

RENDERED: February 20, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3363-WC

ROBERT E. SPURLIN, DIRECTOR
OF SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
NO. WC-92-14040

MARTIN SHEPHERD, JR.;
BLUE DIAMOND COAL COMPANY, INC.;
and HONORABLE DONALD C. SMITH,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

AND: NO. 97-CA-0011-WC

BLUE DIAMOND COAL COMPANY, INC.

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
NO. WC-92-014040

ROBERT E. SPURLIN, DIRECTOR
OF THE SPECIAL FUND;
MARTIN SHEPHERD, JR;
HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
REVERSING ON APPEAL AND CROSS-PETITION

* * * * *

BEFORE: DYCHE, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Robert E. Spurlin, Director of the Special Fund (Special Fund) and Blue Diamond Coal Company, Inc. (Blue Diamond) appeal from an order of the Workers' Compensation Board (the Board) entered November 18, 1996, which affirmed an award entered by the Administrative Law Judge (ALJ) on March 27, 1996. We reverse.

Martin Shepherd (Shepherd) has worked as an underground coal miner for twenty years. His last date of exposure to coal dust was January 11, 1991, while he was employed by Blue Diamond. Shepherd was laid off on that date, and has not returned to work.

In April 1992, Shepherd filed an application for adjustment of claim alleging entitlement to benefits for pneumoconiosis (the 1992 claim). In support of his claim, Shepherd introduced medical records from Dr. W. F. Clarke and Dr. Glen Baker (Dr. Baker), both of whom diagnosed Category I pneumoconiosis. Blue Diamond introduced medical records from Dr. Ballard Wright (Dr. Wright) and Dr. John Myers, Jr. (Dr. Myers), both of whom found no evidence of pneumoconiosis. Pulmonary function studies conducted by Dr. Wright and Dr. Myers indicated FVC and FEV1 values greater than 80%.

In an opinion entered January 30, 1993, Administrative Law Judge Lloyd Edens (ALJ Edens) held that Shepherd had failed to show that he had contracted pneumoconiosis and dismissed his claim. ALJ Edens indicated that he relied on the medical records

of Dr. Wright and Dr. Myers in reaching his decision. Shepherd did not appeal ALJ Eden's decision.

On June 22, 1995, Shepherd filed a verified motion to reopen his 1992 claim, alleging progression of both pneumoconiosis and respiratory impairment. Shepherd's motion to reopen was granted, and the parties submitted their proof.

Shepherd submitted medical records from Dr. William Anderson (Dr. Anderson), who saw him on May 17, 1995. According to Dr. Anderson's records, chest x-rays showed Category 1/1 pneumoconiosis. Dr. Anderson's pulmonary function studies were invalid due to excess variation.

Shepherd also introduced additional records from Dr. Baker, who saw Shepherd again on October 18, 1995. Dr. Baker evaluated x-rays performed on that date and diagnosed Category 1/0 pneumoconiosis. Dr. Baker reported a FVC of 69.3% and an FEV1 of 67.8% which he attributed to exposure to coal dust and smoking.

Blue Diamond submitted additional records from Dr. Wright, who saw Shepherd again on August 19, 1995. Again, Dr. Wright found no evidence of pneumoconiosis upon reviewing the chest x-rays. Dr. Wright indicated an FVC rating of 81%, but an FEV1 rating of 71% which he attributed to pulmonary disease.

Blue Diamond also submitted additional records from Dr. Myers who re-evaluated Shepherd on July 24, 1995. Dr. Myers diagnosed Category 0/1 pneumoconiosis. Dr. Myers reported an FVC

of 76% and an FEV1 of 70% which he attributed to pulmonary disease and past pneumotherapy.

In an opinion rendered March 27, 1996, the ALJ held that Shepherd sustained his burden under KRS 342.125 of showing that his condition had worsened since the dismissal of the 1992 claim. The ALJ held that Shepherd was suffering from Category 1/1 pneumoconiosis which was attributable to his exposure to coal dust and awarded Tier II benefits pursuant to KRS 342.732(1)(b) for a period of 425 weeks. The Board affirmed, holding that Shepherd's claim was not barred by res judicata and that reopening was proper under KRS 342.125(1).

On cross-petition, Blue Diamond argues that KRS 342.125(1) does not control the reopening of a claim for coal workers' pneumoconiosis benefits. Instead, Blue Diamond contends that KRS 342.125(2)(a) controls, and that under that section there must be a previous award of benefits before a claim can be reopened. We agree.

