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Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001011-WC (Direct)

COSTAIN COAL, INC. (NOW LODESTAR ENERGY, INC.) APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-044623

JOE BLACK; SPECIAL FUND; HON. ZARING
P. ROBERTSON, Administrative Law Judge;
AND WORKERS' COMPENSATION BOARD APPELLEES

and

NO. 1998-CA-001154-WC (Cross)

ROBERT L. WHITTAKER, Director of SPECIAL FUND CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-044623

JOE BLACK; COSTAIN COAL, INC.; HON. ZARING
P. ROBERTSON, Administrative Law Judge; and
WORKERS' COMPENSATION BOARD CROSS-APPELLEE

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, Chief Judge; COMBS and KNOPF, Judges.

COMBS, JUDGE: The Special Fund and Costain Coal Inc., petition for review of an opinion of the Workers' Compensation Board (the "board") affirming an order of the administrative law judge (the

"ALJ"). Having reviewed the arguments presented, the disputed opinion, and the applicable law, we believe that the board has correctly interpreted the cited provisions and has not overlooked or misconstrued the provisions or relevant precedent. Nor do we believe that the ALJ or the board erred in assessing the evidence so flagrantly as to cause gross injustice as required by Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992). Consequently, we affirm. We adopt the board's opinion as follows:

> Petitioners, Special Fund and Costain Coal Inc. ("Costain"), appeal from an opinion and award rendered by the Hon. Zaring P. Robertson, Administrative Law Judge ("ALJ"), on March 31, 1997 and from an order dated November 11, 1997 overruling their petitions for reconsideration. On reopening, the ALJ awarded the respondent, Joe Black ("Black"), Tier II benefits pursuant to KRS 342.732(1)(b). Black had initially been awarded retraining incentive benefits ("RIB") in an opinion and awarded dated May 31, 1994. In support of that claim, Black had filed x-ray reports from Drs. William H. Anderson, Emery Lane, and John Myers interpreting x-rays as showing coal workers' pneumoconiosis Category I but had introduced no evidence as to any pulmonary impairment.
>
> Upon reopening, Black submitted medical testimony from Dr. Myers who performed a full examination of him on April 10, 1995. Dr. Myers interpreted a chest x-ray taken that day as showing Category 1/1 and obtained vent studies of 60 percent of predicted on FVC and 59 percent of predicted on FEV1, the results of which he attributed to Black's pneumoconiosis. At his deposition, he acknowledged he had not performed pulmonary testing at the time of Black's original claim and therefore could not say whether Black's breathing had worsened.
>
> Dr. Lane provided evidence on behalf of Black interpreting two chest x-rays taken May 10

and July 26, 1995 as showing Category 1/1 pneumoconiosis.

Dr. B.T. Westerfield provided evidence in support of Black's claim, performing a full examination on July 26, 1995. He interpreted an x-ray taken that day as showing Category ½ pneumoconiosis and an earlier film of May 10, 1995 as showing Category 1/1. He obtained vent studies of 68 percent of predicted on FVC and 63 percent of predicted on FEV1 and indicated Black's pulmonary impairment was caused by coal workers' pneumoconiosis.

Dr. Robert Powell examined Black at the request of Costain on December 20, 1996. He interpreted a chest x-ray taken that day as negative for pneumoconiosis but had previously read earlier chest x-rays of Black as showing Category 1/1 pneumoconiosis. He obtained vent studies of 68 percent of predicted on FVC and 62 percent of predicted on FEV1. In his opinion, Black did not suffer from coal workers' pneumoconiosis, and he therefore would not attribute Black's pulmonary impairment to dust exposure.

The ALJ determined that in order to reopen a previous RIB award, a claimant must produce evidence of progression of the disease by x-ray and the development of respiratory impairment due to the disease and that once a claim has been reopened, an ALJ need only find respiratory impairment in order to grant the claimant an additional award under KRS 342.732. He then found, based upon the opinions of Drs. Westerfield and Myers, that Black suffered from a pulmonary impairment of between 55 and 80 percent of predicted and that the impairment was caused by his pneumoconiosis.

