

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000108-WC

JERRY HOSKINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
FILE NO. WC-96-8776

NEW HORIZONS COAL, INC.;
ROBERT SPURLIN, ACTING
DIRECTOR OF SPECIAL FUND;
HONORABLE MARK C. WEBSTER,
ADMINISTRATIVE LAW JUDGE;

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, EMBERTON, and HUDDLESTON, Judges., Judges.

DYCHE, JUDGE. Jerry L. Hoskins appeals from an opinion of the Workers' Compensation Board affirming an order of the Administrative Law Judge which dismissed his claim for Retraining Incentive benefits. Having reviewed the record, we find that the opinion of the Workers' Compensation Board adequately and completely sets out the applicable law and facts, and we adopt it as our own:

Jerry L. Hoskins ("Hoskins") appeals from an Opinion and Order rendered August 25, 1997 by Hon. Mark C. Webster, Administrative Law Judge ("ALJ"), in which his claim for coal workers' pneumoconiosis was dismissed. On appeal, Hoskins contends that the ALJ's decision was clearly erroneous and that the evidence compels a result in his favor.

Hoskins, born February 7, 1956, has an 11th grade education and, in addition, earned a GED. Moreover, he completed two years of vocational training in welding. The evidence indicated that Hoskins had from 12 to 15 years exposure to coal dust working for multiple coal companies. He last worked for New Horizons Coal, Inc. ("New Horizons") from August 1994 until he was laid off in August 1995. The parties stipulated that Hoskins was last exposed to the hazards of the disease on August 3, 1995. During the course of his employment with various coal companies, Hoskins has worked as a repairman in the shop performing electrical work and rebuilding equipment, repairing underground mining equipment, and as a belt man working on the outside.

The ALJ noted that Hoskins had experienced breathing problems for about two years and that he is a non-smoker. The medical evidence in Hoskins' claim submitted to the ALJ came from Dr. Emery Lane who interpreted a chest x-ray as Category 1/0 pneumoconiosis. Additionally, Dr. Glen Baker interpreted a chest x-ray as category 1/0 pneumoconiosis. Medical evidence on behalf of New Horizons submitted to the ALJ came from Dr. John Harrison who interpreted a chest x-ray as Category 0/0. Additionally, Dr. Robert Powell interpreted chest x-rays as Category 0/0. In addition, Hoskins was evaluated by Dr. John Woodring, of the University of Kentucky Medical School on April 1, 1997, pursuant to KRS 342.315. Dr. Woodring interpreted a chest x-ray as Category 0/0.

The contested issues submitted for final adjudication by the ALJ included: existence of the occupational disease; weight to be

afforded Dr. Woodring's report; and, whether Dr. Woodring's report is evidence.

The ALJ determined as follows:

1. Existence of the Disease.

Based on a review of all the medical evidence of record, I am persuaded by the evidence of Dr. Powell that Hoskins has not met his burden of persuasion that he has the disease. He is not entitled to benefits under any provisions of KRS 342.732(1). An order to that effect is entered hereinbelow.

2. Weight to be Given to Dr. Woodring's Reports. I refuse to give any weight to Dr. Woodring's report. KRS 342.315(2) requires me to explain why. Dr. Woodring, as indicated at the bottom of his report, is not a 'B' reader. Dr. Powell is. I choose to follow Dr. Powell's findings and ignore Dr. Woodring's findings.

On appeal, Hoskins has not raised any issue in connection with the weight afforded the evaluation from Dr. Woodring of the University of Kentucky Medical School. Moreover, there is no cross-appeal from New Horizons in connection with the ALJ's resolution of this contested issue.

Here, Hoskins argues that based upon his testimony of breathing difficulties which have been progressive in nature; the x-ray interpretations from Drs. Lane and Baker; the fact that he is not a smoker; the length of exposure to coal dust; and, causation evidence from Dr. Baker relating his condition to his exposure to [sic] at work, that [sic] the ALJ was clearly erroneous in dismissing his claim. Hoskins also argues that the evidence which he submitted to the ALJ is compelling evidence requiring a different result in his favor.

Hoskins has correctly noted the burden he faces on appeal from a determination by the ALJ in dismissing his claim. Hoskins had the burden of proof before the ALJ. Where the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. The standard of review requires that Hoskins must show that the evidence was such that the finding against him was unreasonable. On the other hand, a finding which can reasonably be made under the evidence presented is not "clearly erroneous." Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). In addition, on appeal, Hoskins must show that the evidence compelled a finding in his favor. Compelling evidence is evidence so overwhelming that no reasonable person would have failed to be persuaded by it. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985).

In Hoskins' claim, the ALJ chose to believe the evidence from Dr. Powell who had determined that his x-ray findings did not disclose evidence of coal workers' pneumoconiosis. It is apparent from the Opinion that the ALJ considered evidence from Hoskins, as well as evidence from Drs. Baker and Lane. However, he was not compelled to believe the evidence submitted on behalf of Hoskins. In weighing the evidence, it is the prerogative of the ALJ to believe some parts of the evidence and to disbelieve others. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, the ALJ is authorized to determine the quality, substance, and character of all the evidence presented when weighing it in the process of reaching a decision. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Moreover, when the medical evidence is conflicting, as it was in this case, the ALJ has the sole authority to determine whom to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). Finally, it is simply not enough for Hoskins to show that the record contains some evidence which would support a reversal of the ALJ's opinion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

Having concluded from our review that the ALJ made reasonable findings under the evidence submitted, his decision is not clearly erroneous. Further, having concluded that there is no compelling evidence requiring a reversal of the ALJ's determination, his decision must be affirmed.

Accordingly, the Opinion and Order rendered by Hon. Mark C. Webster, Administrative Law Judge, is hereby AFFIRMED and the appeal by Jerry L. Hoskins is hereby DISMISSED.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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