

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000463-WC

ALBANY REDI MIX

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-94915

WILLIAM REED ALBERTSON; RONALD W.
MAY, Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

* * * * *

BEFORE: GUDGEL, Chief Judge; DYCHE and KNOX, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board), which affirmed an opinion and award of an Administrative Law Judge (ALJ) awarding appellee William Reed Albertson total disability benefits. On appeal, appellant employer Albany Redi Mix contends that the ALJ's finding as to total disability is not supported by substantial evidence. We disagree. Hence, we affirm.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992), the supreme court limited our review of the board's decisions as follows:

The WCB is entitled to the same deference for its appellate decisions as we intend when we exercise discretionary review of Kentucky Court of Appeals decisions in cases that originate in circuit court. The function of further review of the WCB in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

As here, the only issue before the board was whether substantial evidence supported the ALJ's finding as to total disability, and the board concluded that such evidence existed.

We have carefully reviewed the record herein. Based upon that review, we cannot say that in assessing the evidence, the board committed an error which was so flagrant as to cause a gross injustice. Thus, we deem it appropriate to adopt the board's opinion, determining that the ALJ's total disability award is supported by substantial evidence, as the opinion of this court as follows:

Petitioner, Albany Redi Mix ("Albany"), appeals from an opinion and award rendered by the Hon. Ronald W. May, Administrative Law Judge ("ALJ"), on September 8, 1997 and from an order dated October 6, 1997 overruling its petition for reconsideration. The ALJ found respondent, William Reed Albertson ("Albertson"), to be totally occupationally disabled as a result of an injury he sustained on April 1, 1996 while in the employment of Albany. On appeal, Albany contends the award of 100 percent occupational disability is clearly erroneous on the basis of reliable, probative, and material evidence contained in the record. The award was apportioned 50 percent against Albany and 50 percent against the Special Fund. The Special Fund has not appealed but has filed a brief requesting relief in common with Albany, referring to Middlesboro Tanning Co. v. Eldridge, Ky. App., 925 S.W.2d 464 (1996). Albany, however, did not name the

Special Fund in its notice of appeal as a party to this appeal, and therefore, the Board is without jurisdiction to grant the Special Fund any relief in this matter. 803 KAR 25:010, §13(2).

Albertson was 72 years of age at the time of the proceedings below. He completed the eighth grade in school but has no specialized or vocational training. He has spent the majority of his work career as a truck driver, operating his own truck from 1975 to 1991, mostly hauling coal. He was employed by Albany as a truck driver from 1991 until his injury.

Albertson's injury occurred when, after pulling his truck with its attached cement tanker under a bin for loading, he climbed on top of the truck to fasten a manhole cover after the cement had been loaded and then fell off, falling a distance of approximately 10 to 12 feet, hitting the ground, and injuring his right hip and back. He was taken by ambulance to a hospital and the next day transferred to a hospital near his home where he remained for about a week, being treated by his family physician and then referred to Dr. Narasimha Reddy after his discharge. In addition to treating with Dr. Reddy, he has been seen by Drs. John Corczykca and Tibbs, both in Lexington, one time each. He testified he took physical therapy at home for six to eight months and currently takes pain medication daily for his back and right hip injury. He testified as to being in constant pain all the time in his lower back and hip, that no doctor has released him to return to work, and that he has not sought any kind of work since his accident. Other than helping mow a little in his yard, he currently does not do very much other than sitting in a chair and watching a lot of television.

When asked what his job required him to do, other than driving the truck, Albertson responded that he unloaded the cement, being required to hook a hose to a big pump and that he pulled a dump trailer, hauling sand and dumping it out. He indicated the hose weighed 40 to 50 pounds. He also testified that his job required him to climb up into his truck and get out 10 to 15 times a day. He indicated that he can currently drive his

pickup about an hour a day and that when he worked for Albany, he would drive approximately 500 miles. He currently draws social security benefits and has since he was 62 years of age. He acknowledged that he has been on Parkinson's medication since 1991 but indicated that did not interfere with his driving.

Dr. Reddy testified in support of Albertson's claim. He first saw Albertson on April 3, 1996, receiving a history of the work injury. He reviewed x-rays that Albertson brought with him and found Albertson to have a compression fracture of the L1 vertebral body that was acute. He diagnosed acute compression fracture of the L1 vertebral body which he indicated was consistent with the history of the fall from the top of the tanker. He saw him several more times over the ensuing months, noting some improvement so long as Albertson did not do anything physical but that if he did anything physical, he had more pain in his back as well as his hip. He indicated that when Albany asked him whether Albertson could come back to work, he did not think it was a good idea because of his age, recent injury, and advanced osteoarthritis Albertson had in his back together with some arthritis in the hip.

When asked if Albertson had any limitations as a result of his injury, Dr. Reddy responded that if he were a young man without any other problems with his spine, he would still put a limitation of not bending and lifting more than 25 pounds; not doing any repetitive bending and lifting, just based on the fracture alone; that in his case, he should avoid bending and lifting anything at all with any weight; and also should not do any stooping or pushing and pulling because of his injury, osteoarthritis, and age. He assessed a 17 percent impairment rating to the body as a whole using the AMA guidelines based solely on range of motion.

When asked how big a part he felt Albertson's age played on the effects of the injury, Dr. Reddy responded:

As you get older, bones are softer, so easier to break. You

know, same injury could have produced - same injury may not have produced as much of an injury in a younger patient, so the older you are, the more likely you have a more significant fracture.

