

RENDERED: August 6, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000675-WC

MORGAN KIRK

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-84-27402

RUTH CONTRACTORS; KNOLL COUNTY
MEDICAL CLINIC; HIGHLANDS REGIONAL
MEDICAL CENTER; UNIVERSITY OF KENTUCKY
MEDICAL CENTER; MEDI HOME CARE;
HON. J. KEVIN KING, ADMINISTRATIVE
LAW JUDGE; DEPARTMENT OF WORKERS'
COMPENSATION FUNDS; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: JOHNSON AND TAYLOR, JUDGES; AND EMBERTON, SENIOR JUDGE.¹

JOHNSON, JUDGE: Morgan Kirk has petitioned for review from a
Workers' Compensation Board opinion entered on March 3, 2004,
which affirmed the Administrative Law Judge's order granting

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Ruth Contractor's motion to deny payment of contested medical expenses on the grounds that they were not related to Kirk's pneumoconiosis. Having concluded that the ALJ's factual findings were supported by substantial evidence and that he correctly applied the law, we affirm.

This case arises out of a motion to reopen filed by Ruth Contractors alleging that specific contested medical expenses were not related to Kirk's pneumoconiosis. Previously, the "old" Board in an opinion and award entered on March 10, 1986, had found Kirk to be totally and permanently disabled as of June 4, 1983, as a result of pneumoconiosis and/or silicosis, arising out of and in the course of his employment as a coal miner.

In the instant action, the ALJ on August 19, 2003, ruled that the medical expenses in question were unrelated to King's pneumoconiosis and therefore non-compensable. The ALJ's decision became final on September 15, 2003, in an order denying Kirk's petition for reconsideration. In an opinion entered on March 3, 2004, the Board affirmed the ALJ's ruling. This petition for review followed.

In the litigation of the contested medical expenses, Kirk presented evidence to the ALJ through the testimony of his treating pulmonologist, Dr. Raghu Sundaram, tending to show the medical expenses in question resulted from procedures necessary

for treatment of his pneumoconiosis. Dr. Sundaram opined that Kirk's breathing impairment and recurrent pulmonary infections, as well as his industrial bronchitis, were caused in part by prolonged exposure to coal dust. Hence, Kirk argues that these medical expenses are compensable based on his earlier compensation award against Ruth Contractors.

In rebuttal, Ruth Contractors presented evidence from three board certified physicians. Two of the three doctors, Dr. David Goldstein and Dr. John McConnel, indicated that while Kirk did suffer from pneumoconiosis, in their opinion the medical treatments in question were not a result of his pneumoconiosis, but instead were necessitated by his chronic obstructive lung disease which was caused by cigarette smoking. The third doctor, Dr. Bruce Broudy, did not believe that Kirk suffered from pneumoconiosis, but he concurred with the opinion that the medical treatments were related to cigarette smoking. Dr. Broudy further testified that even if he were to assume that Kirk did have pneumoconiosis, the contested medical treatments were related to cigarette smoking, not to coal dust exposure.

Kirk argues in his petition that the medical reports of Dr. Goldstein, Dr. McConnel and Dr. Broudy did not constitute substantial evidence as to the compensability of the medical expenses. He contends that the medical evidence presented by

Ruth Contractors was contrary to the previously established law of the case.

We begin our analysis by stating that the ALJ did not violate the law of the case doctrine. KRS² 342.035 provides that medical fees are to be reasonable and subject to regulation by the Board. The proper procedure to follow in adjudicating a dispute over any medical bill is the reopening of the award.³ Under KRS 342.020(3), an employer is not required to pay for medical treatment that does not provide a "reasonable benefit" to the injured worker.⁴

Thus, it was proper for the ALJ to reopen the case. Furthermore, our review shows that the law of the case from the first opinion and award was followed during the adjudication of the disputed medical expenses. As the Board correctly pointed out, the ALJ's opinion and award in 1986 found that Kirk suffered from pneumoconiosis and that Ruth Contractors was obligated to pay such medical, surgical and hospital expenses as would be reasonably required for the treatment of his occupational disease. The reopening hearing did not address either of these questions. In resolving the medical fee dispute, the ALJ did not find either that Kirk did not have

² Kentucky Revised Statutes.

