

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: July 24, 2015

CLAIM NO. 201200586

JERRY HAWKINS

PETITIONER

VS. APPEAL FROM HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE

BLEDSON COAL CORPORATION  
and HON. J. LANDON OVERFIELD,  
CHIEF ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
REVERSING AND REMANDING

\* \* \* \* \*

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

**STIVERS, Member.** Jerry Hawkins ("Hawkins") appeals from the July 27, 2012, Order of Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") sustaining Bledsoe Coal Corporation's ("Bledsoe") Motion to Dismiss Hawkins' claim seeking benefits for coal workers pneumoconiosis ("CWP").<sup>1</sup>

---

<sup>1</sup>Hon. J. Landon Overfield retired at the end of 2014.

Hawkins' Form 102 filed May 3, 2012, alleges on October 14, 2012, he became affected by CWP arising out of and in the course of his employment at Bledsoe due to "exposure to dust at job site." Hawkins checked "yes" in answer to the question, "Has plaintiff previously filed a claim for Kentucky coal workers' pneumoconiosis benefits (including retraining incentive benefits)?" Hawkins indicated his previous claim is Jerry Hawkins v. Leeco, Inc., Claim No: 1994-02347.

On June 13, 2012, Bledsoe filed its Motion to Dismiss asserting: "According to the Plaintiff's application he filed a prior claim for coal workers' pneumoconiosis benefits. (Claim No. 1994-02347)."

In his June 19, 2012, Response to Motion to Dismiss, Hawkins asserted as follows:

1. That the Plaintiff was awarded RIB benefits against the Defendant/Employer in Claim No. 1994-02347; however, he never collected any of the benefits as he continued to work for Defendant/Employer until October 14, 2010.

2. That the Plaintiff has had approximately 16 additional years of exposure to coal dust while employed by the Defendant/Employer and as shown by his breathing studies attached to his Application, now suffers from a pulmonary impairment.

In the July 27, 2012, Order sustaining Bledsoe's Motion to Dismiss, the CALJ determined as follows:

This matter comes before the undersigned Chief Administrative Law Judge (CALJ) upon Defendant-Employer's Motion to Dismiss Plaintiff's claim for workers compensation benefits due to the disease of coal workers pneumoconiosis, Plaintiff's response to that motion and Defendant-Employer's Motion for Extension of Time. Defendant-Employer alleges in his [sic] motion to dismiss the Plaintiff was previously awarded retraining incentive benefits against Defendant-Employer in a coal workers pneumoconiosis claim bearing claim number 1994-02347. Plaintiff responds that, while he did receive the award as alleged by Defendant-Employer, "he never collected any of the benefits and he continued to work for Defendant-Employer until October 14, 2010".

Plaintiff also alleges that, due to the approximately 16 additional years of exposure, he has developed pulmonary impairment as a result of that coal mine exposure. Plaintiff submitted with his claim initiating the above styled workers compensation claim, a pulmonary function report. However, the results of these biometric testing indicated that Plaintiff's FVC was 102% of predicted and the FEV<sup>1</sup> was 92% of predicted. This medical report does not support a claim of pulmonary function impairment.

Defendant-Employer has also moved for an extension of time. As the motion to dismiss will be sustained, the motion for an extension of time is moot. The ALJ having reviewed the pleadings and

being fully and sufficiently advised thereby,

It is therefore ordered and adjudged that Defendant-Employer's Motion to Dismiss is **SUSTAINED** and Defendant-Employer's Motion for Extension of Time is **OVERRULED** as moot.

On appeal, Hawkins argues as follows:

It is within the Board's province on appeal to ensure that decisions of the ALJ are in conformity with the Workers' Compensation Act. Whittaker v. Reeder, 30 SW3d 138 (Ky. 2000).

In his Order the CALJ dismissed Hawkins' claim because he had previously filed for benefits in 1994. In this previously filed claim Hawkins was awarded RIB benefits. KRS 342.732(1)(a)(8) states that a claim for retraining incentive benefits provided under this section may be filed, but benefits shall not be payable, while an employee is employed in the severance or processing of coal as defined in KRS 342.0011(23). As detailed in Hawkins' Form 102, he continued working for the Employer for another 16 years and could never receive those benefits.

KRS 342.316(4)(a) states that

The right to compensation under [sic] 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...

Hawkins' claim is not forever barred; he filed a claim within the 3 years after his last date of injurious exposure to coal dust. In *Beech Fork Processing v. Musick*, No. 2005-CA-001660-WC, an unpublished Kentucky Court of Appeals Opinion, the Court of Appeals adopted the Opinion of the Board in a similar situation.

Our interpretation of KRS 342.792 is that the provision was intended by the General Assembly to provide coal miners last exposed to the occupational hazards of coal dust between December 12, 1996, and July 15, 2002, with an opportunity to receive enhanced awards of RIB, irrespective of other similar benefits that may have been granted previously pursuant to earlier versions of KRS 342.732(1)...Moreover, KRS 342.792(1) expressly states that: (1)"any benefits previously granted by an award or settlement shall be credited against any subsequent award of settlement and no interest shall be payable on additional benefits"; and (2)"a previous grant of retraining incentive benefits shall be credited only to the

extent that the benefits were actually paid."

The Court of Appeals opined that the General Assembly intended for coal miners that had additional exposure an opportunity to receive additional benefits.

Because Hawkins continued working in the severance or processing of coal after this award of RIB he never received the benefits. Dismissing his claim is essentially punishing a man for continuing to be a productive member of society. Hawkins has a diagnosed occupational disease, and the medical expenses associated with his condition are now the burden of the tax payers. His Employer has essentially gotten off scot-free from any responsibilities associated with compensating their dedicated employee for the disease he is suffering from.

