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Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002057-WC

ALVIN MEEKS — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-00360

BIRDEYE COAL COMPANY; HON. KEVIN KING, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2004-CA-002218-WC

BIRDEYE COAL COMPANY — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-03-00360

ALVIN MEEKS; HON. KEVIN KING, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
REVERSING DIRECT APPEAL
AND AFFIRMING CROSS-APPEAL

** ** ** ** **

BEFORE: BARBER AND JOHNSON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

BARBER, JUDGE: The Workers' Compensation Board (WCB) affirmed the dismissal of Alvin Meeks' (Meeks) claim for coal workers' pneumoconiosis finding a lack of due and timely notice under KRS 342.316(2). It also found the issue raised in Birdeye Coal Company's (Birdeye Coal) cross-appeal to be moot. Birdeye Coal continues to argue in its cross-appeal to this Court that the evidence compelled a finding that Meeks presumptively does not suffer from pneumoconiosis.

Meeks was employed by Birdeye Coal for approximately four months when it ceased operating. His last day of employment with Birdeye Coal and his date of last exposure was April 3, 1999. Meeks had been employed in the coal industry for 29 years total. On February 19, 2003 Meeks sent written notice to Birdeye Coal that he suffered from an occupational disease based on an X-Ray interpreted by Dr. Glen Baker, a B-reader, taken that same month. Dr. Baker classified Meeks as category 1/2 and saw abnormalities consistent with pneumoconiosis.

Birdeye Coal obtained another X-Ray in May 2003 which was interpreted by Dr. Bruce Charles Broudy as category 0 – no evidence of pneumoconiosis. Since no consensus existed between the two doctors, the Commissioner of the Department of Workers'

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Claims forwarded the X-Rays to three certified B-readers selected at random in accordance with the procedure outlined in KRS 342.316(3)(b)4e.

Those three physicians, Dr. David M. Rosenberg, Dr. John F. Dineen, and Dr. Arthur J. McLaughlin II, filed their readings. Dr. Rosenberg indicated on the required ILO form a reading of category 1/1 and parenchymal abnormalities consistent with pneumoconiosis. Dr. Dineen found no abnormalities and read the X-ray as category 0/0. Dr. McLaughlin found parenchymal and pleural abnormalities consistent with pneumoconiosis and was of the opinion that the X-Ray showed a category 1/2.

The controversy with respect to these opinions arose when Dr. Rosenberg, in a letter dated July 11, 2003, stated that he did not find any evidence of pneumoconiosis, yet, the Commissioner issued a statement to the parties that a consensus had been reached. The Commissioner's letter did not indicate whether the consensus was in favor of or against Meeks' claim. Birdeye Coal then challenged the consensus finding as provided in 803 KAR 25:010 §2(7).

Once a finding of consensus is challenged, the administrative regulations allow a party to ask the administrative law judge (ALJ) to permit cross-examination of the medical provider at his/her or its expense. 803 KAR 25:010 §4(5). Consensus is defined by statute, KRS 342.316(3)(b)4f,

and if a consensus is not reached, the ALJ is given the authority to "decide the claim on the evidence submitted." KRS 342.316(3)(b)4e.

In Meeks' case no one took the testimony of Dr. Rosenberg and the ALJ determined that Dr. Rosenberg's opinion was essentially meaningless since the ILO form and his letter were inconsistent. The ALJ concluded that the Commissioner's finding of a consensus was in error.

However, the ALJ did not reach the merits of Meeks' claim since he decided Meeks had not given due and timely notice to Birdeye Coal. In reaching this conclusion the ALJ stated:

> "Clearly, when [Meeks] filed his federal black lung claim, Meeks had to have had some reason to believe that he suffered from or might suffer from the disease of coal workers' pneumoconiosis. Meeks's filing of a federal black lung claim, in conjunction with his 10 year history of breathing difficulties and his award of social security disability benefits for those breathing difficulties, indicate that Meeks had symptoms reasonably sufficient to apprise him that he had contracted coal workers' pneumoconiosis by sometime in 2000.

The WCB affirmed this reasoning. We disagree for the following reasons:

The evidence in the case shows that Meeks suffered from breathing difficulties beginning in the early 90's. He evidently sought treatment from a Dr. S.J. Sartori whose records are in evidence and show that the doctor wanted Meeks to have a

pulmonary evaluation done, but Meeks apparently never did this. Dr. Sartori's records do not mention pneumoconiosis or black lung. Meeks testified he eventually stopped seeing the physician.

Meeks also testified that he first thought he might have black lung in 2000. Thus, he filed a claim for federal black lung benefits and was sent to Dr. Baker. Dr. Baker found as a result of X-Ray examination that Meeks did not have pneumoconiosis. Meeks did not learn this from Dr. Baker, rather, an employee with the federal system informed him he did not have black lung. At that point he did not pursue the claim. Sometime in 2000 Meeks was awarded Social Security Disability due to his breathing difficulties. He admitted he had not returned to work because of his breathing problems.

