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(2005-SC-0790-WC)

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000805-WC

MANALAPAN MINING COMPANY, INC. APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-70045 & WC-02-90652

RALPH MORGAN; HON. SHEILA C.
LOWTHER, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

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

COMBS, CHIEF JUDGE: Manalapan Mining Co, Inc. (Manalapan) petitions for review of an opinion of the Workers' Compensation Board (Board) affirming a decision by the Chief Administrative Law Judge (CALJ) that awarded Ralph Morgan permanent partial occupational disability benefits based on a 20% impairment

rating. Manalapan argues that the Board erred in its assessment of the evidence and ignored the holding of the Kentucky Supreme Court in Cepero v. Fabricated Metals, 132 S.W.3d 839 (Ky. 2004). Finding no error, we affirm.

Morgan's employment at Manalapan started in August of 2001. He sustained an injury to his back while at work on October 31, 2001. Following a month's respite from his job, Morgan returned to work and injured his back a second time on March 20, 2002. As a result of the second injury, Morgan underwent fusion surgery performed by Dr. James Bean. He has not returned to work.

Prior to his employment with Manalapan, Morgan injured his back in July 2000 while moving a slab of concrete. A central issue before the CALJ concerned what portion of Morgan's condition -- if any -- was attributable to a pre-existing active impairment. The evidence on this point was conflicting. After summarizing the experts' opinions and the lay testimony, the CALJ concluded as follows:

> The next issue which must be considered is whether [Morgan] had a pre-existing active impairment. This is a problematic issue for the Administrative Law Judge. There is no doubt that Mr. Morgan experienced an episode of back pain in 2000. Despite his testimony that this was a negligible event, it did warrant diagnostic tests including x-rays and a CT scan. These studies documented the presence of spondylolisthesis at L5-S1. However, the medical records support Mr.

> Morgan's testimony that he subsequently continued working, performing heavy manual labor, without the necessity of medical treatment. The medical experts who have presented evidence in this claim differ in their opinions on this point. Dr. [Bart] Goldman felt that 7% of [Morgan's] current 20% impairment was due to a pre-existing symptomatic condition. Dr. [Gregory] Gleiss agreed that [Morgan] retains a 20% functional impairment. He felt that prior to the surgery [Morgan] had a 5% functional impairment. [Manalapan] argues that a close reading of Dr. Gleiss's report demonstrates that this was an active and pre-existing impairment. In contrast, Dr. Bean indicated that Mr. Morgan had no pre-existing active impairment. Dr. [David] Muffly also agreed. He testified that [Morgan] had spondylolysis before August 2001 which was aroused into disabling reality by the two work related injuries during the course of [Morgan's] employment as a coal miner. This is certainly consistent with the fact that Mr. Morgan was able to continue performing heavy manual labor from July 2000 until October 2001.
>
> After carefully considering this conflicting evidence, the Administrative Law Judge is persuaded that [Morgan] did not have a pre-existing active condition. The undersigned Administrative Law Judge recognizes the expertise of Dr. Muffley [sic], as well as Dr. James Bean, who also had the benefit of treating [Morgan] for a prolonged period of time. In light of this, the Administrative Law Judge is persuaded that Mr. Morgan did not have a pre-existing active condition.

(CALJ's Opinion and Award entered June 21, 2004, at pp. 9-10.)

Manalapan filed a petition for reconsideration, challenging the CALJ's decision to rely on the opinions of Drs.

Bean and Muffly. It argued that neither doctor had "a full and accurate understanding and picture of [Morgan's] health prior to [October 31, 2001]." Citing Cepero, supra, Manalapan contended that the CALJ erred in deferring to the opinions of either of the two physicians. The CALJ denied the petition.

In its appeal to the Board, Manalapan argued that Dr. Bean's opinion should not have been given any weight because his report did not indicate that he was ever given a history of the 2000 back injury. Manalapan argued that although Dr. Muffly, Morgan's other expert, was aware of the prior injury, his opinion was flawed because he:

> did not review or take into consideration the records of [Morgan's] condition prior to his hire date at Manalapan.

