RENDERED: MAY 31, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002453-WC

WOODLAND HILLS MINING, INC. — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-95-46404

FON McCOY, JR.; SPECIAL FUND; DONNA H. TERRY, Administrative Law Judge; and WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: BARBER, EMBERTON AND KNOPF, JUDGES.

EMBERTON, JUDGE: Two issues are presented in this appeal from an opinion of the Workers' Compensation Board: (1) whether the Administrative Law Judge erred in failing to apply the December 12, 1996, amendments to KRS[1] 342.125 to the claimant's motion to reopen his claim; and (2) whether the evidence supported the finding of a change in the claimant's occupational disability. We affirm.

[1] Kentucky Revised Statutes.

In October 1994, Fon McCoy sustained a work-related injury to his left arm and low back while employed by appellant, Woodland Hills. McCoy was awarded benefits for a 25% occupational disability for these injuries in an award rendered in 1996. In that opinion and award, the ALJ also found the psychiatric problems McCoy was experiencing were work related, but relied upon testimony from appellant's psychiatric expert in concluding that the psychiatric condition was not causing occupational disability.

On September 12, 2000, McCoy moved to reopen his claim alleging that both his physical and mental condition had worsened since the entry of the original award. In support of his motion, McCoy supplied records from his treating physician, Dr. D. N. Patel, who noted increased back pain in stating his opinion that McCoy's condition had worsened since the 1996 award. McCoy also submitted records from his treating psychiatrist, Dr. David Forester, who diagnosed a major depression and generalized anxiety disorder. Dr. Forester did not specifically address impairment or change in condition since 1996.

Appellant Woodland Hills offered evidence from two orthopedic surgeons, both of whom found evidence of symptom magnification and rejected McCoy's contention that his condition had worsened since 1996. The employer also submitted testimony from a psychiatrist who was of the opinion that McCoy suffered no impairment related to his injury and that his complaints were out of proportion to the injury he had sustained. Citing the fact that she had had an opportunity to observe McCoy both in the

original proceeding and on reopening, the ALJ found his current claims of constant pain and of a worsened psychiatric condition to be "entirely credible." The ALJ stated that her observation was borne out by the treatment records of Dr. Forester which "delineate ongoing treatment for symptoms of depression and anxiety severe enough to interfere with his personal relationships and certainly severe enough to prevent him from functioning in any employment environment." Although she noted that she was adopting Dr. Patel's expert opinion of a worsening in McCoy's physical condition and pain level since 1996, the ALJ stated that the "most striking" change over the past four years was in his psychiatric condition. As a result of these findings the ALJ concluded that McCoy was now 100% occupationally disabled.

Woodland Hills appealed the ALJ's decision to the Board alleging, as it does in this appeal, that she erred in failing to apply the 1996 amendments to KRS 342.125 to McCoy's claim. The employer asserted that application of the 1996 amendments would have required McCoy to show a change in disability by objective medical evidence and argued that this amendment was a remedial change which should have been given retroactive effect. Woodland Hills also argued that the evidence did not support a finding of change in McCoy's occupational disability. In upholding the decision of the ALJ, the Board rejected appellant's contention that the 1996 amendments to the reopening statute were remedial and stated that although the evidence of change in occupational disability might be considered to be "somewhat slim," the record

did not contain sufficient evidence to support the findings of the ALJ. We find no error in the Board's analysis.

First, as to the contention the 1996 amendments to KRS 342.125 were remedial, the Board correctly recognized the distinction to be drawn between the purpose of the 1996 amendments and the 1987 amendments to the same statute addressed in Peabody Coal v. Gossett.[2] The Peabody court stated that the purpose behind the 1987 amendment was to bring the standards for reopening in line with the standards for original awards; in words of the Board, "they were designed to correct imperfections in the prior law." The Board noted that the 1996 amendments, on the other hand, were part of a general overhaul of the benefits system created by sweeping 1996 legislation and therefore could not be considered remedial.

We are convinced that the Board's conclusion as to effect of the 1996 amendments to KRS 342.125 fully comports with the Supreme Court's analysis of the nature of the 1996 amendment to KRS 342.732(1)(a), in Zielinski Construction Company v. Burden,[3] which provided the following guidance as to the purpose of that enactment:

> Unlike the 1994 amendment to KRS 342.732(1)(a) that was at issue in Thornsbury v. Aero Energy, Ky., 908 S.W.2d 109 (1995), the 1996 amendment changed the medical criteria for awarding a RIB in addition to changing the remedy, itself. We determined that the amendment that was at issue in Thornsbury was remedial because it adopted a remedy that would more effectively accomplish

[2] Ky., 819 S.W.2d 33 (1991).

[3] Ky., 62 S.W.3d 14, 15 (2001).

> the purpose of the RIB. Id. at 112. Thornsbury is not persuasive authority for the proposition that the 1996 amendment to KRS 342.732(1)(a) was remedial.

We are convinced that the Board properly distinguished Gossett, supra, on the same grounds.

Finally, we are in complete accord with the Board's discussion of the substance of the evidence before the ALJ and her authority to determine the weight, credibility, substance, and inferences to be drawn therefrom.[4] We also agree with the Board that the fact a claimant may overstate his case in the original claim should not forever bar an increase in benefits if his occupational disability in fact increases. In sum, our review of this record convinces us that the Board's opinion is not patently unreasonable nor flagrantly implausible, nor is there any indication that the decision will result in a gross injustice.[5]

The opinion of the Workers' Compensation Board is affirmed.

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[4] Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

[5] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

ALL CONCUR.

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