

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 14, 2021

CLAIM NO. 201901508, 201901507 & 201901506

DENVER A. BROCK

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

BLACKJEWEL, LLC/REVELATION ENERGY
and HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
REVERSING IN PART AND REMANDING

* * * * *

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

STIVERS, Member. Denver A. Brock ("Brock") seeks review of the February 2, 2021, Opinion, Award, and Order of Hon. Chris Davis, Administrative Law Judge ("ALJ") finding he contracted coal workers' pneumoconiosis ("CWP") while in the employ of Blackjewel, LLC/Revelation Energy ("Blackjewel") and awarding income benefits based on a 50% disability rating. Brock also appeals from the February 25, 2021, Order overruling his Petition for Reconsideration.

On appeal, Brock asserts the ALJ erred in not finding him permanently totally disabled pursuant to KRS 342.732(1)(e).

BACKGROUND

On December 17, 2019, Brock filed claims against Blackjewel for occupational hearing loss, cumulative trauma injuries to his lumbar and sacral vertebrae, and CWP arising out of his employment with Blackjewel. All claims were consolidated by the ALJ.¹

Brock testified at a February 6, 2020, deposition and the December 9, 2020, hearing. His testimony establishes he was born on February 19, 1977, and except for working a short time as a night watchman, his entire work history consists of working in underground coal mines. His last employer was Blackjewel. Brock has not returned to work since being laid off by Blackjewel on June 28, 2019. Brock was exposed to coal dust in each mine in which he worked. Brock, a non-smoker, described his breathing problems. At the time of his deposition, Brock was receiving Federal Black Lung benefits. At the time of the hearing, he was using a prescribed Albuterol inhaler.

Brock attached to his claim for CWP the “B” Reading Interpretation form of Dr. Kathleen A. DePonte revealing Brock has radiographic classification Category 2/2 with large opacities in category B and Dr. Thomas Miller’s May 19, 2018, report stating Brock has a radiographic classification Category 2/1 and bilateral “upper lung large opacities with a combined size less than five centimeters

¹ Since the ALJ’s dismissal of Brock’s cumulative trauma injury claim and the award of medical benefits for the occupational hearing loss are not at issue, the evidence pertaining to those claims will not be discussed.

compatible with complicated pneumoconiosis (A).” Dr. Miller, a “B” reader, submitted a Roentgenographic Interpretation consistent with his diagnosis. Brock also attached Dr. James Crum’s chest radiograph classification form reflecting Brock fell within radiographic classification Category 2/3 with large opacities in category A. Dr. Crum commented “findings consistent with Complicated CWP” as Brock had large opacities in Category A. A report providing the results of a CT without contrast performed by Norton Community Hospital is also attached. The clinical indication is “Fibrosis lung, cough, abnormal cxr.” The report noted the “appearance is consistent with coal workers pneumoconiosis with progressive massive fibrosis.” The impression is “Interstitial abnormalities consistent with simple and complicated coal workers pneumoconiosis.” Brock also attached the U.S. Department of Labor form completed by Dr. Esther Ajarapu based upon her examination, which apparently was submitted in Brock’s Federal Black Lung claim. The form reflects the June 25, 2018, chest x-ray reveals “Complicated CWP profusion 1/2 B.” Dr. Ajarapu diagnosed, in relevant part:

Complicated CWP – based on chest x ray findings.

...

Complicated CWP: inhaled coal dust triggers a cascade of immune reactions leading to macules and nodules formation which can appear on chest x ray as rounded or irregular opacities. Over time, these coal macules coalesce to form larger lesions and progress to massive pulmonary fibrosis.

...

His impairment is due to his work in the mines. He has advanced pulmonary disease with complicated pneumoconiosis with large opacity category B.

The Commissioner of the Department of Workers' Claims referred Brock to Dr. B.T. Westerfield for an evaluation. Following his examination, Dr. Westerfield submitted a January 23, 2020, letter stating as follows:

It is my opinion that Mr. Denver A. Brock suffers from Complicated Coal Workers' Pneumoconiosis or Progressive Massive Fibrosis at this time. Mr. Brock has adequate history of exposure to coal mine dust to develop pneumoconiosis and I interpret his chest x-ray as positive for Black Lung with ILO Profusion Category 2/1 and large opacities of "B" size.

