

RENDERED: MAY 13, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001867-WC

EDGAR DAY and
HONORABLE JOHN W. KIRK

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 2003-00713

17 WEST MINING, INC.; HONORABLE
J. KEVIN KING, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI and TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: This is an appeal from an opinion of
the Workers' Compensation Board upholding the denial of
retraining incentive benefits as being precluded by KRS

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.

342.732(1)(a)7 due to the fact that the claimant had reached the age of 65 prior to the date the award became final. We affirm.

The facts are neither complex nor in dispute. It was stipulated that the claimant Edgar Day worked in the coal mining industry for 37 years and that he was last exposed the hazards of respirable coal dust on November 3, 2001. Day was 63 years old on the date of his last injurious exposure and was 65 years old at the time of the opinion and order which is the subject of this appeal.

Day had filed two previous claims for retraining incentive benefits. The first, filed on September 9, 1992, was dismissed in 1993. The second claim for RIB was filed on March 31, 1993 and Day was awarded benefits in that proceeding in 1995. However, Day continued to work after receiving that award and therefore he never received any payment of benefits.

Day's third RIB claim was filed on April 4, 2003, supported by a report which interpreted a chest x-ray as demonstrating evidence of coal workers' pneumoconiosis, category 2/1. In response, the appellee employer submitted an x-ray interpretation which was completely negative. Because no consensus was established by the parties' medical experts, the Commissioner of the Department of Workers' Claims submitted the x-rays provided by the parties to a consensus panel. Two panel members interpreted the x-rays as indicating the existence of

category 1/0 pneumoconiosis and the third member read the x-ray as negative. The claim was subsequently assigned to an Administrative Law Judge who issued a February 25, 2004 opinion concluding that Day's age of 65 years disqualified him from an award of RIB under the plain language of KRS 342.732(1)(a)7.

In an appeal to the Board, Day advanced four arguments in support of his contention that the decision of the ALJ must be reversed: 1) that the ALJ misconstrued the intent and proper application of KRS 342.732(1)(a)7; 2) that the statute does not specify when RIB payments are to start; 3) that his prior RIB award cannot impact any prospective award under the 2002 amendments because no benefits were actually paid as a result of the 1993 award; and 4) that the 2002 amendments to the Act are unconstitutional and the regulations enabling those amendments exceed the scope and authority provided by statute. Citing its lack of authority to rule upon the constitutionality of a statute, the Board declined to address that issue, but affirmed the ALJ's decision on the remaining points.

As noted by the Board, Day's contentions regarding the proper interpretation and application of KRS 342.732(1)(a)7 to the particulars of his claim are a matter of first impression. However, as the Board also properly observed, the issues, while novel, are not complex and may be resolved by resort to the plain language of the statute itself and established case law.

The statute at the heart of this controversy, KRS 342.732(1)(a)7, provides as follows:

An employee who is age fifty-seven (57) years or older on the date of last exposure and who is awarded retraining incentive benefits under subparagraph 1. to 4. of this paragraph, may elect to receive in lieu of retraining incentive benefits, an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage, not to exceed seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740 multiplied by the disability rating of twenty-five percent (25%) for a period not to exceed four hundred twenty-five (425) weeks, or until the employee reaches sixty-five (65) years of age, whichever occurs first, KRS 342.730(4) notwithstanding.

Day argues that under the plain terms of this statute he is entitled to elect to receive a permanent partial disability award in lieu of retraining incentive benefits and thus it is his age (63) on the date of his last injurious exposure which is controlling, not his age as of the date of the award. He therefore posits that he is entitled to the award provided for in this statute from November 3, 2001, the day he last worked, through July 24, 2003, the day he turned 65 years of age. Day also contends that because the statute specifies only when benefits end, not when they are to begin, he is entitled to rely upon KRS 342.316(5)(b), which provides that benefits payable by reason of occupational disease shall commence as of the date of last exposure or the date of actual disability, whichever occurs

later. We agree with the Board's analysis that such a construction fails to give effect to the totality of the statute, as well as to the plain language of KRS 342.730(4) which specifies the date upon which awards of retraining incentive benefits are to commence.

