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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001001-WC

ROBERT L. WHITTAKER,
Director of Special Fund — APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-97-01924

DANNY L. RATLIFF;
ISLAND FORK CONSTRUCTION;
DONALD G. SMITH,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

REVERSING AND REMANDING

** ** ** ** **

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: The Special Fund appeals[1] from an opinion rendered by the Workers' Compensation Board. The Special Fund contends the Administrative Law Judge failed to give presumptive weight to the evidence presented by the university physician appointed pursuant to Kentucky Revised Statute (KRS) 342.315 and

[1] Danny L. Ratliff has settled his occupational disease claim with Island Fork Construction; therefore, the agreed-upon sum extinguished the employer's liability.

that it was error for the Board to hold that this provision could not be applied retroactively to claims where the last exposure occurred prior to December 12, 1996.[2] Additionally, the Special Fund claims the Board erred in stating that the two awards to Danny L. Ratliff, one for an injury claim and one for an occupational disease claim, overlap for 425 weeks. Finally, the Special Fund claims the Board erred in determining when the Special Fund's payments to Danny Ratliff are to begin.

Facts and Procedural History

The Board has described the facts of this case in detail in its opinion, rendered March 24, 2000, and we adopt its recitation.

> Ratliff [] filed a claim for coal workers' pneumoconiosis, Form 102, on August 12, 1997, alleging a last exposure while employed as a foreman for Island Fork Construction . . . with the last exposure occurring on or about October 25, 1996. Ratliff asserted therein that he had been exposed to the hazards of respirable dust on a daily basis for approximately 28 years. His pneumoconiosis filing was assigned Claim No. 97-01924.
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> Ratliff, as a result of his employment with Island Fork, also filed two separate claims in addition to his occupational disease claim. Ratliff alleged that he sustained a work-related injury to his back on or about October 24, 1996, while employed by Island Fork,

[2] This is the date that the presumptive weight provision in KRS 342.315 became effective.

and he subsequently filed a separate claim for hearing loss [].

Initially, when these three separate claims were assigned to an Arbitrator, the three claims were consolidated. Because questions arose as to the applicability of various 1996 statutory amendments to our workers' compensation statute, the consolidated claims were placed in abeyance pending a final decision in Breeding v. Colonial Coal Co., Ky., 975 S.W.2d 914 (1998). Ratliff, however, petitioned for a reconsideration of the abatement order requesting that his injury claim be bifurcated and resolved while the pneumoconiosis claim and the hearing loss claim remained in abeyance. An Arbitrator's order of April 15, 1998[,] bifurcated the injured [sic] claim and on April 28, 1998, the Arbitrator rendered a benefit review determination in that claim finding Ratliff 75% occupationally disabled.

However, apparently Island Fork then filed a de novo appeal to the ALJ on both the injury claim and the hearing loss claim, although there had been no determination on the hearing loss claim by the Arbitrator. Further, when the Supreme Court decision in Colonial Coal, supra, became final, the Arbitrator proceeded to render a decision in both the hearing loss and pneumoconiosis claims on November 10, 1998, since both claims were still pending before the Arbitrator. Thirteen days later, however, ALJ Kline rendered an

opinion in both the injury claim and the hearing loss claims. Accordingly, the Arbitrator issued additional orders to rectify the procedural quandary in which the parties found themselves. The Arbitrator rescinded a portion of the benefit review determination in connection with Ratliff's hearing loss claim and vacated same. Furthermore, the Arbitrator transferred the hearing loss claim to ALJ Kline as of June 26, 1998, nunc pro tunc. The Arbitrator issued these orders on December 22, 1998.

In an Opinion and Award issued by ALJ Kline on November 23, 1998, he dismissed Ratliff's hearing loss claim as not work-related. The last exposure date for the hearing loss claim had also been alleged as of October 24, 1996. In connection with the October 24, 1996[,] back injury claim, ALJ Kline determined that Ratliff sustained a 40% permanent occupational disability. The ALJ apportioned liability 50% to Island Fork and 50% to the Special Fund. He awarded temporary total disability benefits from October 26, 1996[,] through May 24, 1997[,] in the amount of $415.94 per week and thereafter Island Fork was obligated to pay $62.39 per week for 20% occupational disability for 425 weeks. The ALJ assessed liability against the Special Fund in the amount of $62.39 per week for 20% occupational beginning May 5, 1997[,] for 425 weeks.

In the occupational disease claim before ALJ Smith, Island Fork and Ratliff settled their dispute

prior to final adjudication. On April 29, 1999, ALJ Smith approved a settlement between Island Fork and Ratliff for a lump sum of $70,000.00. Therein, however, Ratliff reserved his right to proceed against the Special Fund. That claim was adjudicated to an Opinion and Award before ALJ Smith. Whether Ratliff had contracted the occupational disease of coal workers' pneumoconiosis was the primary issue before the ALJ and the medical evidence submitted to the ALJ was conflicting on this issue. In ALJ Smith's Opinion and Award rendered July 8, 1999, the ALJ, based upon evidence from Dr. John Myers and Dr. Robert Powell, found that Ratliff suffers from Category 2/2 coal workers' pneumoconiosis. The ALJ determined that Ratliff is totally disabled pursuant to KRS 342.732(1)(d).

Since Island Fork had previously settled its liability as of April 29, 1999, the ALJ awarded Ratliff 75% occupational disability benefits against the Special Fund. His award was corrected by an order of September 28, 1999, to reflect the amount of $311.96 per week, subject to the appropriate tier-down of benefits when Ratliff reaches his 65th birthday, in accord with KRS 342.730(4), and following his 70th birthday, the ALJ awarded post life expectancy and post tier-down benefits to Ratliff thereafter in the amount of $124.78 per week.

