

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-001731-WC

MANALAPAN MINING

APPELLANT

PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
v. ACTION NO. WC-03-00370

JERRY HODGE; HON. SHEILA C. LOWTHER,
ADMINISTRATIVE LAW JUDGE; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND McANULTY, JUDGES; HUDDLESTON, SENIOR JUDGE.¹
McANULTY, JUDGE: Manalapan Mining (Manalapan) has petitioned for
review from a Workers' Compensation Board (the Board) opinion
entered July 30, 2004. In this opinion, the Board affirmed the
Chief Administrative Law Judge's (CALJ) determination that Jerry
Hodge (Hodge) sustained his burden of proof to establish a
consensus of category 1/0 coal workers' pneumoconiosis. Because
we conclude that the finding of consensus is a question of fact

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of
the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution
and KRS 21.580.

properly decided by the CALJ and this finding was not unreasonable under the evidence, we affirm.

This case arises out of Jerry Hodge's application for resolution of occupational disease claim against his employer, Manalapan, for coal workers' pneumoconiosis. On his claim form, Hodge stated that he was exposed to the disease as a result of breathing coal/rock dust during his 37 ½-year employment history in the coal mining industry. His last day of employment was January 9, 2003.

In support of his claim, Hodge attached to the application the x-ray interpretation of Dr. Matthew A. Vuskovich. Dr. Vuskovich interpreted the x-ray dated December 3, 2002, as demonstrating 2/1 coal workers' pneumoconiosis.

In response to Hodge's claim, Manalapan filed its notice that it was denying the claim for various reasons. Under KRS 342.316(3)(b)4.d., Manalapan scheduled Hodge to have an x-ray performed by a physician of its choice, Dr. A. Dahan. About three weeks after filing its notice of denial, Manalapan submitted the original x-ray interpreted by Dr. Dahan dated April 29, 2003, and a copy of Dr. Dahan's medical report regarding his evaluation of Hodge. Dr. Dahan interpreted the x-ray as category 0/0.

Based on the two readings, the Commissioner of the Department of Workers' Claims (commissioner) determined there

was no consensus and forwarded both films to a panel of three "B" readers for interpretation. See KRS 342.316(3)(b)4.e. The three "B" readers were Dr. Ernest Coburn, Dr. Kathleen A. Deponte, and Dr. Thomas M. Jarboe.

Dr. Jarboe read x-ray "F" as showing no evidence of pneumoconiosis. He recorded an ILO classification of 0/0 and rated the x-ray as being quality grade two. Dr. Jarboe further qualified his finding by noting that he "would recommend a repeat film with improved technique."

Dr. Coburn read film "A" and diagnosed category 1/0 pneumoconiosis. And Dr. Deponte interpreted film "A" as demonstrating category 1/0 pneumoconiosis. Dr. Coburn rated the x-ray he read as quality grade two, indicating that it was underexposed, while Dr. Deponte rated the x-ray as quality grade one.

Once the commissioner received the reports of the three "B" readers, he issued a letter giving notice to the parties that there was a consensus reading. Then he assigned the claim to the CALJ.

After the commissioner assigned the case to the CALJ, Manalapan deposed Dr. Coburn to refute the commissioner's finding of consensus. In the deposition, Manalapan established that the films could be of varying quality. Film quality one is the best. Dr. Coburn believed that the film quality of the film

that he interpreted was a quality two because it was an underexposed exam. Dr. Coburn testified that by marking the 1/0 box on the ILO form, he was not necessarily making a diagnosis of coal workers' pneumoconiosis. This is so because the ILO classification system is nonspecific in that the "B" reader just marks any opacity that he or she sees, which opacity could be due to other causes.

Manalapan also deposed Hodge. Hodge testified regarding his work and medical history. Hodge stopped working due to a heart condition that required multiple by-pass surgery. He has trouble breathing and has been on oxygen since January of 2003. Although he did not smoke at the time of the deposition, he had smoked between a pack to a pack and a half of cigarettes per day for about thirty years.