The Board properly concluded that Day received an award of retraining incentive benefits which, due to his age on the date of his last exposure, he was entitled to convert to a 25% permanent partial disability award under KRS 342.732(1)(a)7. However, such a conversion does not change the nature of appellant's award from one of retraining incentive benefits, nor does it relieve Day from the effect of the statutes applicable to RIB awards. The Supreme Court of Kentucky addressed the question of the commencement date for awards of RIB in Meade v. Spud Mining,² a case in which the Court set out the following basic premises which we find pertinent to our review of this case:

[T]he apparent purpose of the RIB was to encourage coal workers who had contracted category 1 pneumoconiosis, but who as yet had experienced no significant respiratory impairment, to seek employment outside the mining industry before their condition worsened.

. . .

Aside from being contrary to the plain language of KRS 342.316(1)(b) and KRS

² 949 S.W.2d 584, 587-88 (Ky. 1997).

342.040(3), it would defeat or, in the least, undermine the very purpose of the 1994 amendment for a working miner to obtain an award which "locks in" the entitlement to a RIB but which permits the worker to defer payment of the benefit until some uncertain future date.

. . .

The fact remains that it is a claimant who controls the filing of a claim for RIB. Nothing forces a worker to file a claim pursuant to KRS 342.732(1)(a) until such time as he is ready to meet the conditions which authorize payment of the benefit.

. . .

We conclude that an award of RIB begins on the date upon which the award becomes final and extends for the 208 consecutive weeks which follow the award.

The cited language clearly reflects the emphasis which must be placed on the purpose of the legislation in interpreting the meaning and application of the retraining incentive benefit statutes. KRS 342.732(1)(a)7 unequivocally states that "KRS 342.730(4) notwithstanding," a worker who has reached the age of 65 is ineligible to receive an award of retraining incentive benefits. We therefore agree with the Board's conclusion that a worker must otherwise qualify for an RIB award in order to avail himself of the conversion provision of the statute. Because Day was no longer eligible for an RIB award, there was nothing to convert to a permanent partial award.

Next, Day argues that a RIB award he received in 1995 is res judicata and that he is entitled to reopen that claim under KRS 342.792. Again, we disagree. This is precisely the type of award abatement which the Court in Spud Mining found to be "inconsistent with accomplishing" the purposes of the RIB statutes. Furthermore, the Supreme Court specifically rejected the contention that Smith v. Leeco, Inc.,³ a case upon which Day relies, was either "controlling or persuasive" as to abatement of RIB awards.

Finally, as to the constitutionality of the Act and its enabling regulations, Day's argument consists solely of a citation to two of this Court's opinions which are currently pending in the Supreme Court. Neither case has any application to the issues raised in this case. In Bartrum v. Hunter Excavating⁴ this Court determined that "to the extent that KRS 342.316 and the regulations promulgated thereunder preclude the use of x-ray evidence in rebuttal in a coal-worker's pneumoconiosis claim, they violate the parties' due-process right to a meaningful hearing." The "consensus" procedure prescribed by that statute has not been raised as an issue in this case. In Day v. Fairbanks Coal Company,⁵ the Court

³ 897 S.W.2d 581 (Ky. 1995).

⁴ ___ S.W.3d ___ (Ky.App. rendered May 28, 2004).

⁵ 2003-CA-002418-WC (Rendered March 24, 2004, not to be published).

addressed mandatory language in KRS 342.316(3)(b) requiring that the date of the x-ray to be indelibly labeled on the x-ray and contained in the report. The constitutionality of the statute was not considered. As no specific argument has been advanced concerning this statute's constitutionality, we decline to address the matter except to note that were the issue properly before us, the rationale utilized by the Supreme Court in upholding the constitutionality of KRS 342.730(4) in McDowell v. Jackson Energy RECC⁶ appears dispositive of the constitutionality of terminating eligibility for an RIB award at age 65.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Harlan Callis, III
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BRIEF FOR APPELLEE:

Carl M. Brashear
Lexington, Kentucky

⁶ 84 S.W.3d 71 (Ky. 2002).