Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 20, 2015

CLAIM NO. 199232257

PAUL TURNER
and JOHNNIE TURNER PETITIONERS

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

NEW HOPE OF KENTUCKY
and HON. J. LANDON OVERFIELD,
CHIEF ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Paul Turner ("Turner") seeks review of the June 12, 2014, Order of Hon. J. Landon Overfield, Chief Administrative Law Judge ("CALJ") overruling his motion to

reopen his coal workers' pneumoconiosis ("CWP") claim.[1] No petition for reconsideration was filed.

The record reveals that on April 5, 1993, Hon. Denis S. Kline, Administrative Law Judge ("ALJ Kline") entered an Opinion and Award finding Turner began working for New Hope of Kentucky in 1990 and continued to work there up until rendition of the opinion and award. Based upon the testimony of Drs. Ballard D. Wright, William H. Anderson, Emery Lane, and Matt Vuskovich, the ALJ concluded Turner contracted CWP and was entitled to Retraining Incentive Benefits ("RIB"). Accordingly, Turner was awarded RIB benefits of $142.50 per week from the date of the award not to exceed 208 weeks. He was also awarded medical benefits.

On May 2, 2014, Turner filed a motion to reopen stating he had previously filed a Form 102 and on April 5, 1993, ALJ Kline awarded weekly benefits of $142.50 per week for 208 weeks. Turner alleged his condition has worsened since April 5, 1993, as evidenced by the attached medical report of Dr. Glen Baker. Turner asserted his condition has worsened and he is now totally occupationally disabled.

[1] Hon. J. Landon Overfield retired as of December 31, 2014, and is therefore no longer the Chief Administrative Law Judge but will be referred to as the CALJ for purposes of this opinion.

The motion was not verified by Turner. Attached to his motion to reopen is the award of ALJ Kline, a narrative report of Dr. Baker dated April 15, 2013, and the U.S. Department of Labor's Independent Medical Examination ("IME") form completed by Dr. Baker with attached documents providing the results of Dr. Baker's testing.[2] Significantly, Turner did not file an affidavit as required by 803 KAR 25:010 Section 4(6)(a)2.

In Dr. Baker's April 15, 2013, narrative report he states Turner is fifty-seven years old and was seen on April 12, 2013, for a pulmonary evaluation for a possible occupationally induced lung disorder secondary to his coal mining employment. Dr. Baker stated Turner had worked a total of thirty-five years in the coal mining industry, thirty-three of which were in underground mines. He noted Turner worked as a miner operator for twenty-three years, and also operated a roof bolter, a shuttle car, and a scoop. Dr. Baker stated Turner had worked at surface mines for two years.

Dr. Baker noted that at the time of his evaluation, Turner was still employed but not working due to recent shoulder surgery. Turner's only work experience

[2] Turner also attached other documents not relevant to the issue on appeal.

was in the mining industry. He noted that for thirty-three years Turner smoked one pack per day and quit smoking at age 50. Dr. Baker then provided a summary of Turner's breathing problems.

After setting forth Turner's medical history, the results of his physical examination, and the results of the laboratory testing, Dr. Baker provided the following pulmonary diagnosis:

> 1. Coal Workers Pneumoconiosis, category 1/2, on basis of 2000 ILO Classification.
> 2. Chronic obstructive pulmonary disease with a mild obstructive defect based on pulmonary function testing.
>
> 3. Bronchitis: based on history.

Dr. Baker concluded Turner had a long history of coal dust exposure most of which was at the face of the mine operating a continuous miner, roof bolter, shuttle car, and scoop. He concluded Baker had "x-ray changes of Coal Workers Pneumoconiosis 1/2 on basis of 2000 ILO Classification." Consequently, Dr. Baker concluded Turner's thirty-five years of coal mining employment substantially contributed to and aggravated his chronic dust-induced lung disease, respiratory impairment, and shortness of breath. He stated Turner should avoid further

exposure to coal mine dust, rock dust, or similar noxious agents as his condition could worsen.

In the June 12, 2014, Order overruling Turner's motion to reopen, the CALJ stated the record reflects the award or last order granting or denying benefits in this claim was rendered April 5, 1993. The CALJ stated that pursuant to KRS 342.125(3), no claim shall be reopened more than four years following the date of the last award or order or within one year of any previous motion to reopen by the same party. Since Turner filed his motion to reopen in this claim more than four years after the last award or order, the CALJ overruled his motion. Turner did not file a petition for reconsideration.

On appeal, Turner argues his condition has worsened, as evidenced by Dr. Baker's medical report, to the extent he is now totally occupationally disabled. He argues at the time ALJ Kline rendered his decision in 1993, the statute as amended in 1996 was obviously not in existence and is not binding upon him. Turner cites to KRS 342.125(5)(a) which provides he may file a new claim upon working two additional years in Kentucky.

