Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 8, 2016

CLAIM NO. 201400515

JAMES RIVER COAL SERVICE CO. PETITIONER

VS. **APPEAL FROM HON. R. ROLAND CASE, ADMINISTRATIVE LAW JUDGE**

JENNINGS FIELDS and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

ALVEY, Chairman. James River Coal Service Co. ("James River") seeks review of the Opinion, Award and Order rendered November 24, 2015 by Hon. R. Roland Case, Administrative Law Judge ("ALJ"), awarding Jennings Fields ("Fields") Retraining Incentive Benefits (RIB) pursuant to KRS 342.732(1)(a)1. James River also appeals from the

December 29, 2015 order denying its petition for reconsideration.

On appeal, James River argues the ALJ failed to properly consider whether Fields demonstrated a worsening of his condition attributable to the work performed while in its employ. James River next argues the ALJ did not properly consider whether Fields' coal workers' pneumoconiosis ("CWP") resulted solely from a pre-existing disability or impairment. James River next argues the ALJ did not properly consider whether Fields' CWP claim was precluded by the fact he had previously been compensated for RIB. Finally, James River argues the ALJ erred by failing to find it was entitled to a credit if Fields was awarded benefits based upon his current diagnosis of CWP. Because we determine the March 28, 1994 settlement agreement was based upon a compromise, and did not contain a determination Fields had actually contracted CWP, it does not constitute a "one-time only" award of RIB benefits pursuant to KRS 342.732(1)(a), and we therefore affirm.

Fields filed a Form 102-CWP on March 3, 2014 alleging he contracted CWP while employed as a heavy equipment operator by James River at a coal mine located in Perry County, Kentucky. Fields stated he had worked for over thirty-six years in the coal mining industry, for

multiple employers, with November 6, 2013 as his last date of exposure. In the Form 102-CWP, Fields noted he had previously filed a claim for CWP while employed by Ikerd & Bandy, in claim number 1993-40827. In support of his current claim, Fields attached the December 6, 2013 x-ray report of Dr. Glen Baker who read an x-ray of that date as quality 1, with a 2/2 profusion of p and t opacities in all 6 lung zones. In addition to the CWP claim, Fields also filed hearing loss and injury claims which are not relevant to this appeal, and will not be addressed.

Fields testified by deposition on May 19, 2014, and again at the hearing held October 6, 2015. Fields was born on January 25, 1953, resides in Manchester, Kentucky, and is a high school graduate with no specialized or vocational training. He began working as a bulldozer operator for James River in November 2006, and last worked there on November 6, 2013, when he was laid off. In addition to operating a bulldozer, he occasionally operated rock trucks and end loaders. He stated the bulldozer he operated had a closed cab, and was air conditioned. During the seven years he was employed by James River, Fields worked 42 hours per week. He earned $21.50 per hour at the time he was laid off.

Fields admitted at his deposition he filed a claim for “first-stage black lung” while employed at Ikerd & Bandy, where he worked from 1987 to 1995. He alleged he had breathing problems at the time he filed that claim. He supported his previous claim with a report from Dr. Baker. He believed he settled the claim for $17,000.00 in lump sum. At the hearing, he acknowledged the previous claim for CWP benefits against Ikerd & Bandy was settled for a lump sum of $16,250.00.

Fields sometimes has difficulty breathing for which he uses a Ventolin inhaler and takes Singulair. He does not believe he can perform his previous work as an equipment operator due to his breathing difficulty, which he admitted he has experienced for fifteen to twenty years.

In addition to Dr. Baker’s December 2013 report, Fields filed the report of the spirometric testing performed at Stone Mountain Health Service on June 8, 2015. That testing demonstrated the highest FVC as 85% of predicted, and the highest FEV^1 as 73% of predicted.

