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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000671-WC

ROBERT L. WHITTAKER,
Director of Special Fund — APPELLANT

v. — PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. 97-01727

GARY L. GRAY;
NALLY & HAMILTON, INC.; JOHN B. COLEMAN, Administrative Law Judge;
and WORKERS' COMPENSATION BOARd — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: HUDDLESTON, MILLER and TACKETT, Judges.

HUDDLESTON, Judge. The Special Fund appeals the award of occupational disability benefits to Gary L. Gray. The Special Fund argues that Gray, a coal worker, did not comply with the notice provisions of Kentucky Revised Statute (KRS) 342.316(2)(a) and that the university evaluator’s opinion was entitled to presumptive weight pursuant to KRS 342.315.

Gray worked as an equipment operator for several surface coal mining companies for twenty-six years. He filed an

occupational disease claim on July 23, 1997, in which he stated he had contracted coal workers' pneumoconiosis. Gray claimed he was last exposed to the hazards of the disease on or about July 15, 1996. Gray also stated that he gave notice to his employer of his affliction with this disease on February 3, 1997.

The first question presented is whether Gray met the notice requirement of KRS 342.316(2)(a) when he did not notify his employer until almost seven months after his last exposure. Under KRS 342.316(2)(a), to meet the notice requirement for claims in occupational disease cases,

> notice of claim shall be given to the employer as soon as practicable after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur[.]

Gray sought medical attention in August 1993, due to shortness of breath. According to the Administrative Law Judge, Gray has never smoked cigarettes. Dr. Glen R. Baker diagnosed Gray with "black lung" (i.e., coal workers' pneumoconiosis) in January 1994. However, Gray continued to work following this diagnosis. Gray gave notice to his employer following his recovery from a July 18, 1996, automobile accident. Gray had hoped to return to work, contingent upon his doctor releasing him from medical care.

In finding that Dr. Baker's diagnosis did not trigger the notice requirement of KRS 342.316(2)(a), the ALJ relied upon Howell v. Shelcha Coal Co.[1] In Howell, the employee continued working, so his disease did not disable him for purposes of requiring notice of disability under KRS 342.316(2)(a). Since Gray continued to work following Dr. Baker's diagnosis, the ALJ reasoned that he was not under a disability. Having no disability, Gray had no reason to believe he had a claim for compensation. Without a claim, no requirement to notify the employer exists.

The Special Fund points to Newberg v. Slone[2] where the Supreme Court said that "the notice provision of KRS 342.316(2)(a) is clear and requires notice to an employer when the worker has knowledge of a potentially compensable condition."[3] However, Slone is distinguishable from the case under consideration. Gray intended to return to work when he filed notice of his claim. Slone was collecting unemployment benefits when he filed notice of his claim. The Court in Slone made clear that it decided the case with the claimant's employment status in mind when it said:

> Although we would not disturb the presumption of nondisability if the employee continues working for the same employer, once there is a cessation of employment the presumption disappears and "the question becomes whether circumstances exist from which the workman

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1 Ky. App., 834 S.W.2d 693 (1992).

2 Ky., 846 S.W.2d 694 (1992).

3 Id. at 695.

realizes or reasonably should realize that his capacity to work is impaired by reason of the disease."[4]

Gray's employer did not discharge him from his job, nor had he resigned. He was merely recuperating from an unrelated injury. Therefore, he is entitled to the presumption of nondisability.

"In light of the munificent, beneficent and remedial purposes of the Workers' Compensation Act, the notice provision should be construed liberally in favor of the employee."[5] "It is well-established that notice is an issue of fact for determination by the fact-finder [that is, the ALJ]; that a factual finding cannot be disturbed on appeal if there is substantial evidence to support it; and that when more than one reasonable inference can be drawn from the evidence, it is for the fact-finder to decide."[6] The ALJ's finding that Gray gave timely notice is supported by substantial evidence consisting of Gray's continued intent to return to work and his notification to his employer as soon as practicable under the circumstances upon learning that he could not return to his job as a coal miner.

The second question presented is whether the university evaluator's opinion was entitled to presumptive weight pursuant to

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[4] Id. at 697, quoting Caldwell v. Yocom, Ky. App., 574 S.W.2d 913, 915 (1979), citing Blue Diamond Coal Co. v. Stepp, Ky., 445 S.W.2d 866 (1969).

[5] Coal-Mac, Inc. v. Wheeler Blankenship, Ky. App. 863 S.W.2d 333, 335 (1993).

[6] Whitaker Coal Co. v. Melton, Ky. App. 18 S.W.3d 361, 365 (2000), citing Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

KRS 342.315. The Workers' Compensation Board opined that the ALJ could consider the university evaluator's opinion as simply another piece of evidence. In doing so, the Board relied upon the reasoning expressed in its decision in Magic Coal Co. v. Fox,[7] that this Court had affirmed, holding that the granting of presumptive weight was not required in those claims that arose before the effective date of the requirement. Here, the Board determined that the ALJ had discretion to pick and choose from conflicting evidence, without regard for a presumption in favor of the university evaluator's findings. Subsequently, the Kentucky Supreme Court reviewed Magic Coal and the decision of this Court, reversing both.[8]

In Magic Coal, the Supreme Court held that a university evaluator's opinions and findings "constitute substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder."[9] Further, "[w]here 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."[10] Additionally, "[w]here a fact-finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing

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[7] Claim No. 97-00367.

[8] Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000).

[9] Id. at 96.

[10] Id. at 97.

so must be specifically stated."[11] Finally, the Court said that "the amendments to KRS 342.315 . . . apply to all claims pending before the fact-finder on or after [December 12, 1996]."[12]

The Board stated that it did not require the ALJ in Gray's case to grant presumptive weight to the university evaluator's findings and that the ALJ chose not to do this. The Board was incorrect. This claim was pending after the effective date of the amendments; therefore, presumptive weight was to be granted to the university evaluator's findings. Further, the ALJ noted in his opinion that he should apply presumptive weight to the university evaluator's findings in analyzing the evidence of this claim,[13] and he did just that.

The ALJ recognized the university evaluator's findings were based on a lower quality x-ray than the one used by the physician upon whom he had relied in finding that Gray had coal workers' pneumoconiosis. Although a dispute existed as to the quality of the x-ray viewed by the university evaluator, the ALJ resolved this dispute based on the opinion of another physician who also does university evaluations. The ALJ based his opinion on the long exposure history and on Gray's expert rebuttal evidence. Therefore, the ALJ stated specifically, in choosing to disregard the testimony of the university evaluator, a reasonable basis for finding that the disabling disease existed.

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[11] Id.

[12] Id.

[13] Although the ALJ came to this conclusion, it was apparently based on faulty reasoning.

"[T]he function of the Court of Appeals in reviewing decisions of the Workers' Compensation Board is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice."[14] Here, the Board misconstrued controlling law. However, the ALJ correctly applied the law and the Board was incorrect in its perception of the position taken and acted upon by the ALJ. While the Board committed an error in assessing the evidence, this error does not require correction. The ALJ made the correct decision and that decision was affirmed by the Board, albeit for incorrect reasons.

We affirm the decision of the Board.

ALL CONCUR.

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[14] Daniel v. Armco Steel Company, L.P., Ky. App., 913 S.W.2d 797, 797-798 (1995); and see Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).