RENDERED: July 31, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 97-CA-1934-WC

MARTIN COUNTY COAL CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-03747

ALLEN WAYNE WILSON;
HON. J. LANDON OVERFIELD,
Administrative Law Judge;
and WORKERS' COMPENSATION
BOARD — APPELLEE

OPINION
AFFIRMING

* * * * * * *

BEFORE: ABRAMSON, GARDNER, and GUIDUGLI, Judges.

ABRAMSON, JUDGE: Martin County Coal Company ("Martin County") appeals from a decision of the Workers' Compensation Board

("Board") upholding a finding of the Administrative Law Judge ("ALJ") that Appellee Allen Wayne Wilson ("Wilson") is entitled to an award of retraining incentive benefits pursuant to KRS 342.732(1)(a). Martin County argues: 1) that the decision of the ALJ is clearly erroneous as it was not supported by substantial evidence; 2) that the ALJ erred in refusing to dismiss the claim for failure to give timely notice as required by KRS 342.316(2); and (3) that the finding with respect to last injurious exposure is erroneous. Having reviewed the record in light of these contentions, we affirm the decision of the Board.

Wilson was employed by Martin County from 1976 until his layoff in 1991, working as a grader operator for approximately ten years and then as a scraper operator. In the last few years of his employment by Martin County, he worked utility which included work on all surface equipment and coal loading. He never worked in the deep mines. After being laid off by Martin County in 1991, Wilson went to work for Penn Coal Company in West Virginia building a road. Wilson testified that this was road building and not coal mine work, that the soil had a clay-like consistency that produced little dust, and that he was not exposed to coal dust during his work for Penn Coal.

Wilson also testified that he spent six and one-half years in the United States Army doing general construction work, which included building roads and airports. While he was in Vietnam, he was exposed to rock dust on a consistent basis and

the airport work he did while stationed in Hawaii entailed constant exposure to coral dust. Wilson stated that his only experience smoking cigarettes occurred in Vietnam and that he has not smoked in 25 years.

Wilson testified that he first learned he had been diagnosed with the disease of pneumoconiosis on March 25, 1996, after a chest x-ray was interpreted by Dr. John E. Myers, Jr. Wilson stated that he did not recall having any previous x-rays. Through counsel, Wilson notified Martin County of the pneumoconiosis diagnosis by letter dated March 27, 1996. The record indicates that Martin County received this letter on March 30, 1996.

In support of his claim for benefits, Wilson submitted the report of Dr. Betty W. Joyce, a "B" reader and specialist in internal medicine. She performed a pulmonary examination on April 30, 1996 and relied upon an X-ray interpretation showing pneumoconiosis category 1/0 in concluding that Wilson had developed coal workers' pneumoconiosis rather than silicosis. Wilson also submitted the deposition of Dr. Myers who diagnosed category 1/1 silicosis, citing as causation Wilson's chronic dust exposure in surface mining and his work in the military with the Corps of Engineers. The ALJ took particular note of Dr. Myers statement that, "You can't really tell the difference in them [coal workers' pneumoconiosis versus mixed dust pneumoconiosis]

radiographically, and I'm sure all workers have a degree of silica exposure, probably as much as coal dust."

Martin County offered the testimony of Drs. Bruce C. Broudy and Ballard D. Wright both of whom interpreted x-rays as being completely negative. The Special Fund introduced the report of Dr. Thomas M. Jarboe who also interpreted an x-ray as negative for pneumoconiosis.

After reviewing the evidence, the ALJ entered the following finding:

> Plaintiff has the disease of coal workers pneumoconiosis, category 1/0, as a result of his coal mine employment. In making this finding I have relied on the evidence presented by the Plaintiff through the form 108 of Dr. Joyce which, in this instance, I find to be the most credible and convincing evidence in the record on the issue of the existence of the disease. Dr. Joyce voices her opinion that Plaintiff has category 1/0 coal workers pneumoconiosis "secondary to his coal dust exposure." Regardless of whether or not Plaintiff's exposure to rock dust and silica dust while in the Army was an injurious exposure, it apparently did not, according to Dr. Joyce's opinion, result in the development of silicosis. Her finding was of coal workers pneumoconiosis as a result of his coal mine exposure.