In determining the credit to be given to the petitioners herein, he stated:

> Subsection (2)(b) of the reopening statute also directs a specific credit for retraining incentive benefits "previously awarded." Unlike the standard mathematics for credit, as outlined in case law, the statute provides, "the amount to be deducted shall be subtracted from the total amount awarded, and the remaining

> amount shall be divided by the number of weeks for which the award was made, to arrive at the weekly benefit amount which shall be apportioned in accordance with the provisions of KRS 342.316." The statute refers to benefits previously awarded, as opposed to benefits previously paid. In addition, it inequitably allows credit for retraining incentive benefits which do not actually overlap the award below, which does not begin until the day of last exposure. Finally, it allows the Special Fund a share of credit for benefits paid exclusively by the defendant-employer. Applying the foregoing statute literally, it appears to this Administrative Law Judge that the retraining incentive benefit award should continue unaffected by current proceedings. The amount of that award is $147.90 per week times 208 weeks, or $30,763.20. This sum shall be subtracted from the value of plaintiff's "tier 2" award, and the balance shall be divided by 425 weeks to arrive at the weekly amount thereof. In accord with KRS 342.316, the defendant-employer shall be responsible for the first one-fourth of the payments below, and the Special Fund shall [be] responsible for the balance.

The ALJ commenced Black's Tier II award on March 9, 1995, Black's last date of injurious exposure, rather than April 10, 1996, the date Black filed his motion to reopen.

On appeal, the Special Fund contends the ALJ erred in granting Black's motion to reopen in that he showed no progression of respiratory impairment, having produced no proof of any spirometric testing in his original claim and that the ALJ erred in commencing Black's benefits on the date of last exposure rather than on the date he filed his motion to reopen. Costain concurs in the Special Fund's contention that the ALJ erroneously granted Black's motion to reopen and further contends, in the alternative, that the ALJ erred in basing the Tier II award on the benefit rate in effect in 1995, the year of Black's last injurious exposure, rather than the 1992 benefit rate, the year in which

Black filed his original RIB claim, and in awarding benefits which exceed the maximum benefit allowable for Tier II benefits.

The ALJ, in determining the award to be payable to Black, stated:

> As a maximum wage earner in 1995, the value of the plaintiff's "tier 2" award is $311.96 per week times 425 weeks or $132,583. Subtracting the amount of retraining incentive benefits awarded results in a balance of $101,819.80. The balance divided by the compensable period of 425 weeks results in a weekly award of $239.58.

Costain's argument relating to this issue is that during the period of time the RIB award overlaps the Tier II award, Black will be receiving $147.90 per week on the RIB award and $239.58 per week on the Tier II award, a combined amount of $387.48 per week.

We first address the contention that Black's RIB award was erroneously reopened. KRS 342.125(2)(a) provides that a RIB award may be reviewed upon the application of the claimant and a showing of progression of his previously-diagnosed occupational pneumoconiosis and the development of respiratory impairment due to that pneumoconiosis and that upon a finding of respiratory impairment due to that pneumoconiosis, an award for benefits under KRS 342.732 shall be made. Costain and the Special Fund both contend that since no evidence of respiratory impairment was produced in Black's original RIB claim, he cannot show that he has developed a respiratory impairment since that award. Costain also contends Black failed to show a progression of his previously-diagnosed occupational pneumoconiosis.

This latter contention has been addressed by the Kentucky Supreme Court in AAA Mines Services v. Wooton, Ky., [959 S.W.2d 440 (1998)]. In that case [,] the Court held that a progression within Category I was sufficient to establish a prima facie showing under KRS 342.732(1)(a) if the claimant satisfied the second step of the reopening provision; that is, the development of

respiratory impairment. KRS 342.316(2)(d) (in effect on the date this claim was filed) provides that the procedure for filing a RIB claim is that a claimant file two x-rays and x-ray reports in support of his claim. There is no requirement and it would be of no benefit in the adjudication of a RIB claim for a claimant to file spirometric test results in that a RIB award is not contingent upon any breathing impairment. Therefore, in our opinion, to interpret KRS 342.125(2)(a) to require a claimant to prove that he developed respiratory impairment after his initial RIB award would be absurd in that the statutory procedure for obtaining a RIB does not provide for the claimant to produce any evidence relating to respiratory impairment. Furthermore, the reopening statute itself merely requires the affected employee to show that his pneumoconiosis has progressed and that he has developed respiratory impairment due to that pneumoconiosis. The progression clearly must be a progression from that stage of the disease the claimant had at the time of his original RIB award. The development of respiratory impairment has no such similar time reference. Furthermore, the medical evidence in this claim, both prior to the original award and on reopening, is practically identical to the medical evidence presented in the claim of Wooton, supra.

