

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002555-WC

BARRY LONG

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01735

AHLSTROM USA;
HON. IRENE STEEN, ADMINISTRATIVE
LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,¹ SENIOR
JUDGE.

KELLER, JUDGE: Barry Long appeals from the Board's Opinion affirming the

Administrative Law Judge's (ALJ) Opinion and Order dismissing his workers'

compensation claim. On appeal, Long asserts that the evidence compelled a finding in

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11-(5)(b) of the Kentucky Constitution and KRS 21.580.

his favor; that the ALJ's Opinion was not supported by substantial evidence; that the ALJ erred when she found that Long had not presented any objective evidence of disability; that the ALJ's denial of his request for a discogram constituted an abuse of discretion; and that the ALJ failed to consider the combined effect of Long's physical and mental disabilities. A unanimous Workers' Compensation Board affirmed the ALJ and we likewise affirm.

FACTS

Long was 44 years of age at the time of the alleged work injury. He has a high school education, and worked for Ahlstrom, a filter manufacturer, from January of 1984 until July of 2003. Long's primary duty with Ahlstrom involved saturating large paper rolls with chemicals. On January 7, 2003, Long was lifting a pipe when he experienced low back pain, felt like he was paralyzed, and fell to the ground. Long reported the injury to his supervisor and sought medical treatment. He returned to work the next day and continued working on modified duty until July of 2003, when his pain became too intense to continue.

Long described his low back pain as constant, with periods of exacerbation and improvement, but he never experienced any total relief. He also complained of occasional right leg pain, moodiness, and difficulty dealing with his anger. By the time of his June 2005 deposition, Long was using a cane at all times to walk. He testified that he spends his days trying to accommodate his back pain by frequently changing positions.

Litigation of Long's claim began with a medical fee dispute, wherein Long sought an order requiring Ahlstrom to authorize and pay for a discogram that had been recommended by Dr. McComis. In response to the medical fee dispute, Ahlstrom filed the reports of Dr. Best, Dr. Wolens, and Dr. Travis.

Dr. Best examined Long and found complaints of tenderness, no muscle spasm, normal reflexes, nondermatomal sensory loss, no atrophy, and inconsistent straight leg raising. Based on his examination of Long and his review of the medical records, Dr. Best stated that Long exhibited evidence of symptom magnification and that, with two weeks of aggressive physical therapy, Long could return to work with no restrictions. Dr. Best assigned Long a 0% impairment rating and stated that performing the requested discography was not reasonable or necessary.

Dr. Wolens stated that he had reviewed Long's medical records, which revealed complaints of mechanical pain only, with no MRI evidence of disc pathology. Dr. Wolens opined "that discography is poorly predictive for the identification of disc mediated pain" and he recommended denial of the requested discography.

Dr. Travis, who conducted a review of Long's medical records, concluded that the recommended discography was not indicated. In doing so, Dr. Travis noted Dr. Best's findings of symptom magnification, the lack of evidence of a disc abnormality in the report of Long's 2003 MRI, and the unreliability of discography as a diagnostic tool. In a follow-up report, Dr. Travis stated that he had reviewed Long's MRI film and it showed only annular bulging at L4-5 and L5-S1 with no evidence of nerve root

compression. Dr. Travis reiterated his belief that he saw no evidence that would support performing a discography on Long.

In November of 2003, Long filed an Application for Resolution of Injury Claim (Form 101) alleging that he had suffered a low back injury on January 7, 2003. During the course of the litigation, Long amended his claim to assert a claim for psychological injury. Long attached numerous medical records to his Form 101 reflecting his ongoing complaints of low back pain, mechanical in nature, dating to a work injury on January 7, 2003. These records also reflect that Long reported some initial improvement in his symptoms with conservative treatment, but that he did not report any longstanding relief from his pain.

In late 2003, Long's medical fee dispute and injury claim were assigned to an ALJ for adjudication. During the course of litigation, Long filed medical records/reports from Dr. Dennis, Dr. Holzknecht, Dr. Jackson, Dr. Bays, Dr. Gaines, Dr. Spence, Dr. Donley, and Dr. Wagner. In order for us to determine whether the ALJ's opinion is supported by the evidence, we must review all of the evidence. A summary of the evidence filed by Long follows.

