

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000298-WC

ISLAND CREEK COAL COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-92-03238

ROY C. BOLDS; HON. THOMAS A. NANNEY;
ADMINISTRATIVE LAW JUDGE; SPECIAL FUND;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: Island Creek Coal Company (Island Creek) petitions for review of a Workers' Compensation Board (Board) opinion rendered on January 16, 1998, that reversed the Administrative Law Judge's (ALJ) opinion which following a motion to reopen had reduced Roy C. Bold's (Bolds) previous award of total disability to an award of fifty percent permanent partial disability. We affirm.

Bolds, was born on October 16, 1948, and worked for Island Creek for 21 years before becoming totally disabled. On May 18, 1987, Bolds suffered an injury when he lifted and attempted to position a conveyor belt motor at Island Creek.

This injury resulted in a herniated disc and Bolds underwent surgery in June 1987. The permanent restrictions placed on him by this treating physician included not lifting more than 20 pounds occasionally and more than ten pounds frequently. By opinion and award dated February 8, 1989, the ALJ found Bolds to be 30% permanently partially disabled. Bolds returned to work in 1989. On January 13, 1992, Bolds suffered yet another disc herniation when he was injured while lifting sixty-pound bags of rock dust. Bolds underwent a second back surgery. His treating physician restricted him to lifting no more than ten pounds occasionally and to participating in only sedentary activities. The ALJ, by opinion dated February 9, 1994, determined that Bolds was totally occupationally disabled and on his own motion reopened the 1987 award and found that all the disability was related to the 1987 injury. All parties appealed the ALJ's award to the Board.

In September 1994, while the appeal was pending before the Board, Bolds began working for Minact, Inc. (Minact) at the Earle C. Clements Job Corps in Morganfield. Bolds' job involved minor preventative automobile maintenance work such as oil changes, tire rotations and vehicle lubrications. He testified that his temporary total disability benefits ended in 1993, and that he was desperate to provide some sort of income for his family during the appeal of the disability award. Bolds' job application failed to disclose his injury and the application falsely stated that he had experience as an automobile mechanic. Bolds was hired at Minact by a good friend; and another friend,

who also worked at Minact, frequently assisted Bolds when he was unable to perform particular job tasks. While working at Minact, Bolds was allowed to take rests and breaks when needed. Bolds worked approximately 40 hours a week at \$8.16 per hour. He testified that he was in pain at the end of every day. On April 7, 1995, the Board affirmed Bolds' total disability award. Bolds received his past-due disability benefits in December 1995, and quit working two months later in February 1996.

On March 7, 1995, Island Creek filed a motion to reopen Bolds' claim. Island Creek argued that Bolds' return to work demonstrated that he was no longer totally disabled. Bolds' response to the motion to reopen argued that while he "has undeniably obtained employment, at a job position he has never worked at before, at severely decreased wages, the employer has failed to show that he has decreased occupational disability since he is still 'disabled from his customary employment' as a coal miner and has been forced to seek alternate employment due to his severe financial status." On September 12, 1995 the ALJ entered an order determining that a prima facie case for reopening had been made and the matter was assigned to an ALJ.

By opinion dated February 26, 1997, the ALJ found that Bolds had experienced a decrease in his occupational disability. The ALJ made the following findings of fact and conclusions of law:

1. The plaintiff vehemently argues that he remains totally disabled and that his situation is in some ways equivalent to that in Gunderson v. City of Ashland, Ky.[,] 701 S[.]W[.]2d 135 (1985). He indicates that,

only due to the sympathy of his employer and friends, was he able to work.

Despite the fact that plaintiff has given testimony that he received help from his friends, the record is uncontradicted that the plaintiff worked from September 1994 through February 16, 1996, well over a year, performing work as a mechanic on a daily basis, working eight hours a day and earning over \$8.00 an hour. Plaintiff ceased this work after the Defendant-Employer filed its Motion to Reopen. I am fully aware that the plaintiff states that he quit working because of increased pain, but his timing is, nevertheless, suspect. In light of plaintiff's election to accept the benefits to which he clearly knew he was not entitled, and further, based upon his falsification of his employment application, I find that there is a significant issue raised as to the plaintiff's credibility in this proceeding. Under the circumstances, I find that plaintiff was not totally occupationally disabled from the time he began working for Minact, Inc. At the very least, he was capable of sedentary work, and perhaps more.

