

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000157-WC

BUSTER AMBURGEY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-16113

BIG ELK CREEK COAL COMPANY;
HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE;
SPECIAL FUND; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: DYCHE, MILLER AND TACKETT, JUDGES.

TACKETT, JUDGE: Buster Amburgey petitions for review of an opinion of the Workers' Compensation Board that reversed in part and remanded an opinion by the Administrative Law Judge awarding Amburgey permanent total disability benefits due to pneumoconiosis and hearing loss in a second reopening proceeding. We affirm.

In April 1994, Amburgey filed an application for retraining incentive benefits (RIB) based on breathing problems

associated with exposure to coal dust or pneumoconiosis. At that time, he was 61 years old and had worked in coal mines for 25 years. The medical evidence submitted by Amburgey in support of his RIB application included x-ray interpretations by Dr. William Anderson of small opacities profusion category 1/1 and by Dr. T. R. Marshall of category 2/1. Dr. Marshall also performed pulmonary function spirometric testing that indicated a Forced Vital Capacity (FVC) value of 98% of predicted normal and a Forced Expiratory Volume in one second (FEV1) value of 108% of predicted normal. A few weeks later, Amburgey and Big Elk Creek Coal settled this claim for an \$18,000 lump sum payment.

At the same time, Amburgey filed an Application for Adjustment of Claim based on noise induced hearing loss. In support of this claim, he submitted reports from Drs. Samir Guindi, Albert Cullum, and William Green, who assigned Amburgey a disability rating of 13%, 19% and 18% respectively, based on auditory test results and the American Medical Association (AMA) Guidelines. In February 1995, Big Elk Creek Coal settled its portion of this claim for a lump sum payment of \$5,102 based on an 18% disability rating. The claim proceeding continued against the Special Fund resulting in an opinion by the ALJ awarding benefits to Amburgey upon a finding of a 19% permanent partial disability and apportioning responsibility for payment of the award of 25% to the employer and 75% to the Special Fund. The award was eventually finalized by a settlement between Amburgey and the Special Fund.

In June 1997, Amburgey filed a motion to reopen the RIB pneumoconiosis claim based on further spirometric tests performed in 1997 by Drs. Harold Bushey and Glen Baker. Dr. Baker opined that Amburgey's pneumoconiosis had progressed as evidenced by Dr. Bushey's test results of a profusion category 2/1, and his own pulmonary test results of a FVC value of 79.9% of predicted normal and FEV1 value of 68.6% of predicted normal. On August 6, 1997, the ALJ entered an order denying the motion to reopen stating "plaintiff's motion fails to establish a prima facie case for worsening of condition/increase in occupational disability."

In November 2000, Amburgey filed a second motion to reopen both the RIB pneumoconiosis and hearing loss claims. In support of this motion, he offered the medical reports generated for the original claims plus a report from Dr. Charles Hieronymus, a family practice physician, based on his examination of Amburgey on October 3, 2000, indicating pneumoconiosis profusion category 1/2, FVC value of 81% of predicted normal, FEV1 value of 71% of predicted normal, and a 22% whole body impairment related to hearing loss. In response, the employer argued that Amburgey had not shown a prima facie case of progression of the pneumoconiosis or hearing loss. In December 2000, the Chief ALJ issued an order finding that a prima facie case had been presented and granting the motion to reopen. The case was then assigned to a new ALJ for further proceedings. Big Elk Creek Coal submitted reports from Dr. Thomas Jarboe, showing a pneumoconiosis profusion category of 0/0; Dr. Abdul Dahhan, showing profusion category 0/0, FVC value of 76%, and FEV1 value

of 79%; and Dr. Daniel Schumaier, indicating a 22% impairment due to hearing loss. Amburgey also submitted a new report from Dr. Glen Baker based on an April 2001 examination, which stated his x-ray interpretation of pneumoconiosis profusion category 1/0, FVC value of 93%, and FEV1 value of 73%.

