

RENDERED: March 5, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1998-CA-001101-WC

DEPARTMENT OF TRANSPORTATION
[TRANSPORTATION CABINET,
COMMONWEALTH OF KENTUCKY]

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-96-008955

RALPH REYNOLDS;
WORKERS' COMPENSATION BOARD;
ROBERT WHITTAKER, Director of
SPECIAL FUND; and
DONALD G. SMITH,
Administrative Law Judge

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: GUDGEL, Chief Judge; HUDDLESTON and KNOX, Judges.
HUDDLESTON, Judge. The Department of Transportation (DOT),
Transportation Cabinet, Commonwealth of Kentucky, seeks review of
a Workers' Compensation Board opinion that affirmed an Administra-

tive Law Judge's decision that Ralph Reynolds contracted silicosis while employed by DOT and is thus entitled to an award of workers' compensation benefits based upon a 30% occupational disability. We have reviewed the arguments advanced on appeal in accordance with the standard set forth in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), and conclude that the Board's decision must be affirmed.

Reynolds filed a claim for Retraining Incentive Benefits (RIB) in January 1997 against DOT, his employer, alleging that he had contracted an occupational disease as a result of 22 years' exposure to various dusts.¹ He amended his claim on March 14, 1997, to seek permanent disability benefits in lieu of RIB. Reynolds submitted medical reports from Drs. Emery Lane and Matt Vuskovich. DOT submitted the depositions of Drs. John E. Myers, Emery Lane, Matt Vuskovich and Betty Joyce; a report from Dr. Betty Joyce; records from the Kentucky Retirement System; and lay depositions from Douglas Sutton and Scott Fugate. Reynolds testified both by deposition and live at the administrative hearing. After the ALJ issued his opinion and award,² DOT and the

¹ Reynolds' employment history includes work as a road worker, light equipment operator, farmer, construction worker and concrete mixer. He was exposed to sand dust and hay dust while performing these jobs. Reynolds was last exposed while in the employment of DOT.

² The ALJ awarded Reynolds workers' compensation benefits based on 30% occupational disability as a result of contracting silicosis due to work-related exposure to dust over a 30-year period while employed by multiple employers. Liability for the award was apportioned 25% to DOT and 75% to the Special Fund.

Special Fund petitioned the ALJ to reconsider, arguing that the finding that Reynolds had contracted silicosis is not based on reliable, credible and probative evidence.³ The petitions for reconsideration were denied.

DOT appealed to the Workers' Compensation Board where its contentions were the same as those made in this Court. Because the Board has adequately addressed DOT's allegations of error, we shall borrow liberally from its opinion.

DOT's first argument is that the Board erred by relying on Dr. Vuskovich's testimony because it lacks a "reasonable evidentiary foundation" in that Dr. Vuskovich did not review all the x-rays taken of Reynolds' lungs nor certain medical records. Dr. Vuskovich interpreted a chest x-ray taken by Dr. Baker on February 19, 1997, and his own x-ray of Reynolds taken on March 27, 1997, the day he evaluated Reynolds. Dr. Vuskovich, a certified B reader, stated that the films revealed Category 1/2 silicosis and causally attributed, in part, to Reynolds' work-related dust exposure. He performed pulmonary function studies demonstrating a FVC of 66.6% and an FEV₁ of 57.1% of predicted, indicative of Class 3 moderate impairment. An electrocardiogram was abnormal, indicating atrial fibrillation or abnormal cardiac rhythm (which

³ DOT and the Special Fund also petitioned the ALJ to review his award of permanent partial disability to Reynolds for both 425 weeks and for the remainder of his life, should he live beyond his life expectancy. DOT cited Ky. Rev. Stat. (KRS) 342.730 (1)(c) in support of its contention that Reynolds should have been granted an award for permanent partial disability for not more than 425 weeks. The ALJ responded by limiting the award to a period of 425 weeks.

Reynolds controls by taking digitalis). Dr. Vuskovich acknowledged that if a patient's cardiac rate gets out of control, congestive heart failure may result, but he found no evidence of congestive heart failure in Reynolds. Dr. Vuskovich concluded that Reynolds suffered a 30% permanent functional impairment under the AMA guidelines and that he should not return to work.

DOT relies upon C. & K. Coal Co. v. Hall, Ky., 481 S.W.2d 265 (1972), where Kentucky's highest court determined that a physician's report was improperly used in apportioning an award where the report referred only to one of two industrial accidents at issue in the claim. DOT's contention that it is necessary for a physician to review each and every medical record of a claimant finds no support in the law. Dr. Vuskovich personally examined Reynolds, performed an EKG and pulmonary studies, and interpreted his own x-rays of Reynolds' lungs. A physician's conclusions may be based upon first-hand knowledge, such as his own examination or tests of the patient, upon information gleaned from the patient's statements, or upon reports of examinations performed by others. Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643, 646 (1991).

Dr. Vuskovich also testified that he did not detect evidence of emphysema or lung cancer on either of the x-rays. Drs. Myers, Lane and Joyce testified that the FEV₁ finding of 57.1% of predicted, as determined by Dr. Vuskovich on pulmonary testing of Reynolds, was consistent with emphysema or an obstructive lung disease caused by Reynolds' 40-year history of smoking. DOT

contends, therefore, that Dr. Vuskovich's testimony does not rise to the level of "substantial evidence" since the other physicians' testimony contradicts his testimony on the point of whether or not Reynolds suffers from emphysema or an obstructive lung disease.

Dr. Myers interpreted two other x-rays of Reynolds, dated February 22, 1996, and December 12, 1996; and he interpreted the x-ray dated February 19, 1997, one of the two x-rays Dr. Vuskovich had relied upon for his diagnosis of Reynolds. Dr. Myers interpreted the earlier x-rays as negative for silicosis, revealing only a 0/1 category. Dr. Myers expressed an opinion that the February 19, 1997, x-ray produced a positive reading for silicosis because of Reynolds' atrial fibrillation.

Because DOT was unsuccessful in persuading the ALJ that Reynolds suffered no occupational disability from his exposure to dust, the question we must answer is whether or not the ALJ's decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). Substantial evidence has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable persons." Smyzer v. B. F. Goodrich Chem. Co., Ky., 474 S.W.2d 367, 369 (1971). The probative value of evidence is not determined by the number of doctors who testify. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974).

Issues of exposure, occupational disease and causation are questions of fact. The ALJ, as fact finder, has the sole

authority to determine the weight, credibility and substance of the evidence and the inferences to be drawn from it. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). Whenever the ALJ is confronted with conflicting evidence, he may choose what portions of the evidence to believe. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

DOT finally contends that since Dr. Myers' explanation as to why the x-ray findings were inconsistent is the only evidence touching upon this matter, it is uncontradicted. Contrary to DOT's contention, the ALJ was not faced with uncontradicted testimony from Dr. Myers concerning the interpretation of the x-ray dated February 19, 1997. Dr. Vuskovich testified both that he found no evidence of congestive heart failure on the date of his examination of Reynolds, and he detected no evidence of emphysema on either of the x-rays he interpreted.

For the foregoing reasons, the decision of the Workers' Compensation Board is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
RALPH REYNOLDS:

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