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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2002-CA-000928-WC

TERRY CAUDILL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-92-14193

GOLDEN OAK MINING COMPANY;  
ROBRET L. WHITAKER, DIRECTOR OF  
SPECIAL FUND;  
DONALD G. SMITH, ADMINISTRATIVE  
LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

AND: NO. 2002-CA-001059-WC

ROBERT L. WHITAKER, DIRECTOR  
OF WORKERS' COMPENSATION FUNDS

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-92-14193

TERRY CAUDILL;  
GOLDEN OAK MINING COMPANY;  
HON. DONALD SMITH, ADMINISTRATIVE  
LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION  
REVERSING ON DIRECT APPEAL  
AND AFFIRMING ON CROSS-APPEAL

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BEFORE: BARBER, DYCHE AND TACKETT, JUDGES.

BARBER, JUDGE: The Appellant, Terry Caudill, seeks review of a decision of the Workers' Compensation Board, reversing the Administrative Law Judge's award on reopening, and remanding for dismissal. The Board held that the Administrative Law Judge (ALJ) gave insufficient reason for rejecting the university evaluator's opinion. The Appellee, Workers' Compensation Funds, cross-appeals and argues that *res judicata* barred consideration of certain testimony upon reopening. We reverse on the direct appeal, and affirm on the cross-appeal.

In April 1992, Caudill, a scoop operator, filed an application for adjustment of occupational disease claim against the Appellees, Golden Oak Mining Company ("Golden Oak"), and the Special Fund ("the Fund"),<sup>1</sup> alleging that he had developed coal workers' pneumoconiosis ("cwp") as a result of working "at or near the face for 12 years."

On September 20, 1993, the ALJ rendered an opinion in the original claim, concluding that Caudill was eligible for "RIB benefits only." In December 2000, Caudill filed a motion to reopen on ground that his cwp had progressed. By order of January 11, 2001, the motion was granted to the extent that the claim was assigned to an ALJ for further adjudication.

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<sup>1</sup> Now, the Workers' Compensation Funds.

The reopened claim was litigated. On October 25, 2001, the ALJ rendered an Opinion and Award, providing in pertinent part that:

Plaintiff relies upon the reports of Dr. John Myers and Dr. Glen Baker. Plaintiff has testified by deposition on reopening. In response, the Defendants submitted reports and depositions from Dr. Bruce Broudy, Dr. Robert Powell, and Dr. John Dineen on reopening. The reports of Dr. James Reed and Dr. N.K. Burki were submitted pursuant to KRS 342.315. . . .

\* \* \*

The Administrative Law Judge is aware that the reports of Dr. Reed and Dr. Burki are entitled to presumptive weight pursuant to KRS 342.315. However, the Administrative Law Judge believes that sufficient evidence is present in the file to rebut the presumption. . . . Pursuant to Magic Coal v. Fox, Ky., 19 S.W.3<sup>rd</sup> 88 (2000), KRS 342.315 entitles the university evaluator report to a rebuttable presumption. . . . The Administrative Law Judge would . . . note that the vast experience of Dr. Myers and his excellent qualifications and experience in this area of the law is recognized by this Administrative Law Judge and would provide a basis for not giving "presumptive weight" to the university report. Dr. Baker and Dr. Powell have also rebutted the university evaluation. . . .

The Administrative Law Judge must now determine whether the Plaintiff has shown a worsening of condition on reopening by a progression of the disease and/or a decrease in breathing capacity. Upon consideration of the entire record, the Administrative Law Judge finds that the Plaintiff has sustained his burden. . . . Specifically, the evidence now confirms a radiographic classification

of Category 2/1 pneumoconiosis resulting from his exposure to coal dust. Plaintiff's breathing capacity has changed from an FVC of 79% and FEV1 of 67% in the original claim to an FVC of 78% and FEV1 of 68% on reopening. Once Plaintiff has made a prima facie showing of progression on x-ray and breathing capacities (as found in the order dated January 11, 2001), Plaintiff is only required to show a progression entitling him to a higher level of benefits under KRS 342.732. In this case, Plaintiff has shown entitlement to benefits under KRS 342.732 (1)(d), which does not even require a respiratory impairment. See Miller v. Big Elk Creek Coal Company, Ky., 47 S.W.3d 330(2001). Based upon this evidence, the Plaintiff is entitled to additional benefits pursuant to KRS 342.732.

