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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000867-WC

JAMES DAMRON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-00024

KENTUCKY MAY MINING COMPANY;
HONORABLE JOHN COLEMAN, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE AND CLAYTON, JUDGES; HARRIS,[1] SENIOR JUDGE.

CLAYTON, JUDGE: James Damron appeals from a split decision of the Workers' Compensation Board (Board) reversing the opinion and award of the Administrative Law Judge ("ALJ"), who found on reopening that Damron's

[1] Senior Judge William R. Harris sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

occupational hearing loss had worsened and awarded him permanent partial disability (PPD) benefits for a 425-week period. Kentucky May Mining Company (Kentucky May) appealed the ALJ's decision. Upon reconsideration, the Board determined that the ALJ erroneously awarded PPD benefits to Damron because the increase in his hearing loss was not due to noise exposure while at work but was due to aging. After careful review, we affirm the Board's decision.

FACTUAL AND PROCEDURAL BACKGROUND

Damron was employed in the coal mining industry for approximately thirty years, during which time he was exposed to loud noises. He was last employed by Kentucky May from April 9, 1996, until March 5, 2003. Damron was an electrician and equipment mechanic for Kentucky May and was, at times, required to work underground. When he worked underground he was supplied with ear plugs. According to Damron, after he left Kentucky May's employment, he was not exposed to loud noises.

Initially, Damron filed his application for adjustment of hearing loss claim on January 4, 2006. He supported his claim by filing a report by Dr. Charles J. Hieronymus, a family practitioner, who diagnosed bilateral hearing loss, chronic tinnitus, and impaired speech discrimination. Further, Dr. Hieronymus's opinion was that the hearing loss was related to Damron's exposure to noise. Dr. Hieronymus concluded that Damron had 12 percent impairment under the standard in the 2000 version of the American Medical Association's *Guides to the Evaluation of Permanent Impairment (Guides)*. In addition to that evaluation, he

was also evaluated by Dr. Joseph Touma, who found 1 percent impairment, and University evaluators, Drs. Raleigh Jones and Jennifer Shinn, who assessed 7 percent impairment.

On May 11, 2006, Damron's settlement with Kentucky May was approved by the ALJ. The settlement agreement cites a hearing loss based on exposure to occupational noise that Damron settled for $1,000 with an additional $100 that waived his right to future medical benefits and retraining. No impairment rating was noted in the agreement itself although the agreement stated that the date of last exposure was March 5, 2003.

On August 30, 2007, Damron filed a motion to reopen his claim alleging that his hearing loss had worsened since the settlement. Besides his own belief that his hearing loss had increased, Damron supported his motion by an attached affidavit, which provided a new evaluation by Dr. Hieronymus that determined Damron now had 14 percent functional hearing impairment. The claim was assigned to an ALJ, and a benefit review conference was held on February 14, 2008. He ordered a University evaluation, which Drs. Jones and Shinn administered on April 9, 2008. They assessed Damron's current impairment at 13 percent, which was almost twice their initial evaluation of 7 percent.

In the first inquiry, Kentucky May relied on Dr. Touma's evaluation of hearing loss, which had assessed the impairment at 1 percent. In the second action, Dr. Touma testified that he evaluated Damron again on September 14, 2007. At his deposition, Dr. Touma acknowledged that his first report was in error

because it incorrectly stated the impairment rating at 1 percent when it should have been 8 percent. Furthermore, Dr. Touma found that Damron's hearing impairment was now 10 percent even though he had not been exposed to further industrial noise. Kentucky May argued that the reports of the evaluators indicate that Damron's increased impairment was due to natural aging and, thus, Damron was not entitled to increased benefits.

The final hearing was held on September 16, 2008, and on November 4, 2008, the ALJ entered his opinion and order. According to his review of the evidence, interpretation of KRS 342.125, KRS 342.7305, and applicable caselaw, he found that Damron's hearing loss was consistent with workplace exposure, the impairment had increased, and Damron was entitled to increased workers' compensation benefits.