An evaluation was performed by Dr. Byron Westerfield of Commonwealth Associates on September 9, 2015, at the request of the Commissioner of the Department of Workers’ Claims because no university evaluator was available. Dr. Westerfield stated an x-ray taken on the

date of the examination was a film quality 1, which he read as 1/1 for CWP in all six lung zones, with q/p opacities. Spirometric testing performed on the date of the examination demonstrated an FVC of 101% of predicted, and an FEV[1] of 85% of predicted, which Dr. Westerfield determined was within the realm of normal resulting in no impairment. Dr. Westerfield diagnosed Fields with CWP caused by his exposure to coal dust in the severance and processing of coal, resulting in no pulmonary impairment. He further opined Fields retains the pulmonary capacity to return to his previous position in coal mining, or work of equal energy requirements in other industries.

The March 28, 1994 settlement agreement was introduced at the hearing. The agreement, which was approved by Hon. Thomas A. Dockter, Administrative Law Judge ("ALJ Dockter"), stated as follows:

> Based upon an average weekly wage of $ maximum, plaintiff shall receive compensation as follows: **Based upon the evidence, the ALJ could dismiss or enter an award of benefits under KRS 342.732(1)(a).** The Defendant/Employer and Plaintiff wish to settle their dispute in this claim for $16,250.00, lump sum. This amount is inclusive of all attorney fees, rehabilitation, and no medical expenses apply as this is a claim for simple coal worker's pneumoconiosis. **This is a compromised settlement. (Emphasis added).**

A telephonic Benefit Review Conference ("BRC") was held on September 30, 2015. The BRC order and memorandum reflects the sole issue preserved for determination was benefits per KRS 342.732. At the hearing, the issues of pre-existing disability and impairment, work-relatedness/causation, and the effect of a previous claim for CWP benefits were listed as additional issues.

At the hearing, James River also introduced some of the x-ray reports from Fields' prior claim. A report from Dr. Judah Skolnick dated August 5, 1993 of an x-ray taken July 26, 1993 was interpreted as a film quality 2, and read as 1/2 for CWP with p/p opacities in all six lung zones. An interpretation of the same x-ray by Dr. Baker on July 26, 1993 was read as a quality 1, with q/t opacities in five lung zones, and read as 1/0 for CWP. An x-ray dated September 21, 1993 was read by Dr. Abdi Veazy as a film quality 1, and was interpreted as 1/0 for CWP with q/t opacities in all six lung zones. No other reports or medical information from the 1993 claim were submitted as evidence in Fields' current claim despite language contained in the settlement agreement indicating evidence was introduced in the 1993 claim which would have supported a finding Fields did not have CWP.

In his November 24, 2015 decision, the ALJ summarized the medical and lay evidence. Relying upon the opinion of Dr. Westerfield, the ALJ determined Fields had x-ray evidence of the presence of Category 1 CWP with no pulmonary impairment. The ALJ specifically found as follows:

> It is therefore found the Plaintiff has established the presence of Coal Workers' Pneumoconiosis, Category 1/1 and no pulmonary impairment based upon pulmonary function studies above 80%. The plaintiff will only be entitled to a Retraining Incentive Benefit pursuant to KRS 342.732(1)(a)1. Also, since the plaintiff was sixty (60) years old at the time of his last exposure, he does have the option pursuant to KRS 342.732(1)(a)7 to elect to receive, in lieu of Retraining Incentive Benefits, a 25% disability rating from the date of last exposure until sixty-five (65) years of age.

Regarding credit for the previous RIB settlement, the ALJ found as follows:

> Essentially, the defendant wants credit for a prior RIB settlement which has been satisfied long ago. This issue was addressed by the Kentucky Workers Compensation Board in *Sidney Coal Company, Inc. v. Mullins*, Claim No. 2006-01038. In that Opinion, the Board addressed the argument now presented by the defendant and held the employer was not entitled to credit for the previous RIB award. The Administrative Law Judge adopts the reasoning of the Kentucky Workers Compensation Board in that case.

James River filed a petition for reconsideration arguing Fields failed to prove he sustained a worsening of his condition while working in its employ. It argued Fields should not receive a second award of RIB benefits. James River argued in Sidney Coal Company, Inc. v. Mullins, WCB No. 2006-01038 (February 29, 2008), none of the evidence from the previous CWP claim was introduced into evidence. It argued in this case, reports from three B readers from the 1993 claim were introduced which established simple CWP existed at that time. James River also argued Mullins was seeking a disability, not a RIB award.

