RENDERED: June 9, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003205-WC

LEE DOTSON, JR. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-94-17706

CRYSTAL SPRINGS COAL COMPANY;
ROBERT L. WHITTAKER, Director
of Special Fund; DONALD G. SMITH,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

AND: 1999-CA-000168-WC

ROBERT L. WHITTAKER, Director
of Special Fund — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-94-17706

LEE DOTSON, JR.;
CRYSTAL SPRINGS COAL COMPANY;
HON. DONALD G. SMITH,
Administrative Law Judge; and
WORKERS'COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: GUDGEL, CHIEF JUDGE; BUCKINGHAM and HUDDLESTON, JUDGES.

BUCKINGHAM, Judge. Lee Dotson, Jr., (Dotson) petitions this court for review of the December 4, 1998, opinion of the Workers' Compensation Board (Board), which reversed and remanded the opinion and award of the administrative law judge (ALJ) awarding

100% occupational disability benefits upon reopening. The Special Fund has filed a cross-petition for review regarding credit for payments made under the settlement agreement. Having considered the parties' arguments and the record below, we do not perceive that the Board committed any error. Therefore, we affirm.

Dotson sustained a work-related injury to his back on April 15, 1994, while in the employment of Crystal Springs Coal Company (Crystal Springs). He filed an application for adjustment of claim, and he eventually settled his claim on June 12, 1995, for 60% permanent partial disability apportioned equally between Crystal Springs and the Special Fund. He received a lump sum of $40,241.40 from Crystal Springs and periodic payments of $187.18 per week for 260 weeks from the Special Fund. Dotson also settled a RIB claim against Crystal Springs in 1994 for $15,000.

On August 11, 1997, Dotson filed a motion to reopen the 1995 settlement, claiming an increase in functional and occupational disability from the 1994 injury. An arbitrator granted the motion to reopen on September 24, 1997, and following proof time, entered a subsequent order on January 7, 1998. Dotson filed his request for a de novo hearing before an ALJ on January 20, 1998. Following the entry of proof and a final hearing, the ALJ entered an opinion and award finding that Dotson had established an increase in his occupational disability and that he currently suffered from a 100% occupational disability. In particular, the ALJ stated that "although this Court [sic] believes that it is questionable whether the Plaintiff was

totally disabled at the time he entered into the settlement agreement, the Administrative Law Judge now believes the Plaintiff is definitely totally disabled." The ALJ later entered an order denying the Special Fund's petition for reconsideration in which he stated that the 60% settlement accurately reflected Dotson's occupational disability at that time and that the defendants were entitled to a credit for payments made pursuant to the settlement.

Crystal Springs and the Special Fund both appealed to the Workers' Compensation Board, arguing that substantial evidence did not support the ALJ's decision regarding a change in medical condition or in occupational disability and that the ALJ erred in failing to make specific findings as to the amount of credit. The Board reversed the ALJ's opinion and award, finding no evidence to support his finding of an increase in occupational disability. This decision rendered the Special Fund's appeal regarding credit moot.

Dotson has now petitioned, and the Special Fund has cross-petitioned, this court for review of the Board's decision. Dotson argues that substantial evidence of record supports the ALJ's finding of an increase in occupational disability.

The Board provided an excellent and thorough summary of the lay and medical evidence located at pages two through seven of its opinion, which we do not need to repeat here. Therefore, we will adopt that portion of the opinion as our own.

We first note the standard of review applicable in this appeal. When the party without the burden of proof is unsuccessful, as here, the question on appeal is whether the

findings of the ALJ were supported by substantial evidence. See Smyzer v. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). Substantial evidence is defined as "evidence of substance and relevant consequences having the fitness to induce conviction in the minds of reasonable men." Union Underwear Co. v. Scearce, Ky., 896 S.W.2d 7, 9 (1995). If the findings of the ALJ are supported by substantial evidence, the reviewing court must affirm the fact finder's decision. In workers' compensation actions, the role of the court of appeals is to correct the Board only when it has misconstrued the law or erroneously assessed the evidence so flagrantly as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

Pursuant to KRS 342.125, the reopening of a claim settled under KRS 342.730(1)(c) occurring after April 4, 1994, and before December 12, 1996, requires a showing of a change of medical condition. Any final award increasing or diminishing benefits requires a showing of a change in occupational disability. "The party seeking to increase an award has the burden of proving that there has been a change of condition resulting from the original compensable injury." Griffith v. Blair, Ky., 430 S.W.2d 337, 339 (1968).

