

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000494-WC

GATLIFF COAL COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-98-00207

JUSTICE D. KING;  
W. BRUCE COWDEN, JR.,  
ADMINISTRATIVE LAW JUDGE;  
SPECIAL FUND; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 1999-CA-000595-WC

ROBERT L. WHITTAKER,  
DIRECTOR OF SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-98-00207

JUSTICE D. KING;  
GATLIFF COAL COMPANY;  
W. BRUCE COWDEN, JR.,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING IN PART, REVERSING IN PART, AND REMANDING

\*\* \*\* \* \* \* \* \*

BEFORE: DYCHE, HUDDLESTON, AND KNOX, JUDGES.

KNOX, JUDGE: In its petition for review of a decision of the Workers' Compensation Board (Board), appellant, Gatliff Coal Company (Gatliff), argues the Board erred in failing to dismiss appellee Justice King's claim. Gatliff further contends it was error for the Board not to retroactively apply the 1996 amendments to KRS 342.315 and KRS 342.732 to this claim. Appellant, Special Fund, posits the Board exceeded its authority by awarding relief which was not sought on review. Having thoroughly reviewed the record and applicable law, we affirm in part, reverse in part, and remand.

Justice King (King) was employed by Gatliff as an underground coal miner. The record reflects that King's last day of exposure was December 31, 1994, and that he has not been employed since that date. On January 29, 1998, King filed an adjustment of claim alleging coal workers' pneumoconiosis and seeking benefits therefor. The contested issues before the administrative law judge (ALJ) were the: (1) existence of the occupational disease of coal workers' pneumoconiosis; (2) extent and duration of the disability, if any; (3) applicability of the 1996 amendments to KRS 342.315 and 342.732 to King's claim; and, (4) cause of any pulmonary impairment.

The parties subsequently submitted medical evidence from Drs. Robert Powell, Matt Vuskovich, and Bruce Broudy. Further, in accordance with KRS 342.315, the Commissioner of the Department of Workers' Claims appointed Dr. Richard Goldwin, a

University of Louisville evaluator, to conduct a radiographic examination of King.

King introduced the medical report of Dr. Vuskovich, who performed a full-scale pulmonary evaluation of King on May 23, 1997. Dr. Vuskovich evaluated King as having ILO changes consistent with Category 2/2/ q/q silicosis. The doctor noted that King denied a history of asthma, emphysema, chronic bronchitis, pneumonia, tuberculosis, heart trouble, and allergic rhinitis. He further opined that, within a reasonable degree of medical probability, the radiographic changes were attributable to King's several decades of employment in the coal mining industry.

Dr. Vuskovich conducted pulmonary function tests which revealed an FVC of 70.6 percent of predicted and an FEV1 of 64.0 percent of predicted values. This doctor concluded King's pulmonary impairment was attributed to his infliction with silicosis. Dr. Vuskovich further opined that, from the pulmonary standpoint, King could continue to perform his usual coal mining employment, or comparable and gainful employment. However, it was noted that King should not have any additional exposure to coal, rock or sand dust. The doctor observed that silicosis can progress, without further exposure, to a higher capacity of simple silicosis or to the complicated, progressive, massive fibrosis associated with the disease. King was advised to be monitored with annual chest radiographs.

King also produced the medical report of Dr. Robert Powell, who, likewise, performed a full-scale pulmonary

evaluation on July 22, 1997. Dr. Powell's radiographic evaluation of King revealed evidence of histoplasmosis. The exam further indicated the possible presence of additional noncalcified nodularity to the extent of Category 1/1. q/q profusion. Dr. Powell performed pulmonary function tests evidencing an FVC of 72 percent best of predicted and an FEV1 of 64 percent best of predicted values. King's total lung capacity was monitored as 106 percent of predicted and a residual volume of 195 percent of predicted.

