RENDERED: June 1, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002357-WC

GARRETT TAYLOR — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-1282 & WC-98-01520

R. B. COAL COMPANY, INC.;
HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BARBER, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Garrett W. Taylor (Taylor) appeals from an opinion of the Workers' Compensation Board (the Board) entered September 13, 2000, which affirmed an opinion and order of ALJ Ronald W. May (the ALJ) which dismissed Taylor's claim for benefits for coal workers' pneumoconiosis and a work-related back injury. We affirm.

Having read the parties' briefs on appeal and having reviewed the record on appeal, we hereby adopt the following portion of the Board's opinion as our own:

Taylor last worked for RB Coal on September 19, 1997 claiming that was his last date of exposure to the hazards of coal dust and he also has filed a claim alleging that he sustained a work-related injury on July 29, 1997 as a result of a rock fall. Taylor has worked primarily in underground coal mining for approximately 24 years. During that time, he has been exposed to coal dust and engaged in heavy manual labor. He testified that during his many years of working in the mines he has, on more than one occasion, strained his back lifting objects. Apparently, in 1987, he was injured when he was struck by a large rock. This resulted in a fracture of the T12 vertebrae, the necessity to miss work for at least four months during which he drew temporary total disability benefits and required him to wear a brace. He did return to underground mining activities after that time and filed no claim. The evidence also indicates he sustained an injury to his hand in 1996 when another rock fell, striking him. In July 1997 he was trying to free a piece of cable when a rock fell, striking him on the side of the head and neck, knocking him to the ground. He believed the rock probably weighed around 50 pounds and was certainly smaller than the one that caused his injury in 1987. He testified that there was another employee present whom he thought saw the accident. Taylor testified that he reported the incident to his supervisor. However, he did not seek any medical attention until at least two or three weeks later. This was Dr. Mangan; although no Dr. Mangan was introduced into the record, there was a Dr. Morgan who saw Taylor in June of 1997, approximately a month prior to the injury with complaints of chronic bronchitis and tenderness in the lumbar spine. Taylor was seen again on July 8 and then on October 10 with similar complaints. The first mention by Dr. Morgan of any work injury was in January of 1998.

After ceasing his employment, Taylor was first seen for the purpose of having x-rays to determine whether he had coal workers' pneumoconiosis by Dr. George Chaney in late September of 1997. Dr. Chaney apparently diagnosed coal workers' pneumoconiosis and a copy of Dr. Chaney's x-ray was sent to Dr. Robert Powell. Dr. Powell sent a letter

dated September 24, 1997, to counsel for Taylor. According to Taylor, he received a phone call from his attorney who advised him that he had been diagnosed with black lung or coal workers' pneumoconiosis. However, it was not until January of 1998 that Taylor, through counsel, sent a letter notifying RB Coal of the diagnosis of coal workers' pneumoconiosis and the likelihood of filing an application for adjustment of a claim.

A number of lay witnesses were introduced into evidence. These included Jim Enlow, David Partin and Charles Ramey. Ramey testified that at the time of Taylor's alleged injury he was superintendent of the mine where Taylor was working. He testified he did recall an occasion in which Taylor advised him that he had been hit by a rock. He remembered asking Taylor the next day how he was and Taylor indicated that he was sore. According to Ramey, an accident report was completed but he is uncertain what ultimately became of it.

Partin is the safety director and Enlow is in charge of workers' compensation. Both of these individuals described the activities undertaken by them to investigate the alleged incident and also the procedure that would have been followed upon the report of an injury. Both received confirmation from Ramey that Taylor had told him something. However, investigation did not find any witnesses to the incident.

The medical evidence in the occupational disease claim included reports from Drs. Robert Powell, Emery Lane, Glenn Baker, A. Dahhan, Arthur Lieber and Richard Goodwin. Dr. Powell interpreted an x-ray as being Category 1/0; Dr. Lane Category 1/1; Dr. Baker Category 1/0; and Dr. Baker having pulmonary function studies showing an FVC of 81.2% of predicted and an FEV-1 of 69.8% of predicted although he questioned the validity of the FEV-1 due to the inability to meet the 95% confidence level. Dr. Dahhan interpreted an x-ray as being negative for coal workers' pneumoconiosis with an FVC of 82% and an FEV-1 of 66% but also questioned the validity of the FEV-1. Dr. Lieber read the x-ray of Dr. Dahhan and interpreted it as being Category 1/0. Dr. Goodwin, who performed an

evaluation pursuant to KRS 342.315(2), interpreted an x-ray as being Category 0/1.

