

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 22, 2019

CLAIM NO. 201602892 & 201702114

HAROLD MEADE

PETITIONER

VS.

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

L&L EXCAVATION,
And HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
REVERSING IN PART, AND REMANDING

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

RECHTER, Member. Harold Meade appeals from the December 14, 2018 Opinion and Order and the January 15, 2019 Order rendered by Hon. R. Roland Case, Administrative Law Judge (“ALJ”), dismissing his coal workers’ pneumoconiosis (“CWP”) and occupational disability claims. On appeal, Meade argues the ALJ erred

in failing to award benefits pursuant to KRS 342.732 or KRS 342.316, in failing to address permanent total disability or enhanced benefits, and in failing to award medical benefits. Additionally, Meade argues KRS 342.732 is unconstitutional. For the reasons set forth herein, we affirm in part, reverse in part and remand.

Meade alleged he contracted CWP on August 23, 2016 while employed by L & L Excavation (“L&L”). He later amended his claim to also allege occupational disease related to severe restrictive lung disease.

Meade has worked forty-five years in surface mining. He worked for L & L as a foreman/operator from February 2015 through August 23, 2016. During his career as a miner, Meade was exposed to dust on a daily basis. At L&L, Meade stated he was exposed mostly to road dust, but also coal dust at times. In past employment, he was exposed to coal dust when using a coal loader and drill, and when helping mechanics work on equipment.

Dr. Thomas E. Miller read an October 6, 2016 x-ray as showing simple CWP category 1/0, with small opacities in all zones but no large opacities. On the same day, a pulmonary function study was performed by Hazard Clinic, which showed pre-bronchodilator FVC and FEV1 of 61% of predicted values.

Dr. Bruce Broudy examined Meade on March 7, 2017. Dr. Broudy interpreted Meade’s chest x-ray as category 0/0, negative for CWP. Dr. Broudy noted scattered calcifications in both lungs, with no large opacities and no pleural disease. Pulmonary function studies showed pre-bronchodilator FVC of 32% of predicted value and FEV1 of 32% of predicted value. Post-bronchodilator FVC was 22% of predicted value with FEV1 of 24% of predicted value. Dr. Broudy noted

suboptimal effort and technique with an abrupt end to exhalation and suboptimal chest excursion. He considered the study to be invalid. Furthermore, Dr. Broudy indicated morbid obesity was a contributing factor in the low results.

Dr. Broudy later reviewed the pulmonary function studies conducted at Hazard Clinic. In a May 15, 2017 supplemental report, Dr. Broudy noted the results were “far greater than what was obtained at the Lexington Clinic indicating that the patient made a much better effort on that study.” He noted the Hazard Clinic pulmonary function study indicated restrictive ventilatory defect. Dr. Broudy attributed this defect to the fact Meade is morbidly obese, which could “restrict the inspiratory capacity of the lungs such that the lungs are smaller than they would be without the morbid obesity.”

Dr. Fred J. Rosenblum performed a university evaluation on March 16, 2018. Dr. Rosenblum diagnosed severe restrictive lung disease and severe functional limitation. The chest x-ray attached to Dr. Rosenblum’s evaluation was read by Dr. Harold Reed as negative for CWP, with no parenchymal abnormalities and no pleural abnormalities consistent with pneumoconiosis. However, Dr. Rosenblum noted “an outside film by a different B-reader in 2016 that was read as positive.” He additionally noted Meade’s lung function had declined since 2016, as evidenced by pre-bronchodilator FVC function of 27% of predicted value and FEV1 function of 28% of predicted value. Post-bronchodilator FVC was 20% of predicted value with FEV1 of 21% of predicted value. Notwithstanding the chest x-ray, Dr. Rosenblum considered these factors in concluding Meade suffers from severe restrictive lung disease and severe functional limitations. He attributed these diagnosis to exposure to

coal dust. Dr. Rosenblum assigned a 65% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). He further indicated a diagnosis of obstruction was not supported by the FEV1 to FVC ratio with no significant bronchodilator response.

In his deposition, Dr. Rosenblum testified that he interpreted Meade’s chest x-ray and reviewed Dr. Reed’s interpretation. Dr. Rosenblum agreed with Dr. Reed who indicated there is no evidence of interstitial lung disease on the B read. However, a significant portion of Dr. Rosenblum’s testimony is devoted to his expressed disagreement with the legal requirements to establish a claim for CWP. Dr. Rosenblum acknowledged the requirement that CWP be diagnosed through a B read, but stated a CT scan is more thorough and accurate. Dr. Rosenblum also noted some patients experience significant restriction from working in a coal mine, but are not eligible for an award because they are not diagnosed with “typical restrictive lung disease.”

