

RENDERED: April 1, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-002477-WC

JIMMY HOWARD
AND DICK ADAMS, ATTORNEY

APPELLANTS

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01026

PEABODY COAL COMPANY;
HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE;
WILLIAM EMRICK, ACTING EXECUTIVE
DIRECTOR, OFFICE OF WORKERS'
CLAIMS; CHRISTOPHER H. SMITH,
EXECUTIVE DIRECTOR, KENTUCKY
LABOR DEPARTMENT; GREGORY D. STUMBO,
ATTORNEY GENERAL¹

APPELLEES

OPINION
AFFIRMING

** **

¹ Attorney General Gregory D. Stumbo did not participate in this appeal, having given notice to the Board of his intention not to intervene, indicating "that the parties already before the Workers' Compensation Board adequately represent all the interests in regard to the constitutionality of KRS 342.732(1)(a) and 803 KAR 25:125 for which reason he respectfully declines to appear herein to defend the challenged statute."

BEFORE: TACKETT AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.²

MILLER, SENIOR JUDGE: Appellants, Jimmy Howard (Howard) and Dick Adams, Attorney (Adams), have petitioned for review of an opinion of the Workers' Compensation Board (Board) entered on November 5, 2004, which affirmed a decision of the Administrative Law Judge (ALJ) rendered on July 9, 2004, that denied Adams an attorney fee for services rendered to Howard in obtaining an award of Retraining Incentive Benefits (RIB) against appellee Peabody Coal Company (Peabody).

Before us appellants argue that 803 KAR³ 25:125, which sets out the computation of attorney fee in RIB award cases, is an unconstitutional violation of federal and state equal protection rights;⁴ that the award of an RIB claimant's attorney fee should be governed by Kentucky Revised Statutes (KRS) 342.320(2)(A); that 803 KAR 25:125 violates public policy; and that the ALJ's weekly award rate was computed incorrectly. We conclude that Adams' request for attorney fees is premature and affirm the Board.

Howard, born October 30, 1950, worked in coal mines for over thirty years until being laid off on December 2, 2002,

² Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

³ Kentucky Administrative Regulation.

⁴ United States Constitution, 14th Amendment; Kentucky Constitution, Sections I, II, and III.

due to the mine closure. Following un rebutted evidence of Howard's Coal Worker's Pneumoconiosis (CWP) claim, the ALJ concluded, pursuant to KRS 342.732(1)(a)1, that Howard suffered from the disease of CWP, category 1, and awarded Howard a one time only RIB of \$103.25 per week for a period not to exceed 104 weeks. Despite KRS 342.732(1)(a)2 and 3's prerequisite that receipt of said benefits was contingent upon enrollment and active and successful participation as a full-time student in a bona-fide training or education program, the record is void of any documentation certifying compliance.

On June 24, 2004, Adams filed a motion for approval of attorney fee in the amount of \$2,147.60. A fee agreement signed by both appellants indicating payment of attorney fee upon recovery of an award of benefits was attached to the motion. The motion did not reference any enrollment by Howard in a training or education program. On July 9, 2004, the ALJ overruled the motion, stating:

Pursuant to 803 KAR 25:125, counsel for [Howard] is entitled to an attorney's fee for a retaining [sic] incentive benefit (RIB) award only if [Howard] has enrolled in a bona fide retraining program or GED program and is actually receiving payments as a result of the award. There has been no showing by counsel for [Howard] that such is the case.

Appellants thereafter appealed to the Board, raising the same three issues pertaining to attorney fees raised herein.

Appellants also raised for the first time a computational error in Howard's award. The Board affirmed the ALJ on the attorney fee issues, noting that it was without authority to address the constitutional issues. Although stating with regard to the computational issue that the award appears "incorrect on its face," the Board concluded that it had no jurisdiction to reach this issue because Howard failed to preserve or timely appeal it. The Board noted, however, that Howard could seek correction of the erroneous calculation by way of a motion to reopen. This petition for review follows.

Our standard of review of a decision of the Board "is to correct the Board only where the the (sic) Court perceives 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). Additionally in this case, because appellants are claiming that a duly enacted regulation is unconstitutional, our review of those issues is *de novo*. Commonwealth v. DLX, Inc., 42 S.W.3d 624 (Ky. 2001).