The ALJ also concluded that Wilson gave due and timely notice of his claim in that it was undisputed that he first learned that he had developed pneumoconiosis in late March, 1996 and Martin County was notified by letter of counsel received on March 30, 1996. As to last significant exposure, the ALJ

concluded that all of Wilson's exposure to coal dust occurred during his 14 ½ years of employment with Martin County. Citing Wilson's own testimony and medical opinions based upon Wilson's testimony, the ALJ determined that his work for Penn Coal did not result in an injurious exposure.

As it did in its appeal to the Board, Martin County argues that the findings of the ALJ are clearly erroneous with respect to presence of the disease of coal workers' pneumoconiosis, notice and last injurious exposure. Our review of the record in this case convinces us that the Board correctly upheld the decision of the ALJ with respect to each issue.

Martin County first argues that there is no credible evidence supporting the finding of the existence of coal workers' pneumoconiosis. On appeal, however, the Board determined that reliance upon the opinion of Dr. Joyce was well-within the prerogative of the ALJ as factfinder. We agree.

Citing McCloud v. Beth-Elkhorn Corporation, Ky., 514 S.W.2d 46 (1974), the Board emphasized that Martin County cannot prevail by merely showing that the record contains some evidence supporting its position. Our examination of McCloud discloses that it is also significant for its holding that the "probative value of evidence is not determined by the number of doctors who testify" on one side or the other. 514 S.W.2d at 47. We are thus convinced that the McCloud decision disposes of Martin County's contention that because five medical experts found no

evidence of coal workers' pneumoconiosis, Dr. Joyce's opinion "makes no sense in light of all the evidence."

Like the Board, we find nothing unreasonable or incredible in Dr. Joyce's conclusion based upon the evidence that Wilson was continually exposed to coal dust during his 14 ½ years working around surface mining. In reaching his decision, the ALJ also relied upon Dr. Myers' statements that it is impossible to distinguish coal workers' pneumoconiosis from mixed dust pneumoconiosis radiographically and that all coal workers are probably exposed to silica as well as coal dust. The Board properly determined that Dr. Joyce's opinion provided substantial support for the decision of the ALJ and that his decision on this issue may not be disturbed.

Martin County next argues that because Wilson had experienced coughing and sputum production for several years prior to his diagnosis by Dr. Myers, the notice given to it in March, 1996 cannot be considered timely. The employer posits that KRS 342.316(2)(a) requires notice to be given "as soon as practical after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted such disease, or that a diagnosis of such disease is first communicated to him, whichever shall first occur." (Emphasis added.) Martin County argues that the coughing and sputum

production were symptoms sufficient to trigger the notice requirements of KRS 342.316(2)(a).

In upholding the decision of the ALJ on this issue, the Board noted that there was no evidence that Wilson had ever had a prior x-ray, that he had ever filed a previous workers' compensation claim or that he had ever required medical attention for breathing difficulties. It was thus within the discretion of the ALJ to conclude that notice given after the x-ray diagnosis of March 1996 satisfied the requirements of KRS 342.316(2)(a). A finding as to notice is a question of fact, giving the ALJ sole authority to determine the weight and credibility of the evidence. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Because we concur in the Board's assessment that the ALJ's decision was reasonable under the evidence, his finding as to notice is not clearly erroneous. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Finally, we agree with the Board that both Wilson's own testimony and the opinion of Dr. Myers are ample support for the ALJ's conclusion that Wilson's last injurious exposure occurred while in the employ of Martin County. The testimony as to the nature of Wilson's work for Penn Coal and as to the clay-like quality of the soil is sufficient to support the determination that he was exposed to coal dust only in the course of his employment with Martin County.

Finding no reversible error in any of the arguments presented, we affirm the opinion of the Worker's Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leo Marcum
Lowmansville, Kentucky

BRIEF FOR APPELLEE:

Leonard Stayton
Inez, Kentucky