

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 26, 2015

CLAIM NO. 201401614

BILL GRAY, JR.

PETITIONER

VS.

APPEAL FROM HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE

JAMES RIVER COAL/BEECH FORK MINE
HON. J. LANDON OVERFIELD, FORMER CALJ
AND
HON. ROBERT L. SWISHER,
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING
AND ORDER

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Bill Gray, Jr. ("Gray") appeals from the October 29, 2014 Order of Hon. J. Landon Overfield, then Chief Administrative Law Judge ("CALJ") dismissing his pneumoconiosis claim against James River Coal/Beech Fork

Mine ("James River") and the December 29, 2014 order overruling his petition for reconsideration rendered by Hon. Robert L. Swisher, CALJ. Gray argues his claim, filed within five years of his last exposure, is timely. Finding no error, we affirm.

Gray filed his claim on August 22, 2014 alleging he became affected by coal workers' pneumoconiosis ("CWP"), chronic bronchitis and chronic obstructive pulmonary disease ("COPD") on August 24, 2009 as a result of constant exposure to dust, gas and other noxious fumes. His last date of exposure was August 25, 2009. Gray supported his application with the February 5, 2011 report of Dr. Glen Baker, who read an x-ray taken that day as showing Coal Workers' Pneumoconiosis ("CWP"), Classification 1/1. Ventilation studies revealed a mild obstructive defect. Dr. Baker diagnosed CWP 1/1, COPD with mild obstructive defect, and chronic bronchitis, all caused by coal dust exposure. Dr. Baker also indicated Gray had a mild respiratory impairment. Dr. Baker concluded Gray's CWP 1/1, COPD with mild obstructive defect, and chronic bronchitis have an adverse effect on his respiratory system and contribute to his mild pulmonary impairment, due significantly to his coal dust exposure.

James River filed a motion to dismiss, special answer, and Form 111 asserting Gray's claim is barred by the statute of limitations. By order dated October 29, 2014, CALJ Overfield held:

Plaintiff's supporting medical evidence is in the form of a U.S. Department of Labor Coal Mine Workers Pneumoconiosis medical report dated February 5, 2011. Attached to the report is an ILO report of a chest x-ray taken February 5, 2011 and read that same date by Glen R. Baker, M.D., noting Plaintiff has evidence of pneumoconiosis. While Plaintiff's claim was filed within five (5) years of his last exposure, it was obviously not filed within three (3) years of the date of the first distinct manifestation of an occupational disease in the nature of a February 5, 2011 x-ray read as positive for pneumoconiosis. The CALJ, having reviewed the pleadings and being fully and sufficiently advised thereby,

It is **ORDERED** Defendant-Employer's motion is **SUSTAINED** and Plaintiff's occupational disease claim is **DISMISSED** as barred by the applicable statute of limitations.

Gray filed a petition for reconsideration arguing the ALJ erred in dismissing the claim because it was filed within five years of his last exposure. Further, Gray contended an x-ray reading is not a "symptom" within the plain meaning of the statute.

CALJ Swisher issued an order on December 29, 2014 overruling Gray's petition for reconsideration. He determined Gray's petition is simply a re-argument of the merits of the claim and did not demonstrate any patent error on the face of the October 29, 2014 Order.

On appeal, Gray again argues a positive x-ray interpretation does not constitute a symptom "reasonably sufficient to apprise him that he has contracted the disease" which would trigger the statute of limitations. Because his claim was filed within five years of his last exposure to coal dust, Gray argues it is timely.

As the party raising a limitations defense, James River had the burden of proof. Kentucky Container Service, Inc. v. Ashbrook, 265 S.W.3d 793 (Ky. 2008). If the party with the burden of proof before the CALJ was successful, the sole issue on appeal is whether the CALJ's decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

KRS 342.316 provides:

The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of

symptoms reasonably sufficient to apprise the employee that he or she has contracted the disease, whichever shall last occur; and if death results from the occupational disease within that period, unless a claim therefor be filed with the commissioner within three (3) years after the death; but that notice of claim shall be deemed waived in case of disability or death where the employer, or its insurance carrier, voluntarily makes payment therefor, or if the incurrence of the disease or the death of the employee and its cause was known to the employer. However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard, except that, in cases of radiation disease or asbestos-related disease, a claim must be filed within twenty (20) years from the last injurious exposure to the occupational hazard.

KRS Chapter 342 does not define "symptom."

However, Stedman's Medical Dictionary, 28th Edition at page 1884, defines a symptom as "any morbid phenomenon or departure from the normal structure, function, or sensation, experienced by the patient and indicative of disease."

Contrary to Gray's argument, we hold a positive x-ray reading constitutes a symptom for purposes of the statute of limitations. The opacities revealed by x-ray are a "morbid phenomenon or departure from the normal

structure" of the lung indicative of the disease of CWP. Thus, Dr. Baker's x-ray interpretation is evidence of the presence of symptoms of CWP in February 2011. Dr. Baker communicated the diagnosis to Gray who filed a federal claim in February 2011. Because Gray was aware of his symptoms and diagnosis in February 2011, the statute required that he file his state claim for CWP by February, 2014. His application filed August 22, 2014 is untimely and barred by the statute of limitations.

Even if we assume *arguendo* an x-ray interpretation is insufficient to establish Gray had symptoms reasonably sufficient to apprise him that he had contracted the disease of CWP, Dr. Baker found Gray's disease had adversely affected the respiratory system, producing a mild pulmonary impairment. The pulmonary impairment is a departure from the normal function of the lungs and constitutes a symptom. Again, Dr. Baker related this impairment to CWP and informed Gray of the relationship in February 2011. Dr. Baker's report is substantial evidence supporting the conclusion Gray had a distinct manifestation of an occupational disease on February 5, 2011. The CALJ correctly ruled a claim filed more than three years after February 5, 2011 is barred by KRS 342.316.

Finally, Gray requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, **IT IS HEREBY ORDERED** the request is **DENIED**.

Accordingly, the October 29, 2014 Order of Hon. J. Landon Overfield and the December 29, 2014 order overruling Gray's petition for reconsideration rendered by Hon. Robert L. Swisher are hereby **AFFIRMED**.

ALL CONCUR.

REBEKKAH B. RECHTER, MEMBER
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