KRS 342.125(1) provides:

In claims where an award or order is entered pursuant to KRS 342.730(1)(a) or (1)(b) and upon its own motion or upon the application of any party and a showing of change of occupational disability, mistake or fraud, or newly-discovered evidence, the administrative law judge may at any time reopen and review any award or order, except as provided in subsection (2) of this section, ending, diminishing, or increasing the compensation previously awarded, within the maximum and minimum provided in this chapter, or change or revoke his previous order, sending immediately to the parties a copy of his subsequent order or award. In claims where an award or order is entered pursuant to KRS

342.730(1)(c) or (d), and upon its own motion or upon the application of any party and a showing of change of medical condition, mistake, or fraud, or newly-discovered evidence, the administrative law judge may at any time reopen and review any award or order, except as provided in subsection (2) of this section, ending, diminishing, or increasing the compensation previously awarded, within the the maximum and minimum provided in this chapter, or the administrative law judge may change or revoke his previous order, sending immediatley to the parties a copy of his subsequent order or award. Any final award increasing or diminishing benefits shall require a showing of a change in occupational disability. Reopening and review under this section shall be had upon notice to the parties and in the same manner as provided for an initial proceeding hereunder but shall not affect the previous order or award as to any sums already paid thereunder. The employer shall not suspend the payment of benefits during the pendency of any reopening procedures. (emphasis added).

KRS 342.730 provides income benefits for total and permanent partial disability resulting from a work-related injury or occupational disease. However, income benefits and retraining incentive benefits (RIB) for coal workers' pneumoconiosis resulting from exposure to coal dust are provided by KRS 342.732. Because the ALJ could not have awarded benefits in the original claim under KRS 342.370, Shepherd's motion to reopen is not governed by KRS 342.125(1).

Instead, the reopening of a claim for pneumoconiosis benefits is governed by KRS 342.125(2)(a),¹ which provides:

¹ Our decision is further supported by the language of KRS 342.125(1), which specifically excepts situations controlled by KRS 342.125(2).

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. (emphasis added).

Based upon our reading of KRS 342.125(2)(a), the dismissal of Shepherd's previous claim precludes reopening because the statute contemplates the review of an "award" only. Absent an award, there is nothing to review on reopening as the dismissal of Shepherd's original claim has the effect of "leaving him in the same position as if no application had been filed." Hysteam Coal Corp. v. Ingram, 283 Ky. 411, 141 S.W.2d 570, 573 (1940).

We also agree with the contention of both Blue Diamond and the Special Fund that Shepherd's claim on reopening is barred by the doctrine of res judicata, which has been held to apply to workers' compensation cases. See Uninsured Employers' Fund v. Fox, Ky. App., 862 S.W.2d 902 (1993). As noted by the Supreme

Court in Pikeville Coal Co. v. Sullivan, Ky., 895 S.W.2d 574 (1995), "filing a subsequent claim after a finding on the merits involving the same proof and involving the same parties does not deserve close scrutiny by the ALJ, and under proper circumstances may constitute a frivolous claim." Pikeville Coal, 895 S.W.2d at 575. Although this action involves a reopening as opposed to a new claim, we feel that the language is equally applicable to attempts to reopen a claim for pneumoconiosis benefits which has previously been dismissed.

Although Shepherd cites Pikeville Coal in support of his argument that reopening of his claim was proper, we note that the Court specifically stated that "[i]f additional exposure is the basis for an allegation of increased occupational disability, then by all means a reopening would be the proper avenue for requesting relief." Id. Shepherd does not meet this requirement as the record shows that he has not been exposed to coal dust since his last date of employment with Blue Diamond.

Shepherd's reliance on Stambaugh v. Cedar Creek Mining, Ky., 488 S.W.2d 681 (1972), is also misplaced. In Stambaugh, the Court held "[w]here [KRS 342.125] expressly provides for reopening under specified conditions, the rule of res judicata has no application when the prescribed conditions are present." Stambaugh, 488 S.W.2d at 682. As Shepherd does not meet the conditions for reopening set forth in KRS 342.125(2)(a), res judicata precludes his claim.

Having considered the parties' argument on appeal, the opinion of the Workers' Compensation Board is reversed.

ALL CONCUR.

BRIEF AND ORAL ARGUMENT FOR
APPELLANT, SPECIAL FUND:

Joel D. Zakem
Louisville, KY

BRIEF AND ORAL ARGUMENT FOR
CROSS-APPELLANT, BLUE DIAMOND
COAL:

Jennifer Nicholson
J. L. Roark
Barret, Haynes, May, Carter &
Roark, P.S.C.
Hazard, KY

BRIEF AND ORAL ARGUMENT FOR
APPELLEE, MARTIN SHEPHERD:

Kenneth R. Witt
Hyden, KY