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Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-000754-WC

RONALD ROBINSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-95-40929

BAILEY MINING COMPANY; CONSOL
OF KENTUCKY, INC.; HON. RON
CHRISTOPHER, DIRECTOR OF
SPECIAL FUND; HON. ZARING P.
ROBERTSON, ADMINISTRATIVE LAW
JUDGE; and WORKERS'
COMPENSATION BOARD

APELLEES

and

NO. 1997-CA-000984-WC

BAILEY MINING COMPANY

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-95-40929

RONALD ROBINSON; CONSOL OF
KENTUCKY, INC.; HON. RON
CHRISTOPHER, DIRECTOR OF
SPECIAL FUND; HON. ZARING P.
ROBERTSON, ADMINISTRATIVE LAW
JUDGE; and WORKERS'
COMPENSATION BOARD

CROSS-APELLEES

and

NO. 1997-CA-001094-WC

HON. RON CHRISTOPHER, DIRECTOR
OF SPECIAL FUND

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-95-40929

RONALD ROBINSON; BAILEY MINING
COMPANY; CONSOL OF KENTUCKY,
INC.; HON. ZARING P.
ROBERTSON, ADMINISTRATIVE LAW
JUDGE; and WORKERS'
COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GARDNER, JOHNSON and MILLER, Judges.

JOHNSON, JUDGE: Ronald Robinson (Robinson) petitions and Bailey Mining Company (Bailey) and the Special Fund cross-petition this Court for review of a February 28, 1997 opinion of the Workers' Compensation Board (Board) which affirmed in part and reversed in part the Administrative Law Judge's (ALJ) opinion and award. Robinson argues that based upon the ALJ's determination that he is totally and permanently disabled from two separate injuries at two different employers, he is entitled to lifetime total disability benefits payable from the two employers even though the first injury was settled 13 years before the second injury occurred and even though the ALJ determined that Robinson's occupational disability from the first injury had actually decreased. Finding no error, we affirm the opinion of the Board.

In 1980, Robinson's left arm was severed between the wrist and elbow when it was caught in a roof bolting machine while he was working for Bailey. Re-attachment was impossible and Robinson has since used a prosthesis. As a result of the settlement of his workers' compensation claim, Bailey was paid 14 weeks of temporary total disability and a lump sum payment of \$45,000 based on a 78.268% occupational disability. Robinson's average weekly wage at that time was \$422.60.

After returning to work for Bailey, Robinson was reassigned to his previous underground mining job. However, Robinson experienced fear and uneasiness and was transferred to work aboveground even though all of his experience and training had been in underground mining. When the Bailey mine shut down, Robinson found other coal mining work and returned to underground mining as a shift foreman. He served as mine superintendent for two other coal mining companies before going to work for Consol of Kentucky, Inc. (Consol) in 1991 as a foreman.

On January 8, 1994, while working for Consol, Robinson reached for a switch to shut down a conveyer belt and slipped and fell onto the conveyer belt. Fortunately, another foreman was able to stop the conveyor before Robinson was injured further. Robinson hurt his back when he fell, but at the time he did not believe it to be a serious injury. In March, Robinson went to his family physician for medical attention for low back pain which he believed was caused from the fall onto the conveyer belt. The doctor determined the back injury to be relatively

minor. However, Robinson indicated to the doctor that he experienced fear from remembering the fall onto the conveyor belt and from recalling the other work accident which had severed his arm. Robinson continued working, but developed increasing tightness in his chest.

In July 1994, Robinson left work at Consol because he thought he was experiencing a heart attack. However, subsequent medical tests determined that he only suffered anxiety-related symptoms, i.e., chest pain, rapid pulse, and high blood pressure. Robinson returned to work at Consol in September 1994, but since an aboveground position was not available at that time, he worked an underground mining job. However, his anxiety level increased to the point that by mid-October he could no longer work.

In October 1995, Robinson filed a new workers' compensation claim for the 1994 injury and a motion to reopen the 1980 claim that had been settled with Bailey. In his motion to reopen, Robinson alleged that he had developed "over-use syndrome" and "post-traumatic stress disorder" which manifested itself only after the 1994 back injury. Robinson withdrew the allegation of "over-use syndrome" and the only allegation left as a basis to reopen was the claim of post-traumatic stress disorder.

