

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2008-SC-000386-WC

DATE 3/12/09 Kelly Klabor D.C.

LEE A. BRASHER

APPELLANT

V.
ON APPEAL FROM COURT OF APPEALS
CASE NO. 2007-CA-002085-WC
WORKERS' COMPENSATION BOARD NO. 02-02140

CONSOLIDATED COAL COMPANY;
HONORABLE ANDREW MANNO,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for pneumoconiosis benefits, finding that he failed to rebut the consensus of a panel of three "B" readers that the best quality x-ray in evidence showed only category 0/0 disease. The Workers' Compensation Board affirmed. The Court of Appeals also affirmed, rejecting the claimant's argument that the consensus procedure found in KRS 342.316(3) denies him equal protection in violation of the 14th Amendment of the United States Constitution as well as Sections 1, 2, and 3 of the Kentucky Constitution. We affirm having rejected the same arguments in Durham v. Peabody Coal Co., ___ S.W.3d ___ (Ky. 2008).

The claimant was born in 1942. He received at least 29 years' exposure to coal dust while working for multiple employers as a coal miner. His last exposure occurred in 1999 while working for the defendant-employer.

Following the procedure set forth in KRS 342.316(3) and discussed in Hunter Excavating v. Bartrum, 168 S.W.3d 381 (Ky. 2005), the parties each submitted a chest x-ray and a "B" reader's interpretation of the x-ray. The claimant submitted a report from Dr. Vuskovich, who rated an x-ray taken in September 2002 as quality grade 1 and reported that it revealed category 1/1 pneumoconiosis. The employer submitted a report from Dr. Broudy, who rated an x-ray taken in March 2003 as quality grade 1 and reported that it was completely negative. KRS 342.316(3)(b)4.f. requires x-ray classifications to be in both the same major classification and within one minor classification to be in consensus. Thus, the parties' reports were not in consensus. As required by KRS 342.316(3)(b)4.e., a panel of three "B" readers who were hired by the Department of Workers' Claims interpreted the parties' x-rays. The panel's consensus was that the best quality x-ray in evidence revealed category 0/0.

KRS 342.316(13) permits a worker to rebut a panel's consensus with clear and convincing evidence. The claimant did not offer additional medical evidence. He testified at the hearing that he inhaled coal dust daily while working underground. He argued in his brief that the consensus procedure denies equal protection to individuals who suffer from coal workers' pneumoconiosis rather than a traumatic injury.

The ALJ determined that the claimant's evidence showed no more than a difference of opinion regarding his disease category and noted that he failed to offer clear and convincing evidence to rebut the consensus classification. Deferring a decision on the constitutional issue to the courts, the ALJ dismissed the claim because KRS 342.732(1) requires a radiographic classification of 1/0 or higher to qualify for benefits. The Board affirmed, explaining that that the sole issue on appeal concerned the constitutionality of a statute, a matter that an administrative body lacks jurisdiction to decide.¹

The claimant argued on appeal that the consensus procedure denies coal workers who file pneumoconiosis claims equal protection by treating them differently in two significant ways from those who sustain a traumatic injury. First, the statute requires coal workers who suffer from pneumoconiosis to submit clear and convincing evidence to rebut the panel's consensus, while workers may prove an injury with only a preponderance of the evidence. Second, the statute limits coal workers to proving the existence of pneumoconiosis with x-ray evidence, which strips the ALJ of the discretion to consider a worker's credible testimony regarding breathing difficulties and the length and nature of the exposure to coal dust. The Court of Appeals disagreed and affirmed.

Appealing, the claimant raises the same constitutional arguments to this court. He also raises an unpreserved argument that the consensus procedure

¹ Blue Diamond Coal Company v. Cornett, 300 Ky. 647, 189 S.W.2d 963 (1945).

denies equal protection to workers who suffer from coal workers' pneumoconiosis as compared to those who suffer from other occupational diseases. We affirm because we rejected the preserved arguments and declined to consider the same unpreserved argument in Durham.

The decision of the Court of Appeals is affirmed.

All sitting. Minton, C.J.; Abramson, Cunningham, Noble, Schroder, and Venters, JJ., concur. Scott, J., dissents as follows: I must respectfully dissent as I did in Durham v. Peabody Coal Co., ___ S.W.3d ___ (Ky. 2008), as you can not impose differing standards of proof and of judicial findings for injuries to different parts of the body under the same administrative process. It is a denial of "Equal Protection" in violation of the 14th Amendment of the United States Constitution, as well as, Sections 1, 2 and 3 of the Kentucky Constitution. The men and women who risk their "life and limbs" to mine the coal that powers this great Commonwealth and nation deserve to be treated better than this.

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