Turner observes that under the 1993 Act, he could have received an award of temporary total disability benefits, permanent total disability benefits, or of RIB

benefits. Turner argues receiving an award of RIB benefits does not prevent him from filing a new claim or motion to reopen for an additional injury resulting from continued work in the coal mines over an additional nineteen years, during which he was breathing and inhaling dust associated with the coal mining industry on a regular basis. He concludes by arguing as follows:

> After the 1993 RIB award, the Petitioner continued to work in and around the coal mining industry for an additional 19 years, with his last date of employment being November 21, 2012. He is receiving TTD benefits for an injury he received in 2012. It was not until 2012 that he was seen by Dr. Baker, who performed tests that showed his lungs and/or breathing had gotten worse since the original award of 1993. The Petitioner believes the Chief ALJ was hasty in dismissing his motion to reopen without at least letting the Petitioner present proof. In a reopening the Plaintiff understands that the burden of proof lies with him since he is seeking modification of an award, Jude v. Cubbage, Ky., 251 S.W.2nd 584 (1950).

Turner requests this Board hold the CALJ erroneously overruled his motion without considering all aspects of the case. He also notes he has filed a new occupational disease claim (Claim No. 201400938) along with the motion to reopen the above-styled claim and requests the two claims be consolidated.

We begin by observing Turner failed to comply with 803 KAR 25:010 Section 4(6)(a)2 by filing "an affidavit evidencing the grounds to support reopening." Further, Turner's motion to reopen was not verified. Thus, we believe Turner's motion was deficient on its face.

That said, we believe the decision of the Supreme Court in Deal v. Gunther Nash Mining Construction Company, et al, 2014-SC-000102-WC, rendered December 18, 2014, Designated Not To Be Published, involving a case substantially similar to the present case is dispositive of this appeal. There, the Supreme Court stated:

> Appellant, Randy Deal, appeals from a Court of Appeals decision which affirmed the overruling of his motion to reopen his coal workers' pneumoconiosis ("CWP") claim. Deal argues that the Chief Administrative Law Judge ("CALJ") erred in overruling his motion to reopen pursuant to KRS 342.125(3) because KRS 342.125(5)(a) is the proper statute to apply. KRS 342.125(5)(a) states:
>
> > Upon the application of the affected employee, and a showing of progression of his previously-diagnosed occupational pneumoconiosis resulting from exposure to coal dust and development of respiratory impairment due to that pneumoconiosis and two (2) additional years of employment in the Commonwealth wherein the employee was continuously

> exposed to the hazards of the disease, the administrative law judge may review an award or order for benefits attributable to coal-related pneumoconiosis under KRS 342.732. An application for review under this subsection shall be made within one (1) year of the date the employee knew or reasonably should have known that a progression of his disease and development or progression of respiratory impairment have occurred. Review under this subsection shall include a review of all evidence admitted in all prior proceedings.

For the reasons set forth below, we affirm the Court of Appeals.

Deal was awarded temporary total disability benefits, permanent partial disability benefits, and medical expenses for CWP in an opinion, award, and order dated December 29, 1993. He also received retraining incentive benefits. After receiving his award based on CWP, Deal states that he continued to work in the coal mining industry for sixteen years, his last date of employment being October 26, 2009.

In late 2012, Deal was examined by his family physician, Dr. Abdul Dahhan. Dr. Dahhan, a former B-reader, performed tests which indicated that Deal's lungs had deteriorated and his breathing had worsened since his original award. Based on this visit, Deal filed a motion to reopen on October 15, 2012, arguing that he is now totally occupationally disabled.

Attached to the motion was a copy of Dr. Dahhan's records showing Deal's spirometry test results and a copy of the original opinion, award, and order from 1993. However, the motion did not state that Deal was attempting to reopen a claim under KRS 342.125(5)(a) or state that he worked around the hazards of pneumoconiosis in the Commonwealth for at least two years after the entry of his original award.

The CALJ overruled Deal's motion to reopen pursuant to KRS 342.125(3) because it was filed more than four years after the date of his last award or order, which was December 29, 1993. Deal filed a petition for reconsideration arguing that the statute of limitations does not apply to an award rendered prior to December 12, 1996, the date in which the 1996 workers' compensation act took effect. In denying the petition the CALJ cited to KRS 342.125(8) for support. That statute states in pertinent part:

> The time limitation prescribed in this section shall apply to all claims irrespective of when they were incurred, or when the award was entered, or the settlement approved. However, claims decided prior to December 12, 1996, may be reopened within four (4) years of the award or order or within four years of December 12, 1996, whichever is later ...

Thus, since Deal filed his motion to reopen later than four years after the original award was issued or December 12, 1996, the CALJ found it was untimely.

