

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000105-WC

JAMES A. GORDON

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01866

PEABODY COAL COMPANY; WORKERS'
COMPENSATION FUNDS; HON. R.
SCOTT BORDERS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; HENRY AND TACKETT, JUDGES.

COMBS, CHIEF JUDGE: James A. Gordon petitions for review of an opinion of the Workers' Compensation Board entered on December 18, 2003. The Board affirmed the dismissal of his claim in which he sought benefits for coal workers' pneumoconiosis pursuant to KRS¹ 342.732. Gordon challenges the consensus procedure created in KRS 342.316(3) and the regulations

¹ Kentucky Revised Statutes.

promulgated to implement the statutory scheme for resolving pneumoconiosis claims. This Court previously placed Gordon's appeal in abeyance pending a review of the consensus statute and its pertinent regulations by the Kentucky Supreme Court in Hunter Excavating v. Bartrum, ___ S.W.3d ___ (Ky. 2005). The decision rendered in that case is now final. Pursuant to the dictates of Bartrum, we vacate and remand.

Gordon was last exposed to the hazards of coal dust while working for the appellee, Peabody Coal Company (Peabody). On November 12, 2002, he filed an application for coal workers' pneumoconiosis benefits and submitted an x-ray that had been interpreted by Dr. Brent Brandon, which revealed the presence of category 2/1 pneumoconiosis. Gordon also filed a report of Dr. Valentino Simpao, whose tests established that Gordon's FEV1 and FVC were less than 80% of predicted normal. Dr. Simpao characterized Gordon's twenty-five-year exposure to coal dust as "medically significant in his pulmonary impairment." (Dr. Simpao's report, at p. 4.)

Pursuant to KRS 342.316(3) and (4), Peabody filed the report of Dr. Robert Pope that was negative for coal workers' pneumoconiosis. Thus, the matter proceeded to the second step of the consensus procedure; *i.e.*, the parties' x-rays were submitted to a panel of three "B" readers whose consensus opinion would govern the outcome. The panel's consensus was

that Gordon did not suffer from the disease after making the following x-ray interpretations: 0/1, 0/0, and 0/0. After reviewing notification of the consensus, Gordon filed another x-ray report from Dr. Glen Baker of an x-ray taken in 1993. Peabody filed a motion to strike the additional report.

In dismissing Gordon's claim, the Administrative Law Judge (ALJ) concluded that there was no "clear and convincing evidence" to "reject the consensus." (ALJ's opinion and order of August 4, 2003, at p. 4.) The ALJ also concluded that 803 KAR² 25:009 § 3(1) precluded any consideration of Dr. Baker's x-ray report submitted by Gordon to rebut the negative consensus of the panel. The Board affirmed.

In Bartrum, the Kentucky Supreme Court upheld the statutory procedure applicable to pneumoconiosis claims. However, it declared invalid specific regulations as impairing a claimant's right to due process.

We conclude that KRS 342.316(3) is constitutional but that 803 KAR 25:009, § 3(1) and (2) conflict with KRS 342.316(13) to the extent that they prohibit additional reports of the x-rays that were considered in the consensus process. To that extent, they are void. . . .[The regulations] defeat the purpose of KRS 342.316(13) and KRS 342.316(3)(b)4.g. by prohibiting a party from submitting additional reports of the x-rays the panel evaluated and prohibiting an ALJ from considering such reports.

² Kentucky Administrative Regulations.

(Slip op. at pp. 2 & 8.) Dr. Baker's report did not address the x-rays considered by the consensus panel. However, because the invalid regulations effectively deprived Gordon of the opportunity to present any rebuttal evidence, his due process rights have been compromised. Id. Thus, pursuant to Bartrum, we must remand the matter to the ALJ for further proceedings.

Gordon also argues that the Board misconstrued 803 KAR 25:009 § 2(7). This regulation provides that:

[w]ithin thirty (30) days of notice that consensus has been reached by the commission, a party **may challenge** consensus by written notification to the department and opposing parties. (Emphasis added.)

Gordon argues that the Board erred in interpreting the regulation as requiring (rather than permitting) a written challenge in order to obtain a resolution on the merits by an ALJ; he claims that the Board:

reveals its misunderstanding of the distinction to be made between the consensus determination issued by the Office of the Commissioner and the factual findings to be made by the Administrative Law Judge.

(Appellant's brief at p. 14.)

We agree with Peabody that it is unnecessary to determine whether the Board properly interpreted this regulation -- although we note parenthetically that the language of the administrative regulations utilizes the precatory *may* as distinguished from the mandatory *shall*. Gordon's claim was not

dismissed because of his failure to comply with 803 KAR 25:009 § 2(7). His claim was instead rejected because he was deprived of the opportunity to submit evidence to rebut the consensus reached by the panel of "B" readers. In light of our holding that the matter must be remanded for further proceedings, this second issue is moot.

The decision of the Workers' Compensation Board is vacated, and this matter is remanded for further proceedings consistent with Bartrum, supra.

ALL CONCUR.

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