

RENDERED: November 16, 2001; 2:00 p.m.
 NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002832-WC

ROBERT L. WHITTAKER, DIRECTOR
OF SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-29220

DONNA CRICK GROVES; HON. THOMAS A.
DOCKTER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** * * * *

BEFORE: JOHNSON, MILLER, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. The Special Fund petitions for review of a Workers' Compensation Board (Board) opinion that reversed a decision by the Administrative Law Judge (ALJ) finding no liability on the part of the Special Fund for Donna Crick Groves's psychiatric condition following a work-related injury, and remanding the case to the ALJ for a finding of apportionment between Clays Trucking and the Special Fund. After reviewing the record and the arguments of counsel, we affirm.

Donna Groves suffered a severe head injury on July 14, 1995, when the truck she was driving for her employer, Clays Trucking, overturned on a highway ramp. She settled her workers' compensation claim with Clays for a lump sum payment of \$8,000, plus weekly payments of \$225, reserving her right to proceed with a claim against the Special Fund.

Shortly after the accident in August 1995, Groves saw Dr. Carla Brandt, a neurologist, for her injury. She diagnosed Groves as suffering from seizure disorder, hearing loss, right side facial numbness, and post-concussion syndrome. In June 1996, Dr. Brandt reported that Groves's seizures had been controlled with medication, her hearing loss problem continued to deteriorate, she had signs of depression, and she experienced some headaches consistent with post-traumatic vascular pressure.

Groves had experienced hearing loss since her late teens and was wearing a hearing aid at the time of the accident. In July and September 1995, she was examined and fitted for new hearing aids after reporting that her hearing problems had increased since the accident.

In January 1996, Groves began treatment with Dr. Oluwole Olusola, a psychiatrist, for depression and anxiety. He diagnosed her as suffering from acute onset of post-traumatic stress disorder resulting from the July 1995 accident. He stated that her case was extreme, evidenced by symptoms such as crying spells, nightmares, lack of concentration, avoidance of social interaction, anxiety attacks, and irritability. Dr. Olusola attributed all of her psychiatric problems to her work accident.

In March 1997, Dr. James Naas, a speech pathologist, who had been seeing Groves since November 1995, reported that she had a congenital, bilateral, sensorineural hearing loss that affected her speaking ability. He attributed her speech characteristics to her congenital hearing condition, rather than the work accident.

Dr. John Ebert, a neurologist, examined Groves on February 24, 1997. Groves indicated that she experienced headaches, an unusual burning smell, low back pain, irritability, a fear of driving, worsened hearing loss, and a lack of balance. He was unable to discover objective evidence of neurologic disease relating to the work accident. He stated the medical reports and his examination indicated a closed head injury, obesity, and bilateral sensorineural hearing loss.

In March 1997, Dr. Joel Dill, a clinical psychologist and vocational expert, tested Groves. He found she had severe problems with concentration, anxiety, and perceptual sensitivity. Based on the tests and restrictions identified by Dr. Olusola, Dr. Dill stated that Groves was unable to perform any work activity.

On October 7 and 8, 1996, Dr. Robert Granacher, Jr., a forensic psychiatrist, performed both a mental and physical examination of Groves. In his 18-page report, Dr. Granacher indicated that he found some positive post-concussive brain damage and a defendant personality disorder. His diagnosis was (1) mild neurocognitive disorder secondary to a closed head injury; (2) dormant dependent personality disorder; (3) status-

post closed head injury with resulting post-traumatic seizure; and (4) moderate external stress due to unemployment. He felt that her dormant personality disorder was a condition outside the normal state of health for a person of her age and experience and had been aroused by her work injury. He assessed a 10% neuropsychiatric whole body impairment based on the American Medical Association (AMA) Guides, 5% or half of which was due to the July 1995 accident, and the other 5% due to arousal of her pre-existing, dormant dependent personality. Dr. Granacher believed that she was at maximum medical improvement from a neuropsychiatric point and she had the ability to engage in any work she was trained to perform. He attributed Groves's speech problems to her hereditary bilateral hearing loss, rather than the work injury.

On June 4, 1997, the ALJ conducted a hearing at which Groves testified. Before the ALJ issued a decision, Groves and Clay Trucking reached a settlement, leaving an issue of the liability of the Special Fund. On August 29, 1997, the ALJ issued an opinion and order finding that Groves had suffered a work-related injury that resulted in a 100% occupational disability. He credited the medical opinions of Dr. Olusola and Dr. Brandt, and Groves's testimony in finding that she suffered from post-traumatic stress syndrome, depression, seizure disorder, hearing loss, and post-concussion syndrome. The ALJ noted Dr. Granacher's assessment of a permanent partial disability with a 10% functional impairment, apportioned half to the physical injury and half to arousal of a pre-existing,

dormant condition, but he stated that the latter was based solely on a psychological condition unrelated to a physical condition. Relying on Fischer Packing Co. v. Lanham, Ky., 804 S.W.2d 4 (1991), the ALJ believed that because the only apportionment opinion (i.e., Dr. Granacher) references Groves's psychiatric disorder and no pre-existing condition that was aroused into disabling reality related to Groves's physical problems, the Special Fund was not liable for any psychiatric conditions related to her physical problems. He thus dismissed the claim against the Special Fund.

While an appeal was pending before the Board, the Kentucky Supreme Court rendered its opinion in Whittaker v. Troutman, Ky., 7 S.W.3d 363 (1999), wherein a unanimous court held that apportionment and liability of the Special Fund under KRS 342.120 applies to a psychological impairment resulting from the arousal by a work-related injury of a pre-existing dormant, non-disabling condition into disabling reality. The Court rejected the view that Fischer Packing Co. tied liability of the Special Fund for an aroused psychiatric condition to apportionment based on a physical disability. Relying on Troutman, the Board reversed the ALJ's decision and remanded the case to the ALJ for a finding of apportionment. This appeal followed.

The Special Fund argues that the Board erred in remanding the case for a finding of apportionment. While the Special Fund concedes a remand is appropriate in light of Troutman, it contends the ALJ must make three determinations:

(1) whether Groves's physical condition renders her 100% occupationally disabled; (2) if her physical condition does not render her 100% disabled, the proportion of disability due to her physical condition and to her psychiatric or mental condition; and (3) if a portion of her disability is due to her psychiatric condition, what portion or percentage is due to the arousal into disabling reality of a pre-existing, dormant, non-disabling condition.

After reviewing the record and the ALJ's opinion, we believe the Board acted appropriately in remanding the case for a finding of apportionment. While the Special Fund continues to argue that Groves's occupational disability is related solely to her physical condition or physical impairment, the ALJ clearly rejected this position. In his opinion, the ALJ noted and credited the evidence of a psychiatric component to Groves's disability offered by Drs. Olusola, Brandt, and Granacher, as well as Groves herself. Since this finding is supported by substantial evidence, it may not be disturbed on appeal. See, e.g., Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481-82 (1999); Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

Having found a psychiatric component, the Special Fund correctly identifies the need for a further inquiry on apportionment based on arousal of a pre-existing dormant, non-disabling condition. The only evidence in the record on this issue is that of Dr. Granacher, who apportioned half of his assessment of a 10% whole body functional impairment to the

arousal of a pre-existing dormant, non-disabling dependent personality disorder. Given this state of the evidence and the ALJ's recognition of Dr. Granacher's opinion, we believe the Board's remand for a finding of apportionment was proper.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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