

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001051-WC

ROBERT L. WHITTAKER, DIRECTOR OF
SPECIAL FUND

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-96-04586, WC-96-04587,
AND WC-96-04588

JAMES D. JOHNSON; JERICOL MINING,
INC.; HON. SHEILA C. LOWTHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2001-CA-001191-WX

JERICOL MINING COMPANY, INC.

CROSS-APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-04586, WC-96-04587, AND
WC-96-04588

JAMES D. JOHNSON; SPECIAL FUND;
HON. SHEILA LOWTHER, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD
TO BE HEARD WITH:

CROSS-APPELLANTS

NO. 2001-CA-001062-WC

JERICOL MINING COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-04586, WC-96-04587, AND
WC-96-04588

JAMES D. JOHNSON; HON. SHEILA LOWTHER,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: KNOFF, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: These workers' compensation petitions and cross-petition all concern the same question: whether claimant James D. Johnson could reopen his injury and occupational disease claims. The Administrative Law Judge (hereinafter, ALJ) dismissed Johnson's motion to reopen his back injury claim on the basis of the terms of the settlement agreement in which for consideration he agreed to dismiss his claim with prejudice. The ALJ overruled the motion to reopen his occupational disease claim because Johnson did not make a prima facie showing of a change in his condition.

The Workers' Compensation Board (the Board) reversed and remanded. The Board concluded that Johnson did not waive the right to reopen, but only dismissed the claim with prejudice and agreed to waive the right to medical benefits on his back injury claim. The Board held that dismissal of a claim with prejudice

is not synonymous with a claimant's waiver of rights under KRS 342.125. In addition, the Board found that because Johnson sought to reopen a previous dismissal and not an award, the proper procedure was a motion to reopen under KRS 342.125(1), and KRS 342.125(2)(a) did not apply. The Board found that Johnson made a showing of a prima facie case with x-ray evidence of coal workers' pneumoconiosis.

On appeal, Jericol Mining and the Special Fund argue that the ALJ correctly held that Johnson could not reopen his claim after a dismissal with prejudice. In addition, they argue that the Board's decision to reopen his pneumoconiosis claim was erroneous because under the terms of KRS 342.125(2)(a), Johnson cannot reopen without proof of additional exposure to coal dust. Additionally, Jericol Mining argues that the Board exceeded its scope of review in setting aside the ALJ's finding of waiver. We have reviewed their claims of error, and we affirm the opinion of the Board.

First, we review Jericol's argument that the Board exceeded its scope of review. Jericol cites the rule that in order to reverse findings of the Board unfavorable to the claimant and upon which he had the burden of proof, the test is whether the evidence compelled a finding in his favor. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986); Lee v. International Harvester Co., Ky., 373 S.W.2d 418 (1963). We do not find that the Board substituted findings of fact for those of the ALJ. Rather, the Board found that the ALJ's view of the evidence was incorrect as to a matter of law: whether a dismissal with

prejudice precluded a reopening under the statute. In addition, the question of whether Johnson had the right to reopen his pneumoconiosis claim was an issue of law. The Board has the authority to correct a misapplication of law by the ALJ. Toyota Motor Mfg., Ky., Inc. v. Czarnecki, Ky. App., 41 S.W.3d 868, 871 (2001). Therefore, we find that the Board proceeded properly in its review of the ALJ's decision.

Appellants' next argument concerns whether Johnson had the right to reopen his back injury claim after it was dismissed with prejudice. They argue that the intention of the parties when the agreement was entered into was that Johnson would, for consideration given, waive the right to reopen in dismissing his claim with prejudice. We believe that the Board decided the issue correctly. Its review of applicable case law showed that a dismissal with prejudice has not been treated the same as a waiver of the right to reopen under the Workers' Compensation Act. Kendrick v. Bailey Vault Co., Ky. App., 944 S.W.2d 147 (1997). The Board stated that, instead, "dismissal with prejudice under the Workers' Compensation Act is tantamount to a decision or agreement as to a claim's merits." We believe the Board properly determined that the result of a dismissal with prejudice is different in the area of workers' compensation because of the capacity of a claimant to reopen a claim for a change in condition.

Appellants argue that the fact that consideration was given for the dismissal with prejudice compels a different result. We might be inclined to agree if it was established that

consideration was given specifically for a waiver of the right to reopen. However, in this case, the Board correctly noted that the express terms of the settlement agreement did not include waiver of "the right to reopen." Therefore, we agree with the Board that appellants have not shown a clearly intentional waiver of the right to reopen by Johnson. And, under the workers' compensation law, it should not be assumed that was what was intended. Therefore, we affirm the opinion of the Board on this issue.

Next, the Special Fund argues that the Board erred because under the 1994 version of KRS 342.125(2)(a), there must have been an award before there can be a reopening. Appellants further argue that the only exception for allowing a reopening is if there has been additional exposure to the hazards of the disease, which Johnson does not claim in this case.

In its opinion, the Board found as follows:

KRS 342.125(2)(a), as enacted in 1994, specifically applies only to the reopening of a previous award and not the opening of a previous dismissal. Under Stambaugh v. Cedar Creek Mining Co., [Ky., 488 S.W.2d 681 (1972)], and Pikeville Coal Co. v. Sullivan, Ky., 895 S.W.2d 574 (1995), the proper procedure to follow where a previous disease claim has been dismissed is a motion to reopen. When no previous award has been made, the only section of the reopening statute that can be applied is that contained in KRS 342.125(1), requiring the moving party to make a showing of a change of occupational disability.

We have examined the statutes in this case, and agree with the Board that it could properly proceed under KRS 342.125(1) to

reopen this claim, without regard to the terms of KRS 342.125(2)(a).

The Board went on to conclude that Johnson made a prima facie showing on reopening with the pulmonary functions studies completed by Dr. Myers, as well as his x-ray interpretation. However, appellants cite Pikeville Coal Co. v. Sullivan, Ky., 895 S.W.2d 574 (1995), to urge that KRS 342.125 only authorizes the reopening of an award when there has been additional exposure to coal dust. That case stated only that, "[i]f additional exposure is the basis for an allegation of increased occupational disability, then . . . a reopening is the proper avenue for requesting relief." Id. at 575. We find that Pikeville Coal does not require additional exposure before a claimant may file for reopening, but requires "different circumstances to warrant reopening." Id. The Board noted that appellant cited a worsening of his condition and medical evidence of a compensable condition. Therefore, we affirm the Board's determination that appellant could reopen this claim.

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

ALL CONCUR.

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