In addition, Dr. Rosenblum disagreed with Dr. Broudy’s conclusion that Meade exhibited suboptimal effort in the 2017 pulmonary function studies. Dr. Rosenblum agreed that the post-bronchodilator values “should be thrown out” but found the pre-bronchodilator values valid based on the flow loops and the technician’s comments. Further, Dr. Rosenblum acknowledged Meade’s obesity contributes to his lung restriction, though he is unable to determine to what extent. Dr. Rosenblum concluded Meade’s disease and pulmonary impairment resulted from exposure to coal dust in the severance or processing of coal.

The ALJ’s findings relevant to this appeal are as follows:

Benefits per KRS 342.732: The report of Dr. Rosenblum is entitled to presumptive weight pursuant to KRS 342.315(2) since it was performed by a University Evaluator. Therefore, the Administrative Law Judge finds the report of Dr. Rosenblum to be the most persuasive.

Dr. Rosenblum was independently selected by the Commissioner of the Department of Workers' Claims for his evaluation. Dr. Crum, Hazard Clinic and Dr. Miller were selected by the plaintiff and Dr. Broudy selected by the defendant.

The Administrative Law Judge has considered all of the evidence in accordance with Magic Coal v. Fox, 19 SW 3d 88 (Ky. 2000). The Administrative Law Judge chooses to rely on and is persuaded by the opinion of Dr. Rosenblum who was independently selected by the Commissioner of the Department of Workers' Claims and found the plaintiff does not suffer from coal workers' pneumoconiosis based on x-ray evidence read as negative for the disease.

The undersigned ALJ believes a coal miner can maintain a claim under KRS 342.316 for an occupational disease other than pneumoconiosis. However, the plaintiff still has the burden of proof. The plaintiff must establish an occupational disease other than pneumoconiosis, which is governed by KRS 342.732.

In addition, the plaintiff must establish impairment, as a result, of the occupational disease. KRS 342.732 is very specific that it governs benefits for occupational pneumoconiosis resulting from exposure to coal dust. The ALJ has carefully reviewed the report of Dr. Rosenblum. The Administrative Law Judge further notes KRS 342.732 specifically requires a positive x-ray. The ALJ would note that if this claim is allowed then the plaintiff's benefits could be potentially greater for having a negative x-ray than if the x-ray had been positive for pneumoconiosis. Therefore, the ALJ finds the plaintiff must establish a disease other than pneumoconiosis in order to prevail under KRS 342.316.

Dr. Broudy noted suboptimal effort and technique on behalf of the plaintiff on pulmonary function testing with

an abrupt end to exhalation and suboptimal chest excursion. He opined that due to the suboptimal and poor effort of the plaintiff the study as well as the results were considered to be invalid. Dr. Broudy further opined the plaintiff's morbid obesity was a contributing factor to his pulmonary condition. Dr. Rosenblum testified in his deposition that he did not diagnose the plaintiff with COPD and further indicated that obesity is a common cause of lung volume restriction and further testified the plaintiff's morbid obesity could be a possible cause of the plaintiff's restriction. He testified there was no specific way of determining how much of the plaintiff's restrictive defect was due to obesity and how much was attributable to other factors. Both Dr. Broudy and Dr. Rosenblum opined the plaintiff's obesity could be a contributing factor in his respiratory condition and Dr. Rosenblum, in his deposition, opined there was no way in which to separate the degree of contribution associated to obesity and the amount associated to differing factors.

Dr. Rosenblum specifically indicated the plaintiff's chest x-ray was negative for the disease of coal workers' pneumoconiosis. Additionally, in his report Dr. Rosenblum specifically indicated a significant portion of the restrictive deficit on the pulmonary function testing was due to coal workers' pneumoconiosis even with the discrepancy in the chest x-rays being taken into account.

The issue in this case is whether an award can be made for exposure to coal dust in the absence of a positive chest x-ray. KRS 342.732 clearly requires a positive chest x-ray. There is no disease or condition other than coal workers' pneumoconiosis identified in this claim. Therefore, although the plaintiff has an impairment resulting from exposure to coal dust the Administrative Law Judge is unable to make an award. **For appellate purposes, the Administrative Law Judge notes that based upon the report of Dr. Rosenblum, which is to be given presumptive weight, the ALJ is persuaded that the plaintiff has a pulmonary impairment due to exposure to coal dust.** However, the Administrative Law Judge is unable to make an award in view of the language contained in KRS 342.732. The Administrative Law Judge is further unable to make an award under KRS 342.316 because the plaintiff has failed to establish any disease or condition **other than** coal workers'

pneumoconiosis. Therefore, the ALJ feels constrained to dismiss this claim.