Kentucky May then filed a petition for reconsideration asserting the ALJ had mischaracterized and misstated the testimony of Dr. Jones and Dr. Touma and misapplied the holding in *AK Steel Corp. v. Johnston*, 153 S.W.3d 837 (Ky. 2005). Additionally, Kentucky May pointed out the ALJ erred in the length of time benefits were to be paid upon reopening. The ALJ denied, in part, and granted, in part, the petition for reconsideration. He granted the portion of the motion that amended the award to reflect the appropriate length of time for the benefits but granted Kentucky May no other relief. The Board in its opinion entered on April 29, 2009, reversed the award and remanded the case to the ALJ

with directions to dismiss the motion to reopen. Subsequently, Damron filed his notice of appeal.

ISSUE

The issue is whether Damron is entitled to reopen his original case and receive increased benefits under KRS 342.125 and KRS 342.7305. In order to resolve the issue, it must it be ascertained whether KRS 342.125 is necessary for reopening the case and, if yes, whether the causation of the increased hearing loss impairment is based on exposure to industrial noise or the natural process of aging.

STANDARD OF REVIEW

We begin with an examination of the standard used by the Court of Appeals to review a decision of the Workers' Compensation Board. First, we must determine whether the Board misconstrued the law or flagrantly erred in evaluating the evidence to the point of causing gross injustice. *Daniel v. Armco Steel Co., L.P.*, 913 S.W.2d 797, 798 (Ky. App. 1995). Here, Damron, the party with the burden of proof, was successful before the ALJ, so that the issue on appeal is whether the ALJ's decision is supported by substantial evidence. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). If that is the case, the Board cannot substitute its view of the evidence for that of the fact-finder, the ALJ. But the standard of review differs in regard to appeals of an ALJ's decision concerning a question of law or a mixed question of law and fact. With regard to questions of law or mixed questions of law and fact, neither we nor the Board are bound by an ALJ's decisions on questions of law or an ALJ's interpretation and application of the law

to the facts. In either case, the standard of review is *de novo*. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

ANALYSIS

On appeal, Kentucky May maintains that KRS 342.125(1)(d) should be construed to mean Damron can only succeed if he establishes a worsening of the impairment due to the injury and not, in this case, due to Damron's increase in age. The pertinent portion of KRS 342.125(1)(d) reads as follows:

> (1) Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:
> . . . .
>
> > (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

In contrast, Damron contends that KRS 342.125 is not the controlling statute in this situation. Although Damron agrees that KRS 342.125 is a general statute used for the purpose of reopening and reviewing any award on the grounds of a "[c]hange of disability as shown by objective medical evidence of worsening or improvement of the impairment due to a condition caused by objective injury since the date of the award or order[,]" he suggests that this general language does not apply to hearing impairment loss. Instead, Damron argues that KRS 342.7305(1) specifically deals with "occupational hearing loss caused by either a single incident

of trauma or by repetitive exposure to hazardous noise over an extended period of employment[.]"

Effective December 12, 1996, the legislature enacted KRS 342.7305, which specifically addresses occupational hearing loss due to hazardous noise. It provides, in pertinent part, as follows:

> (1) In all claims for occupational hearing loss caused by either a single incident of trauma or by repetitive exposure to hazardous noise over an extended period of employment, the extent of binaural hearing impairment shall be determined under the latest available edition of the American Medical Association "Guides to the Evaluation of Permanent Impairment."
>
> (2) Income benefits payable for occupational hearing loss shall be as provided in KRS 342.730, except income benefits shall not be payable where the binaural hearing impairment converted to impairment of the whole person results in impairment of less than eight percent (8%). No impairment percentage for tinnitus shall be considered in determining impairment to the whole person.
>
> (3) The executive director shall provide by administrative regulation for prompt referral of hearing loss claims for evaluation, for all medical reimbursement, and for prompt authorization of hearing enhancement devices.
>
> (4) When audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure and the employee demonstrates repetitive exposure to hazardous noise in the workplace, there shall be a rebuttable presumption that the hearing impairment is an injury covered by this chapter, and the employer with whom the employee was last injuriously exposed to hazardous noise shall be exclusively liable for benefits.

In summary, Damron believes that KRS 342.125 governs when an ALJ may reopen and review; but, it is not the controlling statute for purposes of determining and calculating benefits for an occupational hearing loss claim.

