RENDERED: AUGUST 25, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000627-WC

PEABODY COAL COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-01283

DEWEY BALES;
HONORABLE THOMAS A. NANNEY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING
** ** ** ** **

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

GUIDUGLI, JUDGE. Peabody Coal Company (Peabody) appeals from an opinion of the Workers' Compensation Board (the Board) entered February 11, 2000, which affirmed an opinion of the Administrative Law Judge (the ALJ) entered May 28, 1999, which awarded retraining incentive benefits to Dewey Bales (Bales). We reverse and remand for further consideration in light of the Kentucky Supreme Court's decision in Magic Coal Company v. Fox, Ky., ____ S.W.3d ____ (2000).

The facts of this case are not in dispute, therefore we adopt the following portion of the Board's opinion as our own:

> Bales was employed in coal mining for some 23 years. He was last exposed to the hazards of coal workers' pneumoconiosis on September 19, 1995 while employed by Peabody. Bales filed his RIB claim on July 8, 1998.
>
> In support of his claim, Bales submitted x-ray readings from Dr. John Harrison and Dr. Ballard Wright, both of whom found Bales to be suffering from Category 1 pneumoconiosis. Peabody submitted an x-ray reading from Dr. Robert Powell and two readings from Dr. Bruce Broudy, both of whom found no evidence of coal workers' pneumoconiosis. Pursuant to KRS 342.315(3), Bales was referred to the University of Louisville for an x-ray evaluation. Dr. Richard Goldwin of the University of Louisville read Bales' chest x-ray as being negative for coal workers' pneumoconiosis.
>
> After reviewing the evidence, the ALJ concluded that Bales suffered from Category 1 pneumoconiosis. He rejected Peabody's argument that the opinion of Dr. Goldwin should be given presumptive weight, relying upon the reasoning set out by the Court of Appeals in Magic Coal Company v. Fox, (97-WCB-00367)(1998-CA-000527-WC), decision rendered January 16, 1999 and appealed to the Kentucky Supreme Court (1999-SC-163).

The Board affirmed the ALJ's decision, and this appeal followed.

Peabody contends that the statutory presumption given to the opinion of a university evaluator pursuant to KRS 342.315(2), as amended effective December 12, 1996, is procedural in nature and thus applicable to all claims regardless of the fact that the last date of exposure occurred prior to the effective date of the amendment. While this appeal was pending, the Kentucky Supreme Court rendered its decision in Magic Coal and held as follows:

> [T]he amendments to KRS 342.315 which became effective on December 12, 1996, apply to all claims pending before the fact-finder on or after that date. KRS 342.315(2) creates a rebuttable presumption which is governed by KRE 301 and, therefore, does not shift the burden of persuasion. Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the worker's medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. In instances where a fact finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated.

Magic Coal, ____ S.W.3d at ____.

Based on the foregoing, the opinion of the Workers' Compensation Board is reversed, and this matter "is remanded to the ALJ to make the findings required by KRS 342.315(2)." Id. at ____.[1]

ALL CONCUR.

BRIEF FOR APPELLANT:

Philip J. Reverman, Jr.
Louisivlle, KY

BRIEF FOR APPELLEE, DEWEY BALES:

Thomas M. Rhoads
Madisonville, KY

[1]We will not address Peabody's argument as to whether the ALJ erred in requiring it to pay $155.98 per week directly to Bales as that issue was not presented to the Board and thus is not preserved for our review. Robinson Tool & Dye, Inc. v. Gross, Ky., 432 S.W.2d 443, 445 (1968).