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NOT TO BE PUBLISHED OPINION

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RENDERED: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2010-SC-000070-WC

DATE 10-14-10 Eliz A Gravitt, DC.
APPELLANT

JAMES DAMRON

ON APPEAL FROM COURT OF APPEALS
V. CASE NO. 2009-CA-000867-WC
WORKERS' COMPENSATION BOARD NO. 06-00024

KENTUCKY MAY MINING COMPANY;
HONORABLE JOHN COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded increased income benefits in this reopened claim, having rejected a university evaluator's opinion that the increase in the claimant's permanent impairment rating based on hearing loss did not result from his workplace exposure to hazardous noise and focused on the evaluator's opinion that it resulted from aging. The ALJ reasoned that the medical evidence continued to show a pattern of hearing loss that was compatible with workplace exposure to hazardous noise and that KRS 342.7305(4) does not require age-related impairment to be excluded when

awarding income benefits. A divided Workers' Compensation Board reversed. The claimant appeals the decision by a divided Court of Appeals to affirm the Board.

We affirm. The claimant had the burden at reopening to prove a post-award change of disability "due to a condition caused by the injury."¹ Although the pattern of his hearing loss remained compatible with that caused by hazardous noise at reopening, the university evaluator opined that the increased impairment did not result from the claimant's workplace exposure to hazardous noise. He did so not because he thought that the increase was age-related but because occupational hearing loss does not progress after the hazardous exposure ceases and because the claimant sustained no additional exposure after retiring in 2003. The testimony rebutted KRS 342.7305(4)'s presumption of causation. The ALJ lacked the authority to disregard the opinion because the claimant failed to go forward with evidence to overcome it.² He failed to meet his burden of proving causation as a consequence.

The claimant was born in 1948 and has an eighth-grade education with no specialized training. His work history consisted of operating various types of equipment in underground coal mines for 28 to 30 years. He filed his initial claim based on hearing loss on January 4, 2006, stating on the Form 103 application that he had not returned to work.

¹ KRS 342.125(1)(d).

² KRS 342.315(2).

KRS 342.7305(2) authorizes income benefits based on an impairment rating of at least 8%. Dr. Hieronymus evaluated the claimant on his own behalf in October 2005 and assigned a 12% impairment due to occupational noise exposure. He indicated that the hearing loss “would be progressive with further exposure to noise.” Having evaluated the claimant for the employer, Dr. Touma diagnosed a severe high-frequency hearing loss in February 2006 to which he assigned a 1% impairment. He stated that testing established a pattern of hearing loss compatible with that caused by workplace hazardous noise. Drs. Jones and Shinn performed the evaluation required by KRS 342.7305(3) at the University of Kentucky in March 2006. Dr. Jones assigned a 7% permanent impairment rating based on a pattern of hearing loss that was consistent with workplace hazardous noise exposure.

The litigation culminated in a settlement agreement that an ALJ approved on May 11, 2006. The parties agreed to settle the claim for \$1,000, which included \$100 for the waiver of vocational rehabilitation, \$100 for the waiver of future medical expenses, and \$800 for income benefits. They also agreed that the claimant was last exposed to workplace hazardous noise while working for the defendant on March 5, 2003.

Filed on August 30, 2007, the claimant’s motion to reopen alleged a change of disability as shown by objective medical evidence of a worsening of impairment.³ He supported his claim for increased benefits with a report from Dr. Hieronymus, who evaluated his hearing loss in June 2007 and assigned a

³ KRS 342.125(1)(d).

14% impairment rating. Noting the claimant's long history of exposure to workplace noise, he opined that the tests established a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace.

Dr. Touma evaluated the claimant for the employer in September 2007, noting his complaint that his hearing had worsened, and assigned a 10% impairment rating based on hearing loss. Dr. Touma testified when deposed that he had discovered a typographical error in his 2006 report and that the 1% impairment rating reported at that time should have been 8%. Noting that the claimant did not report any additional workplace noise exposure since the 2006 evaluation, he stated that two medical explanations for the 2% increase in impairment since 2006 were a "test/retest variation" and aging. He also stated that the 2% increase would not be due to workplace noise exposure sustained as of the date the claimant last worked. He acknowledged on cross-examination that the claimant's entire hearing loss, including the additional 2% found in 2007, was consistent with the configuration of noise-induced hearing loss. He noted, however, that activities such as using a lawnmower or shooting a gun also expose an individual to noise and can affect hearing.

Drs. Jones and Shinn performed the university evaluation required by KRS 342.7305(3) in April 2008. Having performed comprehensive audiometric testing, Dr. Jones assigned a 13% impairment rating. Although he noted that the tests showed a pattern of hearing loss compatible with that caused by hazardous noise exposure in the workplace, he stated that any progression of

hearing loss since the claimant's retirement in 2003 was not due to occupational noise exposure but to aging. Dr. Jones explained that occupational hearing loss does not progress after exposure to workplace hazardous noise ceases and that the most accurate test of his occupational hearing loss was that performed closest to his retirement.

The claimant testified that he had not worked since March 2003 and had not been exposed to loud noise since then. He testified that he did go deer hunting about two or three times a year but that he always used hearing protection. He complained of continued difficulty hearing when he watches television or attempts to hear people speak when there is background noise.

