

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002032-WC

JIMMY MARTIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-89-020538

HON. ROBERT L. WHITTAKER,
Director of Special Fund;
HON. DENIS S. KLINE,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GARDNER, KNOX, AND MILLER, JUDGES.

KNOX, JUDGE: This petition for review of a decision of the Workers' Compensation Board (Board) presents the issue of whether the Administrative Law Judge (ALJ) erred in dismissing Jimmy Martin's (Martin) claim for benefits due to coal workers' pneumoconiosis and a psychiatric condition allegedly caused by his employment with Diamond N Mining, Inc. (Diamond N). Finding no error in the Board's affirmation of the ALJ's decision, and having reviewed the record and applicable law, we affirm.

Martin filed his application for adjustment of claim on May 31, 1989, alleging he suffered from coal workers' pneumoconiosis, chronic bronchitis, anxiety syndrome, and post-traumatic stress disorder with depression, all arising as a result of his employment with Rock Bridge Coal Company (Rock Bridge) and/or Diamond N. Martin worked for Rock Bridge over the course of six (6) or seven (7) months in 1987 until he was laid off due to the mine closing. Approximately one (1) year later, in November 1988, Martin was employed by Diamond N for one (1) day. Since that time he has not held any other employment.

The matter was assigned to ALJ Suzanne Shively. Before ALJ Shively, Martin produced evidence from Drs. Myers, Wright and Hieronymus regarding his pneumoconiosis claim, and Dr. Lurie respecting his psychiatric claims. On the pneumoconiosis claim, Diamond N presented the testimony of Drs. Broudy, Mettu, and Dahhan, while Dr. Granacher testified regarding the psychiatric claim. Rock Bridge produced the testimony of Drs. Anderson and Jarboe discrediting the pneumoconiosis claim, and Dr. George on the psychiatric claim.

On February 1, 1990, ALJ Shively dismissed Rock Bridge as a party defendant.¹ Thereafter, Martin moved all evidence produced by Rock Bridge be stricken from the record, which motion

¹ ALJ Shively reasoned that Rock Bridge could not be held liable on the pneumoconiosis claim since Martin was no longer in its employ at the time of his "last exposure." With respect to the psychiatric claims, the ALJ noted that Martin's "nerves" did not give way until he went underground for Diamond N. Therefore, she concluded that if a work-related change in the human organism had occurred, it took place when Martin was employed by Diamond N, not Rock Bridge.

was granted. Diamond N responded by requesting it be permitted to substitute the testimony of Dr. Anderson for one of its physicians, which motion was initially denied but subsequently granted upon reconsideration. Ultimately, Martin and Diamond N entered into a settlement agreement, approved by ALJ Shively on October 19, 1990, wherein Martin reserved the right to pursue his claims against the other parties to the action, i.e. the Special Fund.

On June 16, 1992, Martin moved the matter be submitted for a final decision. Although this motion was granted by ALJ Irene Steen on July 24, 1992, for reasons that are not reflected in the record, no further action was taken on the claim until August 27, 1996, when ALJ James Kerr entered an order recusing himself and remanding the matter to the Department for reassignment. On September 12, 1996, the case was reassigned to ALJ Denis Kline who issued an order on April 1, 1997, stating, in part:

A review of this file reveals that any "proof" in this record is beyond stale. I could not possibly render a decision on the issues presented without updated proof.

ALJ Kline then granted the parties additional time in which to submit more current proof. Martin produced updated reports from Drs. Myers, Wright, Hieronymus and Lurie. The Special Fund did not submit any further evidence but, rather, agreed the case be decided on the record as it stood.

At a hearing on the matter, Martin testified he had been employed as a bolter helper at Rock Bridge. He explained that during this time there was a mining accident near his home

in which several miners were killed. Martin claimed he was somewhat skeptical about entering the mines after the accident. Approximately one (1) year following the closure of the Rock Bridge mine, Martin worked for one (1) day as a scoop operator for Diamond N. However, upon returning to work the second day Martin found himself entirely too frightened to enter the mines. Martin's testimony concluded with the disclosure that he had remained unemployed as of the time of the hearing.

In support of Martin's claim, Dr. Myers testified he first examined Martin in May 1989. At this time, he opined a reading of Martin's chest radiographs indicated Category 1/2 coal workers' pneumoconiosis. He further believed Martin suffered mild restrictive and obstructive pulmonary defects. Martin's chest was again radiographed in April 1997. As a result, a second radiographic report from Dr. Myers was submitted in which the doctor opined the image indicated Category 1/1 pneumoconiosis.

Martin was first examined by Dr. Wright in April 1989. Dr. Wright diagnosed Category 1 pneumoconiosis in addition to some mild to moderate obstructive pulmonary impairment. This physician also read the April 1997 radiograph, concluding it indicated Category 1/2 pneumoconiosis.

Dr. Hieronymus examined Martin in September 1989. He read Martin's radiographs as indicating Category 1/1 pneumoconiosis. He further diagnosed Martin as suffering from restrictive pulmonary disease or chronic obstructive pulmonary disease. Dr. Hieronymus performed pulmonary function studies in

1997. This spirometry indicated an FVC of 80% of the predicted normal values and an FEV1 of 71% of the predicted normal values. It was Dr. Hieronymus' belief that Martin had a borderline obstructive defect and moderate small airways disease.

Regarding his psychiatric claim, Martin submitted the testimony of Dr. Lurie. Following a May 1989 examination, Dr. Lurie diagnosed Martin with post-traumatic stress disorder which he believed was triggered by the mining accident in which Martin's colleagues were killed. Dr. Lurie again examined Martin in 1997 and testified he believed Martin suffered from essentially the same symptoms as previously diagnosed. It was Dr. Lurie's opinion that Martin's condition was related to his work as a miner.