Following a benefits review conference, the ALJ found that Amburgey had shown a progression or worsening of his condition with respect to both pneumoconiosis and hearing loss from the date of the original award. He relied upon and credited most heavily the original x-ray findings of category 1/1 by Dr. Anderson and the later findings by Dr. Hieronymous of a category 2/1 level as to the pneumoconiosis. Similarly, he noted the 3% increase in the assignment of a hearing loss impairment from 19% in the original award and the 22% rating by Drs. Hieronymous and Schumaier, even though the ALJ noted "there were no additional restrictions" placed upon Amburgey. The ALJ found Amburgey to be suffering from a 22% occupational disability under the principles set out in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), based on his hearing loss. He concluded that Amburgey was permanently totally disabled due to the combination of pneumoconiosis and hearing loss, and awarded additional benefits under KRS 342.732 payable by Big Elk Creek Coal and the Special Fund as apportioned 25% and 75%, respectively.

On appeal, the Board rendered an opinion reversing the ALJ's award of permanent total disability benefits on account of pneumoconiosis, and ordered the case remanded for further factual findings on the award of increased benefits for occupational

hearing loss. It stated that while an employee may file successive motions to reopen an award, the parties are bound under the principles of res judicata by ultimate factual findings litigated and decided in a prior reopening. The Board applied this principle with respect to the ALJ's decision on the 1997 motion to reopen that Amburgey's evidence of pneumoconiosis category level 2/2, FVC value of 79.9%, and FEV1 value of 68.6% did not establish a worsening of his condition sufficient to set forth a prima facie case for reopening.¹ The Board found that the Chief ALJ's initial order granting the motion to reopen was erroneous because the evidence submitted in the second motion to reopen did not make a prima facie showing of progression of the respiratory impairment since the date of the 1997 motion.²

The Board further found the ALJ's factual findings on the hearing loss issue lacking given the slight increase in the functional impairment ratings from 19% to 22% and the ALJ's statement that no additional restrictions had been placed on Amburgey related to his hearing impairment. It felt a remand to the ALJ for additional specific factual findings related to the hearing loss issue was needed before an increase in benefits would be justified. This appeal followed.

¹The Board understandably expressed some disagreement with the ALJ's decision given the apparent strength of the evidence showing a worsening of the condition.

²The Board noted that the Chief ALJ's decision probably was affected by the fact that Amburgey's 2000 motion indicated that there had been no prior motions to reopen; thus, she did not consider the effect of the 1997 proceeding.

Under KRS 342.125, an award of benefits may be reopened because of fraud, newly discovered evidence, mistake, or change of disability as shown by objective medical evidence. A party moving to reopen a claim pursuant to KRS 342.125 bears the burden of making a reasonable prima facie showing justifying a reopening under one or more of the grounds stated in the statute. See Tuttle v. O'Neal Steel, Inc., Ky., 884 S.W.2d 661, 665 (1994); Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681, 682 (1972). Under KRS 342.125(5)(a), a claimant seeking to reopen a RIB award must make a prima facie showing of both a progression of the occupational disease and either the development or the progression of a respiratory impairment.³ Campbell v. Universal Mines, Ky., 963 S.W.2d 623 (1998); Neace v. Adena Processing, Ky. App., 7 S.W.3d 382 (1999). A claimant seeking to reopen a benefits award must make a prima facie showing of only a progression of respiratory impairment. Whittaker v. Hurst, Ky., 39 S.W.3d 819 (2001). As with an initial award, the standard of review for a case involving the reopening of a claim is whether the Board overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. See Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999) (citing Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992)); Mountain Clay, Inc. v. Frazier, Ky. App., 988 S.W.2d 503, 505 (1998).

³Progression of an occupational disease such as pneumoconiosis is shown by higher levels of profusion categories. Progression of respiratory impairment is shown by lower levels of pulmonary function evidenced by FVC and FEV1 percentages. See, e.g., KRS 342.732.

