

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2003-CA-002395-WC

WILLIAM A. HAMPTON

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-01537

ISLAND FORK CONSTRUCTION COMPANY;  
HON. LLOYD R. EDENS, ADMINISTRATIVE LAW JUDGE;  
AND THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: GUIDUGLI, McANULTY, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: William A. Hampton petitions this Court to review an opinion of the Workers' Compensation Board (the Board) entered November 5, 2003, which affirmed the Administrative Law Judge's (ALJ) dismissal of Hampton's claim for workers' compensation benefits. We affirm.

Hampton had been a coal miner for some fifteen years. Island Fork Construction Company (Island Fork) was Hampton's last employer, and Hampton's last date of employment was January

3, 1997. Hampton filed a claim for pneumoconiosis benefits on September 16, 2002. In support thereof, he submitted a chest x-ray taken on July 16, 2002, and an ILO report from Dr. Michael Alexander. Dr. Alexander interpreted the x-ray as demonstrating evidence of pneumoconiosis, Category 1/1, and also viewed the x-ray as being Quality 1. In response, Island Fork submitted a report from Dr. Robert Powell and an x-ray taken on December 6, 2002. Dr. Powell interpreted the x-ray as demonstrating Category 0/0 pneumoconiosis and also determined the x-ray to be a Quality 1. As no consensus had been established between the parties' medical experts, the matter was submitted to a consensus panel of three "B" readers for interpretation of the best quality film pursuant to Kentucky Revised Statutes (KRS) 342.316. Two of the three readers interpreted the x-ray of December 6, 2002, as Category 0/1, which is considered negative for pneumoconiosis (consensus reading). The commissioner entered an order providing the parties with notice that two of the "B" readers had reached a consensus that Hampton did not suffer from pneumoconiosis. Hampton then filed a notice challenging the consensus reading but failed to file any additional evidence. By opinion and order dated September 2, 2003, the ALJ dismissed Hampton's claim. Being unsatisfied with the ALJ's dismissal, Hampton sought review by the Board. By

opinion entered November 5, 2003, the Board affirmed the ALJ's dismissal of Hampton's claim. This review follows.

Hampton specifically argues:

1. Whether, in the case of legal presumption, it is still improper "to draw inference from an inference". [sic]
2. Whether the legal presumption described in KRS 342.316(13), that the consensus findings of a panel of physicians following a statutory procedure are presumed to be correct unless overcome by "clear and convincing evidence", [sic] is properly drawn in the absence of evidence that the statutory procedures were followed.
3. Whether the burden of overcoming a rebuttable [sic] presumption is separate from the burden of showing entitlement to a rebuttable [sic] presumption.

In order for the presumption to attach to the consensus reading under KRS 342.316(13), Hampton essentially argues that there must be evidence in the record reflecting that the consensus procedure described in KRS 342.316 was followed. Hampton points out that the record is void of any such evidence:

There is no showing, nor even a suggestion, that the commissioner forwarded two films to the panel physicians. There is no showing that each "B" reader selected the highest quality film and reported only the interpretation of that film.

Absent evidence that the consensus procedure had been followed, Hampton believes the consensus reading is not entitled to the presumption of KRS 342.316.

In rejecting Hampton's argument, the Board concluded:

Nothing in the record officially confirms that the Commissioner fulfilled his statutory duties as prescribed by KRS 342.316(3)(b)4.e., or that the physicians composing the three-member consensus panel selected for review the highest quality film from two films available to them. However, it is equally true that there is no substantial evidence of record proving those persons acted inappropriately or in any manner contrary to the express dictates of the Act. Therein lies the fatal flaw in Hampton's logic. The record is devoid of even a scintilla of evidence that could be interpreted as supporting petitioner's allegations regarding any corruption in the consensus process. Since the burden of proof rested with Hampton, his argument fails.

Once the Commissioner determined that a negative consensus had been reached by the three-member panel, the correctness of consensus classification was presumed as a matter of law, and the burden of proof and persuasion shifted to Hampton as the non-prevailing [sic] party faced with challenging the consensus. See KRS 342.316(13). At that point, Hampton bore the burden of not only proving each of the essential elements of his cause of action, but he also became charged with overcoming the presumed correctness of the consensus reading by clear and convincing evidence. If Hampton had reason to believe the Commissioner and his staff did not follow statutory mandates pertaining to the circulation of x-rays among consensus panel "B" readers, or if he suspected that the "B" readers were not selecting the highest quality film for purposes of review, the onus was on him to present evidence establishing a reasonable basis to support those allegations.

Hampton was free at any time to depose the panel "B" readers, the Commissioner, or any member of his staff involved in the circulation of x-rays to panel experts in order to verify or impeach the propriety of the consensus process. Unfortunately, he chose not to do so. He, therefore, failed in his burden of proof.

We agree with the Board's reasoning and conclude that Hampton bore the burden of proving that he suffered from pneumoconiosis and that the consensus procedure was not followed. The parties' experts disagreed upon the interpretation of the two submitted x-rays; thereafter, two of the three "B" readers reached consensus that Hampton did not suffer from pneumoconiosis. The record is clear that Hampton presented no evidence to demonstrate that the commissioner or any of the three "B" readers failed to comply with the mandates of KRS 342.316. As such, we are of the opinion that Hampton failed to demonstrate that the consensus procedure was not followed and failed to overcome the presumption of correctness that attached to the consensus reading under KRS 342.316.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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