The issues submitted for a decision included, among other things, the claimant's entitlement to increased benefits and the cause of any worsening of his condition. Noting that all of the physicians assigned an impairment rating greater than 8% at reopening and reported a pattern of hearing loss compatible with that caused by hazardous workplace noise exposure, the ALJ relied on *AK Steel Corporation v. Johnston*⁴ for the principle that age-related impairment is not excluded from an impairment rating when awarding income benefits for occupational hearing loss. As a consequence, the ALJ awarded income benefits based on the 13% impairment assigned by Dr. Jones and credited the employer for income benefits paid under the settlement. As amended pursuant to the employer's petition for reconsideration, the award provided benefits from the

⁴ 153 S.W.3d 837 (Ky. 2005).

filing of the motion to reopen through the balance of the 425-week period that commenced on March 5, 2003, the date of last exposure.

The employer appealed, asserting that the ALJ misapplied *AK Steel Corporation v. Johnston*, which did not concern a reopening or address the requirements of KRS 342.125(1)(d). Among those requirements is proof that a worsening of the injured worker's condition results from the effects of the work-related injury. The employer argued that the ALJ erred by failing to require the claimant to prove that the increased impairment found at reopening resulted from his workplace noise exposure. The Board's majority agreed, characterizing as a "red herring" the fact that medical evidence showed a pattern of hearing loss at reopening that remained compatible with the pattern caused by hazardous noise exposure.⁵

AK Steel Corp. v. Johnston concerned whether age-related impairment must be excluded from an impairment rating when calculating the income benefit in an initial claim for noise-induced hearing loss. In *Johnston* the university evaluator estimated the portion of two workers' hearing impairments that was due to their age by consulting tables that were appended to an amendment to the Federal Noise Control Act. He stated that the tables were based on statistical averages, which might or might not apply to a given individual; that he considered use of the tables to be "speculative;" and that he did not attribute the estimated portion of either worker's impairment to aging.

⁵ See KRS 342.7305(4).

He also stated that the method used in the hearing loss chapter of the AMA *Guides to the Evaluation of Permanent Impairment* does not account for age.

The *Johnston* court noted that KRS 342.7305(4) affords a presumption of causation; excludes impairment due to tinnitus; but makes no reference to age-related impairment. The court concluded, therefore, that the legislature intended for awards to be based on an impairment rating as determined by the *Guides*, without an apportionment between age-related and work-related causes. Neither of the claims at issue in *Johnston* concerned a reopening or addressed the requirement that increased impairment at reopening must result from the injury that was the subject of the initial claim or the type of evidence that would rebut KRS 342.7305(4)'s presumption at reopening.

KRS 342.125(1)(d) permits a claim to be reopened and an award to be modified based on proof of a post-award change of disability "due to a condition caused by the injury." As defined by KRS 342.0011(1), the claimant's injury consisted of an exposure workplace hazardous noise that ceased on March 5, 2003 and was the proximate cause producing a hearing impairment. The ALJ misapplied *Johnston* because the question to be decided in this reopening was not whether impairment from aging must be excluded when considering the claimant's entitlement to benefits but whether he met his burden of proving that the post-award progression of his hearing impairment resulted from his exposure to workplace hazardous noise.

KRS 342.7305(4) states as follows:

When audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure and the employee demonstrates repetitive exposure to hazardous noise in the workplace, there shall be a rebuttable presumption that the hearing impairment is an injury covered by this chapter, and the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits.

The claimant admitted that he sustained no exposure to workplace hazardous noise after he quit work on March 5, 2003. Although the pattern of his hearing loss at reopening remained compatible with that caused by hazardous noise, Dr. Jones (the university evaluator) testified that occupational hearing loss does not progress after the exposure to workplace hazardous noise ceases; that any progression of hearing loss since the claimant's retirement in 2003 was not due to occupational noise exposure; and that the most accurate test of his occupational hearing loss was that done most closely to his retirement. KRS 342.7305(4) afforded the claimant a presumption of causation in the initial claim, but Dr. Jones's uncontradicted testimony as a university evaluator rebutted the presumption at reopening and compelled a finding for the employer.

KRS 342.315(2) states that a university evaluator's clinical findings and opinions "shall be afforded presumptive weight . . . and the burden to overcome such findings and opinions shall fall on the opponent of that evidence." As construed in *Magic Coal Co. v. Fox*,⁶ KRS 342.315(2) provides a rebuttable

⁶ 19 S.W.3d 88 (Ky. 2000).

presumption that a university evaluator's clinical findings and opinions are accurate and does not shift the ultimate burden from the party upon whom it was cast. A worker who seeks increased benefits at reopening has the burden to prove that the greater disability (*i.e.*, impairment rating) supporting the motion "is the direct and proximate result of the injury for which compensation is sought."⁷

As the party opposing the university evaluator's opinion concerning causation, KRS 342.315(2) placed on the claimant the burden to go forward with evidence to overcome Dr. Jones's opinion. His failure to do so and the lack of any other evidence to contradict the opinion precluded the ALJ from disregarding it. The record compelled a legal conclusion favoring the employer because the claimant failed to meet his burden to prove that the increase in impairment that occurred after March 5, 2003 was the direct and proximate result of workplace hazardous noise exposure that occurred on or before March 5, 2003.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

⁷ *Whittaker v. Ivy*, 68 S.W.3d 386, 388 (Ky. 2002). See also *Sky Top Coal Co. v. Roark*, 407 S.W.2d 411 (Ky. 1966) and *Jude v. Cabbage*, 251 S.W.2d 584 (Ky. 1952), which were decided under the pre-1996 "occupational disability" standard.

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