Dr. Dennis's examination revealed right leg muscle weakness or atrophy, decreased reflexes, and muscle spasm. Dr. Dennis made diagnoses of severe lumbosacral strain with disc pathology, annular tear, and radiculopathy. He assigned Long a 33% impairment rating; however, Dr. Dennis left the portion of his report regarding causation blank.

Dr. Jackson stated that Long suffered from low back pain with radiation into his right gluteal region. Dr. Jackson also noted that Long's MRI showed a protruding disc at T12-L1 on the right and protruding discs at L1-2 and L5-S1 on the left. Based on her examination of Long and her review of the medical records, Dr. Jackson assigned Long an 8% impairment rating.

Dr. Holzknecht's medical record indicates that he treated Long in early 2004 for complaints of chronic back pain.

Records from Dr. Gaines consist primarily of off-work slips and relevant reports dated May 21, October 12, and November 22, 2004. In his May report, Dr. Gaines recited Long's treatment and stated that he had been following Long to help Long manage his chronic low back pain. In his October report, Dr. Gaines stated that Long's MRI showed a "surgically-correctable lesion." However, in his November report, Dr. Gaines stated that recent radiographic studies showed no surgical disc. Throughout his treatment, Dr. Gaines indicated that Long was essentially unable to work.

Dr. Bays performed an evaluation of Long at the request of the Division for Disability Determinations in connection with Long's Social Security disability claim. Long complained to Dr. Bays of depression with episodic anxiety, irritability, and feelings of isolation. Following his interview and mental status examination of Long, Dr. Bays made a diagnosis of an adjustment disorder with depressed mood. Dr. Bays recommended treatment and stated that Long might benefit from physical and occupational therapy.

Dr. Shirley Spence, a psychologist, began treating Long in June of 2004, and continued to treat him throughout the litigation. In her report, Dr. Spence noted that Long presented with “an underlying degree of frustration and anger” despite his overall politeness. Dr. Spence's testing revealed that Long had some difficulty with performing simple mathematical calculations and evidence of “extreme depression.” Following her interview and testing of Long, Dr. Spence made diagnoses of extreme major depression and adjustment disorder. She assigned Long a GAF of 30 to 35 and a Class IV impairment under the 5th edition of the AMA Guides, which she converted to an 80% impairment rating.

Dr. Donley evaluated Long on June 9, 2004. Long complained to Dr. Donley of low back pain with radiation into his legs. Dr. Donley's examination revealed decreased range of motion, normal reflexes and sensation, and diagnostic test evidence of disc degeneration with no evidence of a surgical lesion. Dr. Donley made diagnoses of low back pain with degenerative disc disease and acute chronic lumbar strain. An EMG/NCV recommended by Dr. Donley revealed no evidence of neuropathy or radiculopathy.

Dr. Tom Wagner performed a vocational evaluation of Long in April of 2005. Based on his testing of Long and review of the medical records, Dr. Wagner stated that Long is 100% occupationally disabled.

In addition to the medical and vocational proof, Long submitted testimony from former co-workers Huland Patton, Jr., Clarence Scisney, and Billy Keplinger.

Patton testified about Long's job duties and that Long was a good worker who did not whine. Scisney testified that he considered Long to be a good, conscientious worker. Keplinger testified that Long “was a hard working kid. He was dependable. He would do his job the way he was told to do it, and his job would come first before anything else.”

Ahlstrom, in addition to the reports from Drs. Best, Wolens, and Travis, filed reports from Dr. Gleis, Dr. Shraberg, and Dr. Conte. Those reports are summarized below.

Dr. Gleis evaluated Long on April 5, 2004. Long complained of low back pain with occasional right leg pain and the feeling that his leg was “asleep.” Dr. Gleis's examination revealed decreased range of motion, decreased straight leg raising, normal reflexes, normal motor strength, no atrophy, normal sensation, increased low back pain with femoral nerve stretch, and a slow gait. Following his examination and an extensive review of the medical records, Dr. Gleis made a diagnosis of lumbosacral strain with no evidence of radiculopathy. Dr. Gleis noted no significant anatomic changes on Long's MRI except for those associated with the natural aging process. Because Dr. Best had found no muscle spasm or restriction to range of motion, Dr. Gleis stated that he suspected that Long's condition had changed significantly during the preceding year or that Long had “learned pain behaviors.” Dr. Gleis classified Long's decreased range of motion and muscle guarding as “more likely 'learned pain behavior' rather than true objective medical findings.” As to impairment, Dr. Gleis stated that Long would have a

maximum of a 5% impairment rating although he noted that Long's objective findings were questionable. Finally, Dr. Gleis stated that he did not believe that a lumbar discogram would provide any beneficial information since Dr. Gleis would recommend against any surgery even if the discogram were positive.

