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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-000637-WC

TORIE MINING, INC. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
NO. 97-85465

STEVEN KIDD;
DENIS S. KLINE,
Administrative Law Judge;
and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: DYCHE, SCHRODER and HUDDLESTON, Judges.

HUDDLESTON, Judge: Following an injury at work, Steven Kidd sought workers' compensation benefits. The Administrative Law Judge who heard Kidd's claim found that while he may be able to do light jobs, he is unemployable due to his physiological and psychological restrictions. The Workers' Compensation Board affirmed the ALJ's award of total occupational disability.

Kidd worked as a scoop operator for Torie Mining, Inc. While working with a roof bolter, his gloved hand became tangled in

the machinery, twisting his arm. The twisting caused a compound fracture of the right arm, torn tendons and a broken wrist.

Kidd had multiple surgeries following the accident and underwent physical therapy. The independent medical examiner who evaluated Kidd observed that despite an "excellent" effort at recovery, he was "still markedly limited in the ability to use the right upper extremity."

The ALJ found that Kidd's main impediment was a fear of re-injury. The psychological evidence indicated that because of his injuries, Kidd suffered from depression, post traumatic stress disorder and anxiety disorder. An occupational rehabilitation consultant who evaluated Kidd determined that he was basically unemployable.

The Board affirmed the ALJ's award of total occupational disability. Torie Mining argued that the ALJ erred by awarding Kidd total occupation disability benefits as some evidence suggested that he could do light jobs. The Board observed that the 1996 changes to the Workers' Compensation Act divided disability into "temporary total disability," "permanent partial disability" and "permanent total disability" and that under the Act, the fact finder has much broader discretion when assessing permanent total disability. The Board determined that "[t]he evidence . . . as analyzed by the ALJ does support the ALJ's conclusion that the medical, lay and vocational testimony support the inability of this individual at this time to be competitive for work . . . ."

As we find that the Board's well-written opinion expresses our view of this matter, we adopt it as our own:

LOVAN, MEMBER. Torie Mining, Inc. ("Torie"), appeals from the decision of Hon. Denis S. Kline, Administrative Law Judge ("ALJ"), awarding Steven Kidd ("Kidd") a total occupational disability.

On January, 15, 1997, Kidd was working for Torie and had been hired primarily as scoop operator. On that date, he was assisting with the roof bolter when his glove became entangled in part of the roof bolting machinery. Unable to disentangle himself, his right arm was twisted, resulting in a significant compound fracture, tearing of tendons and breaking his wrist. He has not worked since the incident.

Temporary total disability benefits and medical benefits were paid and Kidd continues to undergo treatment. His work has primarily consisted of manual labor in the coal mining industry. He testified that he continues to experience problems with his right upper extremity and has developed psychological difficulties in the form of depression, nightmares, difficulty sleeping, and flashbacks to the incident. He has an ongoing fear that his right arm will in some way be reinjured. Kidd does not believe that he presently possesses the capability of returning to any of the work that he has performed in the past and is unaware of any work that he has the physical or mental capabilities to perform at this time. He experiences difficulty relating to his family and other individuals and tends to keep to

himself. He finds it difficult to cope with his inability to work and expresses a desire to better himself. He is presently receiving Social Security disability.

Although three issues were presented to the ALJ, the only issue to be addressed by us on appeal relates to the ALJ's finding Kidd presently permanently, totally occupationally disabled.

The medical evidence concerning Kidd's physiological condition came from Dr. Christopher Prevel, a physician at the University of Kentucky Medical Center, and Dr. Thomas Harter, who examined Kidd at the request of Torie. Dr. Prevel took over the care of Kidd when his initial treating physician left the University. Dr. Prevel assigned a 46% functional impairment to the body as a whole as a result of the injury. While he indicated that in his opinion Kidd had reached maximum medical improvement, he continued to exhibit loss of strength and range of motion in his elbow, wrist, and hand. He did not believe Kidd had the physical capability of returning to any of his prior employment, although he acknowledged there may be some light sedentary activities in which Kidd could engage. He strongly encouraged Kidd to participate in vocational rehabilitation.

Dr. Harter also noted that there was significant limitation of motion and strength in the hand, wrist and elbow of the right upper extremity. He assigned a 34%

functional impairment. This assessment of impairment only considered limitation of motion to a small degree and he believed that if one were to use a range of motion assessment, the impairment could certainly be greater. His evidence was not significantly different from that of Dr. Prevel in that he did not believe it was likely that Kidd possessed the physical capability of returning to the mining industry, although he did believe he had the physical capacity to engage in sedentary labor.