Appellant Adams first contends that 803 KAR 25:125 violates state and federal equal protection rights and public policy. 803 KAR 25:125, titled "Computation of attorney fee in award of retraining incentive benefits pursuant to KRS 342.732(1)(a) and interim attorney fee motions," is promulgated

under the statutory authority of KRS 342.260(1). That section requires the commissioner to promulgate administrative regulations necessary to implement the workers' compensation chapter. The regulation is also enacted pursuant to KRS 342.270(3), which requires the commissioner to promulgate an administrative regulation to establish procedures for the resolution of claims, and KRS 342.732 and 342.792, which set forth the requirements for retraining incentive benefits. Additionally, as stated in the "Necessity, Function, and Conformity" section of the regulation, it:

(E) establishes requirements for computing attorney's fee awards for claims for retraining incentive benefits in order to assist with the claims process and allow claimants to obtain appropriate legal assistance from an attorney.

803 KAR 25:125, Section 1(2), directs the claimant's attorney to file a motion to request an attorney fee "(i)f benefits are awarded for retraining pursuant to KRS 342.732(1)(a)." Section 2(1)(a) provides for payment of the attorney fee if the claimant "(i)s enrolled and has been accepted in a bona fide training program or GED program" and (b) "(d)oes not defer the beginning of benefits pursuant to KRS 342.732(1)(a)5." Section 2(2) directs payment based on the number of weeks of retraining completed by the claimant at the time the motion for attorney fee is filed.

Appellant Adams' specific constitutional complaint is that he is being treated differently than the employer's attorney because his attorney fee is based on a successful claim and his client's enrollment in training, while pursuant to KRS 342.320(8), the employer's attorney gets paid a fee regardless of the outcome of the case. He also complains that the regulation is violative of public policy by discouraging attorneys from representing RIB claimants.

Adams' also argues that KRS 342.320(2)(a)⁵, which sets the formula for computing contingent attorney fees following successful resolution of the case, is exceeded in scope and authority by 803 KAR 25:125, which places prerequisites and procedures governing when and under what circumstances contingency fees are due in RIB cases.

We find no merit in any of these contentions. We are of the opinion that the case of Baker v. Shamrock Coal Company, Inc., 985 S.W.2d 755 (Ky. 1999), is dispositive. In that case, the Supreme Court concluded that an award of attorney fees was premature until the RIB claimant was eligible to receive the award. In Baker, the successful claimant continued working and

⁵ In an original claim, attorney's fees for services under this chapter on behalf of an employee shall be subject to the following maximum limits: (a) Twenty percent (20%) of the first twenty-five thousand dollars (\$25,000) of the award, fifteen percent (15%) of the next ten thousand dollars (\$10,000), and five percent (5%) of the remainder of the award, not to exceed a maximum fee of twelve thousand dollars (\$12,000). This fee shall be paid by the employee from the proceeds of the award or settlement.

had not enrolled at the time the motion for attorney fee was made. Similarly, here, the successful claimant has not yet demonstrated compliance with retraining. As such, Adams' award of attorney fees is premature.

Finally, it is agreed by the Board and all parties that the ALJ erred in arriving at the weekly benefit rate of Howard's award. In addressing this issue, the Board stated:

[Howard] is correct that, although the parties stipulated Howard was earning sufficient wages to qualify for the state maximum benefit rate, the ALJ only granted benefits in the amount of \$103.25 a week for a period not to exceed 104 weeks. The award therefore would appear to be incorrect on its face. . . . That having been said . . . Howard may still seek a correction of the ALJ's erroneous calculation by way of a motion to reopen. Cf. Whittaker v. Reeder, Ky., 30 S.W.3d 138 (2000); Wheatley v. Bryant Auto Service, Ky., 860 S.W.2d 767 (1993).

We find no error in the Board's decision on this issue.

Although we have felt compelled to affirm the Board under the authority of Baker, we are unable to determine from the record if, since the RIB award, Howard has become physically unable to be retrained.⁶ If it is proven that Howard became

⁶ The record on appeal does contain a "Notice of Deferral" filed by Howard in which he elects to defer commencement of RIB benefits for up to 365 days until such time as his health permits fulfillment of the training aspect of the regulation. This notice, however, was filed after the ALJ's overruling of Adams' attorney fee motion. We also note that a medical report, dated after the ALJ's RIB award, is appended to appellants' brief. The report gives one doctor's opinion that Howard is not a good candidate for rehabilitation. We cannot, however, consider these documents in this appeal as they were not before the ALJ.

unable to undergo retraining after the RIB award it would seem that the matter of attorney fees could be squarely presented to the ALJ at that time. The question then will be whether the applicable statutes and regulations shall be interpreted to authorize an attorney fee to claimant's counsel. We express no opinion on this.

For the foregoing reasons, the Opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dick Adams
Madisonville, Kentucky

BRIEF FOR APPELLEE PEABODY
COAL COMPANY:

Peter J. Glauber
Louisville, Kentucky

BRIEF FOR APPELLEE CHRISTOPHER
H. SMITH:

Robert L. Whittaker
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