

RENDERED: JUNE 17, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001123-WC

BILL GRAY, JR.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-01614

JAMES RIVER COAL/BEECH FORK
MINE; HON. J. LANDON OVERFIELD,
FORMER CHIEF ADMINISTRATIVE
LAW JUDGE; HON. ROBERT L.
SWISHER, CHIEF ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Bill Gray, Jr., petitions this Court to review an Opinion of the Workers' Compensation Board (Board) entered January 26, 2015, which affirmed an Order of the Administrative Law Judge (ALJ) dismissing Gray's claim for occupational disease as time-barred. We affirm.

On August 22, 2014, Gray filed a claim for workers' compensation benefits alleging that he had contracted pneumoconiosis, chronic bronchitis, and chronic obstructive pulmonary disease as a result of working over forty years as an underground coal miner in Kentucky. His last date of employment with James River Coal/Beech Fork Mine (James River) and his last date of coal dust exposure were on August 24, 2009. James River filed a motion to dismiss Gray's claim for benefits as time-barred under Kentucky Revised Statutes (KRS) 342.316(4)(a). By Order rendered October 29, 2014, the ALJ granted the motion to dismiss and determined that Gray's claim was indeed time-barred under KRS 342.316(4)(a):

KRS 342.316(4)(a) requires the filing of a claim for an occupational disease three (3) years from the last injurious exposure or after the employee first experiences a distinct manifestation of an occupational disease. However, the same statute creates a statute of repose of five (5) years from the date of last injurious exposure. Plaintiff's response argues Plaintiff's claim is not barred by the statute [of] limitations as he filed his claim within the five (5) year period of repose.

Plaintiff's supporting medial evidence is in the form of a U.S. Department of Labor Coal Mine Workers Pneumoconiosis medical report dated February 5, 2011. Attached to the report is an ILO report of a chest x-ray taken February 5, 2011[,] and read that same day by Glenn R. Baker, M.D., noting Plaintiff has evidence of pneumoconiosis. While Plaintiff's claim was filed within

five (5) years of his last exposure, it was obviously not filed within three (3) years of the date of the first distinct manifestation of an occupational disease in the nature of a February 5, 2011[,] x-ray read as positive for pneumoconiosis. . . .

Being dissatisfied with the ALJ's Order dismissing his claim, Gray sought review with the Board. By Opinion entered June 26, 2015, the Board also determined that Gray's claim was barred by the statute of limitations contained in KRS 342.316(4)(a):

Dr. Baker found Gray's disease had adversely affected the respiratory system, producing a mild pulmonary impairment. The pulmonary impairment is a departure from the normal function of the lungs and constitutes a symptom. Again, Dr. Baker related this impairment to CWP [Coal Workers' Pneumoconiosis] and informed Gray of the relationship in February 2011. Dr. Baker's report is substantial evidence supporting the conclusion Gray had a distinct manifestation of an occupational disease on February 5, 2011. The CALJ [Chief Administrative Law Judge] correctly ruled a claim filed more than three years after February 5, 2011[,] is barred by KRS 342.316.

Opinion at 6. Our review follows.

When reviewing the Board's opinion, we will only reverse if the Board overlooked or misconstrued the law or flagrantly erred in the evaluation of evidence causing gross injustice. *W. Baptist Hospital v. Kelly*, [827 S.W.2d 685 \(Ky. 1992\)](#). In doing so, we must also examine the ALJ's Opinion. As fact-finder, it is within the sole province of the ALJ to judge the weight and credibility of evidence. *Abbott Labs. v. Smith*, [205 S.W.3d 249 \(Ky. App. 2006\)](#). As Gray was unsuccessful before the ALJ, he must demonstrate that the record compels a

finding in his favor in order to prevail. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984).

Gray contends that the Board committed reversible error by affirming the ALJ's dismissal of his workers' compensation claim as time-barred under KRS 342.316(4)(a). Specifically, Gray argues that he had no symptoms of pneumoconiosis in February 2011 when he was seen by Dr. Glen Baker. Gray maintains that his only symptom was dizziness which was related to a heart condition and not to pneumoconiosis. Thus, Gray argues that his claim was not time-barred by KRS 342.316(4)(a). We disagree.