In the occupational disease claim, the ALJ first concluded that there was a failure of due and timely notice. In reaching that conclusion, he noted that no later than September of 1997 Taylor was advised he had coal workers' pneumoconiosis. The notice to the employer was not until January of 1998, some three and a half months later. No explanation is offered in the record as to this delay, although in his brief on appeal Taylor asserts that it was as the result of the necessity of preparing his case.

Notice is a mixed question of law and fact. Harry M. Stevens Co. vs. Workmans' Compensation Board, Ky.App., 553 SW2d 852 (1977). No definitive time is offered by the statute or by the case law as to what may be considered due and timely. There have been occasions where as much as sixty-six days in the delay of giving notice have been excused. See Marc Blackburn Brick Co. vs. Yates, Ky., 424 SW2d 814 (1968). There seems to be no dispute from Taylor but that actual notice was not given until some three and a half months after the notification that he had coal workers' pneumoconiosis. The delay in giving of notice may be excused if there is offered to the fact finder a reasonable ground for that delay. See KRS 342.200. However, the ALJ considered that provision and found no reasonable excuse nor, for that matter, any excuse whatsoever for the delay. While we realize that there may be delays due to mail and other reasons, we also recognize that due and timely notice is a mandatory requirement of the statute. KRS 342.185 and KRS 342.316. Delaying the offering of notice until the claim has been completely prepared does not strike us as one providing a sound basis for the delay in giving of notice. While it may not be unreasonable to expect some short delay, one of three and a half months does not constitute a short delay. The ALJ was well within his authority, in analyzing the evidence and the statutes, in concluding that due and timely notice was not given.

The ALJ went on to conclude, however, that even if notice had been timely he would have

dismissed the claim. He believed that even assuming a validity to the FEV-1 and a reduction in that portion of the ventilatory studies, it was not related to coal dust exposure. Rather, the evidence supported a conclusion that any reduction would be as the result of cigarette smoking. The ALJ also went on to conclude that he would grant presumptive weight, as would be his right pursuant to KRS 342.315(2), to the testimony of Dr. Goodwin which also would result in a dismissal of the pneumoconiosis claim.

We therefore affirm the ALJ in all respects as it relates to the coal workers' pneumoconiosis claim.

The injury claim also requires affirmation. While there were serious questions concerning notice, work-relatedness and causation, the ALJ ultimately concluded that Taylor had failed to sustain his burden of proof to establish an injury of significant proportions. See Harry Gordon Scrap Materials vs. Davis, Ky., 478 SW2d 731 (1972). The ALJ noted that while there may have been notice of the injury and there may have been, in fact, an incident involving a rock, Taylor did not leave the mines until two months thereafter. During that two-month period, he essentially performed the identical work that he had been performing prior to the injury. Further, there was no indication medical treatment was sought for the alleged injury until sometime later and, in fact, the physicians who saw Taylor most immediately after the alleged incident had no reference to the accident in their records. Finally, the ALJ concluded the testimony of Dr. Primm and Dr. Goodman, each of whom believed there were physiological maladies primarily related to the rock fall in 1987. They also concluded the incident in 1997 was a temporary aggravation of an already existing condition. Both of these physicians concluded Taylor would not be entitled to an impairment rating pursuant to the AMA Guidelines. This evidence conflicted with the evidence presented by Taylor that came from Dr. Christa Muckenhausen who assessed a 12 to 15% impairment. However, the ALJ found Dr. Muckenhausen's evidence to be lacking in weight and credibility since it considered physiological conditions other than that

which was claimed and further relied on portions of the AMA Guidelines other than the DRE Model in assessing an impairment.

When, as here, there is conflicting evidence, it is for the ALJ to pick and choose from that evidence and deem that which he determines to be more credible. Smyzer v. B.F. Goodrich Chemical Co., Ky. 474 SW2d 367 (1971). Taylor, having the burden of proof, must, on appeal, establish that the evidence compelled a contrary result. Special Fund v. Francis, Ky., 708 SW2d 641 (1986). When there is conflicting evidence which would have supported either the conclusion reached by the ALJ or an alternative conclusion, there cannot be said to be compelling evidence. Millers Lane Concrete Co., Inc. v. Dennis, Ky.App., 599 SW2d 46 (1974).

Taylor's claim fails in regard to entitlement to benefits if for no other reason than the ALJ's ultimate determination that the more credible testimony came from Drs. Goodman and Primm, neither of who assessed an impairment rating pursuant to the AMA Guidelines. In order to succeed in a workers' compensation claim, since December 12, 1996 and in order to be awarded income benefits, an assessment of an impairment rating pursuant to the Guidelines is mandatory. See KRS 342.730(1)(a) and KRS 342.730(1)(b).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Edmond Collett John Hunt Morgan Hyden, KY	Antony Saragas Harlan, KY