Therefore, the ALJ finds the plaintiff has not carried his burden of establishing the presence of **x-ray evidence of coal workers' pneumoconiosis** or any other occupationally acquired disease related to exposure to coal dust. (Emphasis added).

Meade filed a petition for reconsideration raising the same arguments he makes on appeal. The ALJ overruled Meade's petition, and provided the following additional analysis:

Initially, the Plaintiff argues the ALJ should have awarded benefits pursuant to KRS 342.732. An award of benefits pursuant to KRS 342.732 requires a finding of x-ray evidence of coal workers' pneumoconiosis. Dr. Rosenblum, the university evaluator, did not find x-ray evidence of pneumoconiosis in either his report or during his deposition. In fact, as part of the evaluation, an ILO form was completed as negative for pneumoconiosis. Since there was no x-ray evidence of pneumoconiosis, there can be no award pursuant to KRS 342.732.

Next, the Plaintiff challenges whether KRS 342.732 is constitutional. This ALJ obviously has no authority to rule on the constitutionality of a statute. Next, the Plaintiff argues the ALJ should have made an award pursuant to KRS 342.316. This argument was addressed in the original Opinion on Page 10. In this case, the Plaintiff simply failed to establish any occupational disease other than coal workers' pneumoconiosis to justify an award pursuant to KRS 342.316. KRS 342.732 is the exclusive remedy for coal workers' pneumoconiosis.

Next, the Plaintiff argues the ALJ should have made a finding the Plaintiff was permanently and totally disabled, that the ALJ should have made a finding Plaintiff lacked the physical to return to the type of work he performed at the time of injury, and the ALJ should

have made a finding that Plaintiff was entitled to medical benefits. Quite simply, these findings would only be necessary if the Plaintiff was, in fact, entitled to an award.

On appeal, Meade makes six arguments. He claims he is entitled to an award of benefits for CWP pursuant to KRS 342.732 and, alternatively, that the statute is unconstitutional. He additionally argues he is entitled to an award of income benefits pursuant to KRS 342.316 for severe restrictive lung disease. In his final three assertions of error, Meade claims he is entitled to permanent total disability benefits, enhanced permanent partial disability benefits, and medical benefits.

We begin by examining the ALJ's determination that Meade did not establish the presence of CWP sufficient to support an award pursuant to KRS 342.732. KRS 342.732 authorizes an award of income and medical benefits for CWP. The statute specifies the allowable range of income benefits based upon positive x-ray readings combined with pulmonary function results. All categories of benefits under KRS 342.732 require a positive x-ray reading. Stated otherwise, a positive x-ray reading is required to qualify for an award of income benefits pursuant to KRS 342.732.

In Meade's case, Dr. Rosenblum stated the x-ray was negative for CWP. As Meade emphasizes, Dr. Rosenblum thoroughly explained why he diagnosed restrictive lung disease notwithstanding the chest x-ray and, as part of this explanation, noted a prior positive chest x-ray interpreted by a different reader. However, the discretion to interpret the evidence and draw conclusions therefrom lies exclusively with the ALJ. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951

S.W.2d 329 (Ky. 1997). Dr. Rosenblum did not expressly reject Dr. Reed's chest-x-ray interpretation; in fact, he accepted it as valid in his deposition testimony. Nor did Dr. Rosenblum expressly adopt the prior reader's positive report. The ALJ was well within his authority to rely on the chest x-rays conducted as part of the university evaluation, which are entitled to presumptive weight. Having found the evidence did not establish a positive x-ray reading, the ALJ correctly determined an award of income benefits was not proper pursuant to KRS 342.732.

Meade next challenges the constitutionality of KRS 342.732. He argues equal protection guarantees are violated because a claimant with a pulmonary disease that resulted from occupational exposure is held to a higher standard than a claimant who has a physical injury and seeks benefits pursuant to KRS 342.730. As an administrative tribunal, this Board has no jurisdiction to determine the constitutionality of a statute enacted by the Kentucky General Assembly. Blue Diamond Coal Co. v. Cornett, 189 S.W.2d 963 (Ky. 1945). *See also* Vision Mining, Inc. v. Gardner, 364 S.W.3d 455 (Ky. 2011); Abel Verdon Const. v. Rivera, 348 S.W.3d 749, 752 (Ky. 2011).

