RENDERED: October 31, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-0604-WC

FOUR B & C COAL COMPANY — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD WC-88-015479

MICHAEL R. EPLING, DECEASED; SHEILA EPLING, ON BEHALF OF HIS ESTATE AND HERSELF; STEVEN, ANGELA & JEREMIAH EPLING, SURVIVING CHILDREN; SPECIAL FUND; MARK C. WEBSTER, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

AND

NO. 97-CA-0737-WC

ROBERT L. WHITTAKER, ACTING DIRECTOR OF SPECIAL FUND — APPELLEE/CROSS-APPELLANT

v. — CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD WC-88-015479

FOUR B & C COAL COMPANY — APPELLANT/CROSS-APPELLEE

MICHAEL R. EPLING, DECEASED; SHEILA EPLING, WIDOW; MARK C. WEBSTER, ADMINISTRATIVE LAW JUDGE; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION AND ORDER DISMISSING

* * *

BEFORE: GUDGEL, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This petition and cross-petition for review of a decision of the Workers' Compensation Board (Board) contend that the Board substituted its judgment for that of the administrative law judge (ALJ) on a question of fact when it reversed and remanded the ALJ's determination that Michael Epling (Epling) had failed to present a prima facie showing of an increase in occupational disability on a motion to reopen. Four B & C Coal Company (Four B & C) also argues that requiring it to defend the reopened claim when the claimant has died and cannot be reexamined violates its Fourteenth Amendment rights to due process and equal protection. Because we do not believe that the Board's order is final and appealable, we dismiss both petitions for review.

Epling was injured on April 29, 1988 and filed a claim based on both physical and psychological injury. He was thereafter awarded benefits for 50% occupational disability. In 1994, Epling filed a motion to reopen, alleging a worsening of occupational disability. The motion was granted to the extent that proof was allowed to be taken. The administrative law judge assigned to the case on the merits, however, concluded that Epling's physiological condition had not worsened to the degree

that there was an increase in occupational disability and that any increase in his psychiatric condition was not work related.

Epling filed a second motion to reopen on August 5, 1996, once again alleging an increase in occupational disability due primarily to his psychiatric condition. Appended to the motion were various medical records from a hospital in Pikeville and reports from Drs. Stuart Cooke and D. M. Sizemore. The ALJ found that Epling had failed to make a prima facie showing of an increase in occupational disability and denied the motion.

The Board reversed, concluding that Epling had satisfied the prima facie standard of Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972). Accordingly, the Board remanded the case to the Frankfort motion docket for the issuance of an appropriate order.

Before this Court can review a decision of the Board, the Board's opinion must be final and appealable. This one is not. In North Am. Refractories Co. v. Day, 284 Ky. 458, 145 S.W.2d 75 (1940), our highest Court reaffirmed that a final order is one that:

> 'either terminates the action itself, decides some matter litigated by the parties, or operates to divest some right, in such a manner as to put it out of the power of the court making the order after the expiration of the term, to place the parties in their original condition.'

Id. at 77, quoting Maysville & Lexington R. Co. v. Punnett, 15 B.Mon. 47, 48 (1854). The Court went on to explain that an order such as the Board's, which remands a case to the ALJ without

passing on the merits, is not final and appealable. This is so because neither party has been deprived of a vested right. The effect of the Board's decision was merely to order that a hearing be held to determine whether Epling's award should be increased. It did not determine Four B & C's liability for, or Epling's right to, compensation. Nor did it disturb the existing award in any way.

To paraphrase the Day Court:

> If, after a hearing, the [ALJ] modifies or [increases] the award made to appellee, [his or her] order to that effect would be a final and appealable order and on appeal therefrom [appellant] could then present the question which [it] attempted to raise by the petition for review filed in [this] court, namely, that the Board wrongfully reopened the case but, until the Board makes an order which is in some respect a final determination of the right to or liability for compensation, that is, until it sets aside, modifies or reduces the existing award, no appeal lies.

Day, 145 S.W.2d at 77.

Accordingly, because we adjudge that the Board's opinion was not final and appealable, we do not have jurisdiction to entertain the petition and cross-petition for review.

It is hereby ORDERED that these appeals be, and they are, DISMISSED.

ALL CONCUR.

Entered: October 31, 1997 Wil Schroder
JUDGE, COURT OF APPEALS

BRIEF FOR APPELLANT/CROSS-APPELLEE, FOUR B & C COAL COMPANY:

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