Amburgey maintains that the Board erred in holding that res judicata applied to its second motion to reopen filed in 2000. It is well-established that the concept of finality and the doctrine of res judicata applies to Workers' Compensation awards, but KRS 342.125 does provide some relief by sanctioning reopening under the conditions listed therein. See Whittaker v. Cecil, Ky., 69 S.W.3d 69 (2002); AAA Mine Services v. Wooten, Ky., 959 S.W.2d 440 (1998). Although a party may make successive motions to reopen, it has been held that the parties are bound by determinations on factual issues actually litigated and decided in a prior reopening proceeding. See Charles F. Trivette Coal Co. v. Hampton, Ky., 509 S.W.2d 280 (1974). A claimant relying on a change of disability justification for reopening cannot rely on the same facts existing at the time of a prior reopening decided on the merits but must show different circumstances since the earlier proceeding. See, e.g., Pikeville Coal Co. v. Sullivan, Ky., 895 S.W.2d 574 (1995); Ratliff v. Harris Bros. Constr. Co., Ky., 441 S.W.2d 127 (1969).

Amburgey contends that the res judicata principle does not apply to his 2000 (second) motion to reopen because the denial of the 1997 (first) motion to reopen did not constitute a final judgment on the merits for purposes of applying that principle. See, e.g., Cecil, supra; Pikeville Coal Co., supra. He asserts that the ALJ's order denying the 1997 motion does not provide sufficient specificity to conclude it was based on the substantive merits rather than a technical, procedural

deficiency.⁴ We disagree. The order specifically states the denial was based on Amburgey's failure "to establish a prima facie case for worsening of condition/increase in occupational disability." As indicated earlier, with respect to reopening a RIB award, a claimant must make a prima facie showing of both a progression of the occupational disease and the development or progression of a respiratory impairment. In the 1997 motion, Amburgey submitted medical proof intended to show an increase in the profusion category level of pneumoconiosis and a decrease in the pulmonary values. The ALJ's order indicates a qualitative determination involving an analysis of the medical evidence in the original proceeding and the reopening proceeding. Amburgey's assertion that the decision could have been based on technical grounds is unpersuasive. He had an opportunity to appeal the denial of the motion and request additional factual findings but did not do so.

Amburgey also argues res judicata does not apply because of a lack of identity of claims in that the 2000 motion to reopen involved both the RIB pneumoconiosis claim and the hearing loss claim; whereas, the 1997 motion to reopen involved only the RIB pneumoconiosis claim. The Board, however, only applied res judicata to the RIB pneumoconiosis claim, not the hearing loss claim, so there was an identity of claims as to the former in both motions to reopen. This difference in the two motions is irrelevant and does not support Amburgey's position.

⁴For example, he states the denial could have been based on failure to comply with the filing requirements set out in 803 Kentucky Administrative Regulation (KAR) 25:010 Section 4(6)(a).

Amburgey challenges the Board's decision that a remand for further factual findings is needed. He argues the ALJ's reference to Osborne v. Johnson, supra, and finding of a 22% disability was sufficient to support an award of benefits. He contends the Board erroneously believed the ALJ failed to distinguish between an "impairment" and a "disability". While Amburgey's brief attempts to reference evidentiary support for the various factors relevant to finding an occupational "disability" as identified in Osborne, the ALJ's opinion focuses on the impairment ratings. The Board merely found the ALJ's opinion lacking in specificity given the seemingly contrary statement that "no other restrictions" were placed on Amburgey because of his hearing loss. We fail to perceive how Amburgey is prejudiced by a remand for additional factual findings on this issue.

In conclusion, we believe the Board did not overlook or misconstrue controlling statutes or precedent, or commit an error in assessing the evidence so flagrant as to cause gross injustice. It correctly held the ALJ erred in failing to apply res judicata to the second motion to reopen and that additional factual findings on the hearing loss award were necessary.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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