Damron, Kentucky May Mining, and both the ALJ and the Board discuss *AK Steel Corp.,* 153 S.W.3d at 837, and use it to bolster their respective positions. The ALJ proffers that the Kentucky Supreme Court in *AK Steel Corp.* held that, "[u]nlike KRS 342.0011(1), KRS 342.7305(4) makes no reference to the natural aging process and does not require direct proof of causation." *Id*. at 841. So, the ALJ, in essence, says that KRS 342.7305(4) is a rebuttable presumption that the worker's hearing loss is an injury upon proof of long-term hazardous noise exposure. Further, according to the ALJ's interpretation of KRS 342.7305, since the legislature excluded tinnitus from being considered an impairment in the statute, it would have also specifically excluded natural aging as an exception to the calculation of income benefits. Similarly, Damron cites *AK Steel Corp.* for the proposition that "KRS 342.7305 is a specific and comprehensive provision addressing claims for traumatic hearing loss; therefore, it may be viewed as controlling such claims." *Id.* at 841; citing *Boyd v. C & H Transp.*, 902 S.W.2d 823 (Ky. 1995). Simply put, Damron and the ALJ are suggesting that the case holds that the general statute, KRS 342.125, is superseded by the more specific statute, KRS 342.7305.

In contrast, Kentucky May states that the ALJ erroneously relied on *AK Steel Corp., supra,* because the case has nothing to do with reopening a

previously settled case. No discussion of reopening or KRS 342.125 is included in *AK Steel Corp.* and, hence, it is not applicable to the situation herein. Kentucky May maintains that KRS 342.125(1)(d) imposes a direct burden on Damron to reopen his case by showing that his condition worsened because of exposure to the original industrial noise found in his first complaint and that his increased impairment was not the result of aging. Restated, Kentucky May asserts that statute should be construed to mean Damron can only succeed if he establishes a worsening of the impairment due to the injury and not, as the evidence in this case shows, due to Damron's increase in age. The Board agreed with Kentucky May's analysis. It cited the discussion of reopening by the Kentucky Supreme Court in *House v. BJK Industries*, 103 S.W.3d 13, 16 (Ky. 2003):

> As a result of the 1987 amendment, the focus of inquiry at reopening became whether the effects of a work-related injury were a substantial factor in causing the worker's post-award loss of earning capacity.
>
> When the merits of the reopening were considered, the burden was on the claimant to show that he sustained a post-award increase in occupational disability due to the effects of his injury.

We concur with the Board's analysis. *AK Steel Corp.* has no applicability to cases that are being reopened. The Supreme Court in *AK Steel Corp.* noted that KRS 342.7305 was a specific and comprehensive provision addressing claims for traumatic hearing loss and, therefore, it may be viewed as controlling such claims. *AK Steel Corp*. at 841. It referred, however, to initial claims for hearing impairment and made no reference to reopening a settled case.

Likewise, we believe not only that the Supreme Court was discussing an initial claim in *AK Steel Corp.,* but also that the legislature mandated that KRS 342.125 apply to all workers' compensation cases involving reopening, including settled cases. In fact, the law is well established that an approved settlement agreement carries the force and effect of an award. *Jude v. Cubbage*, 251 S.W.2d 584, 586 (Ky. 1952). So, in order to reopen his case, Damron must follow the precepts of KRS 342.125.

Clearly, the only way to increase occupational disability benefits because of a worsened condition is to follow the strictures of the reopening statute. Based on the statutory language therein, claims may be reopened based upon: (1) Fraud; (2) Newly-discovered evidence . . .; (3) Mistake; [or] (4) Change of disability as shown by objective medical evidence[.] KRS 342.125(1)(a) – (d). Here, Damron is constrained by KRS 342.125(1)(d) to prove that the change in his condition was caused by the original **compensable** condition. Our opinion is that the evidence provided showed that the additional hearing loss was caused by the effects of aging. Notwithstanding *AK Steel Corp.*, which involved an original claim for hearing impairment and its interface with aging, aging upon reopening a case is not a condition "caused by the injury since the date of the award or order." KRS 342.125(1)(d).

Furthermore, we conclude, as did the Board, that, based on the medical and lay evidence presented on reopening, the increased hearing loss was not shown to be a result of the original injury. Damron testified that he had not

been exposed to additional industrial noise since his settlement agreement. Most significantly, all the testifying physicians attributed the increase in hearing impairment to the natural progression of aging and not to any new occupational noise exposure.