The Fund and Golden Oak sought reconsideration. On November 27, 2001, the ALJ entered an order denying the petitions for reconsideration insofar as they alleged a "selective" use of *res judicata* and error in the application of the "presumptive weight" to be accorded to the university evaluator. Specifically, the ALJ explained:

The Defendant-Employer is correct that the Administrative Law Judge in the original Opinion and Award found the Plaintiff's breathing impairment at that time was not significantly caused by his exposure to coal dust. However, on reopening, the Plaintiff did show that the progression was due, at least in part, by coal dust exposure. This is supported by the credible testimony of both Dr. Myers and Dr. Baker. Therefore the doctrine of *res judicata* was not violated.

The Defendant-Employer and the Division of Workers' Compensation Funds next argument regarding presumptive weight pursuant to KRS

342.315 for a university evaluation is also **overruled**. The rebuttable presumption attributable to Dr. Reed and Dr. Burki pursuant to KRS 342.315 has been rebutted pursuant to Magic Coal v. Fox, Ky., 19 S.W.3<sup>rd</sup> 88 (2000). The higher category of pneumoconiosis by Dr. Myers and Dr. Baker on reopening, when taken together with the Plaintiff's significant exposure to coal dust in underground mining, is persuasive. The Administrative Law Judge further recognizes Dr. Myers' qualifications and experience in this field. Even Dr. Powell, who was submitted by the Defendants [sic], evidenced a higher category of pneumoconiosis than the university evaluation. . . . In the instant case, the Administrative Law Judge found that the finding of a lower category by the university evaluator was one, but not the only, reason to find other medical providers more credible. The Administrative Law Judge does believe that Miller v. Big Elk Creek Coal Company, Ky., 47 S.W.3<sup>d</sup> 300 (2001) does justify an award under KRS 342.732(1)(b) without the requirement of a respiratory impairment once the prima facie showing was made. (emphasis original).

The Fund and Golden Oak appealed to the Board. In an Opinion entered April 3, 2002, the Board rejected the argument that the December 12, 1996 amended version of KRS 342.125(5)(a) should apply to Caudill's reopening. The Board also rejected the argument that Caudill had failed to make a prima facie showing on reopening. The Board explained:

We next turn to Golden Oak's contention<sup>2</sup> that Caudill has failed to set forth a prima facie case in his motion to reopen. Golden Oak contends that in the original claim, [the ALJ's] . . . finding that any respiratory

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<sup>2</sup> The Fund filed a brief adopting the employer's arguments on appeal.

impairment . . . was not the result of coal workers' pneumoconiosis is res judicata and precludes reopening. We believe this issue is controlled by the holding in Stambaugh v. Cedar Creek Mining, Ky., 488 S.W.2d 681 (1972). In Stambaugh, the court held "[w]here [KRS 342.125] expressly provides for reopening under specified conditions, the rule of res judicata has no application when the prescribed conditions are met." Stambaugh, 488 S.W.2d at 682. Caudill has made a necessary prima facie showing to reopen an award for RIB. There was a diagnosis of coal workers' pneumoconiosis, validated by new x-ray evidence and spirometric testing, which established both a progression of the disease and an increase in impairment attributable to coal dust exposure. Here, Caudill sought benefits pursuant to KRS 342.732(1)(d). The prima facie showing of both the existence of respiratory impairment and of the progression of the disease satisfied reopening requirements of KRS 342.125(2)(a). Caudill was entitled to a consideration of the merits of his claim. . . .

