

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001391-WC

ANTHONY FLANNERY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-71736

WIEDEMANN CONSTRUCTION; HON.
GRANT S. ROARK, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: Anthony Flannery appeals *pro se* from the Workers'
Compensation Board (Board) opinion affirming the Administrative Law Judge's

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

(ALJ) Findings of Fact and Conclusions of Law that resolved a medical fee dispute in favor of Wiedemann Construction (Wiedemann). The ALJ concluded that epidural steroid injections were not causally related to or a reasonable and necessary treatment of Flannery's work injury. The Board held that substantial evidence supported the ALJ's findings. We agree and, thus, affirm the Board's opinion.

Flannery is a fifty-four-year-old high school graduate who, throughout his adult life, has primarily maintained employment as a carpenter. In September 2003, Flannery sustained a back injury while working at Wiedemann.² His injury required multiple surgeries at the L4-L5 and L5-S1 discs. Flannery filed for workers' compensation benefits based upon this injury.

The Form 100-I that was attached to his claim listed Flannery as 21% impaired. However, the form indicated that only 8% of the impairment was work related. On December 5, 2005, Flannery settled his workers' compensation claim against Wiedemann.

Following the settlement, Flannery underwent several additional medical procedures. On January 14, 2009, another Form 110-I was filed, which reflected that Flannery settled for additional benefits. The agreement left Flannery's entitlement to benefits open for review. The 2009 Form 110-I included impairment ratings assessed by Drs. Travis, Gleis, and Lutz.

² Prior to 2000, Flannery sustained a back injury on the job. However, the injury and treatment are not at issue for the purposes of this appeal.

In April 2009, Dr. Alfred Kahn, Flannery's orthopedic surgeon, suggested Flannery undergo epidural steroid injections at the L3-4 disc. He also discussed the possibility that Flannery's condition may require a fusion at the L3-4 disc. On June 1, 2009, Wiedemann moved to reopen the case claiming that Flannery's request for epidural steroid injections at the L3-4 level were an unreasonable and unnecessary treatment for the 2003 injury.

Following a hearing, the ALJ issued Findings of Fact and Conclusions of Law concerning the medical fee dispute. In the findings of fact, the ALJ noted the opinions of three physicians, Drs. Kirsch, Travis, and Kahn.

Dr. Peter Kirsch opined that Flannery's current symptoms were unrelated to the 2003 work injury. Therefore, Dr. Kirsch claimed that neither the epidural steroid injections at L3-4 nor the additional fusion between L3-4 would be appropriate for the cure and relief of pain related to that injury.

Dr. Kirsch's opinion was supported by the opinion of Dr. Russell Travis. After reviewing Flannery's MRI results, Dr. Travis concluded that Flannery's symptoms in the L3-4 resulted from a natural progression of the aging process rather than adjacent segment degeneration.

Conversely, a report by Dr. Kahn determined that Flannery's symptoms and problems at the L3-4 level were directly related to his work injury and that treatment of those injuries should be added to Flannery's claim.

Although the ALJ described the opinions of the physicians, his initial conclusions were primarily based upon Flannery's testimony at the November 16,

2009, hearing. Flannery testified that he had undergone epidural injections without receiving significant relief from the pain. Based upon Flannery's opinion that the injections were not beneficial, the ALJ found that the injections were not reasonable or necessary and, thus, not compensable.

Thereafter, Wiedemann filed a petition for reconsideration requesting the ALJ to supplement his findings with a determination that any treatment at the L3 level is not causally related to the work-related injury of September 12, 2003. Over Flannery's objection, the ALJ granted Wiedemann's motion.

On June 28, 2010, the Board affirmed the ALJ's findings of fact and conclusions of law. This appeal follows.

Kentucky law clearly assigns the tasks of weighing evidence, drawing inferences, and making determinations of credibility to the ALJ. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. App. 2000). The Board and our Court must only question whether the evidence compels a different result and is unsupported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984); *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). The evidence must be such that no reasonable person could have made the same conclusion as the ALJ.

The ALJ's conclusions are consistent with the opinions of Drs. Travis and Kirsch and the testimony of Flannery. Although Dr. Kahn's opinion was in direct contrast to the ALJ's findings and conclusions, the ALJ is the arbiter of conflicting evidence. The presence of contradictory evidence alone does not

indicate that the ALJ's opinion is unreasonable. *See Magic Coal Co. v. Fox*, 19 S.W.3d at 95.

Although Flannery appears to argue that Dr. Travis's report was untruthful or inaccurate, he failed to prove that the ALJ's conclusion was unreasonable or compelled a different result.

Accordingly, we affirm the Workers' Compensation Board opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Anthony Flannery, *Pro Se*
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BRIEF FOR APPELLEE:

Kenneth J. Dietz
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