When asked if Albertson had never had this injury but had the advanced osteoarthritis that Dr. Reddy saw in the x-rays and his age, would he have recommended that Albertson do the type of work he was doing, he responded that he would not have recommended it. He would have said it was not safe for him to do that, but he would not say not to do it as long as Albertson was enjoying doing it and functionally capable of doing it, indicating that if he were to see Albertson for back pain for the osteoarthritis, he certainly would have recommended that to him. He then indicated Albertson never complained about having back problems prior to the accident. Dr. Reddy also obtained x-rays of the right hip which revealed central osteoarthritis of the hip joint.

Dr. Robert P. Goodman testified on behalf of Albany. He saw Albertson for evaluation on May 20, 1997 receiving a history of no allergies; of taking medication including Propnap, Oruvail, and Trental; of having had prostate surgery; and of his work-related incident. He reviewed various reports including a lumbar spine report revealing degenerative facet disease and degenerative changes at L4-5 and L5-S1; an x-ray of the pelvis showing marked degenerative changes at L4-S1 and degenerative changes of the SI joints; and an MRI lumbar report, dated October 16, 1996, revealing a compression fracture which appeared old, ligamentous and facet hypertrophy at L3-4 and L4-5, foraminal narrowing, central disc bulge at L4-5, posterior spur formation, and no focal disk herniations. An x-ray of the cervical spine showed degenerative changes at C4 through C7 with no fracture. He diagnosed preexisting osteoporosis, degenerative changes, and possible compression fracture. He indicated he thought the osteoporosis preexisted Albertson's accident, indicating it would have been typical for a person of his age, as well as the extensive arthritic changes.

Dr. Goodman testified that his physical examination of Albertson was normal for a man of his age. He testified that at the date of his examination, Albertson had reached maximum medical improvement and needed no further treatment for any residual from the musculoskeletal injury of April 1, 1996. He was uncertain as to whether or not the compression fracture was due to the April 1 incident or was already present, referring to an October 16, 1996 MRI report where the radiologist said that it appeared old. He would give Albertson an impairment rating of 5 percent with half of that caused by the weakening of the bone and the osteoporosis that was preexisting. When asked if the compression fracture, in and of itself, would produce any restrictions on Albertson's engaging in work, Dr. Goodman indicated that if there were considered alone without the osteoarthritis caused by aging, that it really would not produce any significant restrictions, if he did not have the other condition.

The ALJ noted that Dr. Reddy had testified Albertson had no prior problems with his arthritis and noted that his work activities indicated that if he did have any such problems, they were not significant. He also referred to the treating physician's having testified that Albertson's osteoarthritic changes were preexisting and dormant but were aggravated or aroused by his work-related injury. He then found, based upon the entirety of the evidence, that in light of Albertson's age, education, and work experience, he was totally disabled as a result of the work-related injury.

On appeal, Albany contends that neither the testimony of Dr. Reddy nor that of Dr. Goodman support a finding of total disability. It refers to restrictions Dr. Reddy placed upon Albertson as being only not to bend or lift anything at all with any weight, nor to do any stooping, pushing, or pulling because of his injury, osteoarthritis, and age. He also refers to Dr. Reddy's testifying that he would not have recommended that Albertson do the type of work he did even prior to the accident and to his admission that Albertson would have had a loss of range of motion even if he never had the injury. He also refers to Dr. Goodman's

testimony that the compression fracture itself would have caused no significant restrictions and that Albertson had significant age-related arthritic changes along with Parkinson's, which would have required treatment, but that the musculoskeletal injuries he suffered would not require any more supervised treatment. It contends that Albertson could certainly drive a dump truck about which he testified and that that was not in excess of the restrictions placed upon him by Dr. Reddy. Albany contends that Albertson is no more totally disabled after the accident than he was prior to it.

Since Albany was unsuccessful in persuading the ALJ that Albertson was anything less than totally occupationally disabled, the question on appeal is whether the ALJ's decision was supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is evidence that has sufficient probative value to induce conviction in the minds of reasonable persons when taken alone or in light of all the evidence. Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298 (1972); Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). On appeal, Albany must show there is a lack of substantial evidence to support the ALJ's decision, and it is not enough to show the record contains some evidence which would support a reversal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). Because the board may not substitute its judgment for that of the ALJ on questions of fact, if the ALJ's determination is supported by any evidence of substance, it cannot be said the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

In making a determination of occupational disability in a claim, the ALJ must look at the totality of the circumstances and all the factors enumerated in KRS 342.0011(11) and Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). Seventh St. Road Tobacco Wrhse. v. Stillwell, Ky., 550 S.W.2d 469 (1976). Medical evidence is probative on this issue; however, it is not determinative. The ALJ is not inexorably bound to be fully persuaded by the specific testimony of any

one medical witness. Commonwealth Department of Highway v. Gay, Ky., 472 S.W.2d 508 (1971); Hudson v. Owens, Ky., 439 S.W.2d 565 (1969). Furthermore, where medical evidence may be conflicting on the issue of occupational disability, the ALJ has the sole responsibility to weigh and assess the credibility of the evidence. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977).

The restrictions placed on Albertson's activities, together with his own testimony as to some of the duties he is required to do while working for Albany, including lifting a hose that weighed 40 to 50 pounds and climbing in and out of a truck 10 to 15 times a day, support the ALJ's finding of total occupational disability, especially when considered in light of his age, education, and work experience. That evidence being evidence of substance, we may not reverse the ALJ on appeal.

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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