

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000249-WC

WILLIE CRUSENBERRY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-20648

SPECIAL FUND;
HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: JOHNSON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Willie Crusenberry sought to reopen his award based on a progression of his occupational disease from Category 1 to Category 2 of his black lung. A university evaluation was completed at the request of the Special Fund. Although not filed into evidence by a party, the evaluation was considered by the Administrative Law Judge (ALJ). The Workers' Compensation Board (Board) affirmed, holding that once a request for a university evaluation was made, the report automatically becomes part of the record and can be considered by the ALJ, even in reopenings. We agree and therefore affirm.

Willie Crusenberry was originally awarded benefits on July 12, 1994, for retraining incentive benefits (RIB) for Category 1 pneumoconiosis, with no breathing impairment. With the award limited to RIB, the Special Fund was dismissed. On September 2, 1999, the claim was reopened based on a change of condition or progression of his pneumoconiosis. The Special Fund was ordered rejoined. The employer settled with the claimant and was dismissed. The Special Fund then requested a "university evaluation" which was conducted at the employer's expense. The ALJ accepted and considered the university evaluator's report without being requested to do so by a party. The ALJ relied on the report for denying a change in condition. The claimant contends error in considering the report upon reopening as it was not introduced by a party.

KRS 342.125 provides that upon reopening, the matter should be handled as if it were an original claim. 803 KAR 25:010E, Section 8(1) requires all requests for black lung (KRS 342.732) benefits to be referred for a university evaluation. 803 KAR 25:010, Section 12(7), which existed at the time of this reopening, provided for the evaluation to become part of the record and evidence for the ALJ, without the necessity of a formal filing or motion. Our Supreme Court in Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000), approved the scheme for both original claims and reopenings.

The function of the Court of Appeals in reviewing a decision of the Workers' Compensation Board is to correct the Board only where the Court perceives the Board has overlooked or

misconstrued statutes, precedent or has flagrantly erred in assessing the evidence so as to cause a gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992). We find no such errors and therefore affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Mark L. Ford
Harlan, Kentucky

BRIEF FOR APPELLEE, SPECIAL
FUND:

John Burrell
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