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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001156-WC

FRASURE CREEK MINING — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-07-89914

SCOTTIE CORNETT; HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, DIXON, AND THOMPSON, JUDGES.

CLAYTON, JUDGE: Frasure Creek Mining petitions for a review of the decision of the Workers' Compensation Board (Board) that affirmed an opinion of the Administrative Law Judge (ALJ) in part, reversed in part and remanded for further action. The only issue on appeal concerns the Board's reversal of the ALJ's order limiting the permanent partial disability (PPD) award of Scottie Cornett (Cornett)

to benefits based upon a 3 percent whole person impairment rating against Frasure Creek Mining (Frasure Creek). In making his ruling, the ALJ concluded that, following Cornett's April 18, 2007, injury, he had a 13 percent whole person impairment under the American Medical Association, *Guides to the Evaluation of Permanent Impairment* ("AMA *Guides*") but that it was reduced to a 3 percent whole person impairment rating because the ALJ found that he had a pre-existing 10 percent impairment. Hence, the ALJ based Cornett's award of PPD to benefits against Frasure Creek upon a 3 percent whole person impairment rating. After careful consideration, we affirm the decision of the Board.

FACTUAL AND PROCEDURAL BACKGROUND

Prior to his employment with Frasure Mining, Cornett worked as an underground coal miner for Twin Pines from 1995 through 1997. On August 8, 1995, during his employment with Twin Pines, Cornett suffered an injury to his low back. No medical records pertaining to Cornett's treatment as a result of that injury were provided for the claim. And no formal application for workers' compensation benefits was ever filed as a result of that injury by Cornett against Twin Pines. The record, however, did contain the pre-litigation Form 110 Agreement entered into between Cornett and the workers' compensation insurance carrier. On December 19, 1996, an ALJ approved that agreement. Under the terms of the agreement, the parties contracted to settle any claim for income benefits that Cornett may have had at the time against Twin Pines for a lump sum of $9,693.90, representing a "10 percent PPD."

Subsequently, following employment with several other companies in a variety of job positions, Cornett was hired by Frasure Mining as a "dozer operator" in December 2006. On April 18, 2007, Cornett injured his low back when the blade of the bulldozer he was operating became stuck, causing him to be jerked around inside the cab. He immediately experienced pain in the low back and was unable to complete his shift. Cornett sought treatment the following day and followed up with his family physician. Cornett remained off work until June 5, 2007. He testified that upon returning to work at Frasure Creek, he continued to experience pain, which affected his right leg and low back. On August 8, 2007, while at home, Cornett slipped and fell. He again experienced low back pain. Then, two days later, on August 10, 2007, Frasure Mining terminated his employment because he did not report to work or call in sick. In November 2007, Cornett went to work operating a bulldozer for James River Coal Company ("James River"). He worked at James River until March 2008. Cornett testified he was later officially terminated by James River in July 2008 because of missing work due to his low back condition. Since this termination, Cornett has not returned to work allegedly because of his low back condition.

On June 23, 2008, Cornett filed a Form 101 Application for Resolution of Injury claim regarding the injury sustained on April 18, 2007, while operating a bulldozer for Fraser Mining. In the course of the action, three independent medical exams were performed individually by Drs. Gregory T. Snider, Ellen M. Ballard, and Robert K. Johnson. The ALJ issued an Opinion,

Award, and Order on January 8, 2009, determining that, based on the opinions of Dr. Johnson, the injury at Frasure Creek on April 18, 2007, resulted in a lumbosacral disc herniation with radiculopathy of the S1 nerve root. Additionally, the ALJ found that Cornett's August 8, 2007, fall at home was insignificant and did not produce any permanent harmful change. These findings are not disputed on appeal. Nevertheless, the ALJ also found that Cornett had a 10 percent pre-existing active impairment and awarded him 3 percent impairment as a result of the 2007 injury. This finding is disputed. The ALJ denied Cornett's petition for reconsideration on February 6, 2009. Thereafter, Cornett appealed the matter to the Board arguing that the ALJ erred when he apportioned 10 percent of the injury to a pre-existing active condition.

The Board issued its opinion on May 22, 2009. In contrast to the ALJ's findings, the Board held, in light of the medical evidence of record, that Frasure Creek failed to present any competent proof establishing an existent, active impairment rating under the AMA *Guides* relative to Cornett's low back immediately prior to the work-related injury. On remand, the Board instructed the ALJ to issue a new award based upon the entirety of the 13 percent whole person impairment rating. This appeal followed.

ISSUE

The sole issue on appeal is whether the 2007 work injury is compensable for only 3 percent of the 13 percent impairment based on a pre-existing condition as determined by the ALJ, or whether it was error, as the Board

held, for the ALJ to determine Frasure Creek had satisfied its burden of proof with respect to its affirmative defense of Cornett's pre-existing active impairment of 10 percent that was non-compensable.

Frasure Creek argues that the ALJ has the sole authority to judge the weight, credibility, and inferences to be drawn from the evidence of record and that mere evidence contrary to the ALJ's decision does not justify reversal on appeal. In fact, Frasure Creek contends that Cornett must establish that there was no substantial probative evidence of value to support the ALJ's decision. In sum, Frasure Creek maintains the ALJ's decision should not be disturbed on appeal as it was supported by substantial evidence on the record. Cornett responds to these contentions by reasoning that, as the Board determined, the ALJ erred as a matter of law in finding that Frasure Creek had met its burden of proof in establishing that Cornett had a 10 percent active impairment when he was injured in 2007.

