

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003055-WC

BROOKS PATRICK

APPELLANT

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-92-23145

v.

UNION BOILER COMPANY;
HON. ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND;
HON. DENIS S. KLINE,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, EMBERTON, AND MCANULTY, JUDGES.

EMBERTON, JUDGE. Brooks Patrick petitions this Court to review an opinion of the Kentucky Workers' Compensation Board (the Board) entered on November 14, 1998, which affirmed the Administrative Law Judge's (ALJ) opinion and order dismissing Patrick's claim for failure to carry his burden of proof as to any occupational disability as a result of his diagnosis of asbestosis. After reviewing the record, we affirm.

In June 1992, Patrick, a retired pipefitter, filed an application for adjustment of claim with the Department of Workers' Claims as a result of his diagnosis of asbestosis. In his claim, Patrick asserted that his disease arose out of his employment with Union Boiler Company and was based upon a last exposure date of March 18, 1991. Patrick later amended his application to reflect a last exposure date of November 3, 1989. After a hearing, the ALJ dismissed Patrick's claim for failure to show an injurious exposure. Patrick then appealed to the Board. On April 1, 1994, the Board affirmed the ALJ's determination that Patrick's exposure at Union Boiler Company in 1989 was not injurious, but reversed and remanded for a finding that Patrick suffers from asbestosis, a fact that was unrefuted at the hearing and was a prerequisite to the query of injurious exposure. Kinker v. American Radiator & Standard Sanitary, Inc., Ky., 268 S.W.2d 948 (1954). Patrick appealed the Board's opinion to this Court. After this Court affirmed the Board's opinion, Patrick appealed to the Kentucky Supreme Court, which again affirmed the Board's opinion.

On December 27, 1995, Patrick filed another application for adjustment of claim for asbestosis arising out of his employment at Union Boiler Company with a last exposure date of April 3, 1985. On remand from the Board's opinion of April 1, 1994, ALJ Roger Riggs made the requisite finding that Patrick suffers from asbestosis and set a prehearing conference to determine a course of action for Patrick's new claim. Patrick then filed a motion to recuse ALJ Riggs because he had previously

dismissed Patrick's claim based upon the 1989 exposure date. ALJ Riggs granted the motion and the case was assigned to ALJ Denis Kline.

On November 20, 1997, after a hearing, ALJ Kline found: (1) that Patrick had contracted asbestosis; (2) that he was exposed to injurious levels of asbestosis while working for Union Boiler Company in 1985; and (3) that he failed to establish any occupational disability due to the asbestosis. Patrick appealed to the Board. On April 3, 1998, the Board reversed and remanded for a determination of whether Patrick has any occupational disability notwithstanding the absence of any respiratory impairment and the fact that Patrick continued to work from 1985 to 1990. On remand, ALJ Kline again found that Patrick failed to present evidence of any occupational disability. On November 13, 1998, the Board affirmed the ALJ's opinion dismissing Patrick's claim. Patrick then petitioned this Court to review the Board's opinion pursuant to Kentucky Rules of Civil Procedure (CR) 76.25.

When the claimant is unsuccessful below, the issue on appeal is whether the evidence compelled a finding in his favor. Wolf Creek Collieries V. Crum, Ky. App., 673 S.W.2d 735 (1984). Compelling evidence is that which is so overwhelming that no reasonable person could reach the same conclusion as that reached by the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). The ALJ is the sole judge of the facts and determines the quality, character, and substance of the evidence presented, and the reviewing court or body may not substitute its judgment

on these factual issues. Paramount Foods v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

On appeal, Patrick argues that the ALJ erred in determining that he has no occupational disability as a result of his asbestosis. In support of his argument, Patrick relies on the restrictions that were placed on him as a result of his disease. Evidence of the restrictions came from Dr. Prakash Goyal, who concluded that Patrick could go back to work as long as the vocation or occupation did not have exposure to chemicals or dust, and the report of Dr. Ballard Wright, who found that Patrick was 100% disabled from pipefitting work or similar work which required exposure to noxious dust or toxic inhalants. Patrick contends that because a significant portion of pipefitting jobs available to him involve such exposure, his future earning capacity was greatly diminished, and thus, he was entitled to an award of occupational disability pursuant to Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968).

In dismissing Patrick's claim, ALJ Kline stated that "[t]he plaintiff has the burden of proof, and has not presented any credible evidence that would indicate that there is no work available to him which would not require exposure to noxious dusts and fumes." Patrick has failed to produce any compelling evidence that refutes the ALJ's finding of insufficient proof. Patrick's argument focuses solely on his lost job opportunities in the area of pipefitting. However, Patrick's restriction from accepting every available pipefitting job does not dictate an

award of occupational disability. In Osborne, supra at 804, the Supreme Court stated:

"We recognize that the interpretation of the workmen's compensation law that we are adopting herein does not give full recompense for occupational disability in that it does not give consideration to the fact that the workman's job opportunities may have been reduced in number as a result of his injury. However, the inclusion of this factor would require use of a highly complicated formula by no means accurate in result. The workmen's compensation law has never approximated the giving of full compensation for the losses attributable to disability."

Patrick did not produce any evidence concerning the unavailability of employment either in his usual occupation as a pipefitter or in other types of employment. Davis v. Baker, Ky., 530 S.W.2d 370 (1975). Ultimately, Patrick has failed to show a reduction of his future earning capacity as a result of the restrictions placed on him.

For the reasons stated above, the opinion of the Board is hereby affirmed.

McANULTY, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS IN RESULT BY SEPARATE OPINION.

COMBS, JUDGE, CONCURRING IN RESULT: While we are compelled to follow the rule of Osborne, supra, concerning lost job opportunities, I believe that the practical impact on an injured claimant of denial of access to the work to which he is occupationally suited can be devastating. This case highlights the harsh reality that job restrictions placed on a claimant as necessary to preserving his health may in effect eliminate his ability to work gainfully or meaningfully in the field of his training or expertise. The thirty-one year old precedent of

Osborne needs to be re-visited by the Supreme Court in light of the deleterious impact of that holding as a matter of reality.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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