

RENDERED: NOVEMBER 8, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001010-WC

LONE MOUNTAIN PROCESSING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-00659

DONNIE WAYNE CLARK;
HONORABLE R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

** ** * * * **

BEFORE: DIXON, GOODWINE, AND MAZE, JUDGES.

DIXON, JUDGE: Lone Mountain Processing (Lone Mountain) petitions for review of a Workers' Compensation Board (Board) opinion affirming the opinion,

award, and order entered on December 8, 2017,¹ by ALJ R. Roland Case. After careful review, we reverse the Board's opinion and remand this matter to the ALJ for further proceedings consistent with this opinion.

On April 10, 2017, Donnie Clark filed his occupational disease claim under the Workers' Compensation Act (Act)² alleging that he became affected by coal workers' pneumoconiosis on May 13, 2016.³ Because the sole issue on appeal pertains to the applicable version of KRS 342.730(4), we will not summarize the medical and lay evidence.

The ALJ's opinion, award, and order found that Clark suffers from complicated coal workers' pneumoconiosis Category 2/3 and concluded that he is totally disabled pursuant to KRS 342.732(1)(e). Because Clark was fifty-one years of age on the date of his last exposure and the 1996 version of KRS 342.730(4) was held unconstitutional by the Supreme Court of Kentucky in *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017), *reh'g denied* (Nov. 2, 2017), the ALJ applied the tier-down provision of the 1994 version of KRS 342.730(4) to Clark's claim.

¹ The Administrative Law Judge (ALJ) issued orders on December 14, 2017, and January 19, 2018, amending the opinion, award and order to reflect that the decision was rendered on December 8, 2017, as opposed to November 8, 2017, as originally listed in the opinion.

² Kentucky Revised Statutes (KRS) Chapter 342.

³ It is undisputed that May 13, 2016, is also Clark's date of last exposure.

Lone Mountain appealed to the Board, asserting that the 1996 version of KRS 342.730(4) should have been applied to Clark's claim because it was the provision in effect on the date of Clark's last exposure. On June 8, 2018, the Board affirmed the ALJ's opinion, award, and order. This petition for review followed.

Only Lone Mountain filed a petition for review with our court.⁴ The sole question of law involved in this appeal is what version of KRS 342.730(4) should be applied to Clark's award.

The appropriate standard of review for workers' compensation claims was summarized in *Bowerman v. Black Equipment Company*, 297 S.W.3d 858, 866-67 (Ky. App. 2009).

Appellate review of any workers' compensation decision is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Our standard of review differs in regard to appeals of an ALJ's decision concerning a question of law or a mixed question of law and fact *vis-à-vis* an ALJ's decision regarding a question of fact.

⁴ In his Appellee brief, Clark presents a counter argument concerning whether Lone Mountain failed to name the Attorney General as an indispensable party. However, because Clark did not raise this issue as a cross-appeal, we will not address it. Furthermore, had it been properly before us, this issue would not merit much discussion due to our resolution of the central issue on appeal.

The first instance concerns questions of law or mixed questions of law and fact. As a reviewing court, we are bound neither by an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law to the facts. In either case, our standard of review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001); *Cinelli v. Ward*, 997 S.W.2d 474, 476 (Ky. App. 1998). *De novo* review allows appellate courts greater latitude in reviewing an ALJ's decision. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991).

The second instance concerns questions of fact. KRS 342.285 designates the ALJ as finder of fact, and has been construed to mean that the factfinder has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth-Elkhorn Corporation*, 514 S.W.2d 46, 47 (Ky. 1974). Moreover, an ALJ has sole discretion to decide whom and what to believe, and may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

KRS 342.285 also establishes a "clearly erroneous" standard of review for appeals concerning factual findings rendered by an ALJ, and is determined based on reasonableness. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Although an ALJ must recite sufficient facts to permit meaningful appellate review, KRS 342.285 provides that an ALJ's decision is "conclusive and binding as to all questions of fact," and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact[.]" *Shields v. Pittsburgh & Midway Coal Mining*

Co., 634 S.W.2d 440, 441 (Ky. App. 1982). In short, appellate courts may not second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Medley v. Board of Education, Shelby County*, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused only when an ALJ's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

...

Generally, "arbitrariness" arises when an ALJ renders a decision on less than substantial evidence, fails to afford procedural due process to an affected party, or exceeds her statutory authority. *K & P Grocery, Inc. v. Commonwealth, Cabinet for Health Services*, 103 S.W.3d 701, 703 (Ky. App. 2002).

"Substantial evidence is 'that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person.'" *Wasson v. Kentucky State Police*, 542 S.W.3d 300, 304 (Ky. App. 2018) (quoting *Bowling v. Natural Resources and Environmental Protection Cabinet*, 891 S.W.2d 406, 409 (Ky. App. 1994)). Our standard of review requires us to show considerable deference to the ALJ and the Board.

Lone Mountain argues that the 1996 version of KRS 342.730(4) applies to Clark's claim because it was in effect on the date of Clark's last exposure. "As a general rule, the law in effect on the date of injury or last injurious exposure is deemed to control a worker's rights and an employer's obligations with regard to any claim arising out of and in the course of the

employment.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 93 (Ky. 2000). At the time of Clark’s injury, KRS 342.730(4) provided that workers’ compensation benefits “terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits . . . or two (2) years after the employee’s injury or last exposure, whichever last occurs.” This version of KRS 342.730 came into effect in 1996, but subsection (4) was held unconstitutional by *Parker*. Considering *Parker*, the ALJ determined, and the Board affirmed, that the prior amendment to KRS 342.730(4)—which came into effect in 1994 and contained a tier-down provision—should be applied to Clark’s award.

However, during the pendency of this appeal, KRS 342.730(4) was amended, effective July 14, 2018. The issue of whether this amendment was retroactive was recently addressed in *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019). *Holcim* is now binding authority. As such, our opinion is consistent with *Holcim*.

It is well-settled, “[n]o statute shall be construed to be retroactive, unless expressly so declared.” KRS 446.080(3). A Legislative Research Commission note appears below the official version of KRS 342.730(4) stating:

[t]his statute was amended in Section 13 of 2018 Ky. Acts ch. 40. . . . Subsection (3) of Section 20 of that Act reads, “Subsection (4) of Section 13 of this Act shall apply prospectively and retroactively to all claims: (a) For which the date of injury or date of last exposure occurred on or after December 12, 1996; and (b) That

have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act.”

KRS 7.131(3) states that the Legislative Research Commission “may omit all laws of a private, local, or temporary nature[.]” The language regarding retroactivity of KRS 342.730(4) is temporary. The retroactivity for KRS 342.730(4) applies to those cases which “have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act.” Retroactivity of KRS 342.730(4) will not be an issue for any injuries and claims occurring after July 14, 2018. The language in the note to KRS 342.730(4) is only relevant to a particular time frame, and once cases arising during that time frame are fully adjudicated, it will be unnecessary. As a result, due to the temporary nature of the language regarding retroactivity of KRS 342.730(4), codification of this note was not required to ensure retroactive application of this provision.

Since the 2018 amendment applies retroactively, it must be used to determine Clark’s award. Therefore, we remand this matter to the ALJ to use the 2018 amendment to KRS 342.730(4) to determine Clark’s award.

For the foregoing reasons, the opinion of the Workers’ Compensation Board is REVERSED, and this matter is REMANDED to the ALJ for further proceedings consistent with this Opinion.

ALL CONCUR.

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