RENDERED: March 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001937-WC

JAMES LANKFORD — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-01655

ADDINGTON ENTERPRISES;
HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD;
AND WORKERS' COMPENSATION FUNDS — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; AND EMBERTON, SENIOR JUDGE.[1]

GUIDUGLI, JUDGE: James Lankford petitions for review of an opinion of the Workers' Compensation Board affirming an opinion and order of the Administrative Law Judge dismissing Lankford's pneumoconiosis claim. The ALJ determined that Lankford's claim

[1] Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 100(5)(b) of the Kentucky Constitution and KRS 21.580.

was barred by operation of the statute of limitations because it was not filed within five years from his last date of exposure to coal dust. For the reasons stated below, we affirm the Board's opinion.

Lankford was born in 1940, and worked in the coal industry for most of his adult life. After working for other employers, he began his employment with Addington Enterprises on October 16, 1996. At Addington, Lankford's job required him to operate a loader to fill trucks. Lankford was exposed to coal dust during the course of his employment.

In December, 1996, Lankford's employment with Addington ended.[2] On December 18, 2001, he filed an application for Resolution of Occupational Disease Claim with the Department of Workers' Claims. He alleged that he suffered from coal workers' pneumoconiosis (a.k.a., "black lung disease"). He further maintained that his last date of exposure to coal dust was the last date of his employment with Addington, i.e., December 20, 1996.

After receiving the claim, Addington filed a notice of claim denial. As a basis for the denial, Addington maintained

[2] The record is not clear as to the reason for Lankford's termination. He testified that he "left the company," though the record indicates that he was terminated due to being "awkward" and "a danger to himself and others." Another notation in the record merely states that he was laid off . . . (not discharged)."

that Lankford had failed to comply with the applicable statute of limitations.

Proof on the claim was taken by way of deposition. Lankford initially testified that his last day of employment was December 20, 1996. On cross-examination, however, he twice stated that his employment was terminated on December 2, 1996. Later, on re-direct examination, Lankford stated that he thought he worked “up in December”, meaning that he believed he continued to work into mid or late December, 1996. Re-direct examination on this question closed with Lankford stating that he was not sure of the final date of employment with Addington. Finally, in a subsequent deposition, Lankford again stated that December 20, 1996, was the final date of employment.

The matter went before the ALJ. After considering the proof, the ALJ rendered an opinion and order dismissing the claim based on the five-year statute of limitations provided for in KRS 342.316(4)(a). The ALJ determined that the proof tendered by Addington in support of its affirmative defense, particularly the testimony of Lankford’s supervisor Willard Thompson, was credible and persuasive. The ALJ relied on Thompson’s testimony and documentary evidence in reaching the conclusion that Lankford’s final date of employment was December 2, 1996. Since Lankford’s claim was not filed within five years

of that date, the claim was found to be untimely. Accordingly, the claim was dismissed.

Lankford filed an appeal with the Board. After considering the record, the Board rendered an opinion on September 3, 2004, affirming the ALJ's opinion and order dismissing Lankford's claim. The Board noted that compliance with KRS 342.316(4)(a) is mandatory, and that the ALJ has the sole authority to judge the weight of the evidence and the inferences to be drawn there from. It found no basis for altering the ALJ's finding that the evidence in support of Addington's affirmative defense was stronger and more credible than the evidence in support of Lankford's assertion that the claim was timely filed. This petition for review followed.

Lankford now argues that the Board erred in affirming the opinion and order of the ALJ dismissing Lankford's claim as untimely filed. He maintains that the medical evidence clearly establishes that he suffers from coal workers' pneumoconiosis; that credible evidence was produced which supported his assertion that the last date of exposure was December 20, 1996; that Thompson was not a credible witness because of his loyalty to Addington; and, that Lankford's claim should be resolved on its merits and not disposed of on a procedural issue. In sum, he argues that workers' compensation law should be applied in a manner to promote the protection of injured workers, and that

the ALJ and the Board erred in failing to apply this principle to his benefit. He seeks an order vacating the Board's opinion and remanding the matter to the Board for an opinion consistent with the medical evidence.

We have closely examined the record, the law, and the written arguments, and find no error in the Board's opinion affirming the opinion and order of the ALJ. The issue before us turns on two questions: whether the Board properly concluded that the ALJ is vested with the sole authority to judge the weight and credibility of the evidence; and, whether the Board properly concluded that application of KRS 342.316(4)(a) is mandatory rather than discretionary. Both of these questions must be answered in the affirmative.

On the weight and credibility issue, there is little question but that the Board properly concluded that the ALJ is vested with the sole authority to examine conflicting evidence and to draw conclusions there from.[3] In the matter at bar, and as if often the case, the evidence was conflicting. That is to say, evidence exists in the record upon which either party could have reasonably prevailed. Such conflicts in the evidence are resolved by the ALJ, who is in the best position to judge its weight and credibility.[4] The ALJ found Thompson's testimony and the supportive documentary evidence to be more credible than

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

that of Lankford. This is not to say that Lankford was being untruthful in his testimony; rather, it reflects the belief by the ALJ that Addington's affirmative defense as to the date of termination and last exposure was more strongly supported by the evidence.

Lankford recognizes the ALJ's authority in his appellate brief, yet attempts to argue around it by pointing to the principle that workers' compensation law should be applied to protect workers rather than employers. While Lankford properly notes that workers' compensation law exists primarily for the benefit of injured workers, we cannot go so far as to conclude that an injured employee (even one with an uncontested injury) is always entitled to prevail on a claim for benefits. This leads to the second issue – the mandatory application of KRS 342.316(4)(a).

KRS 342.316(4)(a) states in relevant part that, " . . . the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard . . . ." This language is clear and unambiguous, and subject to but one interpretation. The word "shall" means "mandatory".[5]

[5] KRS 446.010(29).

Having determined that the ALJ properly exercised his authority in finding that Lankford's claim was not filed within five years of his final exposure date of December 2, 1996, the mandatory application of KRS 342.316(4)(a) operated to bar Lankford's claim as untimely. The Board correctly so found, and accordingly, we have no basis for tampering with the Board's opinion.

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

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Shawn C. Conley Harlan, KY	Jeffrey D. Damron Pikeville, KY