

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002085-WC

LEE A. BRASHER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-02140

CONSOLIDATED COAL COMPANY;
HON. ANDREW F. MANNO, ALJ;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, CHIEF JUDGE; CAPERTON AND MOORE, JUDGES.

MOORE, JUDGE: Lee Brasher petitions this Court to review an opinion of the Workers' Compensation Board ("Board") entered on September 19, 2007. The Board affirmed an opinion and order of the Hon. Andrew F. Manno, Administrative Law Judge ("ALJ") entered on May 18, 2007.¹ After a careful review of the record, we affirm.

Brasher brought his claim for workers' compensation benefits alleging that he had contracted the occupational disease known as coal workers' pneumoconiosis after working in Kentucky coal mines for approximately twenty-nine years. When

¹ There is a typographical error in the ALJ's opinion and order because it reflects that the opinion and order were entered on May 18, 2006, when they were actually entered on May 18, 2007.

Brasher filed his workers' compensation pneumoconiosis claim form (Form 102), he attached an x-ray interpretation report from Dr. Matthew Vuskovich, a "B" Reader, who found that Brasher's x-ray showed parenchymal abnormalities consistent with pneumoconiosis.

Consolidated Coal Company obtained an x-ray interpretation report from Dr. Bruce Broudy, who found that Brasher's x-ray showed no signs of pneumoconiosis. Brasher's x-rays were then sent to the Commonwealth's "consensus panel" for its own independent interpretation of the x-rays, as required by Kentucky Revised Statute (KRS) 342.316. The consensus panel consists of a randomly selected group of three "B" readers. One of the doctors on the consensus panel, Dr. Bapuji Narra, agreed with Dr. Vuskovich and found that the x-rays were positive for pneumoconiosis. However, the other two consensus panel members found that the x-rays were negative for pneumoconiosis.

In an opinion and order, the ALJ found that the parties had stipulated to the following facts:

1. Coverage under the Workers' Compensation Act.
2. An employment relationship existed between the Plaintiff and Defendant at all times herein relevant.
3. Plaintiff gave due and timely notice.
4. Last exposure to the hazards of the occupational disease occurred during employment with the Defendant, Consolidation Coal Company on November 1, 1999.
5. Mr. Brasher has at least 29 years of multiple exposures.
6. Plaintiff is not currently employed in the severance and processing of coal.
7. Mr. Brasher was born on February 28, 1942.
8. Plaintiff completed 8 years of formal education.

The ALJ then stated that the consensus panel's determination that Brasher did not qualify for workers' compensation benefits was correct unless Brasher could prove otherwise by clear and convincing evidence. Brasher testified at a hearing that was

held, but the ALJ found Brasher failed to show by clear and convincing evidence that he qualified for benefits. Therefore, the ALJ dismissed Brasher's claim.

Brasher appealed to the Workers' Compensation Board, claiming that KRS 342.316 is unconstitutional because it violates injured coal miners' Equal Protection Rights under the Fourteenth Amendment to the United States Constitution and Sections One, Two, and Three of the Kentucky Constitution. The Board determined that it had "no jurisdiction to determine the constitutionality of [a] statute enacted by the Kentucky General Assembly." (Citing *Blue Diamond Coal Company v. Cornett*, 300 Ky. 647, 189 S.W.2d 963 (1945)). The Board then held that because the constitutionality of the statute was the only issue before it and because it lacked jurisdiction to make a determination on that claim, the opinion and order of the ALJ was affirmed.

Brasher now appeals, claiming that KRS 342.316 is unconstitutional because it violates injured coal miners' rights to Equal Protection under the Fourteenth Amendment to the United States Constitution and Sections One, Two, and Three of the Kentucky Constitution. Specifically, he alleges: (1) A miner who suffers from coal miners' pneumoconiosis must meet a higher and more stringent burden of proof, *i.e.*, the "clear and convincing evidence" standard, to rebut the consensus panel's findings, but other similarly situated workers only have to meet a "preponderance of the evidence" standard; and (2) KRS 342.316 limits the type of evidence that an ALJ is permitted to consider while reviewing a coal miner's pneumoconiosis claim. Brasher contends that in reviewing pneumoconiosis claims, an ALJ may not consider the number of years that the miner was exposed to coal dust, the type of work performed by the miner, or the miner's testimony regarding his ability to breathe and function.

