

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000154-WC

MANALAPAN MINING COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-67148

VIRGIL HUBBARD; HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DYCHE, SCHRODER, AND VANMETER, JUDGES.

SCHRODER, JUDGE: Manalapan Mining Company, Inc., petitions for a review of a decision of the Workers' Compensation Board which affirmed an ALJ award of total and permanent disability to Virgil Hubbard for a work-related injury to his upper back received on July 30, 2002. A review of the record demonstrates that neither the Board nor the ALJ flagrantly erred in assessing the evidence. Hence, we affirm.

Virgil Hubbard (Hubbard), a chief electrician and mechanical troubleshooter, had been employed with Manalapan

Mining Company since April of 1993. On July 30, 2002, Hubbard was unloading a 120 pound valve tank from a truck, by hand and by himself. During the process, he felt an intense pain in his back and shoulder area. On July 31, 2002, Hubbard was examined by his family doctor, Dr. Effren Valencia, who ordered x-rays (negative for any break) and referred him to Dr. Vaughn for an MRI on August 5, 2002. On August 1, 2002, Hubbard went to Middlesboro Appalachian Regional Hospital's (MARH) emergency room complaining of a stinging in his mid back as a result of lifting a heavy item of equipment two days prior. X-rays revealed a deformity due to a developmental process at the area of the body of T1 and T2. (Hubbard has a congenital condition known as "Kyphosus" which is a severely painful condition of the thoracic spine). No acute fracture of the spine was seen on the MARH's x-rays.

Hubbard had been examined by Dr. Valencia two weeks prior to the work-related injury, on July 17, 2002, with a complaint on his breathing. In questioning Hubbard about possible causes of his breathing problem, Hubbard reported discomfort in his lower back. Hubbard also disclosed to Dr. Valencia that he had been experiencing flashbacks of the deaths of two of his co-workers, one from a heart attack in the mines and the other from a crushing injury to the head. Hubbard was

prescribed Celexa for his nerves, an inhaler for his breathing and Darvocet for his mid back pain.

Hubbard worked full time even with his congenital condition. Though Hubbard was not able to perform his normal job duties after the work-related injury on July 30, 2002, he continued working without interruption until September 7, 2002, primarily because the company had accommodated him concerning his condition. Hubbard filed an Application for Resolution of Injury Claim on March 19, 2003, alleging injuries to his back and in between his shoulder blades. On June 11, 2003, he subsequently amended his claim to include psychological trauma as a result of the injury. On August 19, 2003, Hubbard again amended his claim to include occupational disease alleging he had contracted coal workers pneumoconiosis as a result of exposure to coal and rock dust on July 30, 2002.

On June 1, 2004 the ALJ decided:

[T]hat the claimant is presently 100% occupationally disabled from a combination of his physical and emotional problems. Plaintiff has admittedly suffered from a long standing problem of kyphoscoliosis, however, he has continued to be employed over the years, and only after the injury herein alleged, has his underlying disease become debilitating.

Additionally, Plaintiff appears to now be suffering from a psychological problem as well. The Defendant Employer's expert, Dr. Granacher, attributed these problems to Plaintiff having lost two friends with whom

he had worked in the mine in 2002, however, although Plaintiff . . . was obviously upset about the death of his friends, stated his psychological problems had arisen after the injury herein, whereas his friends had died in 1996 and 1998, respectively. I am persuaded by the report from Dr. Weitzel, rather than the Defendant's expert.

For the above stated reasons, I find that Plaintiff is presently 100% disabled and his award shall be paid in conformity with KRS 342.730.

Thus, in summary, I do not find that Plaintiff had an active impairment/disability, prior to the injury herein, and further, I am not persuaded that Plaintiff's emotional problems were active either, in spite of his friend's death, but were caused by the accident herein.

In regards to Plaintiff's occupational disease claim, the consensus of the randomly selected B-readers is positive for coal workers pneumoconiosis. . . . However, inasmuch as Plaintiff has already been found to be 100% disabled in connection with his injury claim, and based on the fact that an injury claim takes precedent over an occupational disease claim, Plaintiff shall be unable to collect retraining incentive benefits for an occupational disease claim in addition to his 100% disability benefits. . . . [P]laintiff's occupational disease claim is hereby dismissed.

On December, 23, 2004, the Board decided:

Since the 1996 amendments to KRS 342.0011, and award of whether a permanent partial disability or a permanent total disability has required that an injury produce a disability rating (permanent functional impairment rating multiplied by a statutory factor found in KRS 342.730(1)(b)). Here, there is substantial

evidence that the injury produced at least one sustainable permanent functional impairment rating from which to compute a disability rating: i.e., the permanent impairment rating assessed by Dr. Weitzel for Hubbard's psychological impairment. This permanent impairment rating, alone, was sufficient to permit the ALJ to proceed with her analysis of whether Hubbard sustained a permanent total occupational disability.

As for Manalapan's argument that the ALJ may have impermissibly considered nonwork related impairment in concluding Hubbard is totally occupationally disabled, we again take note of the ALJ's additional explanation in her July 27, 2004, order which denied Manalapan's petition for reconsideration. There, the ALJ explained she principally relied on Dr. Crystal's conclusions, the psychological impairment testimony she credited and Hubbard's testimony. For the reasons previously given, the ALJ acted within her lawful discretion in relying on Dr. Crystal's conclusions, the psychological impairment testimony she credited and Hubbard's testimony. . . . Accordingly, the decision of the ALJ is hereby affirmed.

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, 695 S.W.2d 418, (Ky. 1985). Where evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total

proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

The function of the Court of Appeals in reviewing a decision of the Workers' Compensation Board is to correct the Board only where the Court perceives the Board has overlooked or misconstrued statutes, precedent or has flagrantly erred in assessing the evidence so as to cause a gross injustice.

Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992).

We find no such errors and therefore the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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