling that Morgan has appealed.

As Morgan concedes, the scope of this court's review is limited.

The function of further review of the WCB in the Court of Appeals is to correct the Board only where the . . . Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.¹

As Morgan also concedes, he bore the burden of proof on the issues of worsened condition and causation. Where the fact finder has decided against the party with the burden of proof, "only evidence [in that party's favor] which is so overwhelming that no reasonable person would fail to be persuaded by it" will justify appellate relief on evidentiary grounds.²

In claiming to have met this burden, Morgan essentially repeats the argument he presented to the Board: It is beyond dispute, he contends, that his condition has worsened to the point that he is now totally disabled. Because he has not smoked

¹Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

²Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000) (citing Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986)).

in nearly thirty years, this worsening can not be attributed to smoking. It must, therefore, be the result of some other lung impairment, and, in light of Dr. Hiller's testimony concerning the presence of pneumoconiosis-like damage to his removed lung, that other impairment can only be something caused by his exposure during employment to dust and fumes. In concluding otherwise, Morgan contends, the ALJ and the Board disregarded compelling evidence and thus committed a flagrant error subject to correction on appeal.

Although we agree with Morgan that a fact finder could have interpreted the evidence as he does, we do not agree that such an interpretation was compelled. For even if we grant that his disability has become total and that his lungs were damaged by coal dust, it does not follow that the damage is accurately characterized as pneumoconiosis or that it caused his increased disability. On the contrary, even Morgan's doctors testified that the loss of a lung increases the strain on the remaining lung. And Dr. Branscomb testified that the effects of such strain would progress and were apt to resemble the signs of pneumoconiosis. Morgan's having overcome the smoking habit, therefore, does not rule out the possibility that his condition has continued to worsen as a direct result of the damage caused by smoking. This conclusion is bolstered, as the ALJ noted, by the fact that near the time of Morgan's surgery no doctor or lab examiner mentioned pneumoconiosis or a like condition as an additional concern. The overriding threat to Morgan's health, it seems, was his cancer, and after that the effects of his surgery.

Dr. Hiller's recollection (long after the fact and after the denial of Morgan's first bid to reopen) that Morgan's lungs also bore marks of emphysema and bronchitis does not dispel that impression, at least not to the extent of compelling a finding in Morgan's favor.

We agree with the Board that substantial evidence supports the ALJ's finding that Morgan does not have pneumoconiosis or like disease. It thus also supports her conclusion that Morgan's disability is not work related. Accordingly, we affirm the Board's order of September 13, 2000.

ALL CONCUR.

BRIEF FOR APPELLANT:

Phyllis L. Robinson
Manchester, Kentucky

BRIEF FOR APPELLEE WHITAKER
COAL CORPORATION:

Charles W. Berger
Harlan, Kentucky

BRIEF FOR APPELLEE SPECIAL
FUND:

John Burrell
Frankfort, Kentucky