We are cognizant that the Board's decision was a split one. The dissenting board opinion highlighted that testimony was presented showing that Damron's hearing loss impairment rating, including the subsequent increase in hearing loss, was compatible with that caused by hazardous noise exposure. But that same doctor, Dr. Touma, also said that the increase in hearing impairment was not related to noise exposure. While the doctor merely explained that the pattern of the increased hearing loss remained consistent with noise-induced hearing loss, he acknowledged particularly that Damron's increase in hearing impairment was not related to noise exposure. Finally, if KRS 342.125 did not apply to situations where parties seek additional benefits because of hearing impairment, then all cases based on noise-induced hearing loss awards are subject to reopening regardless of the etiology for the increase in the hearing impairment.

CONCLUSION

We affirm the Board and remand this matter to the ALJ for further proceedings consistent with this Opinion.

ACREE, JUDGE, CONCURS AND FILES SEPARATE OPINION.

ACREE, JUDGE, CONCURRING: I write separately because the majority opinion properly harmonizes the statutes in question.

The legislature saw fit to allow a rebuttable presumption that when exposure to industrial noise and hearing loss are *contemporaneous*, the former is the cause of the latter. Hence, KRS 342.7305(4) was enacted.

But when a worker, compensated for hearing loss experienced contemporaneously with his exposure to industrial noise, later desires to reopen his case, it makes no sense to allow the same presumption – the worker's additional hearing loss is *not contemporaneous* with his exposure to industrial noise, but with an exposure that occurred *in the past*.[2] Consequently, there is no reasonable justification for deviating from KRS 342.125 as the proper standard for reopening a claim. I find both the statutory scheme and the majority opinion entirely logical.

HARRIS, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

HARRIS, SENIOR JUDGE, DISSENTING: Respectfully, I dissent.

Juxtaposed against the Kentucky Supreme Court's construction of KRS 342.7305 in *AK Steel Corp. v. Johnston*, 153 S.W.3d 837 (Ky. 2005), the majority's construction of KRS 342.125 in the present case gives rise to what I believe is an absurd, unjust, and unreasonable result; *viz*., a claimant asserting an initial claim for hazardous workplace noise hearing loss under KRS 342.7305 has the benefit of a rebuttable presumption that his entire hearing loss is attributable to exposure to hazardous noise in the workplace, not to age-related impairment. But

[2] A claim for hearing loss based on subsequent contemporaneous exposure to industrial noise would be grounds for a new claim, not the reopening of an old one, thereby justifying application of the presumption contained in KRS 342.7305(4).

when that same claimant, having prevailed by settlement or award on his initial hearing loss claim seeks to reopen his claim based on an alleged worsening of his hearing impairment, this age-related hearing loss will be excluded from consideration on the threshold reopening issue of whether his then-present hearing impairment is due to "a condition caused by the injury since the date of the award or order." KRS 342.125(1)(d).

It was recently written in *Richardson v. Louisville/Jefferson County Metro Government*, 260 S.W.3d 777, 779 (Ky. 2008), that:

> [O]ur goal in construing a statute is to give effect to the intent of the General Assembly. . . . The statute must be read as a whole and in context with other parts of the law.
>
> . . . We presume, of course, that the General Assembly did not intend an absurd or manifestly unjust result. [Citations omitted.]

This Court can, and should, avoid this result by indulging in the presumption against unjust or absurd results and, therefore, construing KRS 342.125 harmoniously with KRS 342.7305, as construed in *AK Steel*. Such a construction would comport with our duty to observe three "established rules of statutory construction which are relevant to analyze the apparent conflict" between KRS 342.125 and KRS 342.7305. *Abul-Ela v. Kentucky Bd. of Medical Licensure*, 217 S.W.3d 246, 250 (Ky. App. 2006). These rules are:

> (1) that it is the duty of the court to ascertain the purpose of the General Assembly, and to give effect to the legislative purpose if it can be ascertained; (2) that conflicting Acts should be considered together and harmonized, if possible, so as to give proper effect and

> meaning to each of them; and (3) that as between legislation of a broad and general nature on the one hand, and legislation dealing minutely with a specific matter on the other hand the specific shall prevail over the general. *City of Bowling Green v. Board of Education of Bowling Green Independent School District*, 443 S.W.2d 243, 247 (Ky. 1969).

Abul-Ela, 217 S.W.3d at 250.

I would reverse the Board's decision and reinstate the ALJ's opinion.

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