2. Therefore, after reviewing the lay and medical testimony and taking into consideration Plaintiff's age, education and work history, I find that the Plaintiff is suffering from an occupation disability of 50% under the principles of Osborne vs. Johnson, Ky[.], 432 S[.]W[.]2d 800 (1968), from September 14, 1994 and continuing thereafter to and including the date of this Award. I no longer believe that the plaintiff is totally disabled as the result of his original work-related injury. Therefore, plaintiff's benefits shall be reduced, effective August 1, 1995. The plaintiff shall be entitled to benefits at the rate of 50% disability for the weeks since the date of reopening and continually thereafter until the plaintiff's original 425-week period has expired. . . .

On March 13, 1997, Bolds filed a petition for reconsideration which was overruled. Bolds filed an appeal with the Board, and Island Creek cross-appealed. Bolds claimed that

the ALJ's findings as to Bolds' credibility and work at Minact were not supported by the evidence. Bolds pointed out that it was over eleven months from the time Island Creek filed its motion to reopen to the time he quit working at Minact due to a worsening in his back condition. Bolds also argued that the ALJ had failed to set forth any functional impairment rating or changes in his functional work ability upon which to base a change in his occupational disability. Bolds further argued that there was no medical evidence of any change in his physical condition and that the doctors unequivocally stated that his physical condition had not changed appreciably since 1993.¹

In response to Bolds' arguments, Island Creek noted that the ALJ is the sole arbiter of witness credibility and of the weight to be given to evidence and that there was substantial evidence to support the ALJ's finding. Island Creek argued to the Board that Bolds had falsified his employment application at Minact and had received benefits to which he clearly knew he was not entitled.

By opinion rendered January 16, 1998, the Board reversed the ALJ's decision. The Board stated in pertinent part as follows:

In this case[,] it is clear the ALJ determined that Bolds was no longer totally disabled because he obtained employment. In essence, although not perfectly clear from the record, Bolds argues he was forced to seek employment because of Island Creek's attempt to "starve him out." Bolds last

¹ Island Creek's cross-appeal concerned the duration of the permanent partial disability award which is not at issue in this appeal.

received temporary total disability benefits from Island Creek in May 1993 and in his brief before this Board contends he was not paid benefits until Island Creek's appeal of the 1992 award was final in October 1995.

The crux of Bolds' argument on appeal is that if not for the goodwill of his friend in finding him a job, he would have remained unemployable and, in fact, is now so unemployed. He cites Gunderson v. City of Ashland, Ky., 701 S.W.2d 135 (1985), for the proposition that employment in a sheltered environment is not proof of being able to compete in the open labor market.

If this had been a case where an employee had previously been awarded permanent partial disability benefits and been laid off from his job without showing a worsening of medical condition, it is doubtful that the mere layoff would constitute a change in occupational disability. In Gossett, supra, the claimant sought employment from numerous employers and was turned down due to his physical condition. In that rare case, the Court upheld a finding of a change in occupational disability.

Here, Bolds testified he sought employment because he needed the money and after a period of employment was unable to continue in a job where he could work within his doctor's restrictions only due to the help of his friends. The evidence in the records concerning both Bolds' physical condition, as well as the job description at Minact, is uncontroverted. The ALJ doubted Bolds' word concerning his job requirement apparently because he provided misleading information on his job application and quit working after the motion to reopen was filed. While it is true, the ALJ has the sole authority to judge the weight and credibility of the evidence, in this case both the medical and lay testimony was uncontroverted. Bolds' physical condition had not changed since the 1992 award, and he made an attempt at employment which was unsuccessful. Simply, there is not sufficient evidence in the record to support the ALJ's finding of a decrease in occupational disability. Bolds' physical condition has not improved, and the

facts concerning his ability to compete in the open job market do not support a change in occupational disability from an economic standpoint as found in Gossett, supra. The record indicates, as argued by Bolds, a condition unchanged since the total award by ALJ Lovan.

