

RENDERED: SEPTEMBER 23, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-000334-WC

DENNIS WILLIAMS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-00518

MANALAPAN MINING COMPANY; HON.
SHEILA C. LOWTHER, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD; DIVISION OF WORKERS'
COMPENSATION FUND

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

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

COMBS, CHIEF JUDGE: Dennis Williams petitions for review of an opinion of the Workers' Compensation Board that was entered on January 21, 2004. Williams filed a motion pursuant to KRS¹ 342.792(2) to re-open his claim for retraining incentive benefits, a claim which the Chief Administrative Law Judge

¹ Kentucky Revised Statutes.

(CALJ) dismissed. The Board affirmed the dismissal of his motion. Williams argues that the Department of Workers' Claims exceeded its authority in adopting certain regulations pursuant to the consensus procedure established in KRS 342.316(3) for resolving claims based on coal workers' pneumoconiosis. This Court previously placed his appeal in abeyance pending a decision of the Kentucky Supreme Court addressing the constitutional validity of the entire consensus procedure. That decision has now been rendered, and we shall address the merits of Williams's appeal.

In Hunter Excavating v. Bartrum, ___ S.W.3d ___ (Ky. 2005)(slip op. at p. 1), the Court upheld the "two-step 'consensus' procedure for evaluating x-ray evidence of coal workers' pneumoconiosis" as set forth in KRS 342.316(3). However, although the Court upheld the statute, it ruled that administrative regulations were in conflict with the statute's purpose and that they impaired the claimant's right to due process. Like the claimant in Bartrum, Williams had applied for benefits under KRS 342.792. In light of the Court's decision in Bartrum, we vacate and remand the dismissal of his claim.

The facts are not in dispute. Williams had been employed as an underground coal miner for nineteen years. During the last thirteen years of his mining career (1983-1996), he worked for Manalapan Mining Company, the appellee. He was

last exposed to the hazards of coal workers' pneumoconiosis while working for Manalapan on September 26, 1996.

Williams filed a claim for occupational disease benefits in 1997. At that time, he submitted to an independent medical evaluation by a university evaluator pursuant to KRS 342.315 and KRS 342.316(3)(b)4(b) as those sections existed following the 1996 amendments to the Act. The ALJ denied Williams's claim and gave presumptive weight to the adverse findings and opinions of Dr. John H. Woodring, the university evaluator.

On March 12, 2003, Williams moved to re-open his claim pursuant to KRS 342.792(2), which provides as follows:

The original claim of any miner last exposed to the occupational hazards of coal workers' pneumoconiosis prior to December 12, 1996, which was subject to a university evaluation pursuant to KRS 342.315 and was dismissed upon a finding that the miner did not prove the presence of coal workers' pneumoconiosis radiographically may be reopened by the claimant notwithstanding the provisions of KRS 342.125, pursuant to administrative regulations adopted by the commissioner. Income benefits may be awarded thereon pursuant to entitlement standards effective as of the date of last exposure, except the income or retraining benefits shall be paid without interest from the Kentucky coal workers' pneumoconiosis fund, the provisions of KRS 342.1242 notwithstanding.

Subsection (4) of the statute outlines the procedure for re-opening claims which were previously denied under the university evaluation scheme:

Administrative regulations promulgated by the commissioner pursuant to subsections (1) and (2) of this section shall provide that chest X-rays previously taken at university medical schools pursuant to KRS 342.315 shall be obtained by the commissioner and forwarded to three (3) randomly selected "B" readers for determination of consensus pursuant to KRS 342.316(3)(b)4.3. The claim shall be assigned to an administrative law judge for determination of whether the claim should be reopened and the award of additional benefits, if any.

In his motion, Williams claimed that his condition had worsened. In substantiation of his claim, he attached a more recent x-ray (showing category 1/2 pneumoconiosis) as well as the medical report of Dr. Michael Alexander. However, as required by KRS 342.792(4), the only x-ray submitted to the panel of "B" readers was the one that had been utilized during the previous university evaluation process. The panel interpreted the x-ray as follows: 1/1, 0/1, 0/0.

On June 5, 2003, the Department of Workers' Claims issued a notice that the panel had reached a negative consensus. Without any reference to or consideration of the more current medical information, the CALJ accepted the consensus results and dismissed Williams's motion for failure to make a *prima facie* showing of entitlement to benefits.

Williams raised several issues in his appeal to the Board -- including the constitutionality of the regulations governing the re-opening of his previously denied claim. The Board concluded: (1) that the CALJ had no authority to consider the more recent x-ray evidence; (2) that the CALJ appropriately dismissed the motion to re-open after receiving the negative consensus; and (3) that the Board had no authority to address Williams's constitutional challenge to the regulations governing his claim.

In Bartrum, the Supreme Court upheld the statutory framework for the consensus procedure. It concluded that the Department of Workers' Claims had "a legitimate interest . . . in limiting the introduction of evidence. . . (Slip op. at p. 7.) However, it declared invalid and contrary to due process concerns those administrative regulations (803 KAR 25:009, § 3(1) and (2)) which "prohibit[] a party from submitting additional reports of the **x-rays the panel evaluated** and prohibit[] an ALJ from considering such reports." Id., slip op. at p. 8.

Because of the court's holding in Bartrum, we must reject Williams's argument that the CALJ erred in failing to consider the **more recent** x-ray interpreted by Dr. Alexander. However, as emphasized in Bartrum, the regulations under which the claim to re-open was litigated deprived Williams of the

ability to present the **report originally considered by the panel**; that is, the "type of evidence that will rebut [the negative] consensus classification." Id., at p. 7.

Thus, the opinion of the Board is vacated, and this matter is remanded to the CALJ for further proceedings consistent with Bartrum.

ALL CONCUR.

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