Dr. Shraberg evaluated Long on April 5, 2004. Long complained to Dr. Shraberg of irritability and decreased memory and concentration. Dr. Shraberg noted that Long complained that he felt as if he had been betrayed and rejected by Ahlstrom and the workers' compensation carrier. Dr. Shraberg's psychological testing revealed evidence of depression, hostility, symptom magnification, somatization disorder, and paranoid personality disorder. Based on his interview of Long and psychological testing, Dr. Shraberg made diagnoses of personality dysfunction, histrionic with marked dependent features and symptom magnification related to that personality dysfunction.

In a follow-up report, Dr. Shraberg questioned Dr. Spence's conclusions noting that a person with a GAF as low as Dr. Spence assigned would "not be able to give a history much less live alone without home health care." Furthermore, Dr. Shraberg questioned the lack of objective testing performed by Dr. Spence.

In a supplemental report, Dr. Gleis stated that he had reviewed Dr. Shraberg's report. Based on his review of Dr. Shraberg's report, Dr. Gleis stated that his findings of muscle guarding without spasm were not "truly objective finding[s] of injury but rather a 'learned pain behavior.'" Dr. Gleis stated that Long should have a 0%

impairment, because Dr. Gleis's initial impression that the muscle guarding was not an objective finding had been confirmed by Dr. Shraberg's findings.

Dr. Conte performed a vocational evaluation of Long in June of 2005. Based on his testing and review of the medical reports, Dr. Conte stated that Long could perform work within the light and sedentary exertional categories.

The parties also submitted evidence regarding a disability pension plan which provided benefits to Long. That evidence is not pertinent to this appeal; therefore, we will not summarize it.

Following the presentation of the above proof, the ALJ issued a “Preliminary Opinion” extensively summarizing the evidence and ordering Ahlstrom to authorize and pay for an MRI or myelogram. In support of her order, the ALJ noted that the claim had been pending for a significant period of time and that Long's diagnostic testing was dated. The ALJ then re-opened proof so that the parties could address the findings from that diagnostic testing.

On January 30, 2006, Long underwent a lumbar MRI which showed a small disc herniation at L5-S1 on the left, central canal stenosis at L4-5, and small disc protrusions to the right at T12-L1 and to the left at L1-2. Dr. Kline reviewed Long's diagnostic films and concluded that there was no change between the 2003 and 2006 studies. Dr. Gleis also reviewed the two sets of films and noted no changes. Finally, Dr. Gaines noted that the MRI confirmed the existence of lumbar disc disease.

After submission of the MRI report and supplemental reports from the physicians, the ALJ entered her final Opinion dismissing Long's claim. In doing so, the ALJ stated as follows:

After having had the opportunity to review the most recent MRI report and the subsequent medical interpretations made therefrom, it is the final opinion of this ALJ that Plaintiff has failed in his overall burden of proof to show that he had sustained an injury that would qualify him for an occupational disability award from either the orthopedic or mental aspects of his allegations. The most recent MRI was re-read by several physicians, the most persuasive of which came from the Defendant. In reality, there were really no changes from the earlier MRI, taken subsequent to Plaintiff's injury, and which showed only degenerative changes commensurate with Plaintiff's age. Although Plaintiff did show some evidence of a bulge, a tear, or a herniation, at especially the L5-S1 level, the more persuasive evidence indicates that these findings did not explain the horrific complaints of pain of which this man is complaining, especially in view of the fact that Plaintiff's primary problems have been located on the right. The well qualified experts from the Defendant have shown that Plaintiff does not warrant an impairment rating based upon the examinations or radiographic studies, and I will adopt same as being the more persuasive.

Likewise, in regards [sic] to Plaintiff's psychiatric disability allegations, I am more persuaded by the evidence from Dr. Shrubbery [sic], which shows that Plaintiff has adopted an "invalid" attitude, when, in reality, his psychological profile shows that he engaged in severe symptom magnification, bordering on the factitious. Thus, overall, and in further considering that the vocational expert from the Defendant, Dr. Conte, who opined that Plaintiff had no loss of occupational functioning, based upon the evidence as presented, by what I have found to be the more persuasive evidence from the Defendant, it is the final opinion of this ALJ that Plaintiff suffers only from normal age related changes, which are not compensable under KRS 342. Therefore, Plaintiff's claim shall be dismissed in its entirety.

