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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001660-WC

BEECH FORK PROCESSING — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-00336

JIMMY MUSICK; HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE: Beech Fork Processing (hereinafter "Beech Fork") has petitioned this Court for review of the Workers' Compensation Board's July 15, 2005, opinion affirming in part, reversing in part and remanding the Chief Administrative Law Judge's opinion dismissing Jimmy D. Musick's claim for an enhanced award of retraining incentive benefits (hereinafter "RIB"). We affirm.

Musick is currently a sixty-year-old resident of Van Lear, Johnson County, Kentucky, with a date of birth of September 16, 1945. He began first grade at age eight, and dropped out of third grade at age thirteen. Musick began working in the mining industry in approximately 1980, and worked for a number of different coal companies. He began work for Beech Fork in 1988. In 1993, while continuing to work for Beech Fork, Musick filed a RIB application based upon his inhalation of coal dust. Musick and Beech Fork settled that claim on July 12, 1993, for a lump sum payment of $18,000. Musick continued to work for Beech Fork until October 1, 2001, which is the last day he was exposed to coal dust.

On November 19, 2001, Musick filed an injury claim as well as a hearing loss claim against Beech Fork with the Department of Workers' Claims. These claims were consolidated and were eventually settled in 2003 for a $15,000 lump sum payment.

On March 1, 2002, Musick filed the occupational disease claim presently before the Court, alleging that he had contracted pneumoconiosis during his work as a shuttle car operator with Beech Fork. He attached to his application a report from "B" reader Dr. Brent D. Brandon, in which he interpreted a June 5, 2001, x-ray as Category 3/2. Musick also provided a spirometric testing report. Beech Fork filed a

notice of denial, and submitted the report of Dr. Bruce Broudy, also a "B" reader, who interpreted an x-ray taken on July 5, 2002, as Category 0/1. Beech Fork also submitted the report of Dr. A. Dahhan, who interpreted a July 13, 2002, x-ray as Category 0/0.

On July 15, 2002, the General Assembly passed HB 348, drastically amending KRS Chapter 342. Musick was then permitted to file an amended Form 102 pursuant to the statutes and regulations along with supporting documents. Musick filed Dr. Brandon's report, while Beech Fork continued to rely upon Dr. Broudy's report. Because no consensus was reached between the two experts, the consensus procedure was implemented, whereby three "B" readers were randomly selected to read the x-rays. Based upon the reports submitted, a consensus of coal workers' pneumoconiosis 1/1 was reached. Following a November 24, 2003, benefit review conference, contested issues remained as to the existence of the disease, the constitutionality of the 2002 amendments to the Act, the scope and authority of the regulations, notice, and the effect of his 1993 RIB settlement.

Following briefing, the CALJ dismissed Musick's claim, stating as follows:

> Therefore, it is the finding of the Administrative Law Judge that Mr. Musick has met his burden of proving the existence of category 1 pneumoconiosis. The Plaintiff is entitled to retraining incentive benefits

> pursuant to KRS 342.732(1) however, section (1)1. of that statute provides a one time only retraining incentive benefit [] which the Plaintiff has already received when he settled his claim in 1993. Therefore, it is the finding of the undersigned that the Plaintiff is not entitled to any additional benefits. In as much as the Plaintiff's claim for benefits is dismissed, the undersigned does not believe that it is necessary to address the remaining contested issues.

In his Petition for Reconsideration of the CALJ's dismissal, Musick argued that he was entitled to recover an additional $18,208.83 as an enhanced RIB award pursuant to KRS 342.792(1), which would be payable by the Kentucky coal workers' pneumoconiosis fund. This motion was denied, and Musick appealed the CALJ's decision to the Workers' Compensation Board.

On November 12, 2004, the Board entered an opinion vacating and remanding the CALJ's decision. After specifically reviewing KRS 342.792, the Board agreed with Beech Fork that the newly enacted statute would not authorize Musick "to obtain an additional retraining incentive benefit award for the same condition and injurious exposure for which [he] received a retraining incentive benefit settlement in 1993." However, the Board went on to assume that Musick's present claim was "premised on additional injurious exposure occurring subsequent to his 1993 settlement." The Board then remanded the case to

the CALJ to consider the provisions of KRS 342.792 as they related to the factual allegations in the present case.

On remand, the CALJ again dismissed Musick's claim, stating as follows:

> The undersigned apparently was not sufficiently articulate in her original opinion. It is the specific finding of the Administrative Law Judge that Mr. Musick has category 1 coal workers' pneumoconiosis, without evidence of pulmonary impairment. Although he continued working in the coal mining industry and experienced additional injurious exposure between 1993, when he settled his original claim, and 2002, there is no evidence in the record that this additional exposure resulted in the progression of the radiographic evidence of pneumoconiosis or the development of a pulmonary impairment. Therefore, pursuant to KRS 342.732(1)(a) and the holding in Moore v. Sunstone Energy, Ky., 849 S.W.2d 529 (1993), the plaintiff is not entitled to any additional benefits. Quite simply, he has already been compensated for this condition, and a subsequent change in the statute does not entitle him to additional compensation, absent a progression of his occupational disease.