The Form 108-CWP completed by Dr. Westerfield reflects Brock has radiographic classification "Category 2/1 'B.'" Dr. Westerfield concluded Brock's disease is a result of exposure to coal dust in the severance or processing of coal. Further, any pulmonary impairment is the result of exposure to coal dust in the severance or processing of coal. The radiographic interpretation attached to Dr. Westerfield's report is consistent with his diagnosis of Category 2/1 with large opacities in B.

Dr. Westerfield also submitted a document styled "Review of CT Scan of Chest" dated October 2, 2020, providing the following impression: "This imaging study identifies Progressive Massive Fibrosis consistent with Complicated Coal Workers' Pneumoconiosis or Silicosis."

The ALJ dismissed Brock's claim for cumulative trauma injuries. Since Dr. Casey Rutledge Roof, the University Evaluator, determined Brock has work-related hearing loss which did not merit an impairment rating, only medical benefits were awarded. With respect to Brock's CWP claim, the ALJ found as follows:

...

The medical evidence is uniform and undisputed that the Plaintiff has complicated coal workers' pneumoconiosis. There is literally no evidence for me to not make an award for this condition. While I respect all the doctors who provided 12 opinions, and all are experienced, skilled, "B" reader specialists, I will rely on Dr. Westerfield as he was selected by the Department of Workers' Claims pursuant to statute. In fact, Drs. Westfield, Dr. DePonte, Dr. Crum, Dr. Miller and Dr. Ajarapu have all read the x-rays to show either 2/1, 2/2 or 2/3 CWP.

Dr. Westerfield states the Plaintiff has 2/1 CWP with his best spirometric studies being FVC 75% and FEV1 78%. KRS 342.732(1)(c) must be applied. The Plaintiff's award shall be based on a 50% disability rating and his AWW of \$1526.62 subject to the state maximum, for a period of 425 weeks.

The award of income benefits reads *verbatim* as follows:

The Plaintiff's income benefit is \$1526.62 (AWW) x 2/3 (workers' compensation rate subject to statutory maximum) x .50 (disability rating) = \$358.25 a week from June 28, 2019, for 425 weeks. He is also entitled to work-related and reasonable and necessary and work-related medical expenses for the complicated coal workers' pneumoconiosis and hearing loss. His cumulative trauma claims for his low back and left shoulder are dismissed, in their entirety.

Brock's Petition for Reconsideration asserted the same argument put forth on appeal that the award was erroneously based upon a 50% disability rating pursuant to KRS 342.732(1)(c). Brock argued the ALJ should have awarded permanent total disability ("PTD") benefits pursuant to KRS 342.730(1)(e). The ALJ overruled the Petition for Reconsideration based upon the following reasoning which is set forth *verbatim*:

This matter comes before the undersigned on the Plaintiff's Petition for Reconsideration. If anything my

use of the word "complicated" in the Opinion to describe the Plaintiff's CWP was inartful, unhelpful and is deleted. Beyond that I have found that the Plaintiff has CWP 2/1 as shown by radiographs and his best vent is 78%, both on reliance on Dr. Westerfield. Again, any contradiction between this finding and my use of the word "complicated" is be construed as meaning that the Plaintiff has 2/1 CWP with a 78% FEV1. As such KRS 342.732(1)(c) applies. Any argument that any other section applies a re-argument of the merits. The Petition is OVERRULED.

On appeal, Brock asserts the report of Dr. Westerfield, upon which the ALJ relied, demonstrates he has complicated CWP or progressive massive fibrosis. Brock observes the medical evidence is "uniform and undisputed" that he has complicated CWP. He notes the ALJ stated there is "literally no evidence for me to not make an award for this condition." He complains that despite having made that statement, the award of income benefits is not pursuant to KRS 342.732(1)(e) but pursuant to KRS 342.732(1)(c). Brock complains the ALJ's Order overruling the Petition for Reconsideration evidences an attempted finding of fact and conclusion of law which is clearly erroneous as contemplated by KRS 342.285(2)(d). Brock asserts the record unanimously demonstrates he has complicated CWP. He seeks reversal of the award for CWP and remand with directions to enter an award of permanent total disability benefits pursuant to KRS 342.732(1)(e). Brock argues as follows:

In sum, as a matter of both law or logic, an undisputed *finding of fact* that a worker has contracted complicated CWP with large opacities of B category or progressive massive fibrosis cannot lead to a 'conclusion of law' that KRS 342.732(1)(e) would not apply to the worker's income benefit award. For these reasons, and again with respect, Petitioner now contends that the ALJ 'committed an error in assessing the evidence so flagrant as to cause gross injustice.' *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 688 (Ky. 1992). (Emphasis not ours).

