RENDERED: NOVEMBER 17, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001280-WC

TONY COUCH — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-09-00328

JAMES RIVER COAL SERVICE CO.,
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE
and WORKERS' COMPENSATION
BOARD — APPELLEES

NO. 2016-CA-001281-WC

LARRY HAMILTON — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-09-00052

CONSOL OF KENTUCKY, INC.,
HON. R. ROLAND CASE,

ADMINISTRATIVE LAW JUDGE
and WORKERS' COMPENSATION
BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; ACREE AND STUMBO, JUDGES.

ACREE, JUDGE: This appeal presents two coal workers' pneumoconiosis (CWP) claims which we have consolidated for appellate review. The solitary claim of each appellant, Tony Couch and Larry Hamilton, is that KRS[1] 342.125(5)(a) is unconstitutional. That statute governs the reopening of workers claims of the type they present. They draw our attention to, and rely on, *Vision Mining, Inc. v. Gardner,* 364 S.W.3d 455 (Ky. 2011) for the proposition that the statutory provision barring reopening of claims prior to an additional two-year period of exposure violates their equal protection and due process rights. We do not reach the constitutional issue but, for the following reasons, we affirm.

In 2009, Tony Couch was awarded permanent partial disability benefits based upon a 25% disability rating resulting from a category 2/2 CWP claim without pulmonary impairment in accordance with KRS 342.732(1)(b)(1). Couch filed a motion to reopen his claim in 2014 seeking an increase in his award due to an alleged progression of his disease. A hearing was conducted to determine whether to reopen Couch's claim. It was undisputed that Couch had not

[1] Kentucky Revised Statutes.

had any additional occupational exposure to coal dust since prior to his original award of benefits. KRS 342.125(5)(a) permits a reopening of a CWP claim only upon proof of each of the following conditions: (1) the employee's condition has progressed; (2) respiratory impairment has developed; and (3) the employee has had "two (2) additional years of employment in the Commonwealth wherein the employee was continuously exposed to the hazards of the disease[.]" KRS 342.125(5)(a). Couch conceded to the Administrative Law Judge (ALJ) that KRS 342.125(5)(a) bars the reopening of his claim, but argued that the additional two-year exposure requirement was in violation of his equal protection and due process rights.

Likewise, Larry Hamilton filed a CWP claim in 2009, receiving retraining incentive benefits (RIB) based upon a category 1 consensus reading of his x-rays. Hamilton filed a motion to reopen his claim in 2013 alleging his CWP had progressed and he now suffers from pulmonary impairment. Hamilton's former employer maintained he had not satisfied any of the requirements of KRS 342.125(5)(a). After a hearing on the matter, the ALJ determined that Hamilton had demonstrated a worsening condition of CWP, but had not submitted evidence to support a respiratory impairment nor had he indicated he was employed for an additional two years during which period he was continuously exposed to hazards of the disease. The ALJ noted that Hamilton had raised the issue of constitutionality of the reopening statute, but further acknowledged that, as an ALJ, he lacked the authority to rule on the issue. The Board considered Couch's

and Hamilton's claims together, agreed with the respective ALJs, and accordingly dismissed the claims. This appeal followed.

The Workers' Compensation Board's review is limited by statute. *See* KRS 342.285(2). The Board lacks authority to address or decide constitutional issues. *Commonwealth v. DLX, Inc.*, 42 S.W.3d 624, 626 (Ky. 2001) (citing *Goodwin v. City of Louisville*, 309 Ky. 11, 215 S.W.2d 557, 559 (1948)). In this case, the ALJ, and ultimately the Board, found that both plaintiffs did not qualify for benefits under the requirements set forth in the reopening statute because it was undisputed that neither Couch nor Hamilton had two additional years of occupational exposure to hazards of their disease.

This Court does have the authority to declare statutes unconstitutional when appropriate. However, "we must not reach a constitutional issue if other grounds are sufficient to decide the case." *Baker v. Fletcher*, 204 S.W.3d 589, 597–98 (Ky. 2006). We can and do affirm the Board without addressing the constitutional issue.

The Court of Appeals need only correct the Board if it: (1) misconstrued or overlooked controlling precedent, or (2) committed flagrant error in evaluating the evidence that results in gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Neither the Board nor this Court is permitted to substitute its judgment for that of the ALJ "as to the weight of evidence on questions of fact." KRS 342.285; *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007).

In Couch's case, the ALJ summarized the evidence from the reopening hearing, beginning with the testimony of the doctor who performed an Occupational Pulmonary Disease Evaluation on Couch in November 2013. The ALJ's summary of that testimony was as follows: "With no substantial progression of his pulmonary disease since the previous award in 2009, [Couch] continues to be reported with Category 2 pneumoconiosis and normal lung function and arterial blood gases at this time. No impairment was assigned to this condition." (R. at 1026). Next, the ALJ recounted the testimony of another doctor who examined Couch, as well as his medical records and x-rays, at the request of his former employer. The ALJ's assessment of that doctor's testimony concluded "Couch has undergone pulmonary function studies which yielded 0% impairment as well as results . . . within normal limits regarding his arterial blood gases. . . . Based upon the objective studies, he would have no pulmonary impairment[.]" (R. at 1026-27). And, finally, the ALJ sent Couch to a doctor for a University Medical Evaluation by a physician who determined "[a] pulmonary impairment is not resulting from the exposure to coal dust in the severance or processing of coal." (R. at 1027).

While it was undisputed at the hearing that Couch had not had any additional occupational exposure to coal dust since before his original award of benefits, the evidence also demonstrated that he had not developed respiratory impairment due to his disease, a requirement that must be met to reopen an award. KRS 342.125(5)(a) ("Upon the application of the affected employee, and a showing of progression of his previously-diagnosed occupational pneumoconiosis

resulting from exposure to coal dust *and development of respiratory impairment due to that pneumoconiosis* and two (2) additional years of employment in the Commonwealth wherein the employee was continuously exposed to the hazards of the disease, the administrative law judge may review an award or order for benefits attributable to coal-related pneumoconiosis under KRS 342.732.") (Emphasis added). We reiterate that Couch, and Hamilton as well, only challenge the constitutionality of the additional two-year exposure requirement of the statute. Therefore, even if we were to address Couch's constitutional claim and decide the question in his favor, he would still not be entitled to any relief under KRS 342.125(5)(a) because he has not developed any respiratory impairment.

The same can be said for Hamilton.

The ALJ in Hamilton's case concluded that Hamilton had not only failed to demonstrate an additional two years of occupational exposure to the hazards of the disease, but also did not submit any evidence to support the development of a respiratory impairment. "To qualify for an award of pulmonary impairment, the functions must be below 80%, however that is not the case in this claim. [Hamilton's] pulmonary functions studies were above 80%, or normal, and therefore do not rise to the level necessary to award benefits for pulmonary impairment." (R. at 197-98). Again, based upon the circumstances presented in each of these cases, this Court is unable to grant any effective relief to either appellant in deciding whether the additional two-year exposure requirement is

unconstitutional because they have each failed to establish development of their respiratory impairment as required by KRS 342.125(5)(a).

Based on the foregoing, we do not reach the constitutional question presented in this appeal. *Preston v. Clements*, Ky., 313 Ky. 479, 232 S.W.2d 85, 88 (1950) ("The prevailing rule seems to be that the courts will avoid the question of constitutionality unless necessary to a proper determination of the merits of the cause under consideration."). However, for the foregoing reasons, we affirm the Workers' Compensation Board's decisions in both cases.

ALL CONCUR.

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