The Board and Court of Appeals affirmed. KRS 342.125(5)(a) is first mentioned in the Court of Appeals opinion. The Court of Appeals declined to apply it however because Deal "failed to include [with his motion] a medical report expressing the opinion that he has had a progression of his previously diagnosed occupational pneumoconiosis resulting from exposure to coal dust and the development of respiratory impairment as a result thereof, from two continuous years of continuous exposure to the hazards of the disease." This appeal followed.

Deal argues that the overruling of his motion to reopen was erroneous because the CALJ did not apply KRS 342.125(5)(a). However, the first time Deal argued that KRS 342.125(5)(a) should be applied was before the Court of Appeals and it is not the responsibility of the CALJ or Board to argue Deal's case on his behalf. However, even if the CALJ applied KRS 342.125(5)(a), Deal's motion did not satisfy the requirements to reopen his claim. Specifically, Deal did not present any evidence in his motion that he worked for at least two more years in the Commonwealth where he was exposed to hazards of pneumoconiosis. Thus, on the face of the motion Deal's award could not have been reopened based on KRS 342.125(5)(a). *See Bolin v. T & T Mining*, 231 S.W.3d 130 (Ky. 2007) (denying a reopening under KRS 342.125(5)(a) because there was no evidence that the claimant had further exposure to coal dust post-award). Since KRS 342.125(5)(a) was not clearly invoked by Deal and he did not present evidence to satisfy the requirements to reopen under that statute, it was not clearly erroneous for the CALJ to apply

KRS 342.125(3) and (8) to find the motion was untimely.

We also note that Deal has requested that we review and change the standards by which the Board and Court of Appeals review an ALJ's opinion. We decline his invitation to overrule well-established law.

For the above stated reasons we affirm the Court of Appeals.

KRS 342.125(3) and (8) read as follows:

(3) Except for reopening solely for determination of the compensability of medical expenses, fraud, or conforming the award as set forth in KRS 342.730(1)(c)2., or for reducing a permanent total disability award when an employee returns to work, or seeking temporary total disability benefits during the period of an award, no claim shall be reopened more than four (4) years following the date of the original award or order granting or denying benefits, and no party may file a motion to reopen within one (1) year of any previous motion to reopen by the same party.

. . .

(8) The time limitation prescribed in this section shall apply to all claims irrespective of when they were incurred, or when the award was entered, or the settlement approved. However, claims decided prior to December 12, 1996, may be reopened within four (4) years of the award or order or within four (4) years of December 12, 1996, whichever is later, provided that the exceptions to reopening established in subsections (1) and (3) of this section shall apply to these claims as well.

Here, as in Deal, Turner's motion was not filed within four years following the date of the original award. Since the decision of ALJ Kline was rendered in 1993, KRS 342.125(8) mandates Turner must file a motion to reopen within four years of December 12, 1996. Clearly, Turner's motion to reopen was not timely filed pursuant to KRS 342.125(3) or (8).

In addition, KRS 342.125(5)(a) does not provide relief to Turner. It reads as follows:

> (5)(a) Upon the application of the affected employee, and a showing of progression of his previously-diagnosed occupational pneumoconiosis resulting from exposure to coal dust and development of respiratory impairment due to that pneumoconiosis and two (2) additional years of employment in the Commonwealth wherein the employee was continuously exposed to the hazards of the disease, the administrative law judge may review an award or order for benefits attributable to coal-related pneumoconiosis under KRS 342.732. An application for review under this subsection shall be made within one (1) year of the date the employee knew or reasonably should have known that a progression of his disease and development or progression of respiratory impairment have occurred. Review under this subsection shall include a review of all evidence admitted in all prior proceedings.

In his April 15, 2013, narrative report, Dr. Baker states Turner has worked continuously in the

underground mines up until the time of his examination on April 12, 2013. However, he does not state Turner's employment in the underground coal mines occurred in Kentucky. Further, Turner did not provide an affidavit setting forth that after rendition of ALJ Kline's award on April 5, 1993, he had two additional years of employment in Kentucky where he was continuously exposed to hazardous disease.

More importantly, KRS 342.125(5)(a) requires an application for review be made within one year of the date Turner knew or reasonably should have known a progression of his disease and development or progression of respiratory impairment have occurred. The record reflects Turner's motion to reopen was filed on May 2, 2014. Dr. Baker signed the United States Department of Labor's IME form on April 12, 2013, and his letter to Turner's attorney is dated April 15, 2013. The documents filed by Turner establish his motion to reopen was not filed within one year of the date he knew or reasonably should have known he had a progression of his disease and the development or progression of his respiratory impairment have occurred. Thus, the record establishes Turner's motion to reopen pursuant to KRS 342.125(5)(a) was not timely filed.

Accordingly, because KRS 342.125(5)(a) and (8) direct Turner's motion to reopen must be overruled, the June 12, 2014, Order of the Hon. J. Landon Overfield, Chief Administrative Law Judge, is **AFFIRMED**.

ALL CONCUR.

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