

IMPORTANT NOTICE
NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: APRIL 24, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0623-WC

FINAL
DATE 5-15-03 SJA Grant DC

BUSTER AMBURGEY

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-0157-WC

V.

WORKERS' COMPENSATION BOARD NO. 94-16113

BIG ELK CREEK COAL COMPANY;
ROBERT L. WHITTAKER, DIRECTOR OF
SPECIAL FUND; HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

A 1997 motion to reopen the claimant's settled retraining incentive benefit (RIB) claim was denied for failure to show a prima facie worsening of condition/increase in disability. Nonetheless, a subsequent motion to reopen was granted on evidence of a lesser disease subcategory and greater spirometric values, and a total disability award was entered at reopening. In a decision that was affirmed by the Court of Appeals, the Workers' Compensation Board (Board) determined that the 1997 decision precluded a reopening on the evidence that was offered subsequently and, therefore, that the increased pneumoconiosis award must be reversed. We affirm.

The claimant was born in 1933 and had a tenth-grade education with no specialized training. After a twenty-five-year history with multiple coal mining

companies, he quit working on February 3, 1994. On April 11, 1994, he filed both a RIB claim and an occupational disease claim for a noise-induced hearing loss. Medical evidence in the RIB claim included x-ray evidence of category 0/1, 1/1, and 2/1 pneumoconiosis. At the time, the greatest FVC value was 99% of the predicted normal, and the greatest FEV1 value was 108%. In the hearing loss claim, the evidence established a bilateral impairment of as much as 19%. In an agreement that was later approved, the employer agreed to pay a lump sum that equated to a RIB and its 25% share of an 18% occupational disability. An ALJ later awarded a 19% occupational disability in the hearing loss claim, apportioning 75% to the Special Fund.

Sometime in 1997, the claimant moved to reopen the RIB claim although he had sustained no additional exposure to coal dust. He offered evidence of category 2/2 disease, an FVC value of 79.9%, and an FEV1 value of 68.6%, but an arbitrator denied the motion, concluding that the evidence "fail[ed] to establish a prima facie case for worsening of condition/increase in occupational disability." No appeal was taken from the decision, and it became final.

On November 8, 2000, the claimant moved to reopen both claims, alleging that his condition had worsened and that he was no longer able to work. He also asserted that he had filed no previous motion to reopen. In addition to his affidavit, he offered evidence of category 2/1 pneumoconiosis, an FVC value of 81%, an FEV1 value of 71%, and a 22% hearing impairment. Responding to the motion, the employer maintained that there was no worsening of the pneumoconiosis, noting the denial of the 1997 motion and the evidence that was offered at that time. The employer also pointed out that the claimant had not worked since before the initial claims and asserted, therefore, that any increased hearing impairment was not work-related. Nonetheless,

the motion was granted, and the parties proceeded to take evidence.

After failing to make any reference to the 1997 decision and reviewing both the 1994 and 1997 evidence as having been taken in the initial proceeding, the ALJ determined that the claimant had suffered from category 1/1 pneumoconiosis when he settled his RIB claim and that his present disease category was 2/1. Furthermore, his greatest FVC value had decreased from 99% to 93% of the predicted normal, and his greatest valid FEV1 value had decreased from 108% to 73%. Thus, the ALJ concluded that he had made the necessary prima facie showing to reopen and had also established his entitlement to income benefits for total disability under KRS 342.730(1)(d). See Big Elk Creek Coal Co. v. Miller, Ky., 47 S.W.3d 330 (2001). Although observing that there were no increased restrictions due to the hearing loss, the ALJ noted the three-point increase in impairment and awarded a 22% occupational disability for the condition.

Overruling the Special Fund's petition for reconsideration, the ALJ determined that the 1997 motion was dismissed without a decision on the merits and that the proof offered in 1997 was not binding in the 2000 proceeding. Refusing a request for an apportionment between the two conditions, the ALJ pointed out that both claims were apportioned 25% to the employer and 75% to the Special Fund and indicated that it was up to the Special Fund to decide how it would account for the two conditions. The ALJ also noted that the pneumoconiosis claim, alone, rendered the claimant totally disabled at reopening. Appeals by the employer and the Special Fund followed.