Long did not file a petition for reconsideration but did timely file an appeal to the Board from the ALJ's opinion.

STANDARD ON REVIEW

Long raises five issues on appeal: (1) whether the evidence compelled a finding in his favor; (2) whether the supplemental report from Dr. Gleis constituted substantial evidence; (3) whether the ALJ erred by finding that Long had presented no objective evidence of his disability; (4) whether the ALJ abused her discretion by denying Long's request for a discogram; and (5) whether the ALJ failed to consider the combined effects of Long's physical and psychological conditions.

Long has the burden of proof on all issues. *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky.App. 1979). Because Long failed to convince the ALJ and the Board that he had met his burden of proof, Long must establish on appeal that the evidence before the ALJ was so overwhelming as to have compelled a finding favorable to him. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). In order to review the Board's decision, we must review the ALJ's decision. In reviewing the decision of the ALJ, we are constrained to defer to the ALJ on issues of fact because, as fact finder, the ALJ has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). We are mindful that, when deciding those issues of fact, the ALJ is free to choose to believe or disbelieve parts of the evidence from the total proof, regardless of which party offered it. *Brockway v.*

Rockwell International, 907 S.W.2d 166, 169 (Ky.App. 1995); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). Finally, we are also mindful that we may only reverse an opinion of the Board affirming an ALJ's decision if the ALJ's finding is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law or if the Board has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000); *Western Baptist Hospital v. Kelly*, 827 S.W.2d 687, 688 (Ky. 1992).

Within the above standards, we will address each of the issues raised by Long in the order presented.

THE EVIDENCE DID NOT COMPEL
A FINDING IN LONG'S FAVOR

Long argues that the evidence he presented compels a finding in his favor. In order for evidence to compel a finding in favor of Long, that evidence must be “so overwhelming that no reasonable person could reach the conclusion of the Board.” *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky.App. 1985), *overruled on other grounds*. In support of his argument, Long states that he presented “over 178 pages of treating medical records proving that he is 100% occupationally disabled” and testimony from three co-workers that he was an excellent employee. That is true. However, Ahlstrom filed evidence from Drs. Gleis, Best, Travis, and Shraberg showing that Long does not have any permanent impairment related to the alleged work injury. Faced with this conflicting evidence, the ALJ chose to believe the medical proof filed by Ahlstrom

rather than the medical proof filed by Long. That is within the ALJ's purview and we hold that a reasonable person, faced with this conflicting evidence, could have come to the same conclusion as the ALJ. Therefore, we are without authority to disturb the ALJ's findings.

THE ALJ'S OPINION WAS SUPPORTED
BY SUBSTANTIAL EVIDENCE

Long next argues that Dr. Gleis's supplemental report was not substantial evidence and that the ALJ's reliance on that report constitutes reversible error. In support of his position, Long asserts that Dr. Gleis first assigned him a 5% impairment rating. However, after reviewing Dr. Shraberg's report, Dr. Gleis changed his mind and assigned Long a 0% impairment rating. According to Long, Dr. Gleis's supplemental report was fatally flawed because Dr. Gleis had reviewed Dr. Shraberg's report, but he had not reviewed Dr. Spence's report or records.

Evidence is substantial if it “has sufficient probative value to induce conviction in the minds of reasonable men.” *Blankenship v. Lloyd Blankenship Coal Co., Inc.*, 463 S.W.2d 62, 64 (Ky. 1970). However, as noted by the Supreme Court of Kentucky, a medical opinion that might otherwise be substantial evidence, may be fatally flawed if not based on an accurate history. *Cepero v. Fabricated Metals Corporation*, 132 S.W.3d 839, 842 (Ky. 2004). Long relies on *Cepero* to support his position that Dr. Gleis's supplemental report did not constitute substantial evidence. However, *Cepero* is clearly distinguishable from the case herein. In *Cepero*, Cepero alleged that he suffered a work-related knee injury. The ALJ awarded Cepero benefits based on evidence from two

physicians that Cepero's knee condition was related to the work injury. However, neither of the physicians was aware that Cepero had suffered a much more severe knee injury several years earlier. The Board reversed the ALJ, and this Court and the Supreme Court of Kentucky affirmed the Board. In doing so, the Supreme Court held that “[I]n cases such as this, where it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician **on the issue of causation** cannot constitute substantial evidence.” *Cepero* at 842. (Emphasis added).

