

OPINION ENTERED: JUNE 27, 2012

CLAIM NO. 200782826

TERRY HUFF (DECEASED)
BY AND THROUGH SANDRA HUFF, WIDOW PETITIONER

VS. APPEAL FROM HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE

CUMBERLAND MINE SERVICES
and HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION and ORDER DISMISSING

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

SMITH, Member. Sandra Huff ("Sandra"), widow and representative of Terry Huff ("Huff") deceased, appeals from the January 11, 2012 motion docket order of Hon. Grant Roark, Administrative Law Judge ("ALJ Roark"), denying her motion to reopen and from the February 16, 2012 motion docket order of Hon. Douglas W. Gott, Administrative Law Judge ("ALJ Gott"), denying her petition for

reconsideration. Both ALJs determined Huff could not reopen the claim of her deceased husband since he had passed away prior to the filing of the motion to reopen.

Huff sustained a lumbar injury on July 6, 2007 during the course of his employment with Cumberland Mine Services ("Cumberland"). Dr. James Bean performed a discectomy at L5-S1 and assessed a 10% impairment pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). In an October 28, 2008 Opinion, Order and Award, Administrative Law Judge Caroline Pitt Clark awarded permanent partial disability benefits based upon the impairment assessed by Dr. Bean.

Sandra filed a motion to reopen on December 5, 2011, alleging Huff's condition had worsened as shown by the attached report of Dr. Bean to the extent that he was totally disabled prior to his death as a result of his worsened condition. Sandra indicated Huff underwent additional surgery in May 2011 and died shortly thereafter. Dr. Bean assigned a 20% impairment rating pursuant to the AMA Guides.

In his order overruling the motion to reopen, ALJ Roark found as follows:

The record reflects that the award or last order granting/denying benefits in this claim was rendered October 28, 2008. Pursuant to KRS 342.125(4), no increase in compensation shall be had prior to the date of the motion to reopen. Because Plaintiff passed away prior to the filing of the Motion to Reopen, he cannot be awarded increased benefits on reopening.

Sandra filed a petition for reconsideration, arguing Dr. Bean's report, in and of itself, established a worsening of Huff's condition during his lifetime and she should be allowed to pursue the claim for increased occupational disability. Sandra argued that, since Huff could have pursued a reopening, KRS 342.730(3) should be interpreted as allowing her to pursue the claim. She argued KRS 342.125(4) should not bar her from seeking an increase in benefits pursuant to KRS 342.730(3).

ALJ Gott issued an order on February 16, 2012, finding no patent error and overruling the petition for reconsideration. ALJ Gott made the following findings:

KRS 342.730(3) allows the widow to receive a portion of the previously made award. A widow has no basis to file a motion to reopen, that would have to be undertaken by the Plaintiff, and that right extinguished upon Mr. Huff's demise."

On appeal, Sandra again argues Dr. Bean's report establishes an increase in Huff's occupational disability

and a worsening of his condition during his lifetime. Sandra argued she should be allowed to pursue his claim for increased occupational disability benefits pursuant to KRS 342.730(3). Sandra acknowledges the ALJ correctly determined no increase in benefits could be awarded prior to the date of the filing of the motion to reopen. However, she argues this does not bar her from seeking an increase in disability benefits pursuant to KRS 342.730(3), which states a claimant can pursue any claim for disability compensable under KRS 342 so long as it is filed or could have been timely filed in his or her lifetime, even if he dies from causes other than the injury before the expiration of the compensable period. Sandra notes the reopening was filed within four years of the date of the initial award and is not time barred.

After considering the record, we conclude neither we nor the ALJ has jurisdiction to address the merits of the case. Although Sandra names herself as petitioner in her notice of appeal to this Board, the record is silent as to whether Sandra had previously moved to be substituted as a party to the action before the ALJ. The record also fails to establish that the any ALJ had entered an order on his own motion substituting the real party in interest. In Hammons v. Tremco, Inc., 887 S.W.2d 336 (Ky. 1994), the

court noted the following as it applies to the requirement for revival of actions and the requirement that a real party in interest be substituted on behalf of the claimant:

Therefore, when considered together, KRS 395.278 and CR 25.01(1) require that when a plaintiff dies any action pending on the part of the deceased plaintiff must be revived by the decedent's successor or personal representative within one year, and the successor or personal representative must be substituted as a real party in interest. . .

In this case, to date, no substitution of parties has been made. In light of this fact, this Board determines that neither the ALJ nor this Board has jurisdiction to rule in this matter. The order of September 15, 2008 was therefore void, *ab initio*, since the parties were not properly before the ALJ.

Accordingly, it is hereby ordered the appeal in this matter is **DISMISSED**.

ALL CONCUR.

LAWRENCE F. SMITH, MEMBER,
WORKERS' COMPENSATION BOARD

COUNSEL FOR PETITIONER:

HON. RONALD C. COX
207 EAST CENTRAL STREET
HARLAN, KY 40831

COUNSEL FOR RESPONDENT:

HON SCOTT M B BROWN
300 E MAIN ST STE 400
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGES:

HON. DOUGLAS W GOTT
400 EAST MAIN STREET STE 300
BOWLING GREEN, KY 42101

HON. GRANT ROARK
410 WEST CHESTNUT STREET
SUITE 700
LOUISVILLE, KY 40202