Several physicians evaluated Robinson and they all diagnosed him with a minor back injury and little, if any, functional impairment. Three psychiatrists evaluated Robinson and each diagnosed him with depression, anxiety, panic disorder

and post-traumatic stress syndrome. Two of the psychiatrists diagnosed him with a 20% functional impairment and the other diagnosed him with a 15% impairment. One of the psychiatrists specifically concluded that Robinson would be a danger to himself and others if he returned to underground mining work and that Robinson's psychiatric conditions had been dormant following the traumatic amputation of his arm but were aroused by the 1994 injury. Another of the psychiatrists concluded that Robinson was unable to work at that time but he gave Robinson a good prognosis for future improvement.

The ALJ found that Robinson was unable to return to work and that he was 100% occupationally disabled with 50% being prior, active disability attributable to his 1980 injury and the remaining 50% being attributable to psychiatric residuals from the 1994 injury. The ALJ also noted that a claim may not be reopened without a showing of "change of occupational disability" and that Robinson's occupational disability regarding the 1980 accident had not increased but rather had decreased. Nonetheless, the ALJ reluctantly determined that under Campbell v. Sextet Mining Company, Ky., 912 S.W.2d 25 (1995), Robinson was entitled to lifetime benefits at the maximum benefit rate for the 1994 injury for the combined disability of the 1994 and the 1980 injuries, even though the 1994 disability rate was more than twice the maximum amount payable for the 1980 injury. The ALJ stated as follows:

The more troublesome issue is the applicability of the Supreme Court's decision in Campbell v. Sextet Mining Company, Ky., 912 S.W.2d 25 (1995). Therein, the plaintiff had suffered two injuries, having returned to work after the first. His claims were filed, consolidated and practiced as one, so that a single opinion and award issued. . . . The first injury obviously resulted in partial disability only, and but for the second injury, would have only entitled the plaintiff to a 425-week award under [Kentucky Revised Statutes] KRS 342.730(1)(b). However, the plaintiff was found to be totally disabled as a result of the combined effects of the first and second injury. The majority of the Supreme Court therefore concluded:

As a result of the second injury, the occupational effect of the first injury changes from being partially disabling to being totally disabling . . . the combined effect of both of these injuries has rendered the worker totally disabled and, therefore, that worker should be treated the same as if the worker had suffered both injuries at the same time. (Emphasis added [by the ALJ].)

Although the Court acknowledged that the plaintiff's two claims were litigated at the same time, it did not suggest that there would have been a different result had one of the claims been litigated previously. . . . The opinion also seems to suggest that the total disability award should be based upon the wage rates applicable at the time of the most recent injury. Thus, while it seems unbelievably inequitable, the apparent effect of the Supreme Court's decision is to require an employer, who settled a claim for a lump sum fifteen years ago, to now be saddled with liability for lifetime benefits at more than double the previous compensation rate. Reluctantly, I so hold.

The ALJ ordered Bailey to pay \$207.97 per week for a 50% occupational disability to continue for as long as Robinson is disabled, Consol to pay \$207.97 per week for a 50% occupational disability for a period based on one-half of Robinson's projected life expectancy, and the Special Fund to pay \$207.97 thereafter for as long as Robinson is disabled.

Bailey, Consol and Robinson appealed the decision to the Board. Bailey contended that the ALJ erred in assessing additional occupational disability benefits against it based upon the reopening and the Campbell decision after the ALJ had already determined that Robinson's occupational disability from the 1980 injury had actually decreased. Bailey also argued that the ALJ erred in increasing Bailey's liability with respect to the 1980 injury to the rate payable for injuries in 1994. Robinson did not appeal the ALJ's finding that his occupational disability associated with the 1980 injury had decreased, but he did file a protective appeal arguing that if the total disability award were reversed, he should receive a RIB award. We need not address Consol's arguments since those issues are not before us on appeal.

Relying on KRS 342.125 and Newberg v. Davis, Ky., 841 S.W.2d 164, 166 (1992), the Board ruled that the ALJ had erred in reopening Robinson's 1980 claim when the ALJ had not found Robinson's occupational disability to have increased since the settlement of his original claim. The Board stated as follows:

In the instant case, Robinson had settled his claim with Bailey for his 1980 injury some 13 years prior to sustaining his subsequent injury while employed by Consol. We find nothing in Sextet, supra, that would expand the grounds for reopening beyond those set forth in K.R.S. 342.125. That statute authorizes a reopening upon a showing of change of occupational disability, mistake or fraud, or newly discovered evidence. The latter three showings are not at issue in this claim nor in our opinion did Robinson prove a change in occupational disability as contemplated by K.R.S. 342.125.

