

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002232-WC

BILLY HOSKINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-03595 & WC-96-03927

FRED DAVIS & SONS, INC.; SPECIAL FUND;
J. KEVIN KING, Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: COMBS, EMBERTON AND TACKETT, JUDGES.

EMBERTON, JUDGE: The sole question in this appeal is whether the Workers' Compensation Board erred in upholding the dismissal of appellant's motion to reopen a previously dismissed coal workers' pneumoconiosis claim. Having reviewed the record in light of the opinions of the Kentucky Supreme Court in Pikeville Coal Company v. Sullivan,¹ and Blackburn v. Lost Creek Mining,² we affirm.

In 1996, Hoskins filed a claim for coal workers' pneumoconiosis benefits, alleging that he was last exposed to the

¹ Ky., 895 S.W.2d 574 (1995).

² Ky., 31 S.W.3d 921 (2000).

hazards of the disease on September 20, 1995. Having received medical evidence from several providers showing a range of x-ray readings from 0/0 to 1/1, as well as the results of spirometric testing, the Administrative Law Judge entered an opinion and award in which he found the negative x-ray interpretations of 0/1 to be the most reliable and was persuaded by medical evidence that established appellant's obstructive airway disease was most likely the result of cigarette smoking. After the ALJ dismissed his claim for benefits, appellant did not file a petition for reconsideration or appeal.

In March 2001, appellant filed a motion to reopen his previously dismissed claim, alleging that his pneumoconiosis had worsened to the point that he had become totally occupationally disabled. In support of his motion, appellant filed a medical report from Dr. John E. Myers dated February 14, 2001, indicating a reading of Category 1/1 pneumoconiosis, as well as additional pulmonary function studies. On May 3, 2001, the ALJ denied appellant's motion on the basis that he failed "to establish a prima facie case for worsening of condition/increase in occupational disease." A subsequent appeal to the Board produced an opinion that held:

We believe that the language of KRS 342.125(2)(a), as it existed on the date of Hoskins' last exposure, and the holding in Pikeville Coal Company v. Sullivan, *supra*, make it clear that a pneumoconiosis claim dismissed on the merits may only be reopened when there is additional exposure to the hazards of the disease. In the instant claim, however, Hoskins has not alleged or proved any additional exposure. We therefore find no error with the ALJ's order denying Hoskins' motion to reopen.

In his appeal to this court, appellant Hoskins argues that a claimant can always reopen a claim, even one that was previously dismissed, so long as he subsequently makes a "reasonable prima facie showing of the substantial possibility that one or more of his prescribed conditions now exist so as to warrant a change in that decision. . . ." Because we agree with the Board that a motion to reopen a claim for pneumoconiosis benefits is governed by KRS³ 342.125(2)(a) [as it existed on September 15, 1995, the date of Hoskins' last exposure], we must also conclude that his motion was properly dismissed because the pertinent language in that statute clearly contemplates the existence of a previous award:

Upon the application of the affected employee, and a showing of progression of his previously diagnosed pneumoconiosis resulting from exposure to coal dust and development of respiratory impairment due to the pneumoconiosis, the administrative law judge may review an award of a retraining incentive benefit because of the diagnosis, and upon a finding of respiratory impairment due to that pneumoconiosis shall make an award for benefits as provided in KRS 342.732. Such a reopening may also occur upon a showing of progression of respiratory impairment in a claim for which benefits were previously awarded under the provisions of KRS 342.732. (Emphasis added).

Based upon our interpretation of the cited portion of KRS 342.125(2)(a), we concur in the Board's assessment that the dismissal of appellant's original claim for coal workers' pneumoconiosis benefits precludes reopening because the statute speaks in terms of reviewing a previous "award" only. Neither

³ Kentucky Revised Statutes.

Pikeville Coal nor Lost Creek, supra, is of any avail to appellant because additional exposure was a factor in those decisions and no additional exposure was alleged in appellant's motion.

Finally, we agree with the contention of both the employer and the Special Fund that appellant's claim on reopening is barred by the doctrine of res judicata. Appellant chose not to appeal the ALJ's original decision that he did not suffer from pneumoconiosis and that his pulmonary impairment was the result of cigarette smoking. He is thus precluded from rearguing those facts in this appeal.⁴

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald C. Cox
JOHNNIE L. TURNER, P.S.C.
Harlan, Kentucky

BRIEF FOR APPELLEE FRED DAVIS
& SONS, INC.:

John S. Harrison
SHEFFER & SHEFFER
Louisville, Kentucky

BRIEF FOR DIVISION OF WORKERS'
COMPENSATION FUNDS (SUCCESSOR
TO SPECIAL FUND):

Joel D. Zakem
Frankfort, Kentucky

⁴ Uninsured Employers' Fund v. Fox, Ky. App., 862 S.W.2d 902 (1993).