

RENDERED: JUNE 10, 2005; 10:00 A.M.

NOT TO BE PUBLISHED

MODIFIED: JULY 1, 2005; 2:00 P.M.

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002537-WC

TEDDY A. TURNER

APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 97-WC-01864

v.

APOLLO FUELS, INC. AND
HON. SHEILA C. LOWTHER,
CHIEF ADMINISTRATIVE LAW JUDGE,
AND KENTUCKY WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** *

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

HENRY, JUDGE: Teddy A. Turner (Turner) has petitioned for review of an opinion of the Workers' Compensation Board (Board) entered on November 12, 2004, which affirmed an order of the chief administrative law judge (CALJ) rendered June 17, 2004, overruling Turner's motion to reopen his coal workers' pneumoconiosis (CWP) claim. We affirm.

Turner worked for Apollo Fuels, Inc. (Apollo Fuels) for eighteen years. For sixteen of those years he was a tipple operator, and the last two years of employment he operated a road sweeper. His last date of exposure was November 6, 1996. Six months before his last exposure he began operating a small feed business with his father which he continued after leaving employment with Apollo Fuels.

On August 20, 1997, Turner filed to recover retraining incentive benefits (RIB). In support of his claim, he filed two x-ray reports from January and February of 1997. In a reading of the January x-ray (rated a Grade 1 film), the doctor found p/p opacities in all zones of both lungs in a 1/1 profusion. A second doctor reading the February x-ray (rated a Grade 2 film) found p/q opacities in the upper zone of the left lung in a 1/1 profusion. On behalf of Apollo Fuels, two doctors read the same x-rays, rated them as Grade 1 films, and found no evidence of pneumoconiosis. A third doctor on behalf of Apollo Fuels read a third x-ray (rated a Grade 1 film) from February 6, 1998, and likewise found no evidence of pneumoconiosis.

Pursuant to changes in the Workers' Compensation Act which became effective December 12, 1996, a university medical evaluator was appointed to examine Turner. Kentucky Revised Statutes (KRS) 342.315. After examining a chest x-ray (rated a

Grade 1 film) dated October 7, 1997, the evaluator found no evidence of pneumoconiosis.

Upon review of the medical evidence and Turner's deposition, the ALJ found:

That portion of the 1996 Amendments providing for the appointment of a university evaluator is procedural and is applicable to this case. That portion of the Amendment that provides the report of the university evaluator shall be given presumptive weight is substantive and is not applicable to this case in which plaintiff's last exposure occurred prior to the effective date of the 1996 Amendments. Therefore it was proper for a university evaluator to be appointed to examine plaintiff in this case but the report of that university evaluator is not given presumptive weight.

The ALJ thereafter found that although the medical evidence was conflicting, that presented by the employer was more persuasive and sufficient to establish that Turner did not suffer from CWP. Based upon this finding he entered an order dismissing Turner's claim for RIB.

On October 23, 2003, Turner filed a motion to reopen his claim "for review of the university x-ray in compliance with reconsideration procedures of KRS 342.732, effective 7-15-02¹ with his last exposure to coal dust being prior to 12-12-96." In support of his motion, Turner filed an affidavit indicating that since the ALJ order of June 11, 1998, his "condition has

¹ Reference is also made in the record to this amendment as HB 348.

continued to worsen to the point that I am totally disabled. I would state that my breathing is now more impaired and I have difficulty doing normal day to day activities." He further stated, in response to Apollo Fuels' objection to the motion, that "under HB 348 and KRS 342.732, [I am] reopening [my] claim to have the university procedures reviewed and [I do] not need a new x-ray to support this." Turner's motion was filed and his university evaluator x-ray was referred to three "B" readers for interpretation, whom, on April 7, 2004, found as a consensus a negative reading of 0/0.

On June 17, 2004, the CALJ issued the following order:

Based upon this negative consensus reading, it is the finding of the undersigned Administrative Law Judge that the Plaintiff has failed to make a prima facie showing of entitlement to additional benefits. No challenge having been made, IT IS HEREBY ORDERED, Plaintiff's Motion to Reopen is OVERRULED.

Turner appealed to the Board, contending for the first time a denial of his right to administrative due process. He alleged that 803 KAR² 25:009, § 3, which restricts the submission of additional x-rays in a consensus procedure, is void by its conflict with KRS 342.316(13), which allows for rebuttal of consensus findings by clear and convincing evidence.

² Kentucky Administrative Regulations.

On November 12, 2004, the Board affirmed the order of the CALJ, finding that Turner failed to avail himself of the opportunity provided in 803 KAR 25:009, § 4(5), for cross-examination of the medical evidence of record, and as such, failed to fully exhaust his administrative remedies, while further indicating that it was without authority to reach Turner's question on appeal of whether the limitation on medical evidence contained in 803 KAR 25:009, § 4, is unconstitutional. This petition for review follows.

Before us Turner makes the same argument as he did before the Board, specifically that he was denied his right to administrative due process because 803 KAR 25:009, § 3, impermissibly conflicts with KRS 342.316(13) in failing to allow him to present additional medical evidence in support of his motion to reopen.

The sole question presented by Turner is constitutional in nature which requires prior notice to the Attorney General pursuant to Kentucky Rules of Civil Procedure (CR) 24.03 and KRS 418.075. The notice requirement applies to a challenge to the constitutionality of a statute or regulation, is mandatory, and is to be strictly enforced. Homestead Nursing Home v. Parker, 86 S.W.3d 424, 425, n. 1 (Ky.App. 1999); *citing* Maney v. Mary Chiles Hospital, 785 S.W.2d 480 (Ky. 1990). A

review of the record herein reveals no such notice.

Accordingly, we decline to address this constitutional question.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnnie L. Turner
Harlan, Kentucky

BRIEF FOR APPELLEE:

Denise M. Davidson
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