³ Westvaco Corp. v. Fondaw, Ky., 698 S.W.2d 837, 839 (1985).

⁴ Square D. Co. v. Tipton, Ky., 862 S.W.2d 308, 310 (1993).

pneumoconiosis or that Ruth Contractors was not responsible for any medical expenses that were incurred as a result of treatment for pneumoconiosis.⁵ The purpose of the evidentiary hearing was not to determine whether Ruth Contractors was liable for medical expenses related to reasonable treatment from the pneumoconiosis, but only to determine whether the medical expenses in dispute were related to the treatment of Kirk's pneumoconiosis.

Thus, the crux of the issue before us is whether Ruth Contractors met its burden of proof in showing that the disputed medical bills were not related to Kirk's pneumoconiosis. When the decision of the fact-finder favors the party with the burden of proof, the unsuccessful party must demonstrate on appeal that there was no evidence of substance to support the ALJ's finding.⁶ Substantial evidence has been defined as evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people.⁷

In considering an appeal, the Board is to "decide whether the evidence is sufficient to support a particular

⁵ In fact, even though Dr. Broudy did not believe that Kirk suffered from pneumoconiosis, he was instructed in his deposition that for the purposes of this hearing he was to view the medical records as if Kirk did have the disease.

⁶ Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

⁷ Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002)(citing Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971)).

finding made by the ALJ," and a reviewing court will overturn the decision of the Board only if the Board misconstrued the law or erroneously assessed the evidence so flagrantly as to cause gross injustice.⁸ In this case, the Board affirmed the ALJ's opinion using the substantial evidence test, and correctly pointed out that the ability of a party to point to contradictory evidence of record is, for the most part, irrelevant if there is substantial evidence of record supporting the ALJ's ultimate findings.⁹

As previously noted, the ALJ considered evidence from four qualified medical experts. Kirk's treating physician, Dr. Sundaram, opined that Kirk's pneumoconiosis was the reason he needed the disputed medical treatment. The other three physicians disagreed with Dr. Sundaram and stated that the medical expenses were not related to the pneumoconiosis. The ALJ, as the finder of fact, has the sole power to determine quality, character, and substance of the evidence.¹⁰ Further, when there is conflicting evidence, as there is here, it is up to the ALJ alone to decide which evidence to believe.¹¹ Clearly, there was substantial evidence to support the finding of the

⁸ Western Baptist Hospital v. Kelly, Ky., S.W.2d 685, 687-88 (1992).

⁹ See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977); and Brockway v. Rockwell International, Ky.App., 907 S.W.2d 166, 169 (1995).

¹⁰ Square D Co., 862 S.W.2d at 308.

¹¹ Id.

ALJ, and the mere contradiction from Kirk's treating physician is not enough on its own to merit a reversal of the decision of the ALJ and the Board.

Kirk also argues that evidence from a doctor who disagrees with the existence of the previously acknowledged diagnosis should be minimized or disregarded.¹² Hence, Kirk contends that Dr. Broudy's evidence should be disregarded since he did not accept the fact that Kirk had pneumoconiosis, and that this alone causes all of the evidence against Kirk to lack the necessary substantive quality for a finding adverse to him. This Court's role on appeal of administrative matters is strictly "one of review, not of interpretation."¹³ This Court cannot substitute its own judgment for that of the ALJ or the Board as to the weight of the evidence.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leonard Stayton
Inez, Kentucky

BRIEF FOR APPELLEE, RUTH
CONTRACTORS:

H. Brett Stonecipher
Lexington, Kentucky

¹² Scott v. Mason Coal Company, 289 F.3d 263 (4th Cir. 2003); Peabody Coal Company v. Graves, 277 F.3d 829 (6th Cir. 2002).

¹³ Kentucky Unemployment Insurance Commission v. King, Ky.App., 657 S.W.2d 250, 251 (1983).

BRIEF FOR APPELLEE, DEPARTMENT
OF WORKERS' COMPENSATION
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David W. Barr
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