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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: August 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0729-WC

FINAL
DATE 9-11-03 [illegible] D.C.

ROBERT L. WHITTAKER, DIRECTOR
OF WORKERS' COMPENSATION FUNDS — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2001-CA-2727-WC
WORKERS' COMPENSATION BOARD NO. 95-12804

BOBBY GENE KENDRICK;
HON. THOMAS A. NANNEY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

KRS 342.125(2)(a) [now KRS 342.125(5)(a)] requires that a motion to reopen "shall be made within one (1) year of the date the employee knew or reasonably should have known that a progression of his disease and development or progression of respiratory impairment have occurred." After a timely-filed motion to reopen his pneumoconiosis award was dismissed for failure to show a progression of respiratory impairment, the claimant moved to reopen again, more than one year after learning of a progression of the disease. At that time he was awarded a permanent, total disability. Rejecting arguments by the Workers' Compensation Funds (Funds), the Court of Appeals has affirmed a decision that the subsequent reopening was not barred by the one-year period of KRS 342.125(2)(a) and that the motion was supported by an

adequate prima facie showing. We affirm.

In 1991, after a 15-year history of exposure to coal dust, the claimant sought workers' compensation benefits for occupational pneumoconiosis. X-ray evidence at the time was interpreted as indicating category 0/1, 1/1, or 1/2 disease. Spirometric studies indicated a highest FVC value of 110% of the predicted normal and a highest FEV1 value of 116% of the predicted normal. In May, 1992, he settled any claim for benefits under KRS 342.732(1)(a)-(d) with his employer for a lump sum of $19,500.00. Shortly thereafter, he settled his claim against the Special Fund for its share of a 50% occupational disability.

On September 12, 1996, he moved to reopen the settled award, alleging a worsening of condition. Although the motion was accompanied by evidence of a progression to category 2/1 or 2/2 disease, it was not accompanied by spirometric test results. The Special Fund submitted a report from Dr. Broudy which noted category 1/0 radiographic changes that, in his opinion, were not indicative of pneumoconiosis. Furthermore, he noted spirometric values that were lower than those at the time of the initial claim (an FVC of 107% and an FEV1 of 93%) but did not attribute the change to the effects of coal dust. On October 30, 1998, an Administrative Law Judge (ALJ) dismissed the motion for failure to make a prima facie showing of a progression of respiratory impairment. KRS 342.125(2)(a).

On June 25, 1999, the claimant filed a second motion to reopen. It was supported with a July 1, 1998, medical report from Dr. Sundarum who interpreted a November 21, 1997, x-ray as revealing category 2/2 disease. Dr. Sundarum also reported that July 1, 1998, spirometric testing demonstrated an FVC of 88% of the predicted normal and an FEV1 of 59% of the predicted normal, attributing the cause of

the depressed values to the claimant's prolonged exposure to coal dust. Based upon this showing, the motion was granted, and additional proof was taken.

Dr. Lane interpreted a November 21, 1997, x-ray as indicating category 2/2 disease. In contrast, Dr. Mallampali, who performed a university evaluation under KRS 342.315, reported category 1/1 disease, an FVC of 95% of the predicted normal, and an FEV1 of 84.2% of the predicted normal. Dr. Mallampali attributed the decline in pulmonary function to the claimant's history of cigarette smoking but noted that his occupational exposure to coal dust could not be excluded as a contributing factor.

After reviewing the evidence, the ALJ determined that the claimant suffered from category 1 disease at the time of the settlement and, therefore, had been entitled to a retraining incentive benefit at that time. Furthermore, the ALJ was persuaded that the claimant's present motion was supported by an adequate prima facie case for reopening under KRS 342.125(2)(a). Noting that Dr. Lane's reputation and experience were well established, the ALJ refused to give Dr. Mallampali's testimony presumptive weight and concluded that, presently, the claimant suffered from category 2 disease. A subsequent petition for reconsideration by the Funds was overruled.

Pointing to the evidence of the requisite level of respiratory impairment at the time of the initial reopening, the Funds maintain that the claimant reasonably knew or should have known that the development or progression of respiratory impairment as well as the progression of pneumoconiosis had occurred at that time. It maintains, therefore, that the 1999 motion was untimely under KRS 342.125(2)(a). We note, however, that this argument overlooks the fact that there was no medical evidence connecting the decline in the claimant's spirometric levels between 1991 and 1996 to his exposure to coal dust. In view of the fact that such evidence was insufficient to

support the 1996 motion, we are persuaded that, likewise, it was insufficient to bar the 1999 motion.

The Funds concede that Dr. Lane reported category 1/2 disease in the initial proceeding, category 2/1 in the first reopening, and category 2/2 in the second reopening. They maintain, however, that because Dr. Myers reported category 2/2 disease in the first reopening, the claimant was required to produce evidence of category 2/3 disease in order to make the necessary prima facie showing in the second reopening. We disagree.

The claimant's evidence in 1996 was that he suffered from category 2/1 or 2/2 disease; whereas, Dr. Broudy reported that he found no indication of pneumoconiosis at that time. Furthermore, the 1996 motion was dismissed based upon a lack of prima facie evidence concerning a progression of respiratory impairment, and there was no judicial finding at that time concerning the claimant's disease category. Thus, even if we were to assume that the claimant was required to offer prima facie evidence of a progression of the disease at reopening, we are not persuaded that the ALJ was required to conclude that the claimant suffered from category 2/2 disease in 1996 or that a progression to category 2/3 disease was required in 1999. In any event, because the claimant's settlement with the Special Fund was for an award of income benefits, the prima facie evidence required at reopening consisted of proof of a progression of respiratory impairment due to coal dust and proof that he was presently entitled to a greater award. Whittaker v. Hurst, Ky., 39 S.W.3d 819, 822 (2001).

The decision of the Court of Appeals is affirmed.

All concur.

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