

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001791-WC

ROSCOE DALE WILBURN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-9607662

A. P. GREEN INDUSTRIES, INC.;
SPECIAL FUND;
HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, HUDDLESTON AND McANULTY, JUDGES.

GUIDUGLI, JUDGE. Roscoe Dale Wilburn (Wilburn) appeals from an opinion of the Workers' Compensation Board (the Board) rendered June 19, 1998, which affirmed an opinion and order of the Administrative Law Judge (ALJ) finding that Wilburn failed to meet his burden of proof on the issue of occupational disability. We affirm.

Wilburn began working for appellee's predecessor in 1972. A. P. Green Industries, Inc. (A. P. Green) purchased Wilburn's prior employer's business on August 1, 1994. Wilburn

continued working until October 1, 1994, when he was laid off. Wilburn testified that during his 22 year employment at the brickyard he was constantly exposed to dust. According to Wilburn, he becomes short of breath upon exertion and tires quickly.

Wilburn filed an application seeking benefits for silicosis in April 1997. The parties stipulated that Wilburn's last date of exposure was October 1, 1994.

In support of his claim, Wilburn submitted the medical reports of Dr. Robert W. Powell (Dr. Powell) and Dr. John E. Myer (Dr. Myer). Dr. Myer diagnosed Level 1/2 silicosis based on his x-ray interpretation. Pulmonary function studies performed by Dr. Myer showed an FVC of 108% and FEV 1 of 113%. Dr. Myer gave an impairment rating of 0-10%, but indicated that Wilburn's occupational implications were greater than the impairment rating listed.

Dr. Powell diagnosed Level 1/1 silicosis and provided pulmonary function study values of 109% FVC and 122% FEV 1. Dr. Powell assigned an impairment rating of 0%, and indicated that Wilburn's occupational implications were not greater than the impairment rating listed.

A. P. Green presented medical reports from Dr. B. T. Westerfield and Dr. Betty Joyce (Dr. Joyce). Both doctors indicated that Wilburn's films were negative for occupational disease. It appears that neither of these doctors performed pulmonary function testing.

Dr. Joyce's evaluation of Wilburn was performed pursuant to KRS 342.315, which provides that "[t]he clinical findings and opinions of [the university medical school evaluator] shall be afforded presumptive weight by arbitrators and administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence." KRS 342.315(2). Wilburn filed a motion in limine with the ALJ seeking to either exclude Dr. Joyce's report or to order that it not be given presumptive weight on the ground that KRS 342.315 is unconstitutional. Wilburn's motion was denied.

On January 6, 1998, the ALJ entered an opinion and order finding that Wilburn failed to meet his burden of proof regarding the existence of occupational disability. The ALJ found:

As plaintiff's claim is a claim for silicosis and not coal workers' pneumoconiosis, he must prove an occupational disability pursuant to KRS 342.316. Review of the medical evidence indicates that plaintiff's pulmonary functioning is normal or above for a person of his age and height. While he testified to shortness of breath upon exertion, his testimony is not supported by the testimony of his physicians. Further, Dr. Powell assessed 0% impairment and stated that plaintiff's diagnosis did not have occupational implications greater than the 0% impairment. Accordingly, the Administrative Law Judge cannot conclude that the plaintiff retains any occupational disability as a result of the alleged contraction of silicosis and his claim must be denied.

The Board affirmed, finding the ALJ's findings were supported by substantial evidence. In regard to Wilburn's arguments concerning KRS 342.315, the Board held:

Wilburn's arguments concerning the ALJ's ruling on the motion in limine are moot. Neither his Opinion nor his order upon reconsideration gave any indication that the ALJ gave presumptive weight to the x-ray interpretation of Dr. Joyce. The ALJ determined that the evidence submitted by Wilburn himself was insufficient to support an award.

On appeal, Wilburn contends that the ALJ erred in denying his motion in limine based upon his challenge to the constitutionality of KRS 342.315. Because we find that KRS 342.315 does not apply to Wilburn, we decline to address the merits of this argument.¹

KRS 342.315 was part of the December 1996 amendments to the Kentucky workers' compensation statutes. Because Wilburn's last date of exposure was in 1994, we would have to find that the presumptive weight provision of the statute is to be applied retroactively for Wilburn to have standing to raise a constitutional challenge.

In order to apply a statute retroactively, we must find that the change brought by a statute is merely procedural as opposed to substantive in nature. For the most part, assignment of the burden of proof has been deemed to be substantive in nature. Director, Office of Workers' Compensation Programs, Dept. Of Labor v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251, 2254, 129 L.Ed.2d 221 (1994). Changes which are outcome determinative have also been found to be substantive. Fite & Warmath Const. Co. v. MYS Corp., Ky., 559 S.W.2d 729, 733 (1977),

¹Although not final, the same decision was reached in Magic Coal Co. v. Fox, Ky. App., ___ S.W.2d ___ (1999).

citing Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed 1188 (1938).

Our reading of KRS 342.315(2) shows that it is clearly substantive. Under that provision, the findings of the university physician are to be given presumptive weight by the arbitrator and ALJ with the burden to overcome those findings resting with the opponent of the evidence in question. Because the statute changes the burden and level of proof that the party challenging the evaluator's findings must meet, it has a substantive impact. Furthermore, under KRS 342.0015, substantive provisions of the 1996 special session concerning Kentucky's workers' compensation statutes only apply to those claims where the last exposure occurred after December 12, 1996. As Wilburn's last exposure occurred in 1994, the statute does not apply to him and he therefore lacks standing to challenge its constitutionality.

Wilburn also contends that the ALJ erred in finding that he had no occupational disability as a result of his exposure. Because Wilburn was unsuccessful before the ALJ, he must show that the evidence was so overwhelming as to compel a different outcome. Paramount Foods v. Burkhardt, Ky., 695 S.W.2d 418 (1985). As long as the ALJ's verdict is supported by substantial evidence, a different outcome is not compelled. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Of the four doctors who evaluated Wilburn, only Dr. Myer found evidence of impairment, and even then estimated it as being from 0-10%. As the Special Fund points out, workers'

compensation benefits are awarded based on occupational disability alone as opposed to mere functional impairment. Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985). The ALJ is given discretion to translate functional impairment ratings into occupational disability ratings. George M. Eady Co. v. Stevenson, Ky., 550 S.W.2d 473, 474 (1977). Given the medical proof before the ALJ in this matter, we do not find that a different result is compelled in this case.

The Board's order of June 19, 1998 is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Robert W. Miller
Grayson, KY

BRIEF FOR APPELLEE, SPECIAL
FUND:

Joel D. Zakem
Louisville, KY

No appearance for appellee,
A. P. Green