Eventually, the parties submitted Hodge's coal workers' pneumoconiosis claim to the CALJ. While under submission, Hodge moved to amend his claim to assert pulmonary impairment resulting from coal workers' pneumoconiosis. To support his new claim, Hodge submitted pulmonary function studies from Dr. Glen Baker. The CALJ granted Hodge's motion to amend his claim and allowed him to file Dr. Baker's report.

A month and half after she allowed Hodge to amend his claim, the CALJ issued her opinion and award in Hodge's case. The CALJ determined that the "B" reader panel produced a

consensus of 1/0 coal workers' pneumoconiosis. As to Hodge's evidence of pulmonary impairment, the CALJ determined that the results of spirometric testing -- between 55% and 79% of predicted normal -- were sufficient to establish respiratory impairment caused by exposure to coal dust. Based on these findings, the CALJ awarded Hodge permanent partial disability benefits. Manalapan filed a petition for reconsideration based upon its assertions that (1) the CALJ erred in concluding that the "B" readers reached a consensus positive; (2) the CALJ failed to consider pulmonary function studies performed by another physician; and (3) the CALJ's calculation of benefits was incorrect.

After the CALJ corrected the amount of the weekly award but denied the remainder of the petition for reconsideration, Manalapan filed an appeal before the Board. In its appeal, Manalapan argued that the CALJ erred in concluding that there was a consensus among the "B" readers. There was no consensus because Dr. Coburn's testimony established that based on the quality of the x-ray and the type of markings that were observed, it was just as likely that the profusions seen were something other than coal workers' pneumoconiosis as it was that they were coal workers' pneumoconiosis. And Manalapan argued that the CALJ erroneously relied upon the pulmonary function studies submitted by the claimant and erred in failing to

consider the pulmonary function studies submitted by the employer.

Upon review, the Board affirmed the CALJ's determination that Hodge had sustained his burden of proof to establish category 1/0 coal workers' pneumoconiosis. In so doing, the Board stated that under KRS 342.316(13), the consensus classification is presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence. And the CALJ's conclusion that Dr. Coburn's testimony was not "clear and convincing" as to overcome the presumption was not so unreasonable under the evidence that the Board must view it as erroneous as a matter of law. However the Board did vacate the award of income benefits because the CALJ did not consider the report of Dr. Dahan in making the award.

Manalapan argues in its petition that the Board erred in affirming the CALJ's finding of consensus. Consistent with its arguments in the administrative proceedings below, Manalapan contends that there was no consensus given Dr. Coburn's testimony that his notation of a positive profusion did not necessarily indicate his belief that Hodge had coal worker's pneumoconiosis. Manalapan asserts that this testimony establishes that consensus never existed because it totally undermines the foundation of facts used for drawing the

inference that supports the presumption. Thus, there was no need to overcome the presumption of consensus by clear and convincing evidence. Finally, the Board erroneously treated the issue as a factual issue, when it was actually a legal issue. Manalapan believes that consensus did not exist as a matter of law.

This Court's function of reviewing the Board's affirmance of the CALJ's consensus determination 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." Western Baptist Hosp. V. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). And, in cases such as this one, "[w]hen the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

KRS 342.316(3)(b)4. sets out the administrative procedure for determining occupational disease claims, such as coal workers' pneumoconiosis. The entire procedure is as follows:

- a. Immediately upon receipt of an application for resolution of claim, the commissioner shall notify the responsible

