

RENDERED: August 20, 1999; 2:00 p.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 1999-CA-000248-WC

JOHNNY SKAGGS

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-97-01801 & WC-96-82813

ROBERT WHITTAKER, ACTING DIRECTOR  
OF SPECIAL FUND; JAMES L. KERR,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BUCKINGHAM, HUDDLESTON, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Johnny Skaggs ("Skaggs") petitions for a review of part of an opinion of the Workers' Compensation Board ("Board") which affirmed a dismissal by the Administrative Law Judge ("ALJ") of an occupational hearing loss claim. The ALJ concluded that Skaggs's hearing loss resulted in no occupational disability.

The uncontroverted evidence on the hearing loss was that Skaggs had approximately 28 years exposure to occupational noise, and the uncontroverted medical evidence showed he suffered a six to eight percent impairment to the body as a whole. Both physicians would allow Skaggs to return to his regular work with a protective hearing device. After reviewing the lay and medical testimony, the ALJ concluded that Skaggs had no occupational disability as a result of the work-related hearing loss and dismissed that part of Skaggs's claim.

Skaggs appealed to the Board, which noted the ALJ was the finder of fact and the evidence did not compel a contrary result and affirmed the ALJ. Skaggs entered into a settlement with the employer. Thus, we are concerned only with liability, if any, of the Special Fund. The basis of this appeal against the Special Fund is that the evidence of record compels a finding of some occupational disability as a result of the finding of some functional limitations to the body as a whole.

Under Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 688 (1992), the function of the Court of Appeals in reviewing Board decisions ". . . 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." Skaggs had the burden of proof in establishing his claim. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Since he was unsuccessful before the ALJ, the question on appeal is

whether the evidence was so overwhelming as to compel a finding in his favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Compelling evidence has been defined as evidence so persuasive that it was clearly unreasonable for the ALJ not to be convinced by it. Hudson v. Owens, Ky., 439 S.W.2d 565 (1969). It is not enough for Skaggs to show that the record contains some evidence which might support a reversal of the ALJ's decision. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). If the ALJ's determination is supported by any evidence of substance, it cannot be said that the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The issue on appeal relates to a finding of fact. Our review of an Administrative Law Judge's findings of fact are severely limited by KRS 342.285. In our review of the record to determine whether there is either compelling evidence in favor of Skaggs and/or substantial evidence of probative value to support the ALJ's decision, we recognize that it is the ALJ who has the authority to determine the weight and credibility of the evidence. In doing so, the ALJ may pick and choose from the evidence, whether it be evidence from one party's total proof or even from a given individual. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977); Codell Constr. Co. v. Dixon, Ky., 478 S.W.2d 703 (1972). Even the Board may not substitute its judgment for that of the ALJ in matters involving the weight to be offered the evidence in questions of fact. KRS 342.285(2).

Our review of the record and the finding of the ALJ that there is no occupational disability, even though there is functional impairment to the body as a whole, leads us to conclude there was no error. Even though we may have drawn a different conclusion, we cannot say the evidence compels a different finding.

For the foregoing reasons, the opinion of the Board which affirmed the findings of the ALJ which dismissed the claim for occupational disability for a hearing loss is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, ROBERT  
WHITTAKER, ACTING DIRECTOR OF  
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