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Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000927-WC

JOE MARTINEZ APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01692

PEABODY COAL COMPANY;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, COMBS, AND STUMBO, JUDGES.

CLAYTON, JUDGE: This is the second appeal involving the Workers' Compensation Board ("Board") decision finding against the employee, Joe Martinez, in his claim for compensation due to pneumoconiosis. Martinez contends that Kentucky Revised Statutes (KRS) 342.316 violates his rights to

Equal Protection. For the foregoing reasons, we reverse the Board's decision and remand the case for reconsideration with the appropriate standard.

PROCEDURAL BACKGROUND

Martinez filed a petition for black lung benefits on October 24, 2002. He asserted he had pneumoconiosis due to his exposure to coal dust. This claim was dismissed by the Administrative Law Judge ("ALJ"). Martinez filed an appeal with the Board and the dismissal was affirmed. His appeal dealt with the constitutionality of KRS 342.316(3). This issue was pending before the Supreme Court of Kentucky in the case of *Hunter Excavating v. Bartrum*, 168 S.W.3d 381 (Ky. 2005), at the time and, thus, Martinez's case was held in abeyance.

The Supreme Court then handed down a decision in *Hunter*, and due to its holding, this Court vacated the Board's decision and remanded the case to the Board and ALJ. The Court found that Martinez had been denied the opportunity to submit additional evidence which might overcome the consensus reading that the ALJ and Board had accepted.

The ALJ once again dismissed Martinez's case. The ALJ found that Martinez had failed to overcome the consensus classification as no new evidence had been presented. After the new ruling from the ALJ, which was affirmed by the Board, Martinez filed this appeal. He now argues that while the Supreme Court had dealt with the due process requirements of KRS 342.316(3) in *Hunter*, it had not dealt with the equal protection issues of the statue. Once again, this case is before our Court.

FACTUAL BACKGROUND

Martinez brought this action on October 24, 2002, as an Application for Resolution of a coal worker's pneumoconiosis claim ("Application") arising out of his employment with Peabody Coal Company ("Peabody"). Along with his Application, Martinez tendered a chest X-ray as well as a report from Dr. Glen Baker finding 1/0 pneumoconiosis.

Peabody had Dr. Robert Neill Pope ("Dr. Pope") examine Martinez on December 23, 2002. Dr. Pope's report indicated that he found no evidence of pneumoconiosis. Dr. Pope diagnosed a mild cardiomegaly and a tortuous descending thoracic aorta. As a result of these reports, the Commissioner filed a Notice that there was no consensus with the initial two "B" Reader reports. As a result and pursuant to KRS 342.316, the two x-rays were forward to three "B" Readers for interpretation. Drs. Ramakrishnan and Rosenberg each found Category 0/1. Dr. Dineen found Category 0/0. The Commissioner then gave notice that the "B" Reader reports indicated a consensus reading.

Peabody thereafter filed a timely Notice of Claim Denial. The ALJ found that the requirements of KRS 342.316(13) had been overcome. As set forth above, the Board affirmed the decision of the ALJ, we held the case in abeyance and then remanded it for the opportunity to provide further evidence.

On remand, Martinez did not provide any further medical evidence regarding his claim. He did, however, argue that the burden placed upon him under KRS 342.316 was a violation of his right to equal protection.

STANDARD OF REVIEW

In reviewing a decision of the Board, our function "is to correct the Board only where [we] perceive[] 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).

"[T]he claimant bears the burden of proof and the risk of non-persuasion before the fact-finder with regard to every element of a workers' compensation claim." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores,* 560 S.W.2d 15, 16 (Ky. 1977).

DISCUSSION

In *Hunter*, the Kentucky Supreme Court examined the issue of whether KRS 342.316's two-step consensus and subsection (13)'s presumption that the consensus x-ray is correct absent clear and convincing evidence to the contrary, deprived the applicant of a meaningful opportunity to rebut the consensus in contravention of his constitutional rights. The Supreme Court found that "KRS 342.316(3) is constitutional, but that 803 [Kentucky Administrative Regulations]

(KAR) 25:009, § 3(1) and (2) conflict with KRS 342.316(13) to the extent that they prohibit additional reports of the x-rays that were considered in the consensus process. To that extent, they are void." *Hunter Excavating*, 168 S.W.3d at 382.

It was due to the finding in *Hunter Excavating,* that this Court remanded Martinez's original appeal to the Board and ALJ. This allowed Martinez an opportunity to submit further evidence in the consensus process. Martinez did not submit additional proof, but rather contended that KRS 342.316 unlawfully discriminates between workers who are injured over time by harmful occupational exposure to coal dust versus those workers who are injured by harmful occupational exposure to other particulates. He asserts that not only is the statute not rationally related to any state objective, but that it raises the bar so high that it prevents and denies the benefits to injured miners. Thus, he argues his right to equal protection under both the United States and Kentucky Constitution was denied. The appellees argue that the equal protection argument was addressed in *Durham v. Peabody Coal Co*., 272 S.W.3d 192 (Ky. 2008).

