

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-003027-WC

LOCUST GROVE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-08877

BILLY L. HATTON;
HONORABLE DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING
** **

BEFORE: McANULTY, MILLER, AND TACKETT, JUDGES.

TACKETT, JUDGE: Locust Grove appeals from an order of the Worker's Compensation Board awarding retraining incentive benefits to Billy Hatton. Hatton, who was fifty-four and received a fourth grade education, worked as a mechanic on Locust Grove's coal trucks. After he had been employed for at least a year, Hatton was laid off when Locust Grove sold its trucks. Rather than seeking new employment, he applied for social security supplemental income benefits. Hatton was awarded total disability benefits by the Social Security Administration. Three

and a half years after he was laid off, Hatton applied for retraining incentive benefits from the Department of Workers' Claims. The Board affirmed the Administrative Law Judge's order determining that Hatton suffered from coal workers' pneumoconiosis and awarded him retraining incentive benefits. Locust Grove appeals from this order and we reverse and remand.

Locust Grove first argues that the ALJ failed to comply with the requirements of Kentucky Revised Statute (KRS) 342.315 regarding the presumptive weight of the university evaluator's report. Hatton submitted x-rays from Dr. John E. Meyers, Jr. and Dr. Emery Lane, both of whom found changes consistent with pneumoconiosis. Dr. B.T. Westerfield, testifying by deposition for Locust Grove, stated that his examination of Hatton showed no evidence of pneumoconiosis. Pursuant to statute, Hatton was referred to Dr. Betty Joyce (the university evaluator) at the University of Louisville, and her report was also negative for evidence of pneumoconiosis.

In 1996, the legislature amended KRS 342.315 (2) to include the following provision:

The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the commissioner. The clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by arbitrators and administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When arbitrators or administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

This amendment became effective on December 12, 1996, only two days after Hatton filed his claim for retraining incentive benefits. The ALJ found that Hatton suffered from pneumoconiosis based on the medical reports of two doctors who testified that they had found changes in his x-rays consistent with pneumoconiosis. In his order, which was entered on September 15, 1997, the ALJ stated:

[T]he Administrative Law Judge is not required to consider the evidence of one medical expert to the exclusion of evidence from another. . . . In this instance, the [ALJ] gives greatest weight to the opinion of Dr. Meyers who interpreted a film as showing a definitive stage of the disease. Dr. Lane was also able to make a positive diagnosis.

The ALJ did not afford the university evaluator's report presumptive weight as he was required to do; nor did he state any reason for rejecting this evidence. Although his order does not address his failure to comply with the amended version of KRS 342.315, it is likely the result of the amendment's effective date. However, the Kentucky Supreme Court's recent decision of Magic Coal Company v. Fox, Ky., 19 S.W.3d 88 (2000), held that the amendments to KRS 342.315 apply to all claims pending before a fact-finder on or after December 12, 1996. Since Hatton's claim was filed on December 10, 1996, and was still pending before the ALJ after December 12, 1996, the ALJ is required to afford the university evaluator's report presumptive weight, pursuant to KRS 342.315 (2).

We will briefly address Locust Grove's remaining arguments in order to forestall future appeals. Locust Grove contends that the ALJ erroneously determined Hatton's weekly wage to be \$400 in reliance on materials which were not properly in evidence. Although Hatton's testimony was taken by deposition, neither party asked him about his hourly wage or work week. The ALJ accepted the figure of ten dollars per hour which Hatton had specified in his application for benefits. Locust Grove argues that under Brooks v. Island Coal Company, Ky. App., 678 S.W.2d 791 (1984), the application for benefits was improperly considered as part of the evidentiary record. Brooks, which involved ex parte medical records attached to an application for benefits, held that since the doctors in question were not deposed, their reports had no evidentiary value. In affirming the ALJ on this issue, the Board noted that Locust Grove had failed to file form AWW-1 as required by 803 KAR 25:010 section 19. Therefore, we direct the ALJ to consider additional evidence which the parties will provide, including form AWW-1, before determining Hatton's weekly wage.

Finally, Locust Grove maintains that awarding retraining incentive benefits to Hatton is improper because he is illiterate and currently receives SSI disability. This court has no way of determining whether the ALJ will find in favor of Hatton on remand; however, if Hatton is still found to have coal workers' pneumoconiosis, then he is eligible for retraining incentive benefits. The ALJ is not bound by any other agency's finding of total disability. Moreover, Hatton has stated he is

willing to be retrained and feels he may be able to do some types of work.

For the forgoing reasons, the Board's decision is REVERSED AND REMANDED to the ALJ with instructions. The ALJ will afford the university evaluator's report presumptive weight, pursuant to KRS 342.315(2) and, if the ALJ rejects the university evaluator's findings, he shall specifically inform the parties of his reasons, in accordance with Magic Coal. The ALJ is also to consider additional evidence, including form AWW-1 which Locust Grove will provide, before determining Hatton's weekly wage.

ALL CONCUR.

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