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# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-001392-WC

WILLARD FOUCH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-01-00562 and WC-92-09718

ISLAND FORK CONSTRUCTION; TUG  
VALLEY LAND DEVELOPMENT; BLAZE  
COAL COMPANY; SPECIAL FUND;  
RONALD E. JOHNSON, Administrative  
law Judge; and WORKERS' COMPENSATION  
BOARD

APPELLEES

### OPINION AND ORDER

(1) DISMISSING PARTY TO APPEAL

AND

(2) AFFIRMING WORKERS' COMPENSATION BOARD OPINION  
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BEFORE: BARBER, BUCKINGHAM and HUDDLESTON, Judges.

HUDDLESTON, Judge: Willard Fouch appeals from a Workers' Compensation Board opinion affirming the decision of an administrative law judge dismissing his claim for additional coal workers' pneumoconiosis (CWP) benefits.

Fouch was born on March 12, 1945, and has a tenth grade education with no specialized or vocational training. He has

worked in the mines for over thirty years. At the time of the benefit review conference, he was 56 years old and unemployed but was receiving federal black lung benefits, social security benefits and a pension from the United Mine Workers' Association. On March 9, 1992, he filed his original application for retraining incentive benefits (RIB) with the Workers' Compensation Board against his then current employer, Blaze Coal Company.

By virtue of an agreement between Fouch and Blaze which was approved October 13, 1992, Fouch received an \$18,000.00 lump sum payment in settlement of his claim. He subsequently returned to work in the mining industry and was last exposed to coal dust on December 12, 1998, while employed by Island Fork Construction. At that time, he was laid off. On December 8, 2000, Fouch filed a motion to reopen his RIB claim on the basis of a worsening of physical condition and/or an increase in occupational disability, and he filed a motion to join additional parties, namely the Special Fund and Tug Valley Land Development.

In separate orders entered on February 13, 2001, the ALJ sustained the former motion, ordering the claim assigned to an ALJ for further adjudication and joined the Special Fund as a party but overruled the latter motion as to Tug Valley, granting Fouch thirty days in which to file a new claim against the subsequent employer. The two claims were to be consolidated upon the new claim being filed.

On April 9, 2001, Fouch filed a new claim against Island Fork and Tug Valley which was then consolidated with the reopening claim. For all purposes permissible under [Kentucky Revised

Statutes] KRS Chapter 342" pursuant to the aforementioned order; the consolidated claim was then assigned to the presiding ALJ. Blaze subsequently moved to have the reopening claim dismissed. Finding Athat [Fouch] was exposed to coal dust for several employers after his employment with [Blaze],@ the ALJ granted Blaze's motion in an order entered on June 15, 2001, ordering Athe entire case@dismissed A[s]ince [Blaze] and the Special Fund are the only defendants@ in that claim. However, the order does not contain finality language as required by Kentucky Rules of Civil Procedure (CR) 54.02(1).<sup>1</sup> No appeal was taken from this order.<sup>2</sup>

In support of his new claim, Fouch relied upon medical evidence from Drs. John Myers and Mann Younes. Dr. Myers diagnosed Category 2/1 disease based on an x-ray taken April 26, 1999, but offered no testimony relative to pulmonary function testing. Dr. Younes interpreted an x-ray taken June 14, 2000, as indicative of Category 2/2 disease. He found an FVC of 110.4%, an FEV-1 of 80.4%

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<sup>1</sup> In Whittaker v. Wright, the Supreme Court observed that Agiven the widespread application of the civil rules to administrative proceedings generally found in 803 [Kentucky Administrative Regulations] KAR Chapter 25,@there is no basis for treating a workers' compensation appeal any differently than a civil appeal. Ky., 969 S.W.2d 209, 211 (1998). Specifically, Aa final order is determined in accordance with CR 54.02(1) and (2).@ Id. at 210.

<sup>2</sup> There was some dispute as to whether Blaze and the Special Fund were viable parties to this appeal in light of this order, i.e., whether the order was final and appealable given the absence of finality language, or did not become final until the order of November 12, 2001, meaning the current appeal was timely filed. As the order of May 22, 2001, consolidated the two claims at issue thereby involving multiple parties, finality language was required under CR 54.02(1) C its omission renders the order dismissing Blaze and the Special Fund interlocutory and both were properly joined as parties to this appeal.

and indicated that the primary etiology was tobacco smoking with occupational coal dust exposure being a contributing factor.

Island Fork relied upon evidence from Drs. Abdul Kadar Dahhan and Thomas Jarboe. According to Dr. Dahhan, who examined Fouch on May 14, 2001, the x-ray revealed Category 0/0 and Fouch had an FVC of 108% and an FEV-1 of 87%. In his view, there was no evidence of pulmonary impairment and/or disability caused by, contributed to or aggravated by inhalation of coal dust or CWP.

Dr. Jarboe interpreted the x-rays taken by Dr. Dahhan on May 30, 2001, as indicating Category 0/1 disease as there were a few opacities of the As@ and At@ variety visible in all lung zones bilaterally with no rounded opacities identified. He concluded that the profusion was insufficient to warrant a diagnosis of CWP, noting that the irregular opacities are not typical of CWP.

Fouch was examined by Dr. N. K. Burki, a university evaluator appointed pursuant to KRS 342.315, on April 3, 2001. While his examination revealed no evidence of CWP, Dr. Burki did diagnose emphysema due to cigarette smoking resulting in a 30% impairment due to loss of pulmonary function. He further found that Fouch had Category 1/0 with an FVC of 110% and an FEV-1 of 80%.

