RENDERED: DECEMBER 22, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003030-WC

CONSOL OF KENTUCKY, INC. APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-02162

ZACHARY D. AKERS;
HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND,
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING
** ** ** ** **

BEFORE: BUCKINGHAM, GUIDUGLI, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: In its petition for review of a decision of the Workers' Compensation Board, Consol of Kentucky, Inc., alleges the Board erred in affirming the administrative law judge's (ALJ) determination that the 1996 amendments to KRS[1] 342.315 and KRS 342.732(1)(a) were inapplicable to Zachary Akers' claim for retraining incentive benefits (RIB). In accordance

[1]Kentucky Revised Statutes.

with the directives of Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000), we reverse in part and remand.

Akers filed an application for RIB on October 2, 1997. His last day of exposure to the hazards of pneumoconiosis was March 29, 1994. Before the ALJ, Akers presented the x-ray interpretation of Dr. John Myers which stated that a film taken on March 26, 1997, evidenced coal workers' pneumoconiosis category 1/0.

Conversely, Consol presented the opinions of Drs. James Lockey and T.B. Westerfield, both of whom evaluated films dated January 3, 1995, and March 26, 1997, as completely negative for pneumoconiosis. Additionally, Dr. Lockey performed a complete pulmonary evaluation of Akers and interpreted his December 12, 1997, x-ray as normal, category 0/0.

Pursuant to KRS 342.315, Dr. Betty Joyce evaluated Akers. She interpreted his November 6, 1997, x-ray as completely negative for coal workers' pneumoconiosis and, therefore, did not perform any additional tests.

Ultimately, the ALJ determined that the 1996 amendments to KRS 342.315 were not remedial in nature thus refusing to afford "presumptive weight" or preferential treatment to the opinion of Dr. Joyce as the university evaluator. Likewise, the ALJ held that the 1996 amendments to KRS 342.732(1)(a) were not remedial in nature and, therefore, not applicable to Akers' case. The Board affirmed the ALJ's ruling that neither the presumptive weight statute nor the 1996 amendments to KRS 342.732(1)(a) were retroactive to Akers' claim. The Board reasoned that although

Akers' claim was filed on October 2, 1997, the date of last exposure was March 29, 1994, that is, prior to the 1996 amendments.

On appeal, our duty is to determine whether "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). Our supreme court's recent decision in the Magic Coal case is dispositive of the issue concerning the application of KRS 342.315, hence we cite directly thereto:

> [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, 19 S.W.3d at 97 (emphasis added).

Consol's second argument is that the ALJ and the Board erred in failing to retroactively apply the 1996 amendments to KRS 342.732(1)(a). If the amendments to the statute are applied retroactively, then Akers would not be entitled to relief since

the only physician to diagnosis pneumoconiosis diagnosed only category 1/0. See KRS 342.732(1)(a).

We agree with the Board that, because the amendment of the statute impacted a vested right to benefits, then the law on the date of the injury rather than the law on the date the claim was filed is applicable. Maggard v. International Harvester Co., Ky., 508 S.W.2d 777, 783 (1974); Breeding v. Colonial Coal Co., Ky., 975 S.W.2d 914, 916 (1998).

Therefore, the Board's opinion is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

GUIDUGLI, JUDGE, CONCURS.

HUDDLESTON, JUDGE, CONCURS IN RESULT.

BRIEF FOR APPELLANT:

Natalie D. Brown
Lexington, Kentucky

BRIEF FOR ZACHARY D. AKERS:

Thomas G. Polites
Lexington, Kentucky