- employer and all other interested parties and shall furnish them with a full and complete copy of the application.
- b. The commissioner shall assign the claim to an administrative law judge and, except for coal workers' pneumoconiosis claims, shall promptly refer the employee to such physician or medical facility as the commissioner may select for examination. The report from this examination shall be provided to all parties of record. The employee shall not be referred by the commissioner for examination within two (2) years following any prior referral for examination for the same disease.
 - c. Except for coal workers' pneumoconiosis claims, within forty-five (45) days following the notice of filing an application for resolution of claim, the employer or carrier shall notify the commissioner and all parties of record of its acceptance or denial of the claim. A denial shall be in writing and shall state the specific basis for the denial. In coal workers' pneumoconiosis claims, the employer's notice of claim denial or acceptance shall be filed within thirty (30) days of the issuance by the commissioner of the notice of the consensus reading unless the consensus is that the miner has not developed coal workers' pneumoconiosis category 1/0 or greater. In the event the consensus procedure is exhausted without consensus being established, the employer's notice of claim denial or acceptance shall be filed within thirty (30) days of the commissioner's notification to the administrative law judge that consensus has not been reached.
 - d. Within forty-five (45) days of assignment of a coal workers' pneumoconiosis claim to an administrative law judge, the employer shall cause the employee to be examined by a physician of the employer's choice and shall provide to all other

parties and file with the commissioner the X-ray interpretation by a "B" reader. The examination of the employee shall include spirometric testing if pulmonary dysfunction is alleged by the employee in the application for resolution of a claim. The commissioner shall determine whether the X-ray interpretations filed by the parties are in consensus.

- e. If the readings are not in consensus, the commissioner shall forward both films, masking information identifying the facility where the X-ray was obtained and the referring physician, consecutively to three (3) "B" readers selected randomly from a list maintained by the commissioner for interpretation. Each "B" reader shall select the highest quality film and report only the interpretation of that film. The commissioner shall determine if two (2) of the X-ray interpretations filed by the three (3) "B" readers selected randomly are in consensus. If consensus is reached, the commissioner shall forward copies of the report to all parties as well as notice of the consensus reading which shall be considered as evidence. If consensus is not reached, the administrative law judge shall decide the claim on the evidence submitted.
- f. "Consensus" is reached between two (2) chest X-ray interpreters when their classifications meet one (1) of the following criteria: each finds either category A, B, or C progressive massive fibrosis; or findings with regard to simple pneumoconiosis are both in the same major category and within one (1) minor category (ILO category twelve (12) point scale) of each other.
- g. The administrative law judge shall conduct such proceedings as are necessary to resolve the claim and shall have authority to grant or deny any relief, including interlocutory relief, to order additional proof, to conduct a benefit

review conference, or to take such other action as may be appropriate to resolve the claim.

- h. Unless a voluntary settlement is reached by the parties, or the parties agree otherwise, the administrative law judge shall issue a written determination within sixty (60) days following a hearing. The written determination shall address all contested issues and shall be enforceable under KRS 342.305.

The statute goes on to specify in KRS 342.316(13) that "[t]he consensus classification shall be presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence."

In this case, the CALJ based her finding of consensus on the readings and reports of the three "B" readers. Two of three readers reported category 1/0 pneumoconiosis. Thus, there was consensus under Section (3)(b)4.f.

The readings and reports of the "B" readers are proven facts. And Section (13) of KRS 342.316 recognizes a probative relationship and attributes a procedural significance to the relationship between the proven facts and the presumed facts. See generally Magic Coal Co. v. Fox, 19 S.W.3d 88, 95 (Ky. 2000) (citing Robert G. Lawson, The Kentucky Evidence Law Handbook §10.00 (3d ed. 1993), for the definition and effect of a presumption and discussing presumptions in the context of KRS 342.315(2)). That procedural significance is that the consensus

classification is presumed to be the correct classification unless overcome by clear and convincing evidence.

In finding consensus, the CALJ was deciding an issue of fact and not an issue of law as Manalapan argues. The CALJ had the sole authority to judge the weight to be afforded the deposition testimony of Dr. Coburn in light of his initial report diagnosing category 1/0 pneumoconiosis with no additional comment. See McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (Ky. 1974). The CALJ did not believe that Dr. Coburn's testimony overcame the consensus classification. The Board affirmed the CALJ. And we perceive no error in the Board's assessment of the case. Thus, we must affirm the Board.

ALL CONCUR.

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