Alternatively, Meade argues he is entitled to an award of benefits pursuant to KRS 342.316 for occupational disease. Because he was unsuccessful in carrying the burden to establish an occupational disease, on appeal Meade must show the evidence compels a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on*

other grounds as stated in Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

We first emphasize that the ALJ correctly determined that KRS 342.316 requires the claimant to establish an occupational disease other than CWP, which is governed by the more specific requirements found at KRS 342.732. See Land v. Newsome, 614 S.W.2d 948, 949 (Ky. 1981)(when two statutes deal with the same subject matter, one in a broad, general way and the other specifically, the specific statute prevails). The ALJ determined Meade failed to prove an occupational disease because he was not convinced Dr. Rosenblum diagnosed a disease other than CWP. The ALJ understood Dr. Rosenblum's testimony to mean Meade has CWP but his x-ray reading is not sufficient to meet the statutory requirements to qualify for benefits. Dr. Rosenblum clearly understood the legal requirements to qualify for CWP benefits under Kentucky law, though he expressed disagreement with the requirement the disease be confirmed by chest x-ray. Dr. Rosenblum relied on other diagnostic tools to conclude Meade has restrictive lung disease, but he clearly indicated the restrictive lung disease is CWP. His reference to restrictive lung disease is descriptive rather than diagnostic, as he explained that CWP is just one type among many restrictive lung diseases. Dr. Rosenblum made no specific diagnosis of a disease other than CWP. Though Meade emphasizes other portions of Dr. Rosenblum's testimony otherwise, the ALJ's understanding of the testimony and university evaluation is reasonable and supported by the evidence. The ALJ's conclusion that Meade does not suffer an occupation disease other than CWP is supported by the evidence, and the proof does not compel a different result.

In his next two assertions of error, Meade argues the ALJ erred in failing to address permanent total disability or his entitlement to enhanced permanent partial disability benefits. The ALJ correctly noted findings on these issues would only be necessary if Meade were entitled to an award. For the reasons explained above, we affirm the ALJ's determination that Meade is not entitled to income benefits pursuant to KRS 342.732 or KRS 342.316. Therefore, it was unnecessary to determine the extent of disability or entitlement to enhanced benefits.

Finally, Meade argues he is entitled to an award of medical benefits because he has a pulmonary impairment rating. The version of KRS 342.020(1) in effect on the date of Meade's last injurious exposure provides:

In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be required for the cure and treatment of an occupational disease. The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits.

The statute was amended effective July 14, 2018 to provide for payment of medical benefits "at the time of the injury and thereafter for the length of time set forth in this section, or as may be required for the cure and treatment of an occupational disease."

KRS 342.020(1) does not expressly condition eligibility for medical expenses on eligibility for income benefits. The Kentucky Court of Appeals, in Combs v. Kentucky River District Health Dept., 194 S.W.3d 823 (Ky. App. 2006), recognized there may be instances when a claimant is entitled to an award of future

medical benefits after reaching maximum medical improvement, even in the absence of a finding of a permanent disability and resulting permanent functional impairment rating. In FEI Installation, Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), the Kentucky Supreme Court concluded KRS 342.020(1) does not require proof of an impairment rating to obtain future medical benefits, and the absence of a functional impairment rating does not necessarily preclude such an award.

A worker who has established a work-related permanent impairment has also established a disability for purposes of KRS 342.020 and is entitled to future medical benefits. The evidence established, and the ALJ specifically found, Meade suffers pulmonary impairment due to exposure to coal dust. This is sufficient to authorize an award of medical benefits.

Accordingly, the December 14, 2018 Opinion and Order and the January 15, 2019 Order rendered by Hon. R. Roland Case, Administrative Law Judge, are hereby **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED** for entry of an award of medical benefits.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, CONCURS IN PART, DISSENTS IN PART, AND FURNISHES A SEPARATE OPINION.

ALVEY, Chairman. While I concur with most of the majority opinion, I must respectfully dissent from the last finding. The ALJ clearly found that Meade does not have coal workers' pneumoconiosis. In fact, in his opinion issued on December 14, 2018, the ALJ clearly stated, "Therefore, the ALJ finds the Plaintiff has, not carried his burden of establishing the presence of x-ray evidence of coal workers'

pneumoconiosis or any other occupationally acquired disease related to exposure to coal dust.”

Further, in the order on petition for reconsideration issued January 15, 2019, the ALJ found there is no evidence of any occupational disease. The ALJ specifically found, “... the Plaintiff simply failed to establish any occupational disease other than coal workers’ pneumoconiosis to justify an award pursuant to KRS 342.316. KRS 342.732 is the exclusive remedy for coal workers’ pneumoconiosis.” In a coal workers’ pneumoconiosis claim, the ALJ must determine x-ray evidence establishes the existence of the disease. In this instance, he did not. Without a determination that Meade established he has CWP, he is not entitled to an award of medical benefits.

I believe the ALJ dismissed the claim in its entirety and found Meade is not entitled to an award of any benefits, including medical benefits. Based upon the facts and the ALJ’s analysis, I would affirm his decision in its entirety.

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