KRS 342.316 provides, in relevant part:

> (3) The procedure for filing occupational disease claims shall be as follows:
>
> > a) The application for resolution of claim shall set forth the complete work history of the employee with a concise description of injurious exposure to a specific occupational disease, together with the name and addresses of the employer or employers with the approximate dates of employment. The application shall also include at least one (1) written medical report supporting his claim. This medical report shall

> be made on the basis of clinical or X-ray examination performed in accordance with accepted medical standards and shall contain full and complete statements of all examinations performed and the results thereof. The report shall be made by a duly-licensed physician. The [commissioner] shall promulgate administrative regulations which prescribe the format of the medical report required by this section and the manner in which the report shall be completed.
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> ****
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> (13) For coal-related occupational pneumoconiosis claims, the consensus procedure shall apply to all claims which have not been assigned to an administrative law judge prior to July 15, 2002. The consensus classification shall be presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence. If an administrative law judge finds that the presumption of correctness of the consensus reading has been overcome, the reasons shall be specially stated in the administrative law judge's order.

Martinez argues that under this statute, the ALJ has no discretion and has little or no room to consider evidence other than the consensus finding. Martinez contends that the ALJ may not consider the years of exposure to coal dust, the type of work performed by the individual claimant, or the claimant's testimony regarding his symptoms and related disabilities. In this way, Martinez asserts the statute is in contravention of the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.

The Equal Protection Clause requires people who are similarly situated to be treated equally. *See Weiand v. Board of Trustees of Kentucky*

Retirement Systems, 25 S.W.3d 88, 92 (Ky. 2000). If they are not, there must be a rational basis to justify the disparate treatment of similarly situated individuals. In *Durham,* 272 S.W.3d at 195*,* the Kentucky Supreme Court held that:

> Although KRS 342.316 treats workers who suffer from coal workers' pneumoconiosis differently from those who sustain a traumatic injury, it is neither arbitrary nor unfair to the former group. KRS 342.316 employs a consensus procedure, but workers found to suffer from category 1 coal workers' pneumoconiosis and who have no respiratory impairment may be entitled to benefits under KRS 342.732(1)(a). Workers who sustain a traumatic injury may submit various types of proof, but they must prove a permanent impairment rating in order to receive any benefits under KRS 342.730(1). We conclude, however, that inherent differences between coal workers' pneumoconiosis and traumatic injuries provide a reasonable basis or substantial and justifiable reason for different statutory treatment.

The Supreme Court continued:

> Although KRS 342.316(13) may appear to be discriminatory, it does not actually impose a greater burden of proof on workers who claim benefits under KRS 342.732. All claimants bear the burden of proof and the risk of nonpersuasion before the ALJ with regard to every element of a workers' compensation claim. In order to sustain that burden, a claimant must go forward with substantial evidence to prove each element, in other words, with evidence sufficient to convince reasonable people.

Id. at 196.

The Court concluded that it "perceived a legitimate state interest in treating coal workers' pneumoconiosis differently than traumatic injuries." *Id.* at 198. The Court found that the "pneumoconiosis [is] proven with x-ray evidence, but the evidence necessary to prove the existence and extent of a traumatic injury

varies with the type of injury. [Thus, the] difference provides a reasonable basis for treating the conditions differently." *Id.*

Pursuant to KRS 342.316, a claimant must submit an x-ray with an interpretation when asserting a claim. The statute then allows the employer to submit an x-ray and interpretation. If the two are not in agreement, the highest quality x-ray is submitted to a panel of "B" readers. The "B" readers are chosen at random to make their own interpretation. If the "B" readers cannot agree, it is up to the ALJ to make a finding based upon the evidence. If the "B" readers reach a consensus, however, the "classification shall be presumed to be the correct classification of the employee's condition unless overcome by clear and convincing evidence." KRS 342.316(13).

While *Durham, supra*, would appear to be dispositive of the equal protection issue currently before us, it is not. *Durham* dealt with traumatic injury in miners versus pneumoconiosis. The issue currently before us is whether KRS 342.316 violates equal protection by treating pneumoconiosis in coal miners differently than that similar lung disease.

In *Cain v. Lodestar Energy, Inc.*, 302 S.W.3d 39, 43 (Ky. 2009), the Kentucky Supreme Court held that:

> KRS 342.316(3)(b)4.e. denied the claimant equal protection because it discriminated between him and a similarly-situated worker whose employer also submitted evidence of category 1 disease but whose claim was not subject to the second phase of the consensus process. KRS 342.316(3)(b)4.e. creates two classes of workers based solely on the amount of discrepancy between the

> worker's and employer's evidence. We discern no rational or reasonable basis for such discrimination where the employer's evidence effectively concedes the worker's entitlement to a RIB. We conclude, therefore, that KRS 342.[316](3)(b)4.e. denies equal protection under both the federal and state constitutions when applied to such a claim.

In Martinez's case, the difference is the burden of proof imposed upon him and others with pneumoconiosis due to coal mining (CWP). While these individuals are subjected to a consensus panel, other pneumoconiosis claims are not.

Since it is apparent that CWP cases are treated differently, the only remaining question is whether there is a "substantial or justifiable reason" for the disparate treatment of similarly situated compensable illnesses. We find there is none. There simply is no substantial nor justifiable reason to treat workers who contract CWP differently than those who contract pneumoconiosis due to the inhaling of other particulates. Thus, KRS 342.316 denied Martinez equal protection under the law.

For the foregoing reasons, we find that KRS 342.316 is unconstitutional in the burden that it establishes for those who make a claim for CWP. We therefore reverse the opinion of the Workers' Compensation Board and remand for further proceedings consistent with this opinion.

ALL CONCUR.

Thomas E. Springer III
Madisonville, Kentucky

BRIEF FOR APPELLEE PEABODY COAL COMPANY:

Peter Glauber
Louisville, Kentucky