

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002112-WC

RAY TURNER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-82631

FOX KNOB COAL CO., INC.;
HON. HOWARD FRASIER,
ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, LAMBERT, AND VANMETER, JUDGES.

VANMETER, JUDGE: Ray Turner appeals from the opinion of the Workers' Compensation Board ("Board") affirming the opinion and order of the Administrative Law Judge ("ALJ") denying Turner's motion to reopen his workers' compensation claim for worsening of impairment and seeking either

additional permanent partial disability (“PPD”) benefits or permanent total disability (“PTD”) benefits. For the following reasons, we affirm.

Turner filed a workers’ compensation claim after an accident that occurred while he was working for Fox Knob Coal Company on June 30, 2006. The ALJ awarded Turner PPD benefits based upon a 14% whole person impairment rating assessed by Dr. Robert Hoskins, an orthopedic surgeon. At that time, Dr. Hoskins testified Turner suffered a 7% functional impairment to his lumbar spine and a 7% functional impairment to his left shoulder.

On December 4, 2009, Turner filed a motion to reopen his claim, on the basis that his impairment had worsened since the ALJ’s original award. He sought either additional PPD benefits or PTD benefits. In support of his motion, Turner testified his back impairment had worsened and, as a result, he was forced to stay in bed more and increase his pain medication. Turner also testified he had to quit most of his daily activities due to the increased pain.

Dr. Hoskins, who previously evaluated Turner in 2007, performed an independent medical evaluation (“IME”) of Turner on November 12, 2009. In 2007, Dr. Hoskins assigned Turner a whole person impairment rating of 14%; however, in 2009, Dr. Hoskins stated the whole person impairment rating in 2007 should have been 22% due to the fact that he overlooked Turner’s back condition. Dr. Hoskins opined that Turner’s impairment is of a permanent nature, that he cannot return to work, and that his whole person impairment rating is now 24%

due to his back condition and an increase in his lumbar spine impairment rating of 2%.

Dr. Gregory Snider, an orthopedic surgeon, performed an IME of Turner on March 3, 2010, after which he concluded there was no objective evidence of worsening of Turner's left shoulder injury and that his range of motion was slightly improved. Regarding Turner's lumbar spine condition, Dr. Snider opined there was no evidence of radiculopathy, nor any evidence to suggest that the work injury accelerated any degenerative change of the lumbar spine. Dr. Snider assigned Turner a 14% whole person impairment rating and concluded that Turner did not require any further medical treatment and was not completely disabled from working.

Dr. David Muffly, an orthopedic surgeon who previously evaluated Turner on June 30, 2006, performed an IME of Turner on March 18, 2010, after which he assessed lumbar degenerative disk disease with osteoarthritis and observed that Turner's range of motion had slightly improved since his 2006 evaluation. Dr. Muffly opined that Turner suffered from age-related degenerative lumbar spine changes, but that his impairment rating of 10% remained unchanged. Additionally, Dr. Muffly stated that Turner could return to work with restrictions to avoid overhead lifting and reaching and any lifting over 30 pounds.

In an opinion and order dated July 6, 2010, the ALJ denied Turner's motion to reopen on the basis that Turner failed to demonstrate an increase in impairment rating and a worsening of his condition so as to constitute a permanent total

disability. Turner appealed to the Board, which affirmed the ALJ's opinion and order. This appeal followed.

As an initial matter, a claimant is entitled to a reversal if the evidence was so strong that it reasonably compels a finding in his favor. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 2986). In other words, if the fact-finder finds against the claimant, the claimant must show that the finding was unreasonable in light of the evidence. *Id.*

Turner argues the ALJ erred by failing to grant his motion to reopen because he set forth compelling evidence that demonstrated his impairment and condition has worsened so as to make him eligible for either additional PPD benefits or PTD benefits. We disagree.

Pursuant to KRS¹ 342.125(1)(d), a workers' compensation award may be reopened upon a "[c]hange of disability as shown by objective medical evidence of worsening . . . of impairment due to a condition caused by the injury since the date of the award or order." If seeking additional PPD benefits, a claimant must show a greater impairment rating. *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 218 (Ky. 2006). However, when a claimant seeks a determination that at the time of reopening he is permanently totally disabled, the claimant need only show that the worsening of his condition is permanent and causes him to be totally disabled. *Id.* Permanent total disability is defined as "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent

¹ Kentucky Revised Statutes.

inability to perform any type of work as a result of an injury[.]” KRS

342.0011(11)(c).

In this case, evidence was presented to support the ALJ’s conclusion that Turner failed to demonstrate that his impairment rating increased and that he is permanently totally disabled. Both Drs. Snider and Muffly observed that Turner’s range of motion in his left shoulder had improved since the initial workers’ compensation award and that no objective medical evidence supported a finding that his condition has worsened or that his impairment rating had increased since the original award. Additionally, Drs. Snider and Muffly opined that Turner was not occupationally disabled and could return to work. Despite Dr. Hoskins’ conclusion that Turner’s whole person impairment rating increased, the ALJ is the sole judge of the weight and inferences to be drawn from the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Thus, the evidence before the ALJ does not compel a different result in this instance.

The opinion and order of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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