

RENDERED: January 23, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-002907-WC

DAN LEMARR

APPELLANT

v. PETITION FOR A REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NOS. 92-WC-39878 & 93-WC-33551

NEW HOPE OF KENTUCKY, INC.;
ROBERT E. SPURLIN, Acting
Director of the SPECIAL FUND;
RICHARD H. CAMPBELL, Administrative
Law Judge; and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
REVERSING and REMANDING

* * * * *

BEFORE: DYCHE, EMBERTON and GUIDUGLI, Judges.

EMBERTON, JUDGE. Dan Lemarr petitions this court for review of the Workers' Compensation Board's opinion affirming the ALJ's dismissal of his motion to reopen his award for benefits under Ky. Rev. Stat. (KRS) 342.732(1)(b). Having reviewed the record

and applicable law, we conclude the Board erred as a matter of law.

In 1993. Lemarr received an award for retraining incentive benefits. Thereafter, in September 1994, he received an award for income benefits pursuant to KRS 342.732(1)(b). On March 11, 1996, Lemarr filed a motion to reopen his claim seeking additional benefits.

KRS 342.125(2)(a) provides:

Upon application of the affected employee, and a showing of progression of his previously diagnosed occupational pneumoconiosis resulting from exposure to coal dust and development of respiratory impairment due to the pneumoconiosis, the administrative law judge may review an award of a retraining incentive benefit because of the diagnosis, and upon a finding of respiratory impairment due to that pneumoconiosis shall make an award for benefits as provided in KRS 342.732. Such a reopening may also occur upon a showing of progression of respiratory impairment in a claim for which benefits were previously awarded under the provisions of KRS 342.732. (Emphasis added).

The Board summarized the medical evidence presented in Lemarr's Motion to reopen as follows:

DOCTOR	DATE	X-RAY	PULMONARY FUNCTION	
			FEV1	FVC
Myers	08/28/95	2/1	76%	71%
Baker	10/04/95	2/1	76.5%	70.8%
Vuskovich	10/04/95	2/2		
Powell	04/20/95	1/1		
Wright	04/20/95	1/0		

The medical evidence presented in the prior proceeding, resulting in an award of income benefits under KRS 342.732(1)(b), is summarized as follows:

DOCTOR	DATE	X-RAY	PULMONARY FUNCTION	
			FEV1	FVC
Baker	07/10/93	2/1	75.7%	83.2%
Myers	11/01/93	2/1	77%	75%
Anderson	10/22/93	2/2		
Lane	04/25/94	1/0		
Vuskovich	04/25/94	0/0		

The ALJ denied Lemarr's motion citing his failure to satisfy the two-pronged test set forth in KRS 342.125(2)(a). On appeal, the Board recognized the ALJ erred to the extent it held Lemarr had to demonstrate progression of the disease by both radiographic evidence and the development or progression of respiratory impairment. Instead, a claimant like Lemarr who is the recipient of an award under KRS 342.732(1)(b), need only show progression of his respiratory impairment to reopen his award.

The Board focused on the question of what degree of "progression" Lemarr must demonstrate to reopen the award.

The ALJ noted that all the pulmonary function tests submitted in support of Lemarr's motion to reopen exhibited results between 55% and 80% of predicted normal. The Board related that Lemarr's test values on reopening clearly were less than they were at the time of his Tier II award. The ALJ and the Board recognized that, although Lemarr submitted evidence that his respiratory impairment was worse, the FEV1 and FVC ratings

were not low enough to support a finding of total disability under KRS 342.732(1)(c).

Additionally, the Board analyzed the statutory scheme which utilized the progressive categories of coal workers' pneumoconiosis and the different levels of respiratory impairment to fix the type and amount of benefits available under KRS 342.732. It recognized the legislature did not intend to establish a different level of benefits for every percentage change in the FEV1 and FVC readings. Thus, it concluded:

[I]n our opinion, KRS 342.125(2) requires a claimant who desires to reopen a previous Tier II award to show progression of respiratory impairment evidenced by spirometric test values of less than 55 percent of the predicted normal values and not merely a percentage decrease.

We believe this conclusion is contrary to the plain language of KRS 342.125(2)(a) and ignores the fact that, upon review, Lemarr may indeed be entitled to greater benefits under KRS 342.732(1)(d).

In this vein, contrary to the appellees' assertion, we note that the principle of res judicata does not operate to preclude Lemarr from establishing that his occupational disease has progressed beyond Category 1. Lemarr has new x-ray evidence that has been interpreted as positive for Category 2 pneumoconiosis. Additionally, he submitted evidence in his prior claim that would have supported a finding of Category 2 disease. Upon review, the ALJ is required to consider the new evidence and

also review and re-evaluate the evidence previously submitted. If, upon review, the ALJ finds Lemarr suffers pneumoconiosis with a radiographic classification of Category 2/1 or higher, he would be entitled to total disability benefits under KRS 342.732(1)(d) regardless of his FEV1 and FVC values.

Accordingly, we conclude KRS 342.125(2)(a) does not require a claimant, such as Lemarr, to demonstrate he has respiratory impairment evidenced by a highest FEV1 or FVC value below 55% of predicted normal before he is entitled to reopen his claim and proceed with a review and a decision on the merits.

Consequently, the decision is reversed and the matter is remanded for proceedings consistent with this opinion.

ALL CONCUR.

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