RENDERED: May 2, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-2430-WC

LARRY GILLIAM — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
NO. WC-91-003494

KENTUCKY DEPARTMENT OF
MINES AND MINERALS;
SPECIAL FUND;
HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, GUIDUGLI and MILLER, Judges.

GUIDUGLI, JUDGE. Larry W. Gilliam, pro se appellant, asks us to review an opinion entered by the Workers' Compensation Board (Board) on August 2, 1996, which affirmed the Administrative Law Judge's (ALJ) decision dismissing appellant's workers' compensation claim against Kentucky Department of Mines and Minerals and the Special Fund, and additionally remanding the matter to the ALJ to impose sanctions against appellant to the extent of appellees' attorney fees and expenses incurred in defending this appeal.

We have examined the record in this matter and find no error and therefore, affirm the decision of the Board. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). As to the imposition of sanctions against appellant, despite our reluctance to impose sanctions in most cases, we find the facts of this case and the actions of appellant justify such unusual action on our part. The actions of appellant, who claims to have some legal education and/or training, proves the old adage that "a little knowledge can be dangerous."

Since the Board's discussion of the pertinent facts and the applicable statutory and case law cannot be improved upon, and since the Board succinctly states the basis for the imposition of sanctions, we adopt and set forth the Board's opinion in its entirety as our own:

> Larry W. Gilliam ("Gilliam") appeals from the decision of Hon. Ronald W. May, Administrative Law Judge ("ALJ"), rendered March 28, 1996 and his order denying Gilliam's petition for reconsideration on April 11, 1996. On appeal, Gilliam contends that due to mistakes of law and an incorrect understanding of the evidence the ALJ erred in finding he was not entitled to RIB benefits.
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> In its brief, Kentucky Department of Mines & Minerals ("Department") contends that Gilliam's appeal is so lacking in merit as to be without reasonable ground and that he should be required to pay the fees and costs associated with the defense of the appeal. The Department states that not only was the ALJ's decision supported by substantial evidence but that the evidence weighed much greater on the side of dismissal. On June 5, 1996, Gilliam filed a reply brief on substantial issues and a motion and brief requesting dismissal of the request for sanctions and a "counter-claim" for attorney's fees and costs expended.

The first appeal of this action was from a dismissal based on an interpretation of the ALJ of KRS 342.732(1)(a) to the effect that the legislative intent of his provision was that RIB benefits were reserved for coal workers and are to be paid by coal mine employers. Gilliam had been employed as a mine safety analyst by the Department since 1984 after having worked in the mining industry for more than ten years. This decision was reversed by the Board which was upheld by the Court of Appeals. The Court of Appeals' rested its action on the broadness of the term "mining industry" as is used in section (1)(a) of KRS 342.732. The claim was then remanded for taking of additional evidence and a determination of the remaining issues.

The ALJ concluded, based on the x-ray interpretations before him, that Gilliam had not met his burden of proof as to the existence of coal workers' pneumoconiosis.

Gilliam submitted x-ray interpretations by Drs. Myers and Baker, each finding coal workers' pneumoconiosis and interpreting each separate x-ray as 1/0. Drs. Anderson and Jarboe each read both of these same x-rays as 0/0. Dr. Vuskovich interpreted a different x-ray as 0/0.

In his petition for reconsideration, Gilliam argued that for an award of RIB the claimant must merely have suffered an injurious exposure with x-rays and medical reports which validate a radiographic classification of 1/0. In support of this, he contends that KRS 342.732(1)(a) does not require the claimant be affected by coal workers' pneumoconiosis, ignoring, of course, the language stating that the classification must result from exposure to coal dust. More importantly, it plainly states that <u>if</u> the ALJ finds Category 1/0, 1/1 or 1/2 benefits shall be given; not that any evidence of one of those readings is adequate.

On appeal, Gilliam further argues that he has complied with KRS 342.316(3)(d) in that he has filed two x-rays and reports thereof and that at that point the burden should have

been shifted to the employer to rebut the "presumption" of pneumoconiosis with evidence proving that the claimant does not suffer from black lung disease.

KRS 342.285 provides, in part, that "the Board shall not substitute its judgment for that of the Administrative Law Judge as to the weight of the evidence on questions of fact". While so codified, case law in Kentucky is so well-established that, if there is evidence of record upon which the fact finder relied, a reviewing body may not look beyond that. Wolf Creek Collieries vs. Crum, Ky.App., 673 SW2d 735 (1984); Paramount Foods, Inc. vs. Burkhardt, Ky., 695 SW2d 418 (1985); McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974); and Special Fund vs. Francis, Ky., 708 SW2d 641 (1986). Although argued in a variety of ways, Gilliam's position is addressed solely to the ALJ's decision that he had failed to sustain his burden of proof to establish the existence of the disease of coal workers' pneumoconiosis. Neither KRS 342.316 nor KRS 342.732 relieve Gilliam of that responsibility. Initial evidence filed by a worker establishing the elements of injurious exposure with x-ray readings indicating the existence of the disease permit the claim to go forward. However, when contradictory evidence is submitted as was done by the Department herein, it is the ALJ who, as fact finder, must determine which evidence to believe. Pruitt vs. Bugg Brothers, Ky., 547 SW2d 123 (1977); and Smyzer vs. B. F. Goodrich Chemical Co., Ky., 474 SW2d 367 (1971). Although Gilliam takes issue with some of the principles based upon the underlying facts in those cases, the principle itself is so well-founded in Kentucky workers' compensation law that we frequently wonder why we must remind parties of those standards.