Musick appealed the CALJ's decision to the Board.

On July 15, 2005, the Board entered an opinion affirming the CALJ's opinion in part, reversing in part and remanding. The Board affirmed the determination that Musick had Category 1 pneumoconiosis without evidence of pulmonary impairment, as that finding was based upon the consensus reached by the "B" reader panel. However, the Board reversed the

remainder of the CALJ's opinion, holding that based upon its interpretation of the statutory provisions, Musick was entitled to an enhanced award of benefits pursuant to KRS 342.732(1)(a), less a credit for the money he received for the 1993 settlement, provided that he could carry his burden of proof on the essential elements of his claim. Thus, the matter was remanded to the CALJ for a determination on the remaining issues. This appeal followed.

In Western Baptist Hospital v. Kelly,[1] the Supreme Court addressed its role and that of the Court of Appeals in reviewing decisions in workers' compensation actions. "The function of further review of the WCB in the Court of Appeals is to correct the Board only where the [] 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."[2] While we might agree with the ALJ and Beech Fork that it appears inequitable for Musick to reap the benefits of the statutory amendments without showing that his condition has worsened, we nevertheless hold that the Board correctly interpreted the law as it now stands. In an opinion authored by Board Member Stanley, the Board provided an excellent analysis, which we shall adopt as our own:

[1] 827 S.W.2d 685 (Ky. 1992).

[2] Id. at 687-88.

> Our interpretation of KRS 342.792[3] is that the provision was intended by the General Assembly to provide coal miners last exposed to the occupational hazards of coal dust between December 12, 1996, and July 15, 2002, with an opportunity to receive enhanced awards of RIB, irrespective of other similar benefits that may have been granted previously pursuant to earlier versions of KRS 342.732(1). KRS 342.792(1) plainly provides that the claim of "[a]ny miner last exposed to the occupational hazards of coal workers' pneumoconiosis between December 12, 1996, and July 15, 2002, shall nonetheless be governed by the provisions of KRS 342.732 . . . notwithstanding the provisions of KRS 342.125." The provision further mandates that "[i]ncome or retraining incentive benefits shall be awarded thereon as if the entitlement standards established by the amendments to KRS 342.732 were effective at the time of the last exposure." Moreover, KRS 342.792(1) expressly states that: (1) "[a]ny benefits previously granted by an award or settlement shall be credited against any subsequent award or settlement

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[3] The applicable section of KRS 792.342 reads as follows:

(1) The claim of any miner last exposed to the occupational hazards of coal worker's pneumoconiosis between December 12, 1996, and July 15, 2002, shall nonetheless be governed by the provisions of KRS 342.732 and notwithstanding the provisions of KRS 342.125 all claims for benefits which were filed for last injurious occupational exposure to coal dust occurring between December 12, 1996, and July 15, 2002, shall be considered pursuant to the provisions of KRS 342.732 and administrative regulations promulgated by the executive director, and closed claims, except claims dismissed for reasons other than failure to meet medical eligibility standards, may be reopened by the claimant. Income or retraining incentive benefits shall be awarded thereon as if the entitlement standards established by the amendments to KRS 342.732 were effective at the time of last exposure. Any benefits previously granted by an award or settlement shall be credited against any subsequent award or settlement and no interest shall be payable on additional benefits. A previous grant of retraining benefits shall be credited only to the extent that the benefits were actually paid. All income or retraining incentive benefits greater than those which would have been awarded were not these new provisions applicable shall be paid without interest from the Kentucky coal workers' pneumoconiosis fund, the provisions of KRS 342.1242 notwithstanding.

> and no interest shall be payable on additional benefits"; and (2) "[a] previous grant of retraining incentive benefits shall be credited only to the extent that the benefits were actually paid."
>
> Along those same lines, KRS 342.792(3) provides "the coal workers' pneumoconiosis claim of any miner last exposed between December 12, 1996, and July 15, 2002, may be filed with the commissioner on or before December 12, 2003." KRS 342.792(3) further states that "[a]ll income or retraining incentive benefits greater than those which would have been awarded were not these new provisions applicable shall be paid by the Kentucky coal workers' pneumoconiosis fund without interest, in the provisions of KRS 342.1242 notwithstanding."
>
> Given such language, we believe it is clear that the General Assembly intended to allow coals miners such as Musick an opportunity to receive additional benefits, RIB or otherwise, under the 2002 amendments to the Act. Enhancement of prior RIB awards for certain classes of miners was a deliberate effect envisioned and incorporated by the legislature by means of the enactment of HB 348. As such, the fact that Musick's claim may be an attempt at a "second bite of the same apple" is not fatal under the circumstances of this case. As we stated in our original opinion, we believe KRS 342.792(1) must be read to create a statutory exception to the general "one (1) time only" limitation of KRS 342.732(1)(a) on a RIB award. To do otherwise would effectively render meaningless language in KRS 342.792 addressing additional retraining incentive benefits.

For the foregoing reasons, the July 15, 2005, opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul E. Jones
Pikeville, KY

BRIEF FOR APPELLEE:

John Harlan Callis, III
Inez, KY