Failure to Give Presumptive Weight

The first question presented by the Special Fund is whether the ALJ erred in failing to give presumptive weight to the evidence presented by the university physician appointed pursuant to KRS 342.315. Although the Special Fund raised this same issue in its brief to the Board, the Board did not address the issue in its Opinion.

Presumptive weight is to be given to the opinion of the university evaluator pursuant to KRS 342.315. The Supreme Court in Magic Coal Co. v. Fox[3] said:

> KRS 342.315(2) creates a rebuttable presumption which is governed by KRE[4] 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 workers' medical condition which may not be disregarded by the fact-finder unless 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.[5]

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[3] Ky., 19 S.W.3d 88 (2000).

[4] Kentucky Rules of Evidence. [Footnote supplied].

[5] 19 S.W.3d at 97.

According to ALJ Smith's Opinion and Award, the report of Dr. John H. Woodring, the designated university evaluator pursuant to KRS 342.315(2), was submitted and considered in the fact-finding process. However, Drs. Myers and Powell conducted evaluations of Ratliff and the results of these evaluations were offered to rebut the findings of Dr. Woodring. The ALJ gave the findings of these evaluators the greatest weight. ALJ Smith said that these evaluators "were fairly consistent in their readings as to the types of nodulation and its location within the lung zones."

We conclude that the ALJ has articulated a reasonable basis for disregarding the evidence presented by the university evaluator's findings. Therefore, although the Board failed to address this question, we find no reason to remand on this question.

Award Overlap

The second question presented by the Special Fund is whether the Board erred in stating that the two awards overlap for only 425 weeks. The Board's contention is that the awards are to overlap for 455 weeks. We disagree.

The two awards in this case are: one for the back injury and one for pneumoconiosis. The back injury award was found to be a 40% permanent occupational disability. The pneumoconiosis occupational disease claim was found to be a total (100%) occupational disability. The payments for the back injury began on May 5, 1997[,] and were to continue for 425 weeks. Payments based

on an occupational disease begin on the date of last exposure.[6] Therefore, according to the findings of ALJ Smith, the payments for pneumoconiosis were to begin on October 24, 1996. Yet, ALJ Smith determined these payments were to begin on April 29, 1999.[7] The problem presented is that "a person at any one time may not receive benefits that exceed total disability benefits[.]"[8] This does not mean that Ratliff cannot receive benefits for both occupational injury permanent partial disability award and occupational disease when the occupational disease claim is a total disability award. As the Supreme court has said:

> The dollar amount of the injury claim must be deducted from the maximum benefit allowed for total disability. The balance of the total disability allowable then becomes the effective amount of the occupational disease award.[9]

On remand, the Special Fund is to continue paying the permanent partial disability for the back injury while applying a credit for that amount against the occupational disease total disability that the Special Fund is to pay each week until the 425-week period for the permanent partial disability ends. When the permanent partial disability payments for the back injury end, the

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[6] See Beale v. Robinson, Ky., 822 S.W.2d 856, 857 (1991); see also Newburg v. Parsons, Ky. App., 852 S.W.2d 336, 337 (1992).

[7] While the start date for occupational disease benefits appears to be in error, this issue is not raised by any of the parties.

[8] Parsons, supra, n. 5 at 338.

[9] Beale v. Shepherd, Ky., 809 S.W.2d 845, 849 (1991).

Special Fund will be responsible for making the full payment of the total occupational disease award without further credit for the permanent partial disability payments.

The permanent partial disability payments began on May 5, 1997. The occupational disease total disability payments began on April 29, 1999. Therefore, as stated by the Board, beginning May 5, 1997, the Special Fund is to pay $62.39 per week (for the Special Fund's portion of occupational disability) for 425 weeks. The Special Fund is entitled to a credit of $62.39 per week against the $311.96 per week that was due, beginning April 29, 1999, for the payment of the occupational disease weekly benefits. This credit is applicable against the weekly payment of occupational disease benefits until the end of the 425-week period of payments due for the occupational disability benefits.

To summarize, the Special Fund is liable for combined benefits of $311.96 per week during the 322-week period beginning April 29, 1999. After the expiration of the 425-week period of payments of the occupational disability benefits, the Special Fund is liable, for the remaining 103-week period, for the occupational disease benefits of $311.96 per week, its 75% share of the maximum benefits for total disability.[10]

Date Payments Are to Begin

The Special Fund argues that payments by the Special Fund must commence June 30, 2001, the date the employer will extinguish its liability on the permanent partial disability award. The Board

[10] See Coots v. Whittaker, Ky., 998 S.W.2d 491, 493 (1999).

held that the Special Fund must begin making payment on both awards as of the date the settlement is approved. The Special Fund argues and the Board agreed that KRS 342.120 governs this question. The Special Fund asserted that Ratliff's employer, Island Fork, reached a settlement agreement with Ratliff only for the occupational disease claim, not the occupational injury claim. This is the basis for the Special Fund's argument that Island Fork has not extinguished liability on the permanent partial disability injury award.

"The function of further review of the [Workers' Compensation Board] in the Court of Appeals is to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or so flagrant as to cause gross injustice."[11] Since the Special Fund has not provided us with a copy of the Settlement Agreement approved on April 29, 1999, that ALJ Smith refers to in his Opinion and Award, we cannot decide the question presented. We cannot discern, without affirmative proof, that Island Fork has, or has not, settled Ratliff's occupational injury claim. If the Board has committed an error in assessing the evidence, we do not have the information necessary to decide the question.

We reverse the Board's opinion on the question concerning the award overlap and remand this case to the Board with directions to order changes in accord with this opinion upon remand to the ALJ.

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[11] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 688-89 (1992).

ALL CONCUR.

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