

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1998-CA-000760-WC

ROBERT L. WHITTAKER, Acting  
Director of SPECIAL FUND

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-90-36354 AND WC-95-48386

SILAS PATRICK; MILLER BROTHERS  
CONSTRUCTION COMPANY; and  
WORKERS' COMPENSATION BOARD

APPELLEES

AND NO. 1998-CA-000761-WC

MILLER BROTHERS CONSTRUCTION  
COMPANY

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF  
THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-90-36354 AND WC-95-48386

SILAS PATRICK; THOMAS A. DOCKTER,  
Administrative Law Judge; SPECIAL  
FUND; and WORKERS' COMPENSATION  
BOARD

APPELLEES

OPINION AFFIRMING

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BEFORE: GUDGEL, Chief Judge; GARDNER and MILLER, Judges.

GUDGEL, CHIEF JUDGE: These matters are before us on petitions for review of an opinion of the Workers' Compensation Board (board). The board reversed and remanded for further findings an Administrative Law Judge's (ALJ's) decision to the extent it dismissed a reopening proceeding, but it affirmed the ALJ's decision dismissing a new claim. On appeal, appellant employer and the Special Fund contend that in the reopening proceeding, the appellee employee, Silas Patrick, failed to meet his burden of proof justifying an award of benefits, and that the board therefore erred by reversing the decision for further findings. We disagree with appellants' contentions. Hence, we affirm.

Patrick was awarded retraining incentive benefits (RIB) in 1991. At that time, all of the medical reports filed in the record indicated that although Patrick had contracted pneumoconiosis, his pulmonary function studies revealed normal breathing capacity. Subsequently, Patrick filed a KRS 342.125(2)(a)<sup>1</sup> motion to reopen, alleging that his disease had progressed from Category 1 to Category 2, and that his respiratory capacity had decreased to less than 80% of predicted normal values. The ALJ denied the motion to reopen, finding that although Patrick had shown a progression of the disease from

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<sup>1</sup>Subsequent to the filing of Patrick's motion to reopen and new claim, KRS 342.125(2)(a) and (b) were amended and renumbered as KRS 342.125(5)(a) and (b).

Category 1 to Category 2, he had failed to show that, utilizing the highest available ventilatory studies as required by existing case law, his pulmonary capacity was less than 80% of predicted normal values. According to the ALJ, it was not significant that some of the recent studies showed breathing capacity of less than 80% of predicted normal values. The ALJ's reopening decision was reversed on appeal because, pursuant to KRS 342.732 and the holding in Campbell v. Universal Mines, Ky., 963 S.W.2d 623 (1998), appellee would be entitled to a total disability award if the ALJ found on remand that he suffered from Category 2 rather than Category 1 pneumoconiosis. The ALJ was directed on remand to make an appropriate finding in this vein, and to render a decision in conformity therewith. This appeal followed.

Appellants essentially contend that the board erred by reversing the ALJ because the language of KRS 342.125(2)(a) prevented a claimant from receiving an award on reopening unless he or she demonstrated not only that the pneumoconiosis had progressed to a higher category, but also that the highest available ventilatory studies showed results of less than 80% of predicted normal values. We disagree.

As we view it, this case is governed by the supreme court's decision in Campbell, supra. There, as here, the worker first received a RIB award although his pulmonary function studies did not show results of less than 80% of predicted normal values. Subsequently, as here, the worker filed a motion to reopen which was accompanied by medical reports showing that his disease had progressed from Category 1 to Category 2. Further,

like the case now before us, the motion to reopen was denied because the worker's increase in respiratory impairment was less than that required for an award of benefits pursuant to KRS 342.732(1)(b) and (c). In reversing the ALJ's denial of the motion to reopen, the supreme court stated as follows:

The legislature may impose any conditions it sees fit to permit a party to reopen a previously final award. However, it is not our function to impose conditions which the legislature has omitted. Unlike KRS 342.732(1)(b) and (c), which use the AMA's Guides to establish irrebuttable presumptions of disability, KRS 342.125(2)(a) makes no reference to the Guides or the presumptions, but permits a reopening of a pneumoconiosis claim upon the mere showing of progression of the underlying disease and either the development or a progression of respiratory impairment. Thus, the worker is not required to show both category 2 pneumoconiosis and compensable respiratory impairment in order to reopen, but only a progression of the disease and a development or progression of impairment, so long as either the disease or the impairment has progressed to the point of compensability. To require progression of both the disease and the impairment to the point of compensability would be illogical, since the worker could not receive compensation for both. McCoy Elkhorn Coal Corp. v. Sullivan, Ky., 862 S.W.2d 891 (1993).

Campbell made the required prima facie showing that his underlying pneumoconiosis had progressed from category 1 to category 2, satisfying the threshold of compensability set forth in KRS 342.732(1)(d). He also presented evidence of progression of pulmonary impairment, although not to the extent that it would be compensable under KRS 342.732(1)(b) or (c). That was all that was required of him under KRS 342.125(2)(a).

963 S.W.2d at 625.

We are unable to distinguish the operative facts herein from those set out in Campbell. Thus, we perceive no error in

the board's reversal and remand for additional findings. Indeed, consistent with Campbell and as directed by the board on remand, it will be

within the ALJ's discretion to conclude that Patrick had satisfied his burden of proof to establish the existence of the occupational disease, Category 2, entitling him to total occupational disability benefits. Although the ALJ here alluded to evidence that would support such a finding, he made no specific determination of the category of the disease. It is therefore necessary upon remand for the ALJ to determine whether Patrick satisfied this burden or whether the more credible evidence was that from physicians who interpreted x-rays as being Category 1. If the ALJ believes the latter, then in accordance with KRS 342.732 he is obligated to accept the highest FEV-1 and FVC, both of which are above 80% of predicted, and no benefits would be awarded.

Finally, we note that Patrick did not file a cross petition for review. Hence, we need not address the constitutional arguments regarding KRS 342.125(2)(a) which are set forth in his response to appellants' petitions for review. See CR 76.25(9).

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR ROBERT L. WHITTAKER,  
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FUND:

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BRIEF FOR SILAS PATRICK:

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