

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000746-WC and
NO. 1998-CA-000976-WC

CORHART REFRACTORIES COMPANY and
CIGNA INSURANCE COMPANIES

APPELLANTS/CROSS-APPELLEES

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-017775

SLAYTON R. CONSTANT, DECEASED;
VIRGINIA CONSTANT, DECEASED WIDOW;
and PATRICIA CONSTANT, Executrix
of the Estate of Virginia Constant

APPELLEES/CROSS-APPELLANTS

and

SPECIAL FUND; LOUISVILLE EMERGENCY
MEDICAL SERVICE; and LIFETRON PARTNERS

APPELLEES

and

WORKERS' COMPENSATION BOARD

APPELLEE/CROSS-APPELLEE

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, KNOPF, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Corhart Refractories Company (Corhart) and Cigna Insurance Companies petition for review, and the estate of Virginia Constant, deceased widow of Slayton Constant (Constant), cross-petitions from a decision of the Worker's Compensation

Board. The procedural history bears explaining for an understanding of the case's current posture.

Constant worked as a welder for 34 years. His last employer was Corhart, for whom he last worked on February 22, 1992. He died on June 17, 1993. Virginia Constant filed a claim for occupational disease benefits on behalf of Slayton, along with the medical reports of Drs. William H. Anderson and Christopher B. Howerton.

In the July 18, 1995 Opinion, Award and Order of the administrative law judge (ALJ), Slayton was found totally disabled by work-related siderosis. The ALJ relied upon "the unequivocal testimony presented by Dr. Anderson in which he stated that the changes on the Plaintiff's x-ray were present to the extent of Category 2/2 and were 'due to his working conditions' and would be classified as 'a mixed pneumoconiosis due to siderosis and silicosis.'" The ALJ also awarded survivor benefits to Constant's widow for the period of Constant's life expectancy.

Corhart appealed to the Board, arguing that the ALJ misinterpreted evidence, that no evidence supported a finding that Constant's death was work-related or that he had a disabling work-related disease, and that he failed to file his claim with two medical reports which met the requirements of KRS 342.316. Virginia cross-appealed, contending that Corhart was estopped from denying compensability because it had made an offer of settlement.

The Board found no error in the ALJ's interpretation of the testimony of Dr. Howerton and Dr. Anderson. The Board ruled that substantial evidence supported the conclusion that Constant was totally disabled from a work-related disease. The Board also determined that the two medical reports filed by Constant met the requirements of KRS 342.316. However, the Board remanded the matter to the ALJ for a finding as to whether Constant's death was due to his occupational disease, as he made no such finding in his Opinion, Award and Order. Virginia's cross-appeal was rendered moot by the upholding of the award of benefits, and therefore, not addressed. Corhart petitioned to this Court, but we dismissed the petition as having been taken from a non-final decision.

Upon remand to the ALJ, the ALJ found that Constant's death was directly and causally related to his siderosis. He relied upon the opinions of Drs. Nichols and Anderson to reach this conclusion. Thus, death benefits were awarded in accordance with KRS 342.750, as were burial expenses according to KRS 342.720.

Corhart appealed and Constant cross-appealed to the Board. Each made the same arguments as were brought before the Board in the initial appeal. The Board determined that the law of the case precluded their re-deciding all the issues except whether the finding of Constant's death's being work related was supported by substantial evidence. The Board reversed on this issue, finding that Constant had made a judicial admission against interest when she stated in the conclusion of her brief:

The single issue before this Board is whether or not Slayton R. Constant died as a result of the occupational disease which totally disabled him. This issue affects only the award of burial expenses inasmuch as the benefits payable to the widow are identical whether paid under KRS 342.730(3) or KRS 342.750, while burial benefits are available only if the death of the employee is work-related.

Admittedly, the proof in this case does not support the award of burial expenses.

Accordingly, the Board remanded the matter to the ALJ for an order dismissing Constant's claim for burial expenses.

Corhart now argues before this Court that Constant failed to provide two medical reports in support of his claim as required by KRS 342.316; that the ALJ misinterpreted Dr. Anderson's opinion; and that the finding of disability as a result of an occupational disease was not supported by substantial evidence. Constant's cross-petition raises the question of whether Corhart is estopped from denying the validity of the claim. Having reviewed the record and the law, we affirm.

Because Constant's claim was for siderosis, and not coal workers' pneumoconiosis, KRS 342.316 governs the requirements of the two medical reports to be filed with the claim. KRS 342.316(2)(b)1.a. states in relevant part:

The application shall also include at least two (2) written medical reports supporting his claim. These medical reports shall be made on the basis of comprehensive clinical examinations performed in accordance with accepted medical standards and shall contain full and complete statements of all examinations performed and the results thereof. The reports shall be made by duly-licensed physicians.

Subsection 1.c. requires that each examination for an occupational pneumoconiosis claim, other than coal workers' pneumoconiosis, shall include x-ray examinations and appropriate pulmonary function tests. 803 KAR 25:011 § 6(1)(d) states that two written medical reports supporting the claim, in compliance with KRS 342.316(2)(b)1., shall be attached to the application for adjustment of an occupational disease claim.