In Newberg v. Davis, 841 S.W.2d 164 (1992), the Kentucky Supreme Court addressed the type of showing of a change of occupational disability required to reopen a previous workers' compensation award in a case involving a subsequent injury. The Court stated:

In the case of a subsequent injury, the test for determining whether a claimant suffers from an active disability is how much, if any, occupational disability he evidenced immediately before the subsequent injury. The fact that the claimant was employed when he received the subsequent injury does not preclude a finding of active disability. Wells v. Bunch, Ky., 692 S.W.2d 806 (1985). In a claim for a subsequent injury, the relevant change, therefore, occurs during the period which begins immediately preceding the [subsequent] injury and ends at the point at which the worker reaches maximum medical improvement after the [subsequent] injury. Any change in the workers' actual occupational disability which may have occurred between the settlement and the second injury, and is attributable to the injury which was the subject of the settlement, properly is the subject

of a motion to reopen that claim.
(Emphasis added [by the Board].)

Id. at 166. The Court went on to note that in the case before it, there was no evidence that the claimant's condition had worsened since the settlement of his original injury claim and that the lack of such evidence precluded a reopening of that claim.

In the instant case, not only is there no showing of a worsening of Robinson's condition since his 1981 settlement agreement, the ALJ specifically found that his condition had improved. Therefore, in our opinion, the ALJ erred in reopening Robinson's claim against Bailey and awarding lifetime benefits for a 50 percent occupational disability against Bailey as the result of the 1980 injury. Having determined that the ALJ erroneously applied the holding in Campbell v. Sextet, supra, to this claim, there is no need to further address Bailey's other arguments on appeal, all of which were predicated upon the Board's having determined that Sextet did apply.

These petitions for review followed.

We review this case under the standards set forth in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), wherein the Supreme Court stated that "[t]he function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] 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." Id. at 687-688.

By statute the Legislature has determined that the following grounds are available to reopen a claim.

(1) Upon motion by any party . . . an arbitrator or administrative law judge may reopen and review any award or order on any of the following grounds:

- (a) Fraud;
- (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence;
- (c) Mistake; and
- (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

KRS 342.125. As the Board pointed out, section (d) is the only section which could possibly apply to this case and the ALJ found that Robinson's disability had decreased. Therefore, it is apparent that Robinson lacked any ground upon which to reopen the 1980 claim.

Regardless of the problems with reopening the 1980 claim, Robinson argues that since he is totally and permanently disabled from several separate injuries, he is entitled to lifetime total disability benefits and that additional liability may be imposed upon Bailey pursuant to Campbell, supra. Robinson's position is that but for the 1980 injury, the 1994 psychiatric condition that caused him to be 100% occupationally disabled would not have occurred. Robinson further notes that the purpose of the Workers' Compensation Act is to wholly compensate injured workers and he contends that Bailey is now responsible for that part of his condition caused by the 1980

accident which in conjunction with the 1994 accident created the total occupational disability.

In deciding the case before us, we must determine the applicability of Campbell. We first observe that the holding in Campbell has been clarified somewhat by our Supreme Court in Fleming v. Windchy, Ky., 953 S.W.2d 604 (1997), and Spurlin v. Brooks, Ky., 952 S.W.2d 687 (1997). We also take note of Justice Cooper's dissent in these two cases and state that we believe his dissent to be the correct interpretation of the law. However, by following the Supreme Court's opinions in Campbell, Fleming, and Brooks, as we are required to do, the result of affirming the Board is the same.

The Supreme Court has made it clear that in Campbell it was presented "with an extremely narrow issue." Fleming, supra, at 607; and Brooks, supra, at 690 quoting Campbell, supra, at 26. The case sub judice does not come within this extremely narrow rule. Thus, we hold that Campbell is factually distinguishable from the case before us. In Campbell, the two injuries were litigated simultaneously--there was no need to reopen a previously settled claim. While KRS 342.120 gives a worker the absolute right to litigate claims for more than one injury at the same time, it does not give an injured worker the right to litigate a settled claim with an unsettled claim absent the reopening of the settled claim. As stated previously, Robinson had no grounds to reopen the settled claim.

An underlying tenet of our legal system is the doctrine of finality. Our Legislature has determined in the Workers' Compensation Act that relief from an adjudicated claim can be found through a motion to reopen based upon the limited grounds of mistake, fraud, newly discovered evidence and a change of disability. KRS 342.125. Bailey's liability for the 1980 injury was determined in the 1981 settlement and cannot be increased absent a reopening.

Due to the disposition of this issue, there is no need to address the protective issues raised in the briefs of Bailey or the Special Fund. The opinion of the Board is affirmed.

ALL CONCUR.

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