Curiously, the Board states:

**We agree with the ALJ that evidence from Dr. Myers and Dr. Baker constitutes substantial evidence and, under ordinary circumstances, absent the presumption, would afford a basis for an award of increased benefits on reopening.** Unfortunately, the rationale relied upon by the ALJ and the reasons he enunciated for disregarding the .315 evaluation were insufficient as a matter of law and require reversal.

As we interpret the ALJ's opinion, he chose to disregard the .315 evaluator for three reasons. First he believed the original diagnosis of Category I pneumoconiosis was res judicata and therefore he could disregard findings of no pneumoconiosis. On reconsideration the ALJ retreated from this position and stated "in the instant case, the Administrative Law Judge found that the finding of a lower category by the university evaluator was one, but not the only,

reason to find other medical providers more credible.”

This Board has consistently held, as have the appellate courts in a series of unpublished opinions, that it is entirely proper for an ALJ to consider evidence of Category 0 to establish the condition has not worsened, despite the fact the clamant may have been previously adjudicated to have Category I pneumoconiosis. The supreme court, in the unpublished case of Brent Horn v. Wolf Creek Collieries, 2000-SC00563-WC, rendered March 22, 2001, held that a previous award for Tier I benefits:

do[es] not foreclose any proof which is relevant as to whether there has been a subsequent progression. . . .Consequently it was proper for the ALJ to consider evidence of category 0 . . . despite the [previous adjudication of] . . . category 1 pneumoconiosis.

Accord Esmond Burke v. AERO Energy, Inc., 2000-SC-1157-WC, rendered September 27, 2001. This unequivocal declaration by the court of the probative nature of this type of evidence, we believe, prevents the ALJ from summarily casting aside a .315 evaluation opinion of no pneumoconiosis.

Second, the ALJ stated that Caudill’s history of exposure to coal dust provided a basis to depart from the opinion of the university evaluator. Again, we disagree. It is our holding that the number of years Caudill was exposed to coal dust is irrelevant, vis-à-vis KRS 342.315. . . .There is nowhere contained within KRS Chapter 342, a minimum requirement of hazardous exposure. . . .The level of benefits, if causation is established, is determined by the medical evidence . . . There is a significant amount of what can only be characterized as substantial evidence that demonstrates that Caudill is not burdened by the effects of pneumoconiosis notwithstanding his history of exposure. Thus, we believe a history of exposure

to coal dust provides no basis to disregard the presumptive weight provisions of the statute.

Finally, the ALJ relied on the "the vast experience and [Dr. Myers'] excellent qualifications and experience in this area of law . . . ." Again, we believe this finding, standing alone, does not provide a specific basis for disregarding the presumptive provisions of KRS 342.315. In reaching this conclusion, we are not without guidance. In Magic Coal, the supreme court determined that the ALJ provided a reasonable basis for disregarding a .315 opinion when the ALJ found "[c]laimant's experts . . . 'well-qualified pulmonary specialists' and that they were the only physicians who examined the claimant as well as to review the x-ray evidence." Id., at 98. Here the ALJ relied On . . . the qualifications of the physicians. However, unlike Magic Coal, there exists no additional finding supported by the evidence that lends separate and articulable [sic] credibility to the claimant's examining physician. . . . **It goes without saying that the evidence from Drs. Myers and Baker rebut the opinions of Drs. Reed and Burki.** However, KRS 342.315 requires specific reasons for rejecting .315 evidence. Drs. Reed or Burki's qualification to express an opinion concerning the existence or nonexistence of pneumoconiosis have not been questioned on appeal. Our independent review of the record convinces us there is no evidence contained therein, nor has the ALJ provided an independent reason why any of the named testifying physicians are any more qualified than the others. Further, we are convinced the ALJ's reliance upon the "excellent reputation" of a given physician must, perforce be based upon the ALJ's independent knowledge. It is axiomatic an ALJ is prohibited from rendering a decision based on evidence not contained within the record or substituting his opinions of [sic] those of the experts.