We reverse the CALJ's dismissal of Hawkins' claim and remand for a determination of Hawkins' entitlement to income and medical benefits including retraining incentive benefits ("RIB") based on the merits of the claim.

KRS 342.792, the statute implicated in Beech Fork Processing v. Musick, Not Reported in S.W.3d, 2006 WL 29131 (Ky. App. 2006), reads, in part, as follows:

(1) The claim of any miner last exposed to the occupational hazards of coal worker's pneumoconiosis between December 12, 1996, and July 15, 2002, shall nonetheless be governed by the provisions of KRS 342.732 and notwithstanding the provisions of KRS

342.125 all claims for benefits which were filed for last injurious occupational exposure to coal dust occurring between December 12, 1996, and July 15, 2002, shall be considered pursuant to the provisions of KRS 342.732 and administrative regulations promulgated by the executive director, and closed claims, except claims dismissed for reasons other than failure to meet medical eligibility standards, may be reopened by the claimant. Income or retraining incentive benefits shall be awarded thereon as if the entitlement standards established by the amendments to KRS 342.732 were effective at the time of last exposure. Any benefits previously granted by an award or settlement shall be credited against any subsequent award or settlement and no interest shall be payable on additional benefits. A previous grant of retraining benefits shall be credited only to the extent that the benefits were actually paid. All income or retraining incentive benefits greater than those which would have been awarded were not these new provisions applicable shall be paid without interest from the Kentucky coal workers' pneumoconiosis fund, the provisions of KRS 342.1242 notwithstanding.

In Beech Fork Processing, supra, the Court of Appeals of Kentucky determined as follows:

Our interpretation of KRS 342.792 is that the provision was intended by the General Assembly to provide coal miners last exposed to the occupational hazards of coal dust between December 12, 1996, and July 15, 2002, with an opportunity to receive enhanced awards

of RIB, irrespective of other similar benefits that may have been granted previously pursuant to earlier versions of KRS 342.732(1). KRS 342.792(1) plainly provides that the claim of "[a]ny miner last exposed to the occupational hazards of coal workers' pneumoconiosis between December 12, 1996, and July 15, 2002, shall nonetheless be governed by the provisions of KRS 342.732 ... notwithstanding the provisions of KRS 342.125." The provision further mandates that "[i]ncome or retraining incentive benefits shall be awarded thereon as if the entitlement standards established by the amendments to KRS 342.732 were effective at the time of the last exposure." Moreover, KRS 342.792(1) expressly states that: (1) "[a]ny benefits previously granted by an award or settlement shall be credited against any subsequent award or settlement and no interest shall be payable on additional benefits"; and (2) "[a] previous grant of retraining incentive benefits shall be credited only to the extent that the benefits were actually paid."

...

Along those same lines, KRS 342.792(3) provides "the coal workers' pneumoconiosis claim of any miner last exposed between December 12, 1996, and July 15, 2002, may be filed with the commissioner on or before December 12, 2003." KRS 342.792(3) further states that "[a]ll income or retraining incentive benefits greater than those which would have been awarded were not these new provisions applicable shall be paid by the Kentucky coal workers' pneumoconiosis fund without interest, in the provisions of KRS 342.1242 notwithstanding."

Given such language, we believe it is clear that the General Assembly intended to allow coals miners such as Musick an opportunity to receive additional benefits, RIB or otherwise, under the 2002 amendments to the Act. Enhancement of prior RIB awards for certain classes of miners was a deliberate effect envisioned and incorporated by the legislature by means of the enactment of HB 348. As such, the fact that Musick's claim may be an attempt at a "second bite of the same apple" is not fatal under the circumstances of this case. As we stated in our original opinion, we believe KRS 342.792(1) must be read to create a statutory exception to the general "one (1) time only" limitation of KRS 342 .732(1)(a) on a RIB award. To do otherwise would effectively render meaningless language in KRS 342.792 addressing additional retraining incentive benefits.

Id. at 3.

The language in Beech Fork Processing v. Musick, supra, convinces this Board Hawkins is entitled to bring a claim for income benefits including RIB benefits based exclusively on his sixteen years of additional exposure of coal dust while working in the coal mines. Even though KRS 342.792 is not applicable here, as Hawkins' last day of exposure to coal dust (i.e. October 14, 2010), falls outside of the range specified in KRS 342.792(1), the court's rationale in Beech Fork Processing, supra, is indeed applicable to the case *sub judice*. That is, Hawkins,

based on an additional sixteen years exposure to coal dust, is entitled to file a claim for RIB benefits "irrespective of other similar benefits that may have been granted." Id. at 3. It is important to note that a medical evaluation pursuant to KRS 342.315 and KRS 342.316 has not been performed in this case. Additionally, there is no regulatory or statutory provision within Kentucky workers' compensation law which permits summary dismissal as occurred in the case *sub judice*. We acknowledge the medical evidence from Dr. Thomas E. Miller introduced in the record by Hawkins is weak, but our role is not to resolve this claim on its merits. Our role is to determine whether Hawkins is entitled to have his claim for CWP resolved on its merits. We conclude he does.

Accordingly, the July 27, 2012, Order is **REVERSED** and this case is **REMANDED** to the CALJ for a determination as to Hawkins' entitlement to income benefits including RIB benefits based upon the evidence in the record.

ALL CONCUR.

**COUNSEL FOR PETITIONER:**

HON MCKINNLEY MORGAN  
921 S MAIN ST  
LONDON KY 40741

**COUNSEL FOR RESPONDENT:**

HON PAUL E JONES  
P O BOX 1167  
PIKEVILLE KY 41502

**CHIEF ADMINISTRATIVE LAW JUDGE:**

HON ROBERT L SWISHER  
657 CHAMBERLIN AVE  
FRANKFORT KY 40601