Unlike the physicians in *Cepero*, Dr. Gleis expressed an opinion regarding impairment, not causation. Therefore, *Cepero* does not have any application to Long's claim.

Furthermore, we note that, while Dr. Gleis did not have Dr. Spence's records to review, that deficit goes to the weight to be afforded to Dr. Gleis's opinion, not to its substance. Weighing the evidence is the exclusive province of the ALJ, and we cannot disturb the ALJ's findings even if we disagree with the manner in which the ALJ weighed the evidence, which we do not. *See Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). Finally, we note that, even if Dr. Gleis's report were not substantial evidence, there is sufficient other evidence of substance from Drs. Best and Travis to support the ALJ's opinion that Long's physical condition is not related to the work injury.

THE ALJ DID NOT ERR WHEN SHE FOUND
THAT LONG HAD NO OBJECTIVE EVIDENCE
OF HIS DISABILITY

Long argues that the ALJ erred when she decided that there was no objective evidence of disability. Specifically, Long cites to the ALJ's statement in her Final Opinion and Dismissal that his MRI “showed only degenerative changes commensurate with Plaintiff's age.” Long argues that the ALJ ignored, disregarded, and discounted the “voluminous records of muscle guarding and spasm” when she determined his condition was not work-related. However, a review of the ALJ's preliminary and final opinions reveals that the ALJ did recognize the evidence of objective medical findings offered by Long. In fact, the ALJ stated in her Final Opinion and Dismissal that Long's MRI “did show some evidence of a bulge, a tear, or a herniation, at especially the L5-S1 level.” Furthermore, the ALJ set forth an eight page summary of the medical proof submitted by Long. After recognizing that evidence, the ALJ simply chose to believe the evidence submitted by Ahlstrom that Long's physical conditions were the result of the natural aging process rather than the work injury. As noted above, choosing what evidence to believe and what evidence to discount is within the purview of the ALJ. As long as the evidence is of substance, and we have previously held that it is, we cannot substitute our inferences or conclusions for those of the ALJ. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 420 (Ky. 1985). Therefore, we hold that this issue is without merit.

THE ALJ DID NOT ABUSE HER DISCRETION
WHEN SHE DENIED LONG'S REQUEST FOR A DISCOGRAM

Long argues that the ALJ abused her discretion when she refused to order Ahlstrom to authorize and pay for the discogram recommended by Dr. McComis. In support of his argument, Long points to the records of Drs. McComis and Gaines indicating that a discogram was necessary in order to evaluate and diagnose Long's condition. Standing alone, these records would have supported Long's position. However, Ahlstrom filed evidence from Drs. Best, Wolens, Travis, and Gleis stating that the recommended discogram was not reasonable or necessary because the test was either unreliable or would not have provided any beneficial information. As noted above, the ALJ can choose which evidence to believe and she simply chose to believe the evidence offered by Ahlstrom rather than that offered by Long. That is within the sole province of the ALJ and we cannot disturb that finding on appeal.

THE ALJ CONSIDERED THE COMBINED EFFECTS OF
LONG'S PHYSICAL AND MENTAL CONDITIONS

Long argues that the ALJ erroneously failed to take into consideration the cumulative effects of his physical and psychological conditions. In support of his argument, Long points to the beneficent purposes of the Act and the holding of the Supreme Court of Kentucky that the Act should be liberally construed to effect those purposes. *City of Louisville v. Slack*, 39 S.W.3d 809, 816 (Ky. 2001). We do not dispute the Supreme Court's holding in *Slack*; however, we note that before an ALJ can take into consideration the cumulative effect of physical and psychological work injuries, she must

first find that a claimant suffered those work injuries. Unfortunately for Long, the ALJ did not find any compensable work injuries, either physical or psychological. Therefore, there are no effects to consider, combined or otherwise.

CONCLUSION

Boiled down to its essential elements, Long's appeal amounted to a request for us to reconsider and re-weigh the evidence before the ALJ. As set forth above at length, that is not within our authority. Therefore, we affirm the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas E. Springer III
Madisonville, Kentucky

BRIEF FOR APPELLEE:

Joel W. Aubrey
Louisville, Kentucky