This appeal followed.

Island Creek claims the Board erred in reversing the ALJ because it contends the ALJ's findings were based on substantial evidence. Island Creek accuses the Board of substituting its judgment for that of the ALJ. Island Creek points out that although reasonable minds could perhaps differ as to what conclusion to draw from the evidence, the ALJ has the sole authority to determine the substance of the evidence.

The Board's role is limited to reviewing the ALJ's decision to determine whether there was sufficient evidence to support the findings made by the ALJ, or whether the evidence before the ALJ was uncontradicted and compelled a different result. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). Our review of the Board's opinion is limited to correcting 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. Id. at 688.

We hold that the Board correctly concluded that the evidence was uncontroverted that Bolds' physical condition had not changed since the 1992 award and that his attempt to work employment at Minact was unsuccessful. The ALJ apparently based his finding of a decrease in occupational disability upon the

fact that Bolds had been employed for some time. Bolds' false statements in his job application for Minact concerning his qualifications and his disability led the ALJ to doubt his credibility. The ALJ also noted that Bolds' timing in voluntarily quitting his job at Minact was suspect. However, Bolds continued to work at Minact for eleven months after the first motion to reopen was filed in March 1995. This fact is inconsistent with the ALJ's finding that he quit his job because of the filing of the motion to reopen. Although the ALJ has the authority to determine the quality, character and substance of the evidence, there must be evidence of substantial quality that supports the ALJ's findings for the ALJ's findings to be conclusive. The Board determined that because Bolds' effort at working was unsuccessful and because Bolds' physical condition remained unchanged since the 1992 total disability award that there simply was not sufficient evidence in the record to support a finding of a decrease in occupational disability.

"Although the concept of finality applies to workers' compensation awards, KRS 342.125 provides some relief from the principles of res judicata and permits a reopening under certain specified conditions." AAA Mine Services v. Wooten, Ky., 959 S.W.2d 440 (1998). "The fact that a worker may be willing and able to work at some occupation does not necessarily preclude his being totally disabled for purposes of workers' compensation." Wells v. Jones, Ky.App., 662 S.W.2d 849, 850 (1983). As stated in Osborne v. Johnson, Ky. 432 S.W.2d 800, 803 (1968),

If the board finds that the workman is
so physically impaired that he is not capable

of performing any kind of work of regular employment, or if the board finds that regular employment in the kind of work the man can perform is not available on the local labor market, the man will be considered to be totally disabled. Otherwise he will be considered to be only partially disabled.

As the Supreme Court pointed out in Gunderson v. City of Ashland, Ky., 701 S.W.2d 135, 136 (1985), quoting, Larson's Workers' Compensation, vol. II, § 57.51, when assessing the degree of disability one must consider "the probable dependability with which the claimant can sell his services in a competitive labor market, undistorted by such factors as business boom, sympathy of a particular employer or friends, temporary good luck, or the superhuman efforts of the claimant to rise above his crippling handicaps." (emphasis original). On the other hand, the Gunderson Court stated that "[t]he compensation statute is not designed to pay full benefits to someone who is employed full time." Id. at 137.

The ALJ relied on Bolds' full-time employment in finding that his disability had decreased to only 50%. However, as the Board concluded, the evidence showed that Bolds' effort at working was unsuccessful. He was only able to work at Minact due to the assistance of his good friends. The medical evidence was uncontroverted that Bolds' physical condition at the time of the reopening was identical to his condition in 1992 when he received a total disability award. We cannot conclude that the Board committed an error in assessing the evidence so flagrant as to cause gross injustice. Therefore, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Hon. Eileen M. O'Brien
Lexington, KY

BRIEF FOR APPELLEE, BOLDS:

Hon. Greg L. Gager
Henderson, KY

BRIEF FOR APPELLEE,
SPECIAL FUND:

Hon. David W. Barr
Louisville, KY