In summary, we believe the ALJ's reasons, individually and in combination, do not provide a rational basis to reject the clinical findings and opinions of the university evaluators. Given

this conclusion we must reverse the opinion and award of the ALJ.  
(emphasis ours).

On May 3, 2002, Caudill filed a petition for review. On appeal, he asserts that the Board misconstrued the law regarding rejection of a university evaluator's opinion. On May 20, 2002, the Special Fund filed a cross-petition, arguing that *res judicata* bars the ALJ's reliance upon Dr. Myers' testimony. The employer did not file a cross-petition, and has thus abandoned several issues it had raised on appeal to the Board.

Caudill provides an excellent summary of Kentucky law relating to presumptions. We consider that in conjunction with the Supreme Court's decision in *Magic Coal*:

Taken together, the 1996 amendments to KRS 342.315 and KRS 342.316 provide for contracts with the University of Kentucky and University of Louisville medical schools for medical examinations. They require a university evaluation in all occupational disease claims and provide that the "clinical findings and opinions" of the university evaluator "shall be afforded presumptive weight." They indicate that the burden to overcome the findings and opinions of a university evaluator falls upon the opponent of the evidence. Finally, they indicate that if an arbitrator or ALJ rejects the findings and opinions of a university evaluator, the reasons for doing so must be specifically stated in the order.

The term "presumptive weight" is one which the parties concede is not found in prior Kentucky law and one which is not defined in Chapter 342. **KRS 342.315(2) does not evince a legislative**

intent for the clinical findings and opinions of a university evaluator to be conclusive. It anticipates that the opponent of a university evaluator report may introduce countervailing evidence which will overcome the report; furthermore, KRS 342.125(2) does not prohibit the fact-finder from rejecting a finding or opinion of a university evaluator but requires only that the reasons for doing so must be specifically stated. In the absence of a definition of the term "presumptive weight," either by prior judicial decision or by statute, **we conclude that the legislature intended to create a rebuttable presumption.**

A presumption has been defined as a rule of law which creates or recognizes a probative relationship between two facts, one of which is proved (the proven fact) and the other of which is unproved (the presumed fact), and which attributes a procedural significance to that relationship. Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 10.00 (3d ed. 1993). **The presumption created by KRS 342.315(2) requires the fact-finder to rely upon the clinical findings and opinions of the university evaluator unless that testimony is properly rebutted by the opponent of the evidence. . . .**

Although KRS 342.315(2) indicates that the "burden to overcome" a university evaluator's testimony falls on the opponent of the evidence, it does not provide a standard for determining the type of evidence which is necessary in order to do so and does not explicitly shift the risk of non-persuasion to the opponent of the evidence. Under those circumstances, **we conclude that the procedural effect of the presumption created by KRS 342.315(2) is properly governed by KRE 301 which provides as follows:**

In all civil actions and proceedings when not otherwise provided for by statute or by these rules, **a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption,**

but does not shift to such party the burden of proof in the sense of the risk of non-persuasion, which remains throughout the trial upon the party on whom it was originally cast.

The proven fact upon which the rebuttable presumption at issue is based is that the services of those physicians who testify are provided pursuant to a contract between the Department of Workers' Claims and the University of Kentucky and University of Louisville medical schools. Particularly in claims for occupational disease, but also in some injury claims, fact-finders are confronted with medical evidence in which the clinical findings and opinions introduced on behalf of one party are vastly different from those introduced on behalf of the opponent. It is clear that clinical findings and opinions from an unbiased medical expert would reasonably be expected to provide an accurate assessment of the medical status of the individual whose condition was at issue and would assist the fact-finder in weighing the conflicting evidence presented by the parties.