We reverse the award and remand with directions to enter an award of permanent total disability benefits in accordance with KRS 342.732(1)(e).

ANALYSIS

KRS 342.732(1)(e) reads, in relevant part, as follows:

If it is determined that an employee has radiographic classification of $3/2$ or $3/3$ occupational pneumoconiosis and respiratory impairment evidenced by spirometric test values of less than fifty-five percent (55%) of the predicted normal values, or complicated pneumoconiosis (large opacities category A, B, or C progressive massive fibrosis), there shall be an irrebuttable presumption that the employee is totally disabled resulting from exposure to coal dust, and the employee shall be awarded income benefits equal to sixty-six and two-thirds percent ($66\frac{2}{3}\%$) of the employee's average weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the average weekly wage of the state as determined by KRS 342.740. Income benefits awarded under this paragraph shall be payable to the employee during such disability.

Significantly, the medical evidence unanimously establishes Brock contracted complicated CWP. Thus, KRS 342.732(1)(e) is applicable and the ALJ must award permanent total disability benefits since the statute unequivocally mandates that when a claimant establishes he/she has complicated CWP there is an irrebuttable presumption he/she is totally disabled resulting from the exposure to coal dust. In the case *sub judice*, the ALJ enjoyed no discretion in determining the award to be entered. Since the ALJ choose to rely upon Dr. Westerfield's opinion Brock has complicated CWP/progressive massive fibrosis, the statute directs the ALJ shall enter an award of permanent total disability benefits. Moreover, even if the ALJ had relied upon another physician's medical opinion, he was required to enter an

award pursuant to KRS 342.732(1)(e) as all physicians agreed Brock contracted progressive massive fibrosis consistent with complicated CWP. As such, an award pursuant to KRS 342.732(1)(c) is erroneous.

As noted by Brock in his brief, the Kentucky Supreme Court provided the following footnote in Vision Mining, Inc. v. Jesse Gardner, et al., 364 S.W.3d 455, 462 (Ky. 2011):

Although not pertinent to the case before us, we also note that KRS 342.732(1)(e) entitles workers who prove the presence of complicated pneumoconiosis (A, B, or C) to total disability income benefits without actual proof of the cause or the extent of the occupational disability:

If it is determined that an employee has radiographic classification of 3/2 or 3/3 occupational pneumoconiosis and respiratory impairment evidenced by spirometric test values of less than fifty-five percent (55%) of the predicted normal values, or complicated pneumoconiosis (large opacities category A, B, or C progressive massive fibrosis), there shall be an irrebuttable presumption that the employee is totally disabled resulting from exposure to coal dust, and the employee shall be awarded income benefits ...

(Emphasis added).

The above firmly demonstrates the irrebuttable presumption contained in KRS 342.732(1)(e) mandates an award of permanent total disability benefits when the claimant has contracted “complicated CWP (large opacities category A, B, or C progressive massive fibrosis).” “The most commonly stated rule in statutory interpretation is that the ‘plain meaning’ of the statute controls.” Wheeler & Clevenger Oil Co., Inc. v. Washburn, 127 S.W.3d 609, 614 (Ky. 2004). Where the

language of a statute is clear and unambiguous, it is not open to construction or interpretation and must be applied as written. Hall v. Hospitality Resources, Inc., 276 S.W.3d 775 (Ky. 2008).

Accordingly, that portion of the February 2, 2021, Opinion, Award, and Order awarding income benefits pursuant to KRS 342.732(1)(c) and the February 25, 2021, Order reaffirming the award are **REVERSED**. This claim is **REMANDED** to the ALJ for entry of an award of permanent total disability benefits pursuant to KRS 342.732(1)(e).

ALL CONCUR.

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