

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003286-WC

RB COAL COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-80051 & WC-94-14737

RANDY E. BELCHER; HON. BOB
WHITTAKER, DIRECTOR OF SPECIAL
FUND; HON. THOMAS A. DOCKTER,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: GARDNER, KNOFF, AND McANULTY, JUDGES.

McANULTY, JUDGE: RB Coal Company petitions this Court for review of the decision of the Workers' Compensation Board affirming the Administrative Law Judge's (ALJ) award of 100% occupational disability benefits to Randy Belcher (Belcher), apportioned equally between RB Coal Company (RB Coal) and the Special Fund. Belcher sustained an injury to his back and right knee in a rock fall on August 30, 1996, during the course of his employment with RB Coal Company. The issue to be resolved on appeal is whether

the ALJ's award was arbitrary, capricious, and clearly erroneous. Having reviewed the record and the parties' respective arguments, we disagree. Hence, we affirm.

Belcher initially filed an application for retraining incentive benefits (RIB) on April 4, 1994, while he was still working for RB Coal. This claim was later dismissed on Belcher's motion without prejudice as he would be unable to collect benefits while still working due to a change in the law.

On August 30, 1996, Belcher sustained a work injury which is the subject of this appeal. At the time of this injury, Belcher was thirty-three (33) years of age. He has an eighth grade education with no specialized or vocational training. Prior to working for RB Coal as an underground coal miner from June 1981 through August 30, 1996, Belcher worked as a laborer for Harlan Community Action and for a construction company. On August 30, 1996, while working for RB Coal, Belcher sustained a work injury during a rock fall. He filed an application for adjustment of claim against RB Coal and the Special Fund on December 6, 1996, claiming injuries to his neck, upper and lower back, shoulder area, and right knee. This application was later amended to include an injury to his lower mid-back and a psychological overlay. Belcher then refiled his application for RIB benefits on December 10, 1996, as he was no longer working and therefore would be eligible to collect these benefits.

The parties entered proof by way of medical reports and depositions, and the claims proceeded to a prehearing conference and a final hearing. In a July 31, 1997, opinion, award, and order, the ALJ found that Belcher was entitled to RIB benefits

and to a total award due to his injury claim. As stipulated at the prehearing conference, the ALJ apportioned the total award equally between RB Coal and the Special Fund.

RB Coal filed a Notice of Appeal with the Workers' Compensation Board (the Board), and the Board affirmed the decision of the ALJ in an opinion rendered November 21, 1997. RB Coal then petitioned this Court for review of the Board's decision on December 22, 1997. RB Coal now argues that a total disability award was not warranted by the evidence before the ALJ and that therefore the award was erroneous. We disagree.

We will first note the standard of review applicable in this appeal. When the party without the burden of proof is unsuccessful, as here, the question on appeal is whether the findings of the ALJ were supported by substantial evidence. See Smyzer v. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). Substantial evidence is defined as "evidence of substance and relevant consequences having the fitness to induce conviction in the minds of reasonable men." Union Underwear Co. v. Scearce, Ky., 896 S.W.2d 7, 9 (1995). If the findings of the ALJ are supported by substantial evidence, the reviewing court must affirm the fact finder's decision.

When the evidence presented is conflicting, as in this case, 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). The ALJ may choose to believe part of the evidence and disbelieve other portions of the evidence whether the evidence 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 Internat'l, Ky. App., 907 S.W.2d 166 (1995). As the finder of fact, the ALJ is given the discretion "to determine the degree of functional disability on the basis of conflicting medial evidence and to translate the functional impairment into occupational disability." Kentucky Carbon Corp. v. Dotson, Ky. App., 573 S.W.2d 368, 370 (1978).

As noted by the Board in its opinion, the ALJ explicitly noted the evidence from the record supporting his award of total disability.

7. Based upon the testimony of the Plaintiff in his discovery deposition and at the Hearing, the totality of medical evidence regarding Plaintiff's physical and psychological conditions, and utilizing the dictates of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), this Administrative Law Judge finds that the Plaintiff presently suffers an occupational disability of 100%. In making this determination, this Administrative Law Judge of occupational disability (sic), this Administrative Law Judge relied upon the testimony of the Plaintiff regarding his continuing problems with pain in his cervical spine, his headaches, his low back pain, his right knee swelling and give away feeling, as well as his depression. The medical evidence provided by Dr. Dubin regarding Plaintiff's knee injury and resulting permanent impairment, as well as the functional impairment rating and restrictions indicated by Dr. Gilbert with a forty pound lifting limit with twenty pounds on a frequent basis and no repetitive bending or twisting activities, provide a basis for the determination of total occupational disability found herein. While this Administrative Law Judge does not find the functional impairment rating indicated by Dr. Muckenhausen to be persuasive in this claim, he does note her thoroughness in examining the Plaintiff and her follow up report after her examination of March 5, 1997. At that time, Dr. Muckenhausen restricted Plaintiff

to twenty pounds maximum lifting and ten pounds on a frequent basis. Plaintiff was also restricted regarding additional exertional activities, including standing and/or walking, as well as sitting, and pushing and pulling. When the psychiatric evidence presented by Dr. Granacher and Dr. Maggard is combined with the above-cited evidence regarding Plaintiff's physical conditions, including Dr. Granacher's acknowledgement (sic) of Plaintiff's underlying dependent personality disorder, functional illiteracy and learning disability, a total disability award is found to be appropriate herein. When the Plaintiff's credible testimony is combined with the evidence regarding his physical and psychological/psychiatric condition, the above-cited medical evidence is considered, as well as the Osborne v. Johnson factors, including Plaintiff's age, education and past work experience, the Administrative Law Judge finds that the Plaintiff has suffered an injury of appreciable proportions which equates to an occupational disability of 100%.

The Administrative Law Judge clearly based his finding of 100% occupational disability on substantial evidence in the record. Although this Court may reach a different conclusion after review the same evidence, this Court may not substitute its judgment for that of the finder of fact, in this case the ALJ. Paramount Foods, Inc. v. Burkhardt, Ky., 698 S.W.2d 418 (1985). It is well established in Kentucky that a court reviewing the action of an agency may not substitute its judgment for that of the fact finder. This Court in Kentucky Bd. of Nursing v. Ward, Ky. App., 890 S.W.2d 641, 642 (1994) addressed this in detail:

"The position of the circuit court in administrative matters is one of review, not of reinterpretation." The appellate (circuit) court is not free to consider new or additional evidence, or substitute its judgment as to the credibility of the witnesses and/or the weight of evidence

concerning questions of fact. Thus, if administrative findings of fact are based upon substantial evidence, then those findings are binding upon the appellate court. The only question remaining for the appellate court to address is "whether or not the agency applied the correct rule of law to the facts so found." If the ruling of the administrative agency is based on an incorrect view of the law, the reviewing court may substitute its judgment for that of the agency.

[Citations omitted]. See also, Commonwealth, Dept. of Education v. Commonwealth, Ky. App., 798 S.W.2d 464 (1990). We cannot hold that, as a matter of law, the ALJ erred in awarding 100% occupational disability benefits.

The opinion of the Workers' Compensation Board affirming the ALJ's award is AFFIRMED.

ALL CONCUR.

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