

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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000624-WC

JAMES BRYAN FULTZ

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-00855

MANALAPAN MINING; HON. W. BRUCE
COWDEN, JR., ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD; AND HON. LARRY GREATHOUSE,
COMMISSIONER, DEPARTMENT OF
WORKERS' CLAIMS

APPELLEES

OPINION
VACATING AND REMANDING

** ** * * *

BEFORE: BARBER, McANULTY, AND MINTON, JUDGES.

McANULTY, JUDGE: James Bryan Fultz appeals the Opinion of the Workers' Compensation Board (the Board) which affirmed the dismissal of his claim for benefits by an Administrative Law Judge (ALJ). This appeal involves an issue which was recently decided in Hunter Excavating v. Bartrum, ___ S.W.3d ___ (Ky. 2005), which determined that a claimant shall be given an opportunity to provide additional evidence to rebut a "B" reader

consensus opinion. Since the result below was not rendered in accordance with that decision, we vacate the Board's decision and remand for additional proceedings.

Fultz made three arguments in support of his appeal. Our review of an Opinion of the Board is limited to correcting the Board only when we perceive 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." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). Fultz complained that the regulations enacted under KRS 342.316(3) exceeded the statutory requirements. The Board found that Fultz's argument on this point was too vague to allow for meaningful review. The only specific argument Fultz makes on appeal regarding the regulations was that they "extend the law to require a consensus finding among the three 'B' readers hired by the Department of Workers' Claims."

In Hunter Excavating v. Bartrum, ___ S.W.3d ___ (Ky. 2005), the Supreme Court determined that one of the regulations which Fultz questions was indeed invalid. The Court stated that KRS 342.316(3) was not unconstitutional, but that 803 KAR 25:009 § 3(1) exceeded its statutory authority because it prohibited additional x-rays and reports to rebut a consensus, and so was void to the extent it conflicted with KRS 342.316(13).

We believe Fultz should be permitted to present his evidence under this new understanding of the statutory enactment. The ALJ had questioned in the Opinion and Order whether Fultz should be permitted under the regulations to introduce any further evidence following the consensus report of the "B" readers. Thus, we remand for further proceedings by the ALJ under the standard established in Bartrum.

Next, Fultz challenges the ALJ's application of the "clear and convincing" standard when a claimant attempts to overcome the consensus by the "B" readers. Fultz essentially argues that the clear and convincing standard as applied by the ALJ is an insurmountable burden. He points to the proof he offered in this case -- positive x-ray interpretations of occupational disease as well as his 45 years in coal mining -- and alleges that this should have been enough to overcome the burden of the consensus of the "B" readers.

The "clear and convincing" standard was interpreted to some extent in Fitch v. Burns, 782 S.W.2d 618 (Ky. 1990), which the Board examined along with other cases and definitions. The Board found that the ALJ was the sole arbiter of what evidence met the standard. The Board found that the ALJ did not apply the standard in an insuperable manner, since the ALJ gave reasons for the decision which had to do with the weight and reliability of the evidence. We agree with the Board that Fultz

has not shown that the ALJ is interpreting the standard in an insuperable manner, and we believe that the Board correctly reviewed the standard in accordance with applicable case law.

Fultz's final argument is that the x-rays failed to meet the minimum standards for medical reports because they did not note the date of the x-ray. The Board found that this claim was completely unfounded as the records do contain the date as required. Fultz does not offer anything to contradict this, and so we affirm the Board's finding.

For the foregoing reasons, we vacate the opinion of the Board, and remand for further proceedings consistent with this decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald C. Cox
Atkins Law Office
Harlan, Kentucky

BRIEF FOR APPELLEE MANALAPAN
MINING:

Paul E. Jones
Jones, Walters, Turner &
Shelton, PLLC
Pikeville, Kentucky