In its opinion of March 18, 2005, the Board summarized the evidence and addressed Manalapan's arguments with respect to the weight to be given to the experts' testimony:

> Manalapan attacks Dr. Bean's opinion that there was no preexisting active impairment on the basis of the incomplete history he received of the 2000 injury and subsequent diagnostic testing. Where the evidence establishes that a physician's opinion as to causation is based upon an inaccurate medical history, the fact finder may reject that opinion as lacking in reliability and probative value. Osborne v. Pepsi-Cola Co., 816 S.W.2d 643 (Ky. 1991). The right to reject the expert's opinion is usually deemed a discretionary matter and considerable deference is accorded the ALJ's fact finding authority.

At the opposite end of the spectrum is Cepero v. Fabricated Metals Corp., supra. In Cepero, the supreme court considered circumstances it found sufficient to mandate reversal based on an insufficient history received by the medical expert. The ALJ in Cepero relied on a medical opinion erroneously premised on the claimant's egregious omission of directly relevant past history. The court held "[medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable." Id. at 842.

Here it does not appear Morgan was acting with deceit in keeping a correct history from Dr. Bean, his treating physician. While it is abundantly clear that Dr. Bean did not have a complete history, he was nonetheless aware of the preexisting non-work-related spondylolisthesis and concluded it was asymptomatic until the injuries that occurred at Manalapan. Although another fact finder may have been less impressed by Dr. Bean's opinion that there was no preexisting active impairment at the time of those injuries, we are without any authority to conclude this evidence was so lacking in probative value that it must be disregarded as a matter of law.

More important, however, is the opinion of Dr. Muffly. In analyzing Dr. Muffly's testimony, the facts and analysis provided by our supreme court in Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001) are instructive. . . . Dr. Muffly was well aware of the 2001 diagnosis of spondylolisthesis/spondylolysis but testified that Morgan's initial complaints in 2000 were the result of a back strain that had resolved. . . . Dr. Muffly later testified he believed the injury that

> occurred in October 2001 and the re-injury in March 2002 aroused a dormant spondylolisthesis condition into disabling reality and that was the reason Morgan had to undergo surgical treatment. Under the state of the evidence, we are unable to conclude that the findings of the CALJ are so wholly unreasonable that her opinion must be reversed as a matter of law or that any further fact finding is warranted.

(Board's Opinion rendered March 18, 2005, at pp. 15-19.)

In this appeal, Manalapan argues that the Board "is still engaging in the practice of what Cepero expressly prohibits." (Appellant's brief at p. 12.) It believes that the Board erred in allowing the CALJ to rely on Dr. Bean's medical report because he was not provided with a complete history of Morgan's back problems.

> The Board erred in holding that the record of evidence in this case met [the Cepero] standard and in finding that the evidence was weighed properly. Just as in Cepero, there was a complete omission of a past injury by Morgan to Dr. Bean, leading Dr. Bean to erroneously find that Morgan's entire condition was work related.

(Appellant's brief at p. 13.) Manalapan also argues that the Board erred in determining that the CALJ had relied on the opinion of Dr. Muffly, suggesting that Dr. Muffly's opinions were not even utilized by the CALJ:

> Dr. Muffly's report is immaterial to the issues on appeal. The judge [CALJ] exclusively relied on the report of Dr. Bean, and not on Dr. Muffly.

(Id.).

We have cited the decision of the CALJ verbatim, *supra*, at pp. 2-3, which refutes the suggestion that the CALJ relied exclusively on the opinions of Dr. Bean. Additionally, Manalapan previously criticized the CALJ for relying on the opinions of **both** doctors on the issue of causation as recited in its petition for reconsideration before the CALJ and its appeal to the Board.

Although Dr. Bean was apparently not aware of the 2000 injurious event, Dr. Muffly was fully aware of Morgan's history of back problems. Dr. Muffly believed that Morgan had no pre-existing active impairment -- an opinion which was shared by Dr. Bean.

We are not persuaded that the Board erred in determining that the CALJ was entitled to rely on the report of Dr. Bean. Cepero removes from an ALJ's discretion the ability to rely on a medical opinion based on an incomplete history that is otherwise "unsupported by any other credible evidence." 132 S.W.3d at 842. As the Board observed, Dr. Bean's opinions were not unsupported. Other substantial and credible evidence supported Dr. Bean's opinion with respect to causation -- namely, the testimony of Dr. Muffly, who was fully aware of the complete medical history. We have no basis to disturb the reasoning either of the Board or of the CALJ.

Therefore, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

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