Meeks returned to Dr. Baker for another X-Ray in 2003. This time Dr. Baker found Meeks to be suffering from pneumoconiosis. Birdeye Coal contends Dr. Baker told Meeks in 2000 that he had a "percentage of black lung." This conclusion is based on Meeks' testimony that Dr. Baker had told him that. However, it is unclear whether Meeks was speaking of the year 2000 or 2003. It is more likely he was referring to 2003 since in another part of his testimony he stated Dr. Baker did not inform him of the results of his X-Ray in 2000.

KRS 342.316(2) requires a claimant to give notice of a potential claim for occupational disability to his or her employer "as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur."

The notice provision of this statute is to be construed liberally in favor of the worker in order to further the purposes of the Workers' Compensation Act. Lewallen v. Peabody Coal Co., 306 S.W.2d 262, 264 (Ky. 1957). In a case such as Meeks' where the employee has ceased working, the question is whether there are circumstances from which it can be inferred that the employee knows he cannot work or should realize his ability to work is impaired by the disease. Newberg v. Slone, 846 S.W.2d 694, 697 (Ky. 1992); Blue Diamond Coal Co. v. Stepp, 445 S.W.2d 866, 868 (Ky. 1969); Whitaker Coal Co. v. Melton, 18 S.W.3d 361, 365 (Ky.App. 2000).

The burden is on the claimant to show that he gave due and timely notice as required by the law. Newberg, 846 S.W.2d at 696; Special Fund v. Francis, 708 S.W.2d 641, 643 (1986). But the notice requirement does not possess the stringency attributed to it by the WCB and the ALJ in this case.

There is no doubt Meeks had breathing difficulties, obtained Social Security Disability benefits for his condition, and filed a rejected claim for black lung benefits all by the year 2000. However, breathing difficulties are not sufficient to trigger Meeks' obligation to give notice. Twin Peak Coal Co. v. Woolum, 467 S.W.2d 134, 136 (Ky. 1971); Inland Steel Co. v. McCarey, 467 S.W.2d 137, 138 (1971). Neither, we think, is an award from Social Security Disability for those breathing difficulties sufficient. There is no evidence in the record apart from Meeks' own testimony that he received an award due to breathing difficulties. Thus, there is no way to know the causation for Meeks' breathing difficulties found by the Administration.

The filing of a claim for federal black lung benefits has long been recognized in this jurisdiction as insufficient to put Meeks on notice that he may suffer from an occupational disease so that he must in turn notify his employer. Kirkwood v. John Darnell Coal Co., 602 S.W.2d 170, 171 (Ky. 1980). This is because the criteria for proving a federal claim versus that for proving a state claim is different. Id. In addition, Meeks was told that he did not have black lung in 2000 and did not pursue the claim any further.

The ALJ's opinion in Meeks' case rests upon the assumption that when he filed a federal black lung claim he must

have thought he suffered from pneumoconiosis because he also suffered from breathing difficulties. We believe this conclusion to be in error based on the case law cited above and because, although Meeks may have experienced symptoms consistent with black lung, those symptoms are also consistent with many other afflictions.

In 2000 there was no evidence to support a "claim" for coal workers' pneumoconiosis under KRS 342.732 since such a claim requires positive X-Ray evidence. The only X-Ray evidence that existed was from Dr. Baker which was communicated to Meeks as negative for black lung. Thus, it is our view that the ALJ's finding is clearly erroneous and the evidence compels a different result. Coal-Mac, Inc. v. Blankenship, 863 S.W.2d 333, 335-336 (Ky.App. 1993). In failing to correct this, the WCB has "committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, 827 S.W.2d 685, 688 (Ky. 1992).

Birdeye Coal's cross-petition for review maintains the evidence from the panel of 3 B-readers explained above should be interpreted as compelling a result that Meeks does not have pneumoconiosis. The ALJ determined Dr. Rosenberg's opinion to be essentially meaningless since a letter from him expressed views inconsistent with his views as expressed on the ILO form

he filed. Thus, the ALJ found that no consensus had been reached.

We agree with the ALJ on this point. Challenging the consensus as Birdeye Coal did here allows any party to take the deposition of the medical provider with leave from the ALJ. 803 KAR 25:010 §4(5). Birdeye Coal chose not to pursue this route. Consensus is defined by statute, KRS 342.316(3)(b)4f, and it is within the authority of the ALJ to determine as fact in the first instance whether or not statutory requirements are met. A simple reading of the statute shows that the ALJ was correct in determining that no consensus was reached once Dr. Rosenberg's report is disregarded because Dr. Dineen and Dr. McLaughlin's readings are not "both in the same major category and within one (1) minor category" of each other. KRS 342.316(3)(b)4f. If consensus is not reached, the ALJ must decide the claim on the evidence submitted. KRS 342.316(3)(b)4e.

Even if we were to agree that a consensus was reached, it would not lead to dismissal of Meeks' claim as advocated by Birdeye Coal. KRS 342.316(13) creates a rebuttable presumption of correctness of the consensus that may be overcome by clear and convincing evidence.

The finding of a lack of due and timely notice is reversed while the finding that no consensus was reached is

affirmed. The case is remanded for further consistent proceedings.

ALL CONCUR.

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