

RENDERED: October 17, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-3460-WC

STEELES CREEK COAL COMPANY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
NO. WC-90-000283

DANNY HALL;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APELLEES

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, EMBERTON and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. Appellant, Steeles Creek Coal Company (Steeles Creek) appeals from an opinion of the Workers' Compensation Board (the Board) entered November 25, 1995, affirming in part and reversing in part an opinion of the Administrative Law Judge (ALJ) entered July 23, 1996, awarding benefits to appellee, Danny Hall (Hall). We affirm.

Hall, a congenital deaf mute with an eighth grade education, was hired by Steeles Creek in 1974. He was operating a roof bolter on September 24, 1974, when a rock fell on him. As a result of the rock fall, Hall's right clavicle was fractured and he underwent surgery to repair a crushed trachea. Following

the rock fall Hall was afraid to return to work but did not seek psychiatric treatment. His friends continued asking him to return to work, and he subsequently did so after two years.

Hall was employed by Maple Ridge Mining Company (Maple Ridge) in 1982. On March 17, 1987, Hall refused to go to work because he had a premonition that