

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001658-WC

ERNEST HAMMOND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-22295

KTK MINING AND CONSTRUCTION, INC;
ROBERT WHITAKER, Director of
SPECIAL FUND; DONALD G. SMITH,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, EMBERTON, and HUDDLESTON, Judges.

COMBS, JUDGE: Ernest Hammond petitions for review of a July 11, 2001, opinion of the Workers' Compensation Board (the Board), which affirmed the opinion and award rendered by the administrative law judge (ALJ). The ALJ found Hammond 75% occupationally disabled upon the reopening of his previous award for partial disability. On appeal, Hammond contends that the ALJ erred in failing to find him to be totally occupationally disabled and that the Board erred in affirming the award. After reviewing the record and the applicable authorities, we affirm.

Hammond sustained an injury to his neck and back on April 20, 1992, while working for the appellee, KTK Mining & Construction, Inc. Although he continued to work for a month after the incident, Hammond has not been employed since May 1992. In 1993, Hammond settled his workers' compensation claim with KTK for a lump sum of \$25,000, which represented a 25% occupational disability; he entered into a separate settlement agreement with the Special Fund, which included a claim for coal workers' pneumoconiosis, for \$213.75 per week for 318.75 weeks, representing a 75% disability.

Hammond moved to reopen his claim in March 2000. An arbitrator concluded that Hammond had made a *prima facie* case for reopening, and the matter was assigned to an ALJ. KTK defended the claim, contending that the degree of Hammond's disability attributable to his injury had not increased since the time of the settlement. Both parties submitted several reports from doctors and vocational experts. A hearing was conducted on November 20, 2000.

In his opinion of January 11, 2001, the ALJ summarized all the evidence and concluded that Hammond had actually been 50% occupationally disabled at the time he entered into his settlement agreements in 1994. He further found that Hammond's injury had resulted in an increase in occupational disability and that he was currently suffering a 75% disability. Hammond appealed to the Board, which affirmed the ALJ's opinion.

In its review, the Board analyzed and discussed the evidence thoroughly. We have reviewed the Board's legal

conclusions based on that evidence and adopt them as our own as follows:

On appeal, Hammond argues the ALJ's decision denying him total occupational disability is clearly erroneous and the evidence compels a finding in his favor. He contends, based on his own testimony, as well as that of Drs. [Joseph] Rapier and [Don] Lafferty, he is totally disabled and unable to perform any type of work. He further relies on the evidence from East Kentucky Psychological Services, as well as the vocational testimony from Dr. William Weikel.

It is well-settled that the party seeking a change in the award bears the burden of proof on reopening. Griffith v. Blair, Ky., 430 S.W.2d 337 (1968). Where the party with the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Compelling evidence is defined as evidence which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). It is not enough for Hammond to show that there is merely some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's opinion 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 ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even if it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, this Board may not substitute its judgment for that of the ALJ

in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(2).

Based on the record, we do not believe the evidence compels a finding that Hammond has become totally occupationally disabled since the time of his settlement approved in January 1994. While there may be evidence on reopening which would have supported a finding of total occupational disability, the evidence does not compel such a finding. Hammond points to the evidence in the record which indicates severe physical and psychological restrictions, however, the ALJ chose to rely on the evidence which supported a finding that Hammond could still perform light type of work. As noted above, when medical evidence is contradictory, it is within the province of the ALJ to rely on the evidence of his choosing. Caudill v. Maloney's Discount Stores,, supra. Inasmuch as the ALJ's decision is supported by substantial evidence in the record, it cannot be said the evidence compels a finding to the contrary. Special Fund v. Francis, supra.

Hammond does not take issue with any of the legal authorities cited by the Board. Indeed, his brief closely parallels the one that he filed before the Board. In both briefs, he discusses only the evidence favorable to his argument that he is totally occupationally disabled; he did not address the evidence considered by the ALJ in support of the finding that he has retained some capacity to work. There is undoubtedly conflicting evidence in the record bearing on the issue of Hammond's disability. There is evidence that would have supported a finding that his disability had not increased since his settlement of his original claim, including the testimony of Dr. Robert Goodman, who evaluated Hammond both in 1993 and again upon reopening of the award. However, there is also evidence which supports Hammond's claim. Thus, we are compelled to hold

that the Board did not err in its assessment of the evidence in Hammond's favor as less than compelling or in its application of the applicable statutes and precedents. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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