KRS 342.316(4)(a) provides:

(4) (a) The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, whichever shall last occur; and if death results from the occupational disease within that period, unless a claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or its insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease or asbestos-related disease, a claim

must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.

Recently, the Supreme Court of Kentucky commented upon the three-year statute of limitations contained in KRS 342.316(4)(a):

[T]he language in KRS 342.316(4)(a) . . . requires a claimant to file an occupational disease claim within three years after the last injurious exposure to the hazards of the disease or within three years of the manifestation of the disease, whichever is later, acts as a statute of limitations, triggered by either of those two events. KRS 342.316(4)(a) also contains a repose provision, which states that no claim may be filed more than five years after the date of last exposure, other than for claims related to exposure to asbestos or radiation, which must be filed within 20 years of last exposure.

Consol of Ky., Inc. v. Goodgame, 479 S.W.3d 78, 83 (Ky. 2015). KRS 342.316(4)(a) does contain a three-year statute of limitation that is triggered when the employee first experiences symptoms of the occupational disease which is reasonably sufficient to appraise such employee of the occupational disease.

In this case, the record contains a letter written by Dr. Baker and signed on February 5, 2011. In that letter, Dr. Baker recounts that he performed a medical examination upon Gray on February 5, 2011. Pursuant to that examination and other diagnostic testing, Dr. Baker opined:

On the basis of my examination the patient has a chronic lung disease secondary to his coal mine employment. This is based on the presence of both clinical and legal pneumoconiosis.

With clinical pneumoconiosis he has x-ray changes of Coal Workers Pneumoconiosis, category 1/1, on basis of 2000 ILO Classification. He worked 41 to 42 years in

the underground mines at the face of the mine. He has no other condition to account for these x-ray changes. This is presumptive evidence these changes are, in fact, due to coal dust and represent Coal Workers Pneumoconiosis. The only way to prove this is to do a lung biopsy, which is not clinically indicated at this time.

He also has legal pneumoconiosis. He has COPD and a symptom complex of chronic bronchitis. These can be caused by coal dust exposure. As he has only an approximate 2-pack year history of smoking and has not smoked any for over 40 years, the coal dust is the most likely cause of these conditions. On this basis, his condition has been significantly contributed to and substantially aggravated by coal dust exposure from his coal mine employment and represents legal pneumoconiosis.

His pulmonary function studies show a mild obstructive defect and his arterial blood gases are normal. On this basis, he does have a mild impairment but he would have the respiratory capacity to perform the work of a coal miner of comparable work in a dust free environment. His medical problems, however, with his cardiac condition, and arthritis of his knees as well as hypertension may be disabling in and of themselves. He would have the respiratory capacity to do the work of a coal miner in and of itself.

His Coal Workers Pneumoconiosis 1/1, COPD with a mild obstructive defect, and chronic bronchitis have an adverse effect on his respiratory system and contributes to his mild pulmonary impairment due significantly to his coal dust exposure.

According to Dr. Baker, Gray suffered from mild obstructive pulmonary defect, chronic obstructive pulmonary disease, chronic bronchitis, and pneumoconiosis on February 5, 2011. The doctor also concluded that these medical conditions were caused by Gray's exposure to coal dust during his work as a coal miner for over 40 years. Importantly, Dr. Baker noted that these medical conditions caused Gray to

experience an adverse effect on his respiratory system and a mild pulmonary impairment. From Dr. Baker's letter, there exists substantial evidence in the record that Gray experienced pulmonary symptoms caused by coal dust exposure and was informed of same in February 2011. Consequently, we conclude that the three-year statute of limitations contained in KRS 342.316(4)(a) was triggered by at least February 5, 2011. The record reflects that Gray filed his claim for workers' compensation benefits on August 24, 2014, which is clearly outside the three-year statute of limitations.

To summarize, we are of the opinion that the Board properly upheld the decision of the ALJ that dismissed Gray's claim as time-barred pursuant to KRS 342.316(4)(a).

For the foregoing reasons, the Opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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