KRS 342.125(1) provides that a reopening and review under that section shall not affect any previous order or award as to sums already paid thereunder. KRS 342.316 provides the time of the beginning of compensation payable for occupational disease claims shall be the date of the employee's last injurious exposure to the cause of the disease or the date of actual disability, whichever is later, except that RIB awards shall begin on the date the RIB award becomes final. The ALJ commenced Black's award on reopening in this claim on the date of his last exposure, stating in an order ruling on petitions for reconsideration that the reopening statute, KRS 342.125, directs an award for benefits as provided in KRS 342.732 when a prior RIB recipient has prevailed on reopening, and then noting that an award for benefits under KRS 342.732(1)(b) commences with the date of last exposure.

The Special Fund, referring to the reopening statute itself and to Newberg v. Cash, Ky.App., 854 S.W.2d 791 (1993), contends the award for Tier II benefits should commence on the date Black filed his motion to reopen and not on the date of last exposure. In Cash, the Kentucky Court of Appeals reversed an award of benefits on reopening to a claimant that commenced on the last payment of temporary total disability benefits to the claimant notwithstanding the fact that last payment occurred prior to the filing of the motion to reopen. The Court referred to the language in KRS 342.125 that a reopening shall not affect a previous order or award as to any sums already paid thereunder and that such an award would require payments back to a point in time when there had been a previous determination the claimant suffered no permanent occupational disability. That same reasoning, however, would not apply to Black's claim because of the specific reopening provisions applicable to a RIB award and specifically KRS 342.125(2)(b). That subsection provides that benefits awarded as a result of reopening a RIB are to be reduced by the amount of the previously awarded RIB, with the effect being that the original award is not affected at all by the award on reopening.

As previously noted, the ALJ based Black's Tier II benefits on the wages Black was making on the date of his last exposure rather than the wages upon which his RIB award was based. Costain contends the benefit rate should be based upon the 1993 rate. However, in our opinion, benefits awarded under KRS 342.125(2)(a) are distinct from benefits awarded on the reopening of any other claim.

That subsection specifically provides that in the event a proper showing is made, an award for benefits shall be made as provided in KRS 342.732. Subsection (b) of that section provides that the benefits awarded under Subsection(a) shall be reduced by the amount of RIB previously awarded and provides that the amount to be deducted shall be subtracted from the total amount awarded with the remaining amount divided by the number of weeks for which the award was made. In the reopening of any other claim, Subsection (1)

of the reopening statute provides that upon the proper showing, the ALJ may reopen and review any award or order ending, diminishing, or increasing the compensation previously awarded. The distinction in our opinion is that under Subsection (2) the ALJ is required to make an award as provided in KRS 342.732. That statute refers to KRS 342.740 with respect to the amount of the award of income benefits. KRS 342.740 provides that the average weekly wage determined under that section is applicable for the full period of the award when the date of occurrence of injury or of disablement in the case of disease falls within the calendar [year] at issue. Therefore, in our opinion, the ALJ correctly based Black's Tier II award on the wages he was earning at the time of his last injurious exposure.

Costain's final argument relates to the method by which the ALJ reduced the Tier II award by the amount of the RIB previously awarded. Costain contends that the method used by the ALJ results in Black receiving, during the period the Tier II benefits overlap with the RIB, a combined benefit in excess of the maximum benefit for a Tier II award. It contends the proper method is to extinguish the RIB award as of the date on which Tier II benefits commence and that the amount of RIB paid through that date are in fact the amount awarded. KRS 342.125(2)(b) provides:

> Benefits awarded as a result of a review under this subsection shall be reduced by the amount of the retraining incentive benefits previously awarded. . . . The amount to be deducted shall be subtracted from the total amount awarded, and the remaining amount shall be divided by the number of weeks for which the award was made, to arrive at the weekly benefit amount which shall be apportioned in accordance with provisions of KRS 342.316.

Costain would have us, in essence, rewrite that subsection so that the Tier II benefit is reduced by the amount of RIB previously paid, not awarded. The statute, in our opinion, is clear on its face and is

therefore not subject to the interpretation urged by Costain. Board of Education of Nelson County v. Lawrence, Ky., 375 S.W.2d 830 (1963).

Accordingly, the decision of the ALJ is hereby AFFIRMED and these appeal[s] DISMISSED.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE COSTAIN COAL, INC.:

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BRIEF FOR APPELLEE JOE BLACK:

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