In the order denying James Rivers' petition for reconsideration dated December 29, 2015, the ALJ stated as follows:

> **IT IS THEREFORE CONSIDERED AND ORDERED** the defendant's Petition for Reconsideration is **OVERRULED**. KRS 342.316(1)(a) provides the employer liable for compensation shall be the employer in whose employment the employee was last exposed to the hazard of the occupational disease. This is clearly the defendant, James River Coal Service Co. Dr. Westerfield diagnosed Category 1/1 while two (2) readers in the prior claim had only diagnosed Category 1/0. The plaintiff settled his claim and there obviously must have been a conflict in the medical evidence

> at the time of the settlement. The law in effect at the time of last exposure is controlling. There is now an opt-out clause that did not exist at the time of plaintiff's prior claim. Although the employer attempts to distinguish *Sidney Coal Co. v. Mullins*, no other authority is offered by the defendant. The *Mullins* case is very similar to the instant case in that the plaintiff had settled for a lump sum of $14,000.00 and the Administrative Law Judge refused to allow credit and the Board affirmed. The employer argues that in *Mullins, supra,* neither party had submitted any medical evidence from the plaintiff's prior RIB claim but obviously there was some evidence or the employer would not have settled for $14,000.00[1]. Employers do not settle for $14,000.00 out of generosity in the absence of evidence. For the above reasons, the Petition for Reconsideration is OVERRULED.

We first note KRS 342.732(1)(a) as it existed on March 28, 1994 stated as follows:

> (1) Notwithstanding any other provision of this chapter, income benefits and retraining incentive benefits for occupational pneumoconiosis resulting from exposure to coal dust shall be paid as follows: (a) If the administrative law judge finds that an employee has a radiographic classification of category 1/0, 1/1 or 1/ 2, based on the latest ILO International Classification of Radiographics, resulting from exposure to coal dust, which is validated by two (2) x-rays and reports of the x-rays

[1] Mullins settled his previous claim for $14,000.00. Fields settled his previous claim for $16,250.00.

> which conform to the standards for x-rays contained in subsection (2) of KRS 342.316, **he shall award a one time only retraining incentive benefit** which shall be an amount equal to sixty-six and two-thirds percent (66 2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by KRS 342.740, multiplied by fifty percent (50%) and shall be payable for a period not to exceed two hundred and eight (208) weeks. **The one time only retraining incentive benefit awarded under this paragraph** may be collected semimonthly as provided in KRS 342.040, by the employee while he continues to work in the mining industry. The retraining incentive benefit may be collected in a lump sum when the employee leaves his hazardous employment in the mining industry if the parties agree and the agreement is approved by the administrative law judge. Based upon this examination, the administrative law judge may make appropriate findings and enter an award if indicated. (Emphasis added).

KRS 342.732(1)(a) in its current form states as follows:

> (1) Notwithstanding any other provision of this chapter, income benefits and retraining incentive benefits for occupational pneumoconiosis resulting from exposure to coal dust in the severance or processing of coal shall be paid as follows:
>
> (a) 1. If an employee has a radiographic classification of category 1/0, 1/1 or 1/2, coal workers' pneumoconiosis and spirometric test values of eighty percent (80%) or more,

the employee shall be awarded **a one (1) time only retraining incentive benefit** which shall be an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage as determined by KRS 342.740, but not more than seventy-five percent (75%) of the state average weekly wage, payable semimonthly for a period not to exceed one hundred four (104) weeks, except as provided in subparagraph 3. of this paragraph. (Emphasis added).

. . .

3. These benefits shall also be paid biweekly while an employee is actively and successfully pursuing a General Equivalency Diploma (GED) in accordance with administrative regulations promulgated by the commissioner. These benefits shall be paid in the amount of sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage not to exceed seventy-five percent (75%) of the state average weekly wage for a maximum period not to exceed seventeen (17) weeks. These income benefits shall be in addition to the maximum amount of retraining incentive benefits payable under this paragraph. (Emphasis added).