STANDARD OF REVIEW

"When we review a decision of the Workers' Compensation Board, we will only reverse the Board's decision where the Board has overlooked or misconstrued the controlling law or so flagrantly erred in evaluating the evidence that a gross injustice has occurred." *Toyota Motor Mfg., Kentucky, Inc. v. Lawson*, _____S.W.3d ____, 2009 WL 3683124 (Ky. App. 2009) (citing *Daniel v. Armco Steel Co.,* 913 S.W.2d 797, 798 (Ky. App. 1995)). It is well-established that the function of this Court in reviewing the Board is to correct the Board only where the Court perceives "the Board has overlooked or misconstrued controlling law or so

flagrantly erred in evaluating the evidence that it has caused gross injustice." *Morrison v. Home Depot*, 279 S.W.3d 172, 175 (Ky. App. 2009) (citing *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992)).

Moreover, even though the ALJ and the Board's determination of the law are given careful consideration, legal questions are subject to *de novo* review by our court in workers' compensation cases. *Carroll v. Meredith*, 59 S.W.3d 484, 489 (Ky. App. 2001).

ANALYSIS

Cornett, as the claimant in a workers' compensation action, bears the burden of proof to convince the ALJ, as the trier of fact, of every element of his cause of action. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). But, as highlighted by the Board in its decision, Frasure Creek bears the burden to establish the affirmative defense of pre-existing active "impairment."

As background for the facts of this situation, it is noteworthy that for purposes of the Act, KRS 342.0011(35) defines "permanent impairment rating" as follows:

> "Permanent impairment rating" means percentage of whole body impairment caused by the injury or occupational disease as determined by "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest available edition[.]

Additionally, the assessment of a permanent impairment rating under the AMA *Guides* in a workers' compensation claim is a medical question solely within the

province of the medical experts. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206 (Ky. 2003). Following this line of reasoning the Board held that the ALJ erred as a matter of law and based its reasoning squarely on the Kentucky Supreme Court's holding in *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003). We quote the decision entered May 22, 2009:

> In this instance, we find the Kentucky Supreme Court's holding in *Roberts Brothers Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003), to be dispositive. In that case, the Supreme Court addressed the issue of active impairment as an affirmative defense. The Supreme Court instructed that for purposes of the Act, "impairment" and "disability" are not synonymous. The Court explained that since the 1996 amendments to the Workers' Compensation Act, in cases involving permanent partial disability, awards are based solely on an injured worker's impairment rating assessed in accordance with the AMA Guides. The Court reasoned, therefore, that an exclusion from a partial disability award for an alleged condition that is preexisting and active must likewise be based upon a pre-existing impairment rating under the AMA Guides.
>
> In view of that, where an employer raises preexisting active impairment as a defense, the ALJ must determine whether the injured worker qualified for an impairment rating involving the same body part immediately prior to the work-related injury for which benefits are being sought. What is more, any such finding must be based on the opinion of a medical expert in accordance with the AMA *Guides*. *Lanter v. Kentucky State Police*, 171 S.W.3d 45 (Ky. 2005).

Thus, from this line of interpretation, it is apparent that, in order for the ALJ to determine that Cornett had a 10 percent pre-existing impairment, medical experts must have ascertained this limitation based on the AMA *Guides.*

Here, the two physicians that the ALJ relied on to determine that Cornett had a 10 percent pre-existing impairment, Drs. Ballard and Snider, did not have any medical records from the 1995 injury or, for that matter, any medical records prior to the 2007 injury. Nor did the physicians evaluate Cornett for a pre-existing impairment using the AMA *Guides*. Apparently, these doctors relied on Cornett's self-report of a previous impairment from his earlier workers' compensation settlement. Obviously, Cornett is not a medical expert who can testify as to his own impairment. No medical expert independently arrived at a pre-existing active AMA impairment based on their objective medical findings, and thus, as a matter of law, it was error for the ALJ to rely on the doctors' opinions to satisfy Frasure Mining's burden of proof in establishing that Cornett had a 10 percent pre-existing impairment.

Additionally, the ALJ erred in characterizing the December 19, 1996, settlement between Twin Pines and Cornett, which was based upon a 10 percent "disability," as substantial evidence sufficient to permit a finding that Cornett had a 10 percent pre-existing active impairment rating. When a settlement agreement is not based on a fully litigated claim, statements contained therein are not binding in future actions. *Beale v. Faultless Hardware*, 837 S.W.2d 893 (Ky. 1992). Hence, the medical evidence of record is insufficient to prove the existence of an active impairment rating under the AMA *Guides* relative to Cornett's low back immediately prior to the work-related injury of April 18, 2007. As a matter of law, therefore, it was error for the ALJ to determine Frasure Creek satisfied its burden

of proof with respect to its affirmative defense of pre-existing active impairment. *Roberts,* 113 S.W.3d at 181.

CONCLUSION

Based on the aforementioned reasoning, we affirm the Board's decision to remand the matter to the ALJ and instruct him to issue a new award based upon the entirety of the 13 percent whole person impairment rating as assessed by Dr. Johnson.

ALL CONCUR.

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