Regarding causation, Dr. Powell explained that within reasonable medical probability, irrespective of King's histoplasmosis, the diagnosis of other nodularity consistent with coal workers' pneumoconiosis was presumably due to the inhalation of coal mine dust. The doctor concluded that, from a pulmonary standpoint, King could perform his usual coal mining employment or other comparable and gainful employment. However, in consideration of King's abnormal chest radiograph, Dr. Powell recommended that King avoid further exposure to high concentrations of coal dust in the future. Finally, Dr. Powell diagnosed King as suffering from a mild obstructive ventilatory defect with hyperinflation due to tobacco use.

Gatliff submitted the report of Dr. Bruce Broudy. Dr. Broudy's evaluation was performed on March 5, 1998. He interpreted his quality 1 film of King's chest as indicating no evidence of coal workers' pneumoconiosis. However, Dr. Broudy did discover multiple scattered calcifications in both lungs and hilar areas, typical of histoplasmosis and, in some instances,

tuberculosis. Pulmonary function studies were conducted both pre- and post-bronchodilator. King's FVC was 82 percent of predicted pre-bronchodilator and 84 percent of predicted post-bronchodilator. King's FEV1 studies revealed a pre-bronchodilator result of 65 percent of predicted and a post-bronchodilator result of 70 percent of predicted.

Dr. Richard Goldwin, as a KRS 342.315 university evaluator, conducted an independent radiographic examination of King's chest on March 17, 1998. Dr. Goldwin's quality 1 films indicated old calcified granulomas scattered in both lungs. Otherwise, the radiographs were interpreted as negative for coal workers' pneumoconiosis.

The ALJ, relying principally on the report of Dr. Powell, issued an opinion, order and award finding King was entitled to retraining incentive benefits (RIBs) pursuant to the 1994 version of KRS 342.732(1)(a). However, unable to find that King had sufficiently demonstrated his pulmonary impairment was significantly caused by exposure to coal dust, the ALJ denied King eligibility for Tier II benefits.

Gatliff appealed the ALJ's decision to the Board arguing: (1) the decision was unsupported by substantial evidence in that Dr. Powell's opinion was equivocal; and, (2) irrespective of Dr. Powell's findings, the 1996 amendments to KRS Chapter 342 were applicable to King's claim which effectively denied him entitlement to any RIBs. In its opinion rendered February 19, 1999, the Board affirmed the ALJ's application of the 1994

version of KRS Chapter 342, but reversed and remanded on the issue of causation. As the Board stated:

In the case sub judice, after considering the entire context [sic] of Dr. Powell's medical report, we cannot say that his opinions on causation are expressed in terms of a reasonable degree of medical probability. Unfortunately, in making this determination, it appears from the face of the opinions that the ALJ relied exclusively "on the findings of Dr. Powell, a noted authority in the field." Since Dr. Powell's opinion in and of themselves do not qualify as substantial evidence, we must reverse.

. . . .

On remand, assuming the ALJ elects to stand by his original determination that King is afflicted with CWP, he is free to adopt one of two possible outcomes. First, he can simply base his conclusions on the opinions expressed by Dr. Vuskovich with regard to x-ray interpretation. Of course, this would alter the outcome of King's award. King would become entitled to benefits under the 1994 version of KRS 342.732(1)(d).

Alternatively, we believe that the ALJ could also reach the conclusion that King has Category 1 CWP and remains entitled to RIB under KRS 342.732(1)(a). Although Dr. Powell's opinion regarding causation of King's x-ray changes were not conclusive in and of themselves, when considered in conjunction with Dr. Vuskovich's positive findings, in our opinion they would be sufficient to justify such a ruling by the ALJ. Dr. Powell found non-calcified nodularity equal to Category 1/1 profusion [a]ffecting all six lung zones when contrasted with standard ILO films. He also noted that King had an exclusive history of injurious exposure spanning several decades. He offered no other explanation for non-calcified changes seen on x-ray other than to say that the nodularity is "consistent with coal workers' pneumoconiosis" and "is presumably due to inhalation of coal dust." Dr. Vuskovich also found small opacities [a]ffecting all six lung zones which he felt were of sufficient profusion when contrasted

with standard ILO films to justify a diagnosis of Category 2/2. Dr. Vuskovich noted that King denied a history of asthma, emphysema, chronic bronchitis, pneumonia, tuberculosis, heart trouble, and allergic rhinitis. Furthermore, Dr. Vuskovich stated within a reasonable degree of medical probability that the changes he saw on x-ray were related to King's work in the mining industry.

