

RENDERED: September 11, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 1997-CA-002438-WC

DONALD RAY ROBINSON

APPELLANT

v. PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
WC-96-006342

NEW HORIZONS COAL, INC.;
SPECIAL FUND; HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * *

BEFORE: COMBS, KNOPF, AND KNOX, JUDGES.

KNOX, JUDGE: Donald Ray Robinson (Robinson) appeals from the decision of the Workers' Compensation Board (Board) affirming the Administrative Law Judge's (ALJ) dismissal of his motion to reopen his claim for coal workers' pneumoconiosis and his claim for a work-related hearing loss.

Robinson was employed by New Horizons Coal, Inc. (New Horizons), as an underground coal miner. In January 1993, Robinson filed a claim for retraining incentive benefits (RIB). In April 1991, the ALJ rendered a decision that Robinson had Category I pneumoconiosis and was entitled to RIB benefits. In July 1996, Robinson filed a motion to reopen his previous RIB claim based upon a worsening of his condition. In the meantime, in May 1996, Robinson filed a hearing loss claim, seeking compensation based upon permanent partial disability.

In dismissing Robinson's motion to reopen his RIB claim, the ALJ noted that, although radiographic studies showed a progression of pneumoconiosis and pulmonary function tests showed a decrease in pulmonary function, medical evidence indicated that the cause of that decrease in pulmonary function was cigarette smoking, and not due to pneumoconiosis. With respect to Robinson's hearing loss claim, the ALJ, in finding no occupational disability due to hearing loss, based her opinion upon evidence that appellant "received only minimal impairment ratings and no restrictions were placed on him in any way, including work activities."

Robinson argues that the ALJ and the Board erred in dismissing his motion to reopen his RIB claim based upon a worsening of his pneumoconiosis. He argues that the changes in the radiographic studies and pulmonary function tests between the time he first filed his claim in 1993 and the time he filed his motion to reopen demonstrate the validity of his claim.

KRS 342.125(2) (a), effective April 4, 1994, requires a claimant in an application to reopen a RIB claim to show a "progression of his previously-diagnosed occupational pneumoconiosis resulting from exposure to coal dust and development of respiratory impairment due to that pneumoconiosis" (Emphasis added).

Robinson is correct that radiographic and spirometric evidence exists that a worsening of his pneumoconiosis has occurred. Robinson presented evidence from Dr. John E. Myers showing changes in radiographic studies from Category I pneumoconiosis of 1/2 in 1992 to Category II pneumoconiosis of 2/1 in 1996, an interpretation with which Dr. Matt Vuskovich agreed. In addition, Dr. Myers reported pulmonary function studies of FVC-90 and FEV1-87 in 1992 and pulmonary function tests of FVC-71 and FEV1-72 in 1996. Dr. Vuskovich's pulmonary function tests in 1996 were essentially similar to those of Dr. Myers's.

In dismissing Robinson's motion, the ALJ relied upon the testimony of Dr. Robert Powell, Dr. Emery Lane, and Dr. John Dineen. Dr. Powell interpreted x-ray studies as showing Category I/II in 1996. He further interpreted pulmonary function studies, including those performed by Dr. Vuskovich and Dr. Myers, as well as a pulmonary function test performed by a Dr. Dahhan¹, which

¹Robinson complains that the ALJ should not have permitted evidence of a test not admitted in the record. However, we believe Dr. Powell's interpretation of the tests performed by Dr. Vuskovich and Dr. Myers is sufficient to support the ALJ's findings.

was not made a part of the record. Dr. Powell testified that no radiographic changes occurred between 1992 and 1996. Dr. Powell opined that Robinson did not have an abnormal FEV 1 caused by his exposure to "coal mine, rock or sand dust." Dr. Lane compared Robinson's chest x-rays from 1992 and 1996 and wrote that he saw "no significant differences among these films as far as category of pneumoconiosis is concerned. All are Category I/0 p, q." Dr. Dineen reviewed an x-ray performed at the Lexington Clinic in September 1996, and categorized the x-ray as 0/1. In addition, he reviewed a spirogram performed at the Lexington Clinic in September 1996 and determined that the spirogram "showed a pattern of minimal reduction of lung volumes." He found "minimal respiratory impairment," and attributed "his cough, sputum production, wheezing and shortness of breath to his habit of cigarette smoking."

A workers' compensation claimant has the burden of proof and risk of persuasion, and if unsuccessful, the question on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in claimant's favor. See Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979); Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Compelling evidence is that which is so overwhelming that no reasonable person could reach the same conclusion reached by the finder of fact. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). If the ALJ's decision is supported by substantive evidence of record, it must be upheld. Special Fund

v. Francis, Ky., 708 S.W.2d 641 (1986). The ALJ, as fact-finder, has the sole authority to judge the weight, credibility, substance and inference to be drawn from the evidence. See Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Furthermore, the ALJ may choose to believe part of the evidence and disbelieve other portions of the evidence whether the proof came from the same witness or from the same party's total proof. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Brockway v. Rockwell Int'l, Ky. App., 907 S.W.2d 166 (1995).

Here, the ALJ considered medical evidence that Robinson's radiographic studies did not show a worsening in coal miners pneumoconiosis between 1992 and 1994. She further considered Dr. Powell's testimony that Robinson's spirometric studies do not demonstrate any abnormality caused by exposure to coal dust. The ALJ further considered Dr. Dineen's opinion that any respiratory impairment was due to Robinson's one-half pack per day cigarette habit over the past twenty (20) years. Considering that evidence, we cannot conclude it compels a decision in Robinson's favor.

With respect to Robinson's hearing loss claim, the ALJ considered the reports of Dr. Samir Guindi and Dr. Albert Cullum. Dr. Guindi assigned Robinson a zero percent (0%) impairment for deafness, and a five percent (5%) impairment rating for noise induced tinnitus. Dr. Cullum assigned Robinson a three percent (3%) AMA Guidelines impairment rating of two percent (2%) due to

hearing loss and one percent (1%) due to tinnitus. Dr. Cullum also found that Robinson's hearing loss was noise induced. Dr. Cullum also noted that, "In an environment where safety depends upon hearing acuity, any significant hearing impairment creates a hazard." We adopt the reasoning of the Board in affirming the ALJ's dismissal of Robinson's hearing loss claim. The Board said:

Similarly, we believe the ALJ's determination that Robinson has suffered no vocational loss or disability as a result of the minimal hearing impairment assessments from Dr. Guindi and Dr. Cullum must be affirmed. The ALJ specifically noted that Dr. Guindi assigned Robinson a 0% impairment for deafness and only 5% impairment for occasional noise-induced tinnitus. The ALJ further noted Dr. Cullum's impairment rating of only 2% for hearing loss and 1% for tinnitus. She further noted that Dr. Guindi's testing revealed speech discrimination scores of 100% at a 40 decibel htl on the right and 96% at a 35 decibel htl on the left. Finally, the ALJ noted that neither physician placed any restrictions on Robinson for his hearing impairment in any way including work activities. We conclude there is no compelling evidence to set aside the ALJ's determination as to Robinson's hearing loss claim even if the evidence submitted by Drs. Guindi and Cullum are considered uncontradicted. Here, the ALJ gave a reasonable explanation as to why this evidence did not result in occupational disability (authority omitted).

For the foregoing reasons, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

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