

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000962-WC

DANIEL SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-94-41025

SPECIAL FUND; KEVIN KING,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\* \* \* \* \* \*

BEFORE: GUDGEL, CHIEF JUDGE; JOHNSON, AND McANULTY, JUDGES.

McANULTY, JUDGE: Daniel Smith seeks review of an opinion of the Workers' Compensation Board (Board) affirming an order of the Administrative Law Judge (ALJ) which denied his motion to reopen his claim for Workers' Compensation benefits. Smith contends that the ALJ's finding that there was no worsening of his condition was not supported by substantial evidence, and was thus erroneous. Because the ALJ's decision was supported by substantial evidence, we affirm.

Smith was originally injured on October 9, 1992, when, while in the employment of Shamrock Coal Company, he slipped and fell off a supply car while unloading railroad track ties. As a result of the accident, Smith fractured his right shoulder and ruptured a disc in his upper back and cervical area. As a consequence of the injury, in October 1994 Smith filed a workers' compensation claim. The claim was initially settled for a 15% disability rating apportioned equally between Shamrock Coal and the Special Fund; the settlement was approved on April 6, 1995.

On May 6, 1996, Smith filed a motion to reopen his case, claiming an increase in occupational disability; the motion was subsequently denied. On August 26, 1996, Smith filed a second motion to reopen. This motion was granted, and Smith was eventually awarded an increase in benefits equating to 10%.

On June 21, 1999, Smith filed the present motion to reopen. Smith contends that since the first reopening his pain has become more severe; that he now has more pain radiating into his right shoulder area; that he is experiencing more frequent and severe headaches as a result of his cervical neck problems; that it is now more painful for him to turn his head from side to side and extend his arms over his head; that since April 1997 he has been dropping things quite often and his right hand grip strength has weakened considerably; that his ability to walk and stand and sit for long periods of time has worsened; that his upper back and head start to hurt if he does not have something to lean his head against; that his ability to sleep has decreased; that some nights he only gets two or three hours of

sleep; that he wakes four or five times a night due to pain; that he is unable to perform exertional type activities such as bending, crawling, stooping, and crouching because of his back and neck pain; and that his ability to do these activities has decreased since his April 1997 award. As a result of the purported worsening of his condition, Smith asserts that he has no capability of returning to active gainful employment, and that he is now totally occupationally disabled.

During the pendency of the present claim, Smith settled with Shamrock Coal Company. On December 27, 2000, the ALJ issued an opinion and award determining that Smith had failed to prove that either his condition had worsened or that his occupational disability had increased. Smith appealed the ALJ's decision to the Workers' Compensation Board. On April 4, 2001, the Board entered an opinion affirming the decision of the ALJ. This appeal followed.

In this appeal, Smith contends that the decision of the ALJ was erroneous on the basis that the more probative and credible evidence compels a finding that Smith has suffered a worsening of his condition since his first reopening award in April 1997, and that he is now 100% permanently occupationally disabled.

Pursuant to KRS 342.125(1)(d), to reopen his claim, Smith is required to show a change of disability as shown by objective medical evidence of worsening of impairment due to a condition caused by the injury since the date of the previous award or order. In a proceeding to reopen a prior award, the

moving party bears the burden of proof. Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681, 682 (1972). "[W]here medical testimony is concerned and that testimony is conflicting, . . . the question of who to believe is one exclusively for the [ALJ]." Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977). The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, Ky., 862 S.W.2d 308, 309 (1993). "Where there is evidence of substantial quality to support the ALJ's decision, the reviewing tribunal is bound by the record." Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 423 (1997); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). "[T]he function of the Court of Appeals in reviewing decisions of the Workers' Compensation Board is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 797-798 (1995); Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

The ALJ concluded that Smith had not demonstrated a worsening of his impairment since the 1996 - 1997 reopening. In his December 27, 2000, Opinion, the ALJ stated,

In support of its position, the Special Fund has offered the opinion of Dr. Patrick. Dr. Patrick did not directly address if Smith's condition has worsened since [ALJ] Smith's opinion and award. However, Dr. Patrick did address Smith's restrictions, which would limit Smith to performing sedentary and light duty work. Dr. Patrick's restrictions are

essentially the same as those imposed by Dr. Templin in 1994 and 1996.

Taking into account Smith's age (50), education (high school), work experience (heavy manual labor), and the restrictions imposed by Dr. Patrick, the Administrative Law Judge finds that Smith has failed to prove that either his condition has worsened or that his occupational disability had increased. In doing so, the Administrative Law Judge specifically relies on the restrictions of Dr. Patrick, which the Administrative Law Judge finds to be similar to, if not the same as, those imposed by Dr. Templin in the two previous litigations of this claim.

In November 2000, Dr. O. M. Patrick, at the request of the Special Fund, evaluated Smith. Dr. Patrick found Smith to have a total of 14% permanent functional impairment to the body as a whole, with 10% impairment due to excision of a cervical disc with fusion with persistent pain, and 4% due to persistent numbness of the right thumb. Dr. Patrick concluded that Smith should be restricted from repetitive over head gaze, repetitive flexion or extension of the neck, and repetitive use of the extremities overhead to lift greater than 25 pounds or more than 10 pounds frequently. As noted by the ALJ, these restrictions are very similar to the restrictions placed by Dr. James Templin in prior litigation in the case. Dr. Templin saw Smith in 1994 and 1996. In 1994 Dr. Templin assessed a 22% impairment, and in 1996 he assessed a 20% impairment. In 1996 Dr. Templin recommended against repetitive use of the upper extremities for pushing, pulling, lifting or working overhead. In 1994 he recommended against lifting in excess of 25 pounds on a maximum

basis, and 10 pounds on a frequent basis. As stated by the Board,

When one views a comparison of the medical testimony of Dr. Patrick, particularly as it relates to the restrictions, with the restrictions as were assessed during the 1996 - 1997 reopening, one can readily see why the ALJ believed Smith had failed in his burden of proof. The restrictions assessed by Dr. Patrick are virtually identical to those of the physicians testifying in the initial reopening in 1996 and 1997. Impairment rating, of course, is a factor but, at the time of the injury in this claim, it was not ultimately controlling. See Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976). While there are small differences, even the impairment rating of Dr. Muckenhausen [the medical evaluator preferred by Smith] as compared to the impairment ratings assessed by Dr. Templin in the original claim and upon the initial reopening are substantially the same.

While Smith challenges the ALJ's reliance upon Dr. Patrick on the basis that Dr. Patrick did not examine him prior to the most recent reopening, this is a question that goes to the weight and credibility to be accorded the evidence from Dr. Patrick and does not undermine the ability of the ALJ to rely upon it. Square D Company v. Tipton, supra. While the conclusion reached by the ALJ and affirmed by the Board is not the only one possible, it is clearly supported by substantial evidence. Because the order denying the motion was a reasonable exercise of the ALJ's discretion based upon competent, probative evidence, and because the Board has not overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice, we have no

choice but to affirm. See Western Baptist Hospital v. Kelly,  
supra.

For the foregoing reasons, the Opinion of the Workers'  
Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Edmond Collett  
John Hunt Morgan  
Monica Rice Smith  
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BRIEF FOR SPECIAL FUND,  
APPELLEE:

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