. . .

7. An employee who is age fifty-seven (57) years or older on the date of last exposure and who is awarded retraining incentive benefits under subparagraphs 1. to 4. of this paragraph, may elect to receive in lieu of retraining incentive benefits, an amount equal to sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage, not to exceed seventy-five percent (75%) of the state average weekly wage as determined by KRS

> 342.740 multiplied by the disability rating of twenty-five percent (25%) for a period not to exceed four hundred twenty-five (425) weeks, or until the employee reaches sixty-five (65) years of age, whichever occurs first, KRS 342.730(4) notwithstanding.

The complicating factor in this instance is the language contained in the 1994 settlement agreement. While the 1993 claim was for RIB, or tier 1 CWP benefits, that settlement agreement does not clearly set forth what was actually settled. The language of the agreement establishes ALJ Dockter could have either awarded or denied RIB benefits based on the evidence of record. However, the last sentence of the agreement is troubling. The statement "This is a compromised settlement" does not definitively reflect whether or not the settlement amounts to an "award" of RIB benefits.

If indeed the 1994 settlement agreement constituted such an award, the ALJ would be precluded from awarding RIB a second time. The statute as it existed in 1994 is consistent with the current statute limiting an individual to a one-time or single award of RIB benefits. However, the 1994 settlement agreement contains no finding Fields had actually contracted CWP or was entitled to a RIB award. The agreement specifically states the settlement

was on a compromise basis. Because the 1994 settlement agreement makes no finding, sets forth the ALJ could either award or deny benefits, and contains the compromise language, we determine it does not constitute a RIB award.

If the 1994 settlement agreement did constitute a RIB award, Fields' current claim would necessarily require dismissal because he would have already received his one-time award. Subsequent employment does not establish entitlement to an additional or second award of the one-time only benefit. The fact the current statute provides a different payout option for individuals of a certain age makes no difference.

The threshold determination is whether Fields is entitled to a RIB award. If he is so entitled, the payout election comes into play, but does not alter his entitlement to the benefit.

That said, the ALJ's reliance upon Sidney Coal Company, Inc. v. Mullins, supra, is misplaced. The question in that case differed from the issue presented here. There, Mullins filed a claim for occupational disability based upon a tier 2 x-ray interpretation. While we do not cite previous decisions of this Board for authority, we do strive for consistency. The Board held in Mullins, "RIB awards are not based upon disability. There

was no medical evidence filed from the prior RIB claim. Thus, there is no medical evidence of a disability related to that settlement. We believe the ALJ properly decided Sidney was not entitled to a credit for the previous RIB award and affirm." Because the subsequent case was for an occupational disease disability claim, rather than for RIB, the Board appropriately denied a credit against the subsequent award.

This interpretation is consistent with a recent holding of this Board in Riverway, Inc. v. James Price, WCB No. 2012-01406 (March 11, 2016). We noted our analysis was necessarily required to "begin with the plain language of the statutes, the goal to give effect to the intent of the General Assembly." Shawnee Telecom Resources, Inc. v. Brown, 354 S.W.3d 542, 551 (Ky. 2011). The KRS 342.732(1)(a), both as it existed in 1993 and its current version, clearly set forth a RIB is a one-time only award, not a matter of credit. As noted above, an individual is entitled to a RIB award only once. Since there was no determination or award which can be determined from the 1994 settlement, James River is not entitled to a credit.

Both Mullins and Price were cases in which the employers sought credit for a prior RIB award against subsequent disability claims. We have consistently held

there is no entitlement to such credit. Because we determine the 1994 settlement does not constitute a RIB award, the ALJ's award of benefits is affirmed.

Accordingly, the November 24, 2015 Opinion and Order and the December 29, 2015 order on petition for reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge, is **AFFIRMED.**

RECHTER, MEMBER, CONCURS.

STIVERS, MEMBER, NOT SITTING.

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