As amended, KRS 342.315 assures that such testimony will be considered in all occupational disease claims and provides a mechanism for obtaining sufficient numbers of such experts. It is not unreasonable to infer that, with regard to issues which fall within the province of medical experts, the clinical findings and opinions of physicians who are affiliated with a medical school are informed by some degree of expertise and are more likely to be free from a preconceived bias toward either the plaintiff or the defense than those of a physician who has been hired to testify on behalf of the plaintiff or defendant. For that reason, **it is neither unreasonable nor irrational to presume that the clinical findings and opinions of a university evaluator accurately reflect the medical condition of the claimant in the absence of evidence to rebut that presumption.**

It has long been the rule that the claimant bears the burden of proof and the risk of non-persuasion before the fact-finder with regard to

every element of a workers' compensation claim. [citations omitted]. In order for that burden to be sustained, no less than substantial evidence of each element of the claim must be introduced. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. [citations omitted].  
. . . .

Where the question at issue is one which properly falls within the province of medical experts, the fact-finder may not disregard the uncontradicted conclusion of a medical expert and reach a different conclusion. [citation omitted]. By operation of KRS 342.315(2), the clinical findings and opinions of the university evaluator are presumed to accurately reflect the claimant's medical condition. For that reason, unless evidence is introduced which rebuts the clinical findings and opinions of the university evaluator, they may not be disregarded by the fact-finder. To the extent that the university evaluator's testimony favors a particular party, it shifts to the opponent the burden of going forward with evidence which rebuts the testimony. If the opponent fails to do so, the party whom the testimony favors is entitled to prevail by operation of the presumption. Stated otherwise, the clinical findings and opinions of the university evaluator constitute substantial evidence with regard to medical questions which, if uncontradicted, may not be disregarded by the fact-finder.

KRS 342.285 was not amended in the 1996 Extraordinary Session. It has been construed to mean that the fact-finder has the sole discretion to determine the quality, character, and substance of evidence and to draw reasonable inferences from the evidence. [citations omitted]. The fact-finder has the sole authority to judge the weight to be afforded the testimony of a particular witness. [citation omitted]. The fact-finder 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. [citation omitted]. Together, KRS 342.315 and KRS 342.316 assure that testimony from a disinterested medical expert will be considered by the fact-finder in all occupational disease claims. **We do not view KRS 342.315(2) as restricting the fact-finder's authority to weigh conflicting medical evidence. We construe it to mean only that because it is presumed that the clinical findings and opinions of a university evaluator will accurately reflect the worker's medical condition, a reasonable basis for disregarding that testimony must be specifically stated by the fact-finder. In other words, the parties are entitled to be informed of the basis for the decision.** [citation omitted]. The presumption created by KRS 342.315(2) neither shifts the risk of non-persuasion to the defendant nor "raises the bar" with regard to the claimant's burden of persuasion.<sup>3</sup>

In another decision rendered the same day as *Magic Coal*, the Supreme Court explained that "the presumption could be overcome by substantial evidence that the worker's condition was other than the university evaluator had indicated. In instances where an ALJ chose to reject the clinical findings and opinions of the evaluator, the only requirement was that a reasonable basis for doing so must be stated."<sup>4</sup>

In the case *sub judice*, the Board recognized that the evidence Caudill produced was substantial and that it rebutted the opinion of the university evaluator.

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<sup>3</sup> *Magic Coal v. Fox*, Ky., 19 S.W.3d 88, 95-97 (2000), emphasis added.

<sup>4</sup> *Golden Oak Mining Co., L.P. v. Kentucky Coal Workers' Pneumoconiosis Fund*, Ky., 19 S.W.3d 99, 105 (2000).

Nevertheless, the Board concluded that the "reasons he enunciated for disregarding the .315 evaluation were insufficient as a matter of law and require reversal." We disagree.

The Board relies upon an unpublished Supreme Court case for the proposition that an ALJ cannot "summarily cast aside" a finding of Category "0" cwp by the university evaluator in a reopening, where the claimant in the original proceeding was found to have Category 1. That decision, which *does not* involve a .315 evaluation, was addressed by the ALJ upon reconsideration, and holds that decisions in reopenings must be made upon the merits based upon a consideration of *all the proof*.