In the present appeal, Dotson argues that his award upon reopening is supported by substantial evidence of record because he is able to do less now that he was at the time of the settlement. However, the ability to do less does not necessarily equate to a higher occupational disability level. At the final hearing, the following colloquy took place during cross-examination by counsel for Crystal Springs:

Q 24 Mr. Dotson, you remember that I took your deposition over in Herbie's office here recently. It was February 26, 1998, is that right?

A Yes, I remember taking the deposition.

Q 25 Okay, sir. And at that time you and I went through each and every one of the jobs that you'd worked at in the past, is that correct?

A Yes, sir.

Q 26 And I asked you if you were able to do any of those jobs since April 15, 1994, and since the time of your settlement, which I believe was some time in June, 1995, and your answer to each and every one of those jobs was, no, you've not been able to do them since that time, is that correct?

A Yes.

. . . .

Q 28 I said, question 100, on page 16 of your deposition, I said, "Is there any work that you've been able to do since June 12, 1995?" Any your answer was, "No." Is that still your testimony today?

A Yes.

Q 29 And then I asked you, "Is there any work that you've been able to do since April 15, 1994, the day of your injury?" And your answer was, "No." Is that still your answer today?

A Yes....

Based upon Dotson's testimony, he was no less able to rejoin the work force at the time of his hearing than he was at the time of his 1995 settlement. The medical records of Dr. Muckenhausen also reflect her opinion that Dotson was totally and permanently disabled from gainful employment prior to the 1995 settlement. Although her later records indicate that his condition had worsened since the settlement, her records do not reflect that this worsening of physical condition translates into an increase

in occupational disability, as these records reflect that Dotson was totally and permanently disabled prior to the 1995 settlement. Even the ALJ in his opinion and award questioned whether Dotson was totally disabled at the time he entered into his settlement agreement for 60% permanent partial disability.

Pursuant to Newberg v. Davis, Ky., 841 S.W.2d 164, 166 (1992), "[t]he disability figure contained in a settlement agreement is a negotiated figure and may or may not equal the claimant's actual occupational disability." The supreme court went on to state that "[t]he relevant change in occupational disability, therefore, is the difference between claimant's actual occupational disability on the date of the settlement, regardless of the figure for which he settled, and his occupational disability at the time of reopening." Id. at 166. In order for an award to be made on reopening, there must be evidence to support the finding that the claimant is more disabled now than at the time of the settlement. Gro-Green Chemical Co. v. Allen, Ky.App., 746 S.W.2d 69 (1987). See also, Central City v. Anderson, Ky., 521 S.W.2d 246 (1975).

This court cannot discern any substantial evidence of record to support the ALJ's finding that Dotson has experienced an increase in occupational disability since the time of his 1995 settlement. It appears more likely that Dotson made a bad bargain when he agreed to settle his injury claim for 60% permanent partial disability. A motion to reopen cannot be used to correct a bad bargain in the absence of an increase in occupational disability.

In reversing the ALJ's award upon reopening, the Board did not misconstrue the law or erroneously assess the evidence. Western Baptist Hospital, supra. Therefore, the opinion of the Workers' Compensation Board is hereby AFFIRMED. As we are affirming on the petition for review, the Special Fund's cross-petition for review is moot.

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-APPELLEE:

Herbert Deskins, Jr.
Pikeville, Kentucky

BRIEF FOR APPELLEE/CROSS-APPELLEE CRYSTAL SPRINGS COAL COMPANY:

J. Logan Griffith
Paintsville, Kentucky

BRIEF FOR SPECIAL FUND:

Joel D. Zakem
Louisville, Kentucky