Corhart maintains that the statute requires two reports which contain findings within a reasonable medical probability that the claimant has a work-related disease which results in impairment. It believes the report of Dr. Howerton was not sufficient to support a prima facie case for benefits, and thus the claim should have been dismissed on the same grounds as the claim in Scorpio Coal Co. v. Harmon, Ky., 864 S.W.2d 882 (1993).

Like the Board, we do not find Harmon dispositive because it specifically dealt with the interpretation of KRS 342.732(1)(a), KRS 342.316(2)(d)1., and 803 KAR 25.011 §§ 3(2) and 7 in a coal workers' pneumoconiosis case. The statute and regulation involved in this case merely require that the two medical reports support the claim.

Dr. Howerton based his opinion on an x-ray, a pulmonary function study, a blood gas study, accurate smoking and employment histories, symptoms, and a physical examination. He diagnosed severe chronic obstructive pulmonary disease (COPD). He felt this was probably predominantly emphysema but added that with Constant's occupational history, it was possible that his work could have contributed to the condition, along with the

cigarette smoking. Based on the x-ray, he found mild pulmonary interstitial fibrosis, which he opined could be due to silicosis from Constant's thirty years in a foundry. Finally, he averred that the welder was totally disabled.

We believe that the ALJ could have inferred from this report that the COPD was caused, at least in part, by Constant's lengthy welding history, that the COPD was siderosis or silicosis, and thus, that Constant was totally disabled by that condition. This question would go to the weight of the evidence and be for the ALJ to decide. The report certainly supports the claim, and this is all the statute requires. Consequently, we decline Corhart's invitation to interpret the statute as strictly as it proposes.

Corhart next argues that the ALJ misinterpreted Dr. Anderson's report when he stated that Dr. Anderson opined that Constant's condition was "totally work related." Corhart believes the error is significant enough to require reversal because the ALJ's entire decision is based on Dr. Anderson's opinion, and there is no evidence that Constant suffered any work-related impairment. We disagree.

Dr. Anderson found category 2/2 mixed pneumoconiosis due to siderosis and silicosis. In summarizing Dr. Anderson's opinion, the ALJ stated that Dr. Anderson felt the condition "was totally work-related." In determining that Constant's siderosis was work-related, the ALJ stated:

[T]his Administrative Law Judge relies upon the unequivocal testimony presented by Dr. Anderson in which he stated that the changes on the Plaintiff's x-ray were present to the

extent of Category 2/2 and were "due to his working conditions" and would be classified as "a mixed pneumoconiosis due to siderosis and silicosis." Dr. Anderson was given a long and complete history of all of the Plaintiff's years of exposure to welding fumes while working initially for Arvin Industries as an arc welder and his work for the Defendant-Employer for approximately 35 years. This long detailed history is given on the first page of Dr. Anderson's report. This Administrative Law Judge has reviewed and/or decided literally thousands of occupational disease claims and has always found Dr. Anderson to be one of the most credible pulmonary specialists who ever testified in such a claim. This position of persuasion is found in the within claim, as well, and this Administrative Law Judge adopts Dr. Anderson's diagnosis and opinion.

In fact, Dr. Anderson diagnosed category 2/2 pneumoconiosis and felt that the x-ray changes were most likely due to a combination of siderosis and silicosis. He expressed that all of the changes seen by x-ray were due to the welder's working conditions. In his opinion, all the agents to which Constant had been exposed as a welder were capable of causing the pulmonary problems he had. He also stated that smoking can cause similar problems. He further averred that he could not rationally give an opinion as to how much of Constant's condition was due to cigarette smoking and how much was due to exposure experienced during welding. Dr. Anderson also thought Constant was totally disabled.

A party is entitled to have a claim decided on the basis of correct findings of fact. See Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985). However, we do not believe that the ALJ's decision is based on an erroneous understanding of Dr. Anderson's testimony. The facts stated in the above-quoted

paragraph are not inaccurate and support the ALJ's findings of work relatedness and total disability. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Therefore, the Board was correct in not reversing the ALJ on this issue.

Finally, Corhart argues that there is no medical evidence of probative value to support the claim that Constant had an occupational disease which caused him any disability. Corhart maintains that the only evidence supporting the claim was stated in terms of possibilities.

On the contrary, both the reports of Drs. Howerton and Anderson constitute substantial evidence supporting a finding of a disabling occupational disease. Both felt Constant was totally disabled, and Dr. Anderson opined that the siderosis and silicosis were to some extent responsible for that condition. Dr. Howerton's opinion can be read to support Dr. Anderson's. That the ALJ chose to rely upon Dr. Anderson's report was well within his authority, and neither the Board nor this Court can substitute its judgment therefor.

The argument on behalf of Constant and his widow is that Corhart should be estopped from denying the compensability of the claim because a third-party administrator of Corhart provided Constant with a letter stating that the company was willing to accept the claim. It later made a settlement offer to Constant, which he accepted, but which obviously later fell through. Because we have affirmed the award of benefits, however, this issue is moot.

Accordingly, the decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANTS/CROSS-
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BRIEF FOR APPELLEES/CROSS-
APPELLANTS, SLAYTON R.
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