Diamond N submitted the testimony of Drs. Anderson, Mettu and Dahhan, all of whom, collectively, found no evidence of pneumoconiosis and believed Martin retained normal pulmonary function studies as a result of their individual 1989 examinations of the claimant. Diamond N further produced the testimony of Dr. Granacher, a psychiatrist, in rebuttal to Martin's psychiatric claim. Dr. Granacher diagnosed Martin as suffering from mild mental retardation and psychosocial deprivation. He testified that neither condition was connected to Martin's employment as a miner.

ALJ Kline issued his opinion and order on November 5, 1997. Therein he stated that he found the testimony of Dr. Anderson to be the most persuasive. As a result, the ALJ concluded that Martin had not contracted the occupational disease

of coal workers' pneumoconiosis and dismissed that portion of Martin's claim. With respect to the psychiatric claim, the ALJ found the testimony of Dr. Granacher to be the most persuasive, whereby concluding that Martin had not suffered a work-related psychological or psychiatric problem. Again, the ALJ dismissed any claim for workers' compensation benefits arising from the alleged psychiatric disability. Martin appealed this decision to the Board, which affirmed.

On appeal, both before this Court and the Board, Martin argues the ALJ erred by failing to base his decision on the most recent evidence of record. He posits that since the ALJ classified the evidence contained in the 1990 record as "stale," it should be considered incompetent and not probative of his present condition. Further, Martin contends that not only did the ALJ err in relying on the outdated medical evidence, but the most recent medical record compels a finding that both his coal workers' pneumoconiosis and psychiatric condition are each totally occupationally disabling. We disagree.

Our duty is to determine whether "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

The Board affirmed the ALJ, pointing out that the ALJ, as the sole arbiter of weight and credibility to be accorded testimony, may rely in whole or in part upon any party's proof, and, may in fact, pick and choose from the evidence even within a

given witness' testimony. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). The Board explained:

The evidence does not compel a finding of total occupational disability either from pneumoconiosis or from his psychiatric condition. Dr. Anderson's testimony is substantial evidence supporting the ALJ's finding that Martin does not suffer from coal workers' pneumoconiosis. In any event, there is no evidence which would support an award of total occupational disability for Martin's pneumoconiosis. There is no evidence that Martin suffers Category 2 pneumoconiosis, nor are there any pulmonary function studies that are below 55 percent of predicted. At best, therefore, Martin would qualify for an award of 75 percent occupational disability under KRS 342.732(1)(b) as it existed at the time of Martin's last exposure.

Likewise, there is substantial evidence supporting the ALJ's finding that Martin does not suffer from a work-related psychiatric condition. Hence, we must affirm the ALJ's opinion. Special Fund v. Francis, [Ky., 708 S.W.2d 641 (1986)].

Moreover, we believe that even if Martin's arguments were accepted as accurate, he has failed to demonstrate that he is entitled to any pneumoconiosis award for which the Special Fund would be liable. KRS 342.316(2)(b)2.b provides:²

2. To be admissible, medical evidence offered in any proceeding under this chapter for determining a claim for occupational pneumoconiosis resulting from exposure to coal dust, shall comply with accepted medical standards as follows:

b. Spirometric testing shall be conducted in accordance with the standards recommended in the latest edition available of the guides to the evaluation of permanent impairment published by the American Medical Association

² We note application of KRS 342.316(2)(b)2.b. in effect at the time the claim was filed.

and the 1978 ATS epidemiology standardization project.

This Court has previously held:

The AMA guidelines (whether the third or fourth edition is followed) call for the administration of a bronchodilator and subsequent testing in certain objective situations. If a bronchodilator should be administered, then the guidelines direct the physician to calculate the FVC and FEV1 values from these results. Thus, pre-bronchodilator and post-bronchodilator results are both contemplated as valid predictors of respiratory impairment.

Fields v. Carbon River Coal Co., Ky. App., 920 S.W.2d 880, 884 (1996).

As discussed above, Drs. Wright and Myers diagnosed Category 1 pneumoconiosis, yet neither physician reported the results of any pulmonary tests. Only Dr. Hieronymus included pulmonary test results in his report; however, these tests failed to comply with the statutory requirements.

Although Dr. Hieronymus found obstruction and an abnormal FVC/FEV1 ratio, he did not perform the mandated post-bronchodilator test.

KRS 342.316(2)(b)2.b and 342.732(1)(b) require that the AMA guidelines be followed in the administration of spirometric testing. The Supreme Court and this Court have repeatedly held that the statutory directive is not discretionary

Id. at 883. (Citations omitted). The failure to perform the requisite testing render the results invalid. Id.

KRS 342.372(1)(a) instructs that where the ALJ finds the claimant to have a radiographic classification of Category 1/0, 1/1, or 1/2, "and no respiratory impairment resulting from exposure to coal dust based upon spirometric testing . . . he

shall award a one time only retraining incentive benefit”
In that Martin is left with medical reports which merely demonstrate Category 1 pneumoconiosis absent any valid proof of pulmonary impairment, the most he could hope to obtain, as a matter of law, would be retraining incentive benefits (RIB). See Varney v. Newberg, Ky., 860 S.W.2d 752, 755 (1993). Since Diamond N has settled its liability and the Special Fund retains no responsibility for RIB benefits, Martin is precluded from any recovery for his claim, hence his arguments are moot.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

John Earl Hunt
Allen, Kentucky

BRIEF FOR SPECIAL FUND:

Joel D. Zakem
Louisville, Kentucky