These relevant portions of the medical evidence in our opinion, when taken as a whole, would constitute substantial evidence to support a finding of RIB. The ALJ could conclude (1) that based on Dr. Vuskovich's finding, King has CWP; (2) that, as also found by Dr. Vuskovich, King's CWP is related to his extensive history of exposure in the coal industry; and (3) that the correct interpretation of the x-ray profusion is Category 1/1 as determined by Dr. Powell.

We believe the Board scrutinized the ALJ's decision too harshly. As opposed to referencing the line of cases discussing the ALJ's discretion as fact finder and authority to independently weigh the evidence, we turn to the direct statutory provisions regarding the Board's standard of review. KRS 342.285(2) provides, in pertinent part:

(2) The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, its review being limited to determining whether or not:

. . . .

(c) The order, decision, or award is not in conformity to the provisions of this chapter;

(d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or

(e) The order, decision, or award is arbitrary or capricious or characterized

by abuse of discretion or clearly unwarranted exercise of discretion.

We believe the Board's opinion operates to substitute its own judgment as to the weight of the evidence. As the Board recognized, the "record as a whole" supported the ALJ's finding that King suffered from coal workers' pneumoconiosis Category 1/1 and was entitled to RIBs under KRS Chapter 342. As finder of fact, the ALJ was free to rely on circumstantial evidence and to draw reasonable inferences from the evidence in arriving at a decision. Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

In our opinion the Board's reliance on Seaton v. Rosenberg, Ky., 573 S.W.2d 333 (1978), for the proposition that medical testimony must be based on probability, as opposed to possibility, is misplaced. Seaton addressed a medical malpractice trial wherein the court disallowed or prejudiced the testimony of one of plaintiff's medical experts. The trial court was of the mind that since the medical expert was not present in the operating room at the time of the alleged tort, he was not qualified to testify as the trial court viewed such opinions as "assumptions." Id. at 337. Our Supreme Court clarified that a medical expert's opinion testimony is admissible whether it be based on the expert's personal knowledge of the case, or based on hypothetical facts alone, or coupled with the expert's knowledge of the case together with facts of his own knowledge. Id. at 338.

Rather, we believe Scorpio Coal Co. v. Harmon, Ky., 864 S.W.2d 882 (1993), controls under the facts of this matter. In Scorpio Coal, the Court concluded that positive radiograph



reports, coupled with evidence of at least a minimum overall work-related exposure to coal dust, if an ALJ so finds, constitute substantial evidence of probative value. See id. at 884. We believe that is the precisely the case before us.

With regard to appellants' arguments that the 1996 amendments to KRS 342.732 and 342.315 should be applied to King's claim, it is our opinion both the ALJ and the Board decided this issue correctly. Since the Legislature, in enacting 1996 amendments to KRS Chapter 342, did not specifically identify KRS 342.732 as a remedial statute or one subject to retroactive application, as other sections of KRS Chapter 342 were so identified, we decline to apply same in such a fashion. See KRS 446.080. Similarly, it has been this Court's position that the 1996 amendments to KRS 342.315 are not merely procedural, but substantive in nature with regard the presumptive weight provision. Magic Coal Co. v. Fox, 46 K.L.S. 2:2 (1999). As such, KRS 342.315(2) has been held not subject to retroactive application, and until otherwise instructed by our Supreme Court, we shall adhere to this interpretation.

For the above-identified reasons, the opinion of the Workers' Compensation Board is reversed to the extent it found the ALJ's identification of King's coal workers' pneumoconiosis and entitlement to retraining incentive benefits therefor, was unsupported by substantial evidence. The order of the Board is affirmed in all other respects. This matter is remanded for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR GATLIFF COAL  
COMPANY:

William M. Cox, Jr.  
Williamsburg, Kentucky

BRIEF FOR SPECIAL FUND:

Joel D. Zakem  
Louisville, Kentucky

BRIEF FOR JUSTICE D. KING:

Ronald C. Cox  
Harlan, Kentucky