RENDERED: September 26, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 96-CA-002781-WC

ANDY HATFIELD APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-94-12582

NEW HORIZONS COAL, INC.;
HON. DONNA H. TERRY,
CHIEF ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD APPELLEES

OPINION
VACATING AND REMANDING

* * * * *

BEFORE: JOHNSON, KNOPF and MILLER, Judges.

JOHNSON, JUDGE: Andy Hatfield (Hatfield) petitions for review of a September 13, 1996 opinion of the Workers' Compensation Board (Board) which affirmed Chief Administrative Law Judge Terry's (CALJ Terry) denial of Hatfield's motion to reopen his case. We vacate the opinion of the Board and remand to the ALJ for further proceedings.

In order to more clearly understand this case, we need to review its entire convoluted history.[1] On March 28, 1994, Hatfield

[1] This task is made even more difficult due to the poor state of the record since various documents are either missing or filed out of order.

filed an application for retraining incentive benefits (RIB) against his employer, New Horizons Coal, Inc. (New Horizons), for which he had worked since 1992. See Kentucky Revised Statutes (KRS) 342.732(1)(a). When previous employment was considered, Hatfield had been exposed to coal dust for about 18 years. At his hearing on October 11, 1994, Hatfield presented medical evidence based upon a December 1993 x-ray. Hatfield did not present any evidence from his pulmonary examinations conducted on March 17, 1994, and May 19, 1994.

On December 28, 1994, nine months from the time Hatfield filed his claim, the Administrative Law Judge (ALJ) ordered that Hatfield receive benefits pursuant to his RIB claim. However, because Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995), was not final at that time, the ALJ ordered that Hatfield's case be held in abeyance. Hatfield's case raised the issue of whether the 1994 legislative amendments regarding the method for paying RIB would apply to his claim retroactively. Apparently, the parties and the ALJ expected Aero Energy to resolve this issue.

On February 22, 1995, Hatfield filed an affidavit which stated that he was no longer employed at New Horizons and that he desired that the payment of his RIB award begin. The ALJ entered an order on March 9, 1995, which stated that Hatfield would "receive benefits on a weekly basis in accordance with my Order dated December 28, 1994[,] so long as he remains unemployed in the coal mining industry." Hatfield then filed a petition for reconsideration and requested that the ALJ reconsider the March 9, 1995 order and add a provision to reflect that after Aero Energy

was finalized that it would control the method of payment. The ALJ entered such an order on June 21, 1995.

On May 24, 1995, Hatfield apparently filed a motion to reopen the RIB award alleging that his condition had worsened.[2] In his motion, he specifically asked the ALJ to "[g]rant his Motion to Amend his claim to File a Form 102 and Reopen his claim; and setting this matter for a proofing schedule."[3] The motion did not ask that the claim be removed from abeyance. The two medical reports that he attached to the motion were based upon examinations that were performed on March 17, 1994, and May 19, 1994. As we noted previously, these examinations were before the October 11, 1994 hearing on Hatfield's RIB claim. On April 9, 1996, Hatfield filed a renewed motion to reopen which specifically incorporated all of the May 24, 1995 motion to reopen language and moved the ALJ to "[g]rant his Renewed Motion to Reopen and Amend his claim to file a Form 102 and Reopen his claim; and set this matter for a proofing schedule."

On May 14, 1996, CALJ Terry ordered that Hatfield's motion to reopen be denied. The order stated that (1) the award was in abeyance and thus nonfinal and therefore was not ripe for reopening; (2) only medical reports obtained after the original proceeding may be used to support a motion to reopen; and (3) the

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[2] The record contains a "Renewed Motion to Reopen" filed on April 9, 1996, that includes the following handwritten notation: "Original motion is on terminal as filed May 24, 1995. It cannot be found." The record contains two copies of a motion to reopen dated May 23, 1995, that have been filed as attachments to other pleadings.

[3] Apparently Hatfield filed a Form 102 with his motion to reopen.

application be stricken from the record since it appeared to be an attempt to circumvent KRS 342.125(2)(a).[4] CALJ Terry's order made no reference to Hatfield's request that his claim be amended. Hatfield appealed the denial of his motion to the Board.

In a September 13, 1996 opinion, the Board affirmed CALJ Terry's denial of Hatfield's motion to reopen; however, the Board affirmed on other grounds. The Board stated:

> While we cannot conclude that Hatfield's motion to reopen was premature under the circumstances in this case, we nevertheless conclude that the denial of Hatfield's motion to reopen was correct under the circumstances presented here. We further cannot agree with Hatfield's assertion that because his award had never become final that the provisions under KRS 342.125(2)(a) did not apply to his claim.

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[4] This reopening statute provides:

> Upon the application of the affected employee and a showing of progression of his previously diagnosed occupational pneumoconiosis resulting from exposure to coal dust and development of respiratory impairment due to that pneumoconiosis, the administrative law judge may review an award of a retraining incentive benefit because of the diagnosis, and upon a finding of respiratory impairment due to that pneumoconiosis shall make an award for benefits as provided in KRS 342.732. Such a reopening may also occur upon a showing of progression of respiratory impairment in a claim for which benefits were previously awarded under the provisions of KRS 342.732. An application for review under this subsection shall be made within one (1) year of the date the employee knew or reasonably should have known that a progression of his disease and development or progression of respiratory impairment have occurred. Review under this subsection shall include a review of all evidence admitted in all prior proceedings.

The Board's Opinion then stated (1) that Hatfield failed to show any progression of the disease; (2) that he used medical reports from examinations performed before and during the pendency of his claim; and (3) that his motion was brought over a year from the time he was aware of the impairment and was thus barred under KRS 342.125(2)(a). The Board, citing Slone v. Jason Coal Co., Ky., 902 S.W.2d 820 (1995), also stated that a motion to reopen cannot be based upon a condition known to Hatfield during the pendency of the original action but not litigated. For these reasons, the Board affirmed CALJ Terry's denial of Hatfield's motion to reopen. This appeal followed.

The standard used by this Court to review a Board opinion 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." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

Hatfield argues that he "was simply attempting to submit medical evidence which had not been submitted in the original claim . . . ." As Hatfield stated in his motions, he wanted to "amend" and "reopen" his claim, "setting this matter for a proofing schedule." Under the applicable statutes and regulations as we understand them, Hatfield could not have reopened his claim;[5] but he could have sought an extension of proof time,[6] or perhaps have

[5] KRS 342.125 refers to reopening "an award." This necessarily requires that the award be final.

[6] See 803 KAR 25:010 § 16 (1996).

sought to amend his claim.[7] Since Hatfield's claim was held in abeyance, it was not final and could not be reopened. Furthermore, since the claim was in abeyance, the order dated May 14, 1996, by CALJ Terry that denied his motion was an interlocutory order and not subject to appeal to the Board. Thus, the Board erred as a matter of law when it affirmed the nonfinal order.

Accordingly, we vacate the opinion of the Board and remand this matter to the ALJ for further proceedings in accordance with this Opinion.

KNOPF, JUDGE, CONCURS.

MILLER, JUDGE, DISSENTS.

[7] See 803 KAR 25:010 § 4 (1996).

BRIEF FOR APPELLANT:

Hon. Ronald C. Cox
Harlan, KY

BRIEF FOR APPELLEE, NEW HORIZONS:

Hon. Ralph D. Carter
Hazard, KY