Psychological testimony was presented from Dr. Robert Granacher and Dr. William Weitzel. Dr. Granacher assessed a 25% impairment based upon a Class III psychiatric impairment. He was of the opinion that the psychiatric disorder developed as a direct result of the injury and believed that it was important that Kidd participate in psychiatric treatment, including pharmacological treatment. He noted Kidd had a preoccupation with pain and resulting depression. He believed it would be appropriate for Kidd to be directed to a pain center staffed by "knowledgeable pain physicians". He further indicated that individuals with "complex injures [sic] of this type often end up with a psychiatric disorder". He believed that treatment of the condition was paramount before Kidd could be expected to be fully functional.

Dr. Weitzel assessed a 15% functional impairment, one-half of which was due directly to the injury and the

remainder to the arousal of a pre-existing condition. He diagnosed depression anxiety and evidence of resolving symptomatology from post-traumatic stress disorder. He believed the post-traumatic stress disorder should respond to treatment but that Kidd "needs immediate attention to the way he is dealing with his right upper extremity injury and he needs to be fully informed of what is possible and what his long term limitations will be". Dr. Weitzel did not believe Kidd was receiving the type of guidance that he needed. Kidd exhibited recurrent and intrusive recollections of the injury and experienced occasional nightmares.

Vocational testimony was presented by Dr. Ralph Crystal and Joe Woolwine. Dr. Crystal found Kidd to have a reading ability at the middle of the 10th grade, spelling at the end of the 4th grade and math at the end of the 3rd grade. He believed there were jobs within Kidd's region that he could probably perform based upon his physical and psychological limitations. He encouraged vocational rehabilitation. He was of the opinion Kidd could engage in sedentary laboring activities.

Joe Woolwine also acknowledged that Kidd could probably engage in sedentary to light laboring activities. He did testify at one point that he believed Kidd was presently totally occupationally disabled. He noted that the combination of the physical injury with

the psychological difficulties would likely limit Kidd from engaging in working activities at this time. Unlike others, he did not believe Kidd was a good candidate for vocational rehabilitation.

The ALJ, after the [sic] considering the entirety of the evidence and addressing the issue of total disability, stated "I believe it is clear that he is. While there may be some very light jobs that he could perform with his current restrictions, I believe he would be placed at such a competitive disadvantage, when compared with workers of similar age, education and experience, that he would be, for all practical purposes, unemployable." The ALJ went on to state that he believed with vocational rehabilitation that the permanency of the total disability could be overcome.

The employer challenges the ALJ's findings arguing that since there is some evidence of record indicating that light and sedentary jobs could be available to Kidd that under the changes in the Workers' Compensation Act effective December 12, 1996, an award of permanent total disability benefits is inappropriate.

We have previously addressed similar arguments in other cases, initially in Ira a. Watson Dept. Store vs. David Hamilton, Claim No. 97-90489, rendered November 13, 1998. This Board strives for consistency, particularly when we believe that our prior decision is correct. In

rendering the opinion herein, we will borrow liberally from our discussion in Ira Watson.

Since December 12, 1996, many things in the Kentucky Workers' Compensation Act have changed. Some things have not. It is the interaction of what has changed and what has not that must be analyzed in the instant appeal. One thing that has not changed is that the burden of proof rests with the injured worker to establish his entitlement to benefits. When, however, the party without the burden of proof is unsuccessful before the ALJ, in this case Torie, we must view the evidence of record and the law to determine whether there was substantial evidence of probative value to support the ALJ's ultimate conclusion. Paramount Foods, Inc., vs. Burkhardt, Ky., 695 SW2d 418 (1985).

Prior to December 12, 1996, there was a single definition of disability contained in KRS 342.0011(11). Effective December 12, 1996, the Legislature created three specific subsections defining "temporary total disability", "permanent partial disability" and "permanent total disability". While additional sections of the Act severely limit an adjudicator's ability to assess occupational disability in permanent partial disability cases, the adjudicator has more discretion to evaluate the evidence in determining total occupational disability. The determination of permanent total disability continues to be a factual finding. The strict

restrictions referred to by Torie apply only to the determination of permanent partial disability in accordance with KRS 342.730(1)(b). If, however, the adjudicator decides that an individual is permanently and totally disabled, those mathematical factors are not applicable. Permanent total disability is defined as:

> The condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury...