The ALJ did consider all the proof upon reopening, as outlined at pages 2-4 of his October 25, 2001 Opinion and Award. The ALJ also properly considered "the presumptive weight" to which the .315 evaluation was entitled; however, the ALJ was more persuaded by other substantial evidence of record, namely the reports of Dr. Myers and Dr. Baker, as well as the report of Dr. Powell. Dr. Powell's report, *filed by one of the defendants*, revealed "Abnormal chest x-ray consistent with a Category 1/0, Q/P occupational pneumoconiosis." The finding of the disease by one of the defense experts casts doubt upon the accuracy of the unbiased university evaluator's assessment, and

detracts from its weight. This, coupled with the *substantial evidence* from Dr. Myers and Dr. Baker, provides a reasonable basis for rejecting the .315 opinion.

Next, the Board determined that Caudill's history of exposure did not provide a basis for disregarding the presumptive weight provisions of the statute. The Board appears to have misperceived the basis for the ALJ's decision. The ALJ did not rely solely upon the history of exposure as the reason for rejecting the university evaluator's opinion. To the contrary, the ALJ explained that "[t]he higher category of pneumoconiosis by Dr. Myers and Dr. Baker on reopening, when taken together with the Plaintiff's significant exposure to coal dust in underground mining, is persuasive." The Board, itself, declared the reports of Dr. Myers and Dr. Baker to be substantial evidence that rebutted the evidence from Dr. Reed and Dr. Burki.

Moreover, we cannot agree with the Board that history of exposure is irrelevant in the context of KRS 342.315. In a hearing loss claim, the Supreme Court held that a reasonable basis existed for rejecting the university evaluation, where the ALJ pointed to inconsistent histories of noise exposure, a

longstanding history of nonwork-related hearing loss, and evidence of exposure to loud noises in the logging industry.<sup>5</sup>

The Board also held that the ALJ's reliance upon " 'the vast experience and [Dr. Myers'] excellent qualifications and experience in this area of law. . . ." was insufficient, explaining that "this finding, standing alone, does not provide a specific basis for disregarding the presumptive provisions of KRS 342.315." Again, the Board appears to have misperceived the ALJ's opinion, because Dr. Myers' qualification "standing alone" was not the reason the ALJ gave for rejecting the university evaluator.<sup>6</sup>

*Magic Coal* emphasizes that KRS 342.285 was not amended in the 1996 Extraordinary Session, and that KRS 342.315(2) does not restrict the ALJ from weighing the evidence. The ALJ, as the finder of fact, retains the sole authority to determine the quality, character, and substance of the evidence. Where, as

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<sup>5</sup> *Bright v. American Greetings Corp.*, Ky., 62 S.W.3d 381 (2001).

<sup>6</sup> In addition, the Board was "convinced the ALJ's reliance upon the 'excellent reputation' of a given physician must, perforce be based upon the ALJ's independent knowledge." The Board appears to have attributed the use of the word, "reputation," to the ALJ in error. We have reviewed both the ALJ's Opinion and Award and his Order on reconsideration and do not see any reference to a physician's "reputation" whatsoever.

here, the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ.<sup>7</sup>

We hold that the Board misperceived the basis for the ALJ's rejection of the .315 opinion. In doing so, the Board impermissibly substituted its judgment for the ALJ's, as to the weight of the evidence on questions of fact, in violation of KRS 342.285(2). Accordingly, we reverse the Board's Opinion insofar as it holds that that the ALJ's reasons for rejecting the .315 opinion were insufficient as a matter of law, and we reinstate the ALJ's award upon reopening.

The only other issue before us is raised by the Fund on cross-appeal. The Fund contends that *res judicata* barred the ALJ from considering Dr. Myers' opinion on causation of Caudill's breathing impairment. The Board rejected this argument, holding that *Stambaugh v. Cedar Creek Mining*<sup>8</sup> controls. We agree with the Board's analysis of that issue, and affirm on the cross-appeal.

ALL CONCUR.

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<sup>7</sup> *Square D v. Tipton*, Ky. 862 S.W.2d 308 (1993).

<sup>8</sup> Ky., 488 S.W.2d 681 (1972).

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