

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002243-MR

COFFEE CUP COAL COMPANY, INC.

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL WRIGHT, JUDGE
ACTION NO. 87-CI-00205

ROBERT BAILEY; SPECIAL FUND;
and WORKERS' COMPENSATION
BOARD

APPELLEES

AND

NO. 1998-CA-002244-MR

ROBERT L. WHITAKER,
Director of Special Fund,
Successor to Carol M. Palmore

APPELLANT

v. APPEAL FROM LETCHER CIRCUIT COURT
HONORABLE SAMUEL WRIGHT, JUDGE
ACTION NO. 87-CI-00205

ROBERT BAILEY; COFFEE CUP
COAL COMPANY; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM and KNOX, Judges.

BUCKINGHAM, JUDGE. Coffee Cup Coal Company, Inc. ("Coffee Cup"),
and Robert Whitaker, Director of Special Fund, both appeal from
the Letcher Circuit Court's Findings of Fact, Conclusions of Law,

& Judgment entered on July 15, 1998.¹ This judgment resulted from an appeal by Robert Bailey to the circuit court from an opinion of the old Workers' Compensation Board ("the old Board"). Having considered the record and the parties' arguments, we reverse and remand.

On or about September 29, 1986, Bailey, then sixty-three (63) years old, filed an application for workers' compensation benefits due to coal workers' pneumoconiosis. Following the introduction of medical and lay testimony, the old Board entered an opinion on June 15, 1987, awarding Bailey 80% permanent, partial disability benefits due to his occupational disease and apportioning liability 25% to Coffee Cup and 75% to the Special Fund.² The old Board specifically found that Bailey still had "the pulmonary capacity to perform some manual labor"

¹The appeals have been consolidated because they involve identical issues.

²Bailey has collected the entirety of his benefits based upon the old Board's award of 80% occupational disability benefits.

and that he had "transferrable skills such as work as a truck driver and construction type work."

On July 22, 1987, Bailey filed a Petition for Review on Appeal of the old Board's opinion to the Letcher Circuit Court, arguing that he should have been awarded total, permanent disability benefits. After the case lay inactive on the circuit court's docket for eleven years, the court entered its judgment on July 15, 1998, finding Bailey to be 100% disabled. Both Coffee Cup and the Special Fund appealed to this court, arguing that the judgment should be reversed.

The claimant in a workers' compensation action has the burden of proof and risk of nonpersuasion, and, if the claimant is unsuccessful, the question on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in the claimant's favor. See Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979); Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984). Compelling evidence is that evidence which is so overwhelming that no reasonable person could reach the same conclusion as the fact finder. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224, 226 (1985). The Board's decision must be upheld if evidence of substance of record supports it. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). As the finder of fact, the old Board was the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. See Paramount Foods, Inc., v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

The circuit court determined that Bailey was totally disabled because he satisfied the definition of "disability" in

KRS 342.620(12). In conjunction with this determination, the circuit court noted that the old Board had stated that Bailey should not return to work in a dusty environment in the coal mining industry. The trial court further found that "[t]he only jobs that would be available to the Plaintiff [Bailey], with his background, are in the coal mining industry."

There is no indication in the circuit court's judgment that it followed the applicable law set forth above in reaching its conclusion. In fact, our review of the record indicates evidence of substance to support the old Board's decision and a lack of compelling evidence to the contrary. It is apparent that the trial court erred by not affirming the opinion of the old Board.

The judgment of the Letcher Circuit Court is reversed, and this case is remanded for the circuit court to enter an order affirming the opinion of the old Board.

ALL CONCUR.

BRIEF FOR COFFEE CUP COAL CO.:

Jeffrey D. Damron
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BRIEF FOR ROBERT BAILEY:

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BRIEF FOR SPECIAL FUND:

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