

RENDERED: July 10, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-1816-WC

BILLY HENSLEY

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-95-029041

UNION BOILER COMPANY;
SPECIAL FUND;
HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: ABRAMSON, KNOX, AND SCHRODER, JUDGES.

KNOX, JUDGE: Billy Hensley, acting pro se, appeals from the decision of the Workers' Compensation Board (Board) dismissing his administrative appeal for lack of jurisdiction.

Appellant was employed by Union Boiler Company as a carpenter. His work consisted of constructing scaffolding for

work crews to use while removing asbestos. He filed his claim for asbestosis benefits, alleging that he had been exposed to asbestos while working with the scaffolding.

Appellant was initially represented by counsel when his case was first heard by the ALJ. On October 4, 1996, the ALJ rendered his opinion and order determining that, although appellant experienced pulmonary impairment, the evidence was not sufficient to show that appellant had contracted asbestosis. After receiving the ALJ's opinion, appellant's counsel informed appellant of the ALJ's decision by way of letter dated October 7, 1996, expressing his opinion about the futility of proceeding further, and apprising appellant of his withdrawal from the case. In that letter, counsel informed appellant of his right to file a petition for review prior to October 18, 1996.

Not until November 4, 1996, however, did appellant take any action, at which time he drafted a letter to the commissioner of the Department of Workers' Claims asking the commissioner to reconsider the ALJ's decision. On November 18, 1996, appellant corresponded with the ALJ and, on November 22, 1996, again wrote the Department of Workers' Claims about his case. By order of February 11, 1997, the ALJ, noting that appellant had not sent copies of his correspondence to the other parties, gave the other parties 10 days within which to respond to appellant's efforts to seek reconsideration of the ALJ's October 1996 opinion.

By order dated March 31, 1997, the ALJ ruled upon appellant's efforts to have his case reconsidered. The ALJ

considered appellant's argument that the original opinion and order did not refer to the opinion of Dr. Wright, one of the physicians who examined appellant. In addressing that point, the ALJ acknowledged that his order should have referred to Dr. Wright's opinion, but noted that Dr. Wright did not believe appellant had asbestosis. The ALJ further ruled that, since appellant had not filed his documents for reconsideration within 14 days from the date of the ALJ's opinion and order of October 4, 1996, as is required by KRS 342.281, appellant's petition for reconsideration must be dismissed.

Appellant then appealed to the Board, which affirmed the ALJ's decision, noting that appellant had not only failed to timely file his petition for reconsideration, but also that appellant had failed to appeal to the Board within 30 days of the ALJ's October 1996 decision, as is required by 803 KAR 25:011(12). Thus, the Board concluded, it was without jurisdiction to hear appellant's appeal. The Board nevertheless expressed its view that the evidence heard by the ALJ supported his decision that appellant had failed to establish the existence of asbestosis.

In reviewing the record in this case, we cannot conclude that the Board erred in dismissing appellant's appeal. Appellant's first effort seeking reconsideration of the ALJ's ruling was by way of his letter to the commissioner for the Department of Workers' Claims, dated November 4, 1996. That letter was sent well outside of the 14-day period provided in KRS

342.281 for the filing of petitions for reconsideration. As noted by the Board, the untimely filing of a petition for reconsideration will not enlarge the period fixed for the filing of an appeal. Rice v. McCoy, Ky. App., 590 S.W.2d 340 (1979). We believe the Board properly ruled that appellant filed his appeal to the Board well outside of the 30-day period set forth in 803 KAR 25:011(12). However, like the Board, we do not believe that the evidence heard by the ALJ was so overwhelming as to compel a finding in appellant's favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). While Dr. B. T. Westerfield made a diagnosis of asbestosis, the record contains the opinions of other physicians who did not diagnose the disease of asbestosis. Given the testimony of those physicians, we agree with the Board that the evidence was not so overwhelming that no reasonable person could fail to be persuaded by it. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985).

Accordingly, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Billy Hensley, Pro Se
Salt Lick, Kentucky

BRIEF FOR UNION BOILER
COMPANY:

Ellen E. Sturgill
Prestonsburg, Kentucky

BRIEF FOR SPECIAL FUND:

David W. Barr
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