After reviewing the evidence, the ALJ found that Fouch Ais not entitled to any more benefits for CWP,@ engaging in the following analysis:

The medical proof presented by the parties goes in opposite directions as might be expected. The University Evaluation falls in the middle and is the most

convincing when paired with [Fouch's] smoking, medical and work history. These findings indicate a 1/0 with 110% and 80%, FVC and FEV1 respectively which would prohibit any recovery even if the conclusion [Fouch] does not have CWP is rejected.@

Fouch filed a petition for reconsideration arguing that it was improper to give presumptive weight to the university evaluator's opinion in a claim originating prior to December 12, 1996. In denying Fouch's petition, the ALJ reiterated that his last day of exposure was December 12, 1998, and that his argument was therefore incorrect pursuant to Magic Coal Co. v. Fox.<sup>3</sup> In so doing, the ALJ observed that Blaze had filed a petition for reconsideration seeking reimbursement Afor Old Republic Coal Co. for the expense of the [university evaluation].@ Noting that Island Fork had stipulated to being Fouch's employer on the date of last exposure at the benefit review conference, the ALJ concluded that Island Fork was responsible for the cost of said examination and ordered Island Fork to Areimburse Old [R]epublic Insurance Company@in the amount of the examination fee.

On appeal to the Board, Fouch argued that his right to CWP benefits vested when he filed the original RIB claim, March 9, 1992, and therefore, his reopening claim was governed by the statute as it existed at that time rather than the amended version in effect on his last date of exposure, December 12, 1998. In support of his argument, Fouch emphasized that the law in effect on

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<sup>3</sup> Ky., 19 S.W.3d 88 (2000).

the date of injury generally determines the rights of an injured worker. He further contended that both the amendment to KRS 342.732 and the enactment of KRS 342.315 affect his substantive rights and therefore should not be applied retroactively.

Fouch's arguments in this Court mirror those he made to the Board. In neither instance did Fouch raise an issue regarding the dismissal of his claim against Island Fork, opting instead to focus on the foregoing question as to which version of the applicable statute should be applied to his reopening claim, an inquiry which implicates only Blaze. Accordingly, the dismissal of Island Fork is final and the present appeal is dismissed as to that party.

When reviewing decisions of the Board, our function is to correct the Board only where we perceive that the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.<sup>4</sup> Here, the Board has correctly applied the governing statute and we perceive no error in its assessment of the evidence. Because we agree with its reasoning as to the dispositive issue in this case, we adopt the following portion of its opinion as our own as set forth below:

We disagree with Fouch's arguments and affirm. Unfortunately for Fouch, in Magic Coal Co. v. Fox, [ ] the Supreme Court concluded [that] the term presumptive weight merely created a rebuttable presumption pursuant

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<sup>4</sup> Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

to [Kentucky Rules of Evidence] KRE 301. KRS 342.315(2) does not restrict the ALJ's authority to weigh conflicting evidence, it only requires him to state specifically a reasonable basis for disregarding the [u]niversity evaluator's opinion. In Magic Coal [], the Supreme Court explained [that] the presumption created by KRS 342.315(2) neither shifts the risk of persuasion to the defendants nor ~~Ar~~aises the bar@ with regard to claimant's burden of persuasion[.] Furthermore, where clinical findings and opinions of the [u]niversity evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact finder to weigh the conflicting evidence. The ALJ found that referral for a [u]niversity evaluation did not affect a substantive right but rather was a procedural change. The [C]ourt found [that] [u]niversity evaluation reports are substantial evidence to be considered regardless of whether the last exposure occurred prior to December 12, 1996.

Here, Fouch has a tremendous burden on appeal. Since his ventilatory studies exceeded 80%, Fouch must show [that] the evidence compelled a decision based upon either the 2/1 or 2/2 x-ray reading and that the 1996 amendments did not apply to his case. Failure to prove either that the evidence compelled a finding of a 2/1 reading or [that] the 1996 amendments did not apply [is] fatal to his appeal. Since the x-ray reading contained in the [u]niversity evaluation is substantial evidence to

support a finding of a 1/0 reading, it cannot be said [that] the evidence compelled a finding in Fouch's favor.[<sup>5</sup>]

Fouch must also fail on the argument that the 1996 amendments cannot be applied to his claim. KRS 342.316 establishes [that] the responsible employer is the employer in whose employment the employee was last exposed to the hazards of the occupational disease and that the time of the beginning of compensation payments shall be the date of the employee's last injurious exposure to the cause of the disease or the date of actual disability, whichever is later. Here, Fouch's last exposure occurred following the enactment of the 1996 amendments and there is no proof of actual disability that predates the 1996 amendments. While Fouch was exposed to coal dust prior to the 1996 amendments, there is a complete lack of evidence of disability prior to the enactment of the 1996 amendments. The ALJ's finding that Fouch is not entitled to any additional benefits for [CWP] is supported by substantial evidence and must be affirmed.[<sup>6</sup>]

In accordance with the foregoing, Island Fork is hereby dismissed from this appeal and the Board's opinion is affirmed with respect to the remaining parties.

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<sup>5</sup> Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

<sup>6</sup> Id.

ALL CONCUR.

ENTERED: December 20, 2002  
MODIFIED: January 10, 2003  
BRIEF FOR APPELLANT:

Leonard Stayton  
Inez, Kentucky

/s/ Joseph R. Huddleston  
Judge, Court of Appeals  
BRIEF FOR APPELLEE ISLAND FORK  
CONSTRUCTION:

William E. Brown, II  
JENKINS PISACANO ROBINSON  
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NO BRIEF FOR APPELLEE  
TUG VALLEY LAND DEVELOPMENT.

BRIEF FOR APPELLEE  
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