Unfortunately for Brasher, this Court has reviewed these same claims on multiple occasions in other cases and, in each of those cases, this Court found that KRS 342.316 does not violate the Equal Protection Rights of injured coal miners complaining of pneumoconiosis.² We find this Court's prior cases on this issue dispositive.

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

CAPERTON, JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, CONCURS AND JOINS IN THE SEPARATE OPINION.

CAPERTON, JUDGE: I concur with the opinion of the court but feel compelled to write separately on Appellant's argument regarding the constitutionality of KRS 342.316.

Arguments to our court must be addressed as presented. The Appellant argues that other workers enjoy a preponderance of the evidence burden while those that endure the disease of pneumoconiosis grapple with the clear and convincing standard. This is true in many cases, but may not be true in all cases. Specifically, KRS 342.316 states, in relevant part:

(3) (b) 4. d. Within forty-five (45) days of assignment of a coal workers' pneumoconiosis claim to an administrative law judge, the employer shall cause the employee to be examined by a physician of the employer's choice and shall provide to all other parties and file with the executive director the X-ray interpretation by a "B" reader. The examination of the employee shall include spirometric testing if pulmonary dysfunction is alleged by the employee

² See, e.g., *Lutz v. Energy Conversion Corp.*, ___ S.W.3d ___, No. 2006-CA-002628-WC, 2007 WL 2812289 (Ky. App. Sept. 28, 2007), as modified (Nov. 9, 2007); *Middleton v. Centennial Resources, Inc.*, No. 2007-CA-000037-WC, 2007 WL 2812617 (Ky. App. Sept. 28, 2007), as modified (Nov. 9, 2007) (unpublished); *Durham v. Peabody Coal Co.*, No. 2007-CA-000032-WC, 2007 WL 2812615 (Ky. App. Sept. 28, 2007) (unpublished); *Ratliff v. Peabody Coal Co.*, No. 2007-CA-001163-WC, 2008 WL 275146 (Ky. App. Jan. 25, 2008) (unpublished); *Cain v. Lodestar Energy, Inc.*, No. 2007-CA-000010-WC, 2008 WL 466073 (Ky. App. Feb. 22, 2008) (unpublished).

in the application for resolution of a claim. *The executive director shall determine whether the X-ray interpretations filed by the parties are in consensus.*

- (3) (b) 4. e. *If the readings are not in consensus, the executive director shall forward both films, masking information identifying the facility where the X-ray was obtained and the referring physician, consecutively to three (3) "B" readers selected randomly from a list maintained by the executive director for interpretation. Each "B" reader shall select the highest quality film and report only the interpretation of that film. The executive director shall determine if two (2) of the X-ray interpretations filed by the three (3) "B" readers selected randomly are in consensus. If consensus is reached, the executive director shall forward copies of the report to all parties as well as notice of the consensus reading which shall be considered as evidence. If consensus is not reached, the administrative law judge shall decide the claim on the evidence submitted.*
- (3) (b) 4. f. "Consensus" is reached between two (2) chest X-ray interpreters when their classifications meet one (1) of the following criteria: each finds either category A, B, or C progressive massive fibrosis; or findings with regard to simple pneumoconiosis are both in the same major category and within one (1) minor category (ILO category twelve (12) point scale) of each other.
- (13) For coal-related occupational pneumoconiosis claims, the consensus procedure shall apply to all claims which have not been assigned to an administrative law judge prior to July 15, 2002. *The consensus classification shall be presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence.* If an administrative law judge finds that the presumption of correctness of the consensus reading has been overcome, the reasons shall be specially stated in the administrative law judge's order.
(emphasis supplied).

A reading of the statute provides an interesting result. If consensus is reached whether by the "B" readers of the employee and employer or after referral to the consensus panel, the consensus shall be presumed to be the correct classification and must be overcome by clear and convincing evidence. However, if there is no consensus between the employee and employer "B" readers, and none is reached after referral by the executive director to the three randomly selected "B" readers, then the

case is given to the administrative law judge for decision. Nothing in KRS 342.316 elevates the burden of persuasion on the claimant above a preponderance of the evidence when referred to the administrative law judge. Thus, to say that a pneumoconiosis claimant must always contend with a clear and convincing standard of proof may not be entirely correct, such claimant may possibly have a preponderance of the evidence standard. This apparent change in burden between two persons suffering from pneumoconiosis is interesting at the very least.

BRIEF FOR APPELLANT:

Thomas E. Springer III
Madisonville, Kentucky

BRIEF FOR APPELLEE:

Carl M. Brashear
Lexington, Kentucky