As often experienced by our Administrative Law Judges, this ALJ was presented with evidence from two physicians who interpreted x-rays as being positive for pneumoconiosis. Three physicians offered evidence indicating no evidence of pneumoconiosis. While not required to do so, this ALJ provided to the

parties additional reasoning as to why he found Gilliam's evidence lacking in consistency and credibility. See Big Sandy Community Action Program vs. Chaffins, Ky., 502 SW2d 526 (1973).

Gilliam further implies that his physicians were "treating physicians" and therefore should be accorded more weight. In the first instance, we find no evidence of record that either of these physicians were treating physicians. They apparently did conduct a physical examination of Gilliam although such a physical examination is of minimal benefit pursuant to KRS 342.732(1)(a). However, even if these individuals were treating physicians, no additional weight need be accorded to them. Yocom vs. Emerson Electric, Ky.App., 584 SW2d 744 (1979). Gilliam relies on our Court of Appeals in Shedd Bartish Foods vs. Bratcher, Ky.App., 568 SW2d 54 (1978). However, our Supreme Court shortly thereafter overruled this opinion in Yocom vs. Bratcher, Ky., 578 SW2d 44 (1979) and specifically stated that "it was published contrary CR 76.28. It shall not be cited or sued as authority in any other case". Such instructions from our Supreme Court in reaching that conclusion recognized that it was in direct contradiction to a number of cases previously rendered by our Supreme Court. See, for example, Codell Construction Co. vs. Dixon, Ky., 478 SW2d 703 (1972).

In order to prevail, it was incumbent upon Gilliam to establish that the evidence compelled a contrary result. Special Fund vs. Francis, Supra. It clearly did not.

We now turn to the issue of sanctions. The Department in its respondent's brief requested sanctions against Gilliam for filing a frivolous appeal in contravention of KRS 342.310. At that point, the record increased immeasurably with responses, replies, motions and even a counterclaim by Gilliam for costs and expenses. We recognize that Gilliam is a pro se claimant although he constantly reminds everyone that he is now attending law school. First, with regard to his "counterclaim for costs and expenses", it

> deals solely with the initial appeal in this action. Any such request would only have been appropriate during the pendency of that claim. Even had Gilliam pursued a request for sanctions at that time, we believe it would have failed. At the time the ALJ entered his original decision and that decision was appealed first to this Board and then to the Court of Appeals, the issue as then framed had not been finally determined. In fact, the issue was not put to rest until the Supreme Court's decision in McKenzie vs. Whayne Supple Co., Ky., 898 SW 2d 484 (1995). The filing of this request, in our opinion, in and of itself was without reasonable foundation.

This reviewing body is reluctant to assess sanctions on either plaintiffs or defendants. When an appeal is concluded adversely to the appealing party, we look beyond the mere straight-forward issue in an attempt to ascertain an implication of "bad faith". Roberts vs. Estep, Ky., 845 SW2d 544 (1993). In doing so, many factors are considered, including whether there were regular misstatements of fact and law by a party. Here we have both. A pro se claimant is held to the same standard as an attorney representing a party. In reality, pro se claimants frequently are given the benefit sof the doubt in questionable claims. Here we do not believe that such benefit of the doubt should be afforded. Accordingly, this matter will be remanded in part to the ALJ with directions that counsel for the Department shall submit within thirty (30) days to the ALJ a statement of costs and time expended on this appeal and an order issued directing reimbursement by Gilliam for the attorney fees and expenses incurred.

> Accordingly, the decision of Hon. Ron W. May, Administrative Law Judge, is hereby **AFFIRMED**, this appeal is **DISMISSED** and this matter if **REMANDED** for further proceedings in accordance with this opinion.
>
> **ALL CONCUR.**

The opinion of the Workers' Compensation Board is affirmed.

DYCHE, JUDGE, CONCURS.

MILLER, JUDGE, CONCURS IN PART AND DISSENTS IN PART BY SEPARATE OPINION.

MILLER, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I concur with the Majority Opinion, except as to imposition of the sanctions against appellant. I would reverse the Workers' Compensation Board upon this issue.

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