Noting that the 1994 evidence would have supported a finding of total disability under KRS 342.732(1)(d), the Board determined that the application of res judicata to the 1997 decision established that evidence of category 2/2 disease, an FVC value of

79.9%, and an FEV1 value of 68.6% showed no worsening of condition at that time. Thus, at a minimum, category 2/3 disease and spirometric values lower than those offered in 1997 comprised the necessary prima facie showing for a subsequent reopening. Since the claimant failed to make that showing, the Board determined that the claim should not have been reopened and that the increased pneumoconiosis award must be reversed. Furthermore, noting that the 1994 Act did not provide for increased income benefits based solely upon increased impairment and noting the finding that the claimant appeared to have no additional restrictions due to his hearing loss, the Board remanded that claim for additional findings of fact. The Court of Appeals affirmed, and this appeal by the claimant followed.

The claimant maintains that the Board's application of the doctrine of res judicata was incorrect for two reasons. First, he asserts that the 1997 decision did not constitute a judgment on the merits. Second, he asserts that because the second reopening involved the hearing loss claim as well as the pneumoconiosis claim, there was no identity of claims. We disagree on both counts.

Although the principles of the finality of judgments apply to all workers' compensation awards, KRS 342.125(1) provides some relief from those principles and permits a reopening under certain specified conditions, one of which is a post-award increase in occupational disability. In both 1997 and 2000, the claimant alleged that a worsening of the pneumoconiosis caused an increase in his occupational disability. Reopening a pneumoconiosis claim upon such an allegation is a two-step process. First, the worker must make the prima facie showing that is required by KRS 342.125(2)(a). Having succeeded in doing so, the worker must then prove on the merits the elements of the subsection of KRS 342.732(1) under which income benefits are

sought.

In order to reopen a RIB, KRS 342.125(2)(a) requires a prima facie showing of both a progression of pneumoconiosis and either the development or progression of respiratory impairment, but only one of them must rise to the level of further compensability. Big Elk Creek Coal Co. v. Miller, *supra*; Campbell v. Universal Mines, Ky., 963 S.W.2d 623 (1998). Only after the prima facie showing has been made, will an adversary be put to the expense of further litigation and will the taking of further proof be authorized. Id. It follows that an award that is entered in an unauthorized reopening does not conform to the requirements of Chapter 342 and must be reversed.

The claimant settled his initial RIB claim during litigation and, therefore, no judicial finding was made concerning the extent of his pneumoconiosis. Nonetheless, the evidence that category 2/1 disease was present at the time would have permitted a total disability award under KRS 342.732(1)(d). When the initial award is the product of a settlement, it is obvious that an ALJ cannot determine whether the necessary prima facie case for reopening has been made without first determining the worker's actual condition at the time of the settlement. KRS 342.125(4); Newberg v. Davis, Ky., 841 S.W.2d 164 (1992). This is not a mere technicality but a substantive matter because, regardless of the figure for which the parties settled, only an increase in actual disability is a ground for reopening. Id. at 166. Although Davis was an injury case, the same principle applies to a settled occupational disease claim.

After the 1997 decision became final, it established that category 2/2 disease and spirometric values of 79.9% and 68.6% failed to show an increase in the claimant's occupational disability, clearly implying a finding that he was totally disabled at the time of the initial claim. Thus, the evidence of category 2/1 disease and spirometric values of

81% and 71% that supported the 2000 motion failed to show either the progression of disease or the development or progression of respiratory impairment that are required by KRS 342.125(2)(a). Furthermore, in view of the 1997 finding that the claimant was totally disabled at the time of the settlement, he could sustain no post-award increase in occupational disability due to pneumoconiosis even if the disease progressed and his respiratory status declined. Thus, a reopening on that ground was not authorized.

The claimant's second argument is that application of the principles of res judicata requires an identity of claims. He maintains that the ALJ awarded a total disability in the 2000 proceeding on the basis of the combined effects of his two conditions. On that basis, he asserts that a finding with respect to the 1997 motion to reopen the pneumoconiosis claim could not be binding with regard to the combined motion to reopen that he filed in 2000. We note, however, that although the defendants were ordered to pay income benefits for total disability, the ALJ rendered a separate award for each condition, and the Board applied the principle only with respect to the pneumoconiosis claim.

The decision of the Court of Appeals is affirmed.

All concur, except Stumbo, J., who dissents without opinion.

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