"Work" is defined in KRS 342.0011(34) as follows:

> "Work" means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

These two provisions of the Act mandate two specific findings by an adjudicator in assessing a total disability award. First, the adjudicator must conclude that the evidence establishes that there is a "permanent disability rating". Here, there is no serious challenge but that Kidd has a 34% or greater impairment rating from his physiological injury and a 15 to 25% impairment as a result of the psychiatric aspects of this injury. The second aspect of the analysis requires the adjudicator to determine whether there has been a complete and permanent inability to perform any type of work as a result of the injury. This portion of the definition of permanent

total disability provides discretion with an ALJ or Arbitrator as he or she interprets the evidence in light of the definition of "work".

While permanent partial disability assessments provide for very little discretion on the part of the fact finder, total disability assessments are not so strictly limited. Although the full impact of Osborne vs. Johnson, Ky., 432 SW2d 800 (1968) has been modified, it is not totally gone.[1] (footnote supplied.) In Osborne, the court thoroughly analyzed the needed requirements for finding disability. The court emphasized that medical percentages are not determinative. While that statement is no longer controlling for permanent partial disability, it remains applicable to permanent total disability. The statute, as it existed at the time of the decision in Osborne and thereafter until December 12, 1996, also required the fact finder to analyze the worker's competitive abilities based upon the "local labor market". However, with the changes in the Kentucky Workers' Compensation Act as effective December 12, 1996, the local labor market analysis is no longer appropriate. The ALJ in the instant action in concluding Kidd was experiencing total occupational disability did not limit his assessment to the local labor market and, therefore, appropriately

[1] Legislative amendments since Osborne to Ky. Rev. Stat. (KRS) 342.730 have made disability ratings determinative for permanent partial disability awards.

disregarded that aspect of Osborne. We believe that the Legislature's definition of "work" as set out above follows a great deal of the language used by the court in Osborne, particularly in their quotations from Larson. Larson noted that if the worker's physical condition is such as to disqualify him for regular employment in the labor market, then total disability may be found. See Osborne at 803. The court went on to state also at page 803 "if the Board finds the workman is so physically impaired that he is not capable of performing any kind of work of regular employment . . . the man will be considered to be totally disabled". In a footnote, the court further states at 803:

> We are talking about hired employment, not self-employment. We do not believe the law contemplates that consideration shall be given to the workman's ability to sell apples or pencils on the street.

In defining normal employment conditions, the court adopted Larson's test of probable dependability to sell services in a competitive labor market. This definition considers whether the individual will be dependable, whether his physiological restrictions prohibit him from using skills within his individual vocational capabilities and accepts that one is not required to be homebound to be determined totally occupationally disabled.

Here, we have an individual who has significant physiological impairment and psychiatric impairment under the AMA Guidelines. We have vocational testimony that offers the belief Kidd is presently totally disabled, although we have medical testimony and vocational testimony stating he might be able to engage in light and sedentary labor. The evidence, however, as analyzed by the ALJ does support the ALJ's conclusion that the medical, lay and vocational testimony support the inability of this individual at this time to be competitive for work, employment of a regular nature in a competitive market. It was within the ALJ's authority and discretion to consider this evidence in this finding. See Caudill vs. Maloney's Discount Stores, Ky., 560 SW2d 15 (1977); Eaton Axle Corporation vs. Nally, Ky., 688 SW2d 334 (1985); and Smyzer vs. B.F. Goodrich Chemical Co., Ky., 474 SW2d 367 (1971). While arguably the evidence may have supported a finding of permanent partial disability, we agree with the ALJ that it clearly supports a finding of total occupational disability at this time. With proper medical and psychiatric treatment coupled with efforts at vocational rehabilitation, Kidd may overcome the level of disability that he now experiences. Until or if that occurs, Kidd is entitled to a finding of total disability.

While things have changed, the Board now has no greater authority to second guess an ALJ's reliance upon

evidence of record than it did prior to December 12, 1996. See McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974). The statutory analysis of disability offered by the Kentucky Legislature in reality provides a greater degree of discretion with the fact finder on assessments of total occupational disability than it does on partial occupational disability. We can only presume that the Legislature created this discretion in a purposeful manner.

Accordingly, the decision of Hon. Denis S. Kline, Administrative Law Judge, is hereby AFFIRMED and this appeal is DISMISSED.

We have reviewed the Board's opinion in accord with the dictates of Western Baptist Hospital v. Kelly.[2] In Western, the Supreme Court discussed the standard of review applicable to decisions of the Board:

> 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.[3]

[2] Ky., 827 S.W.2d 685 (1992).

[3] Id. at 687.

Finding that the Board has not overlooked or misconstrued controlling law or erred in assessing the evidence, we affirm its decision.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul E. Jones
BAIRD, BAIRD, BAIRD
& JONES, P.S.C.
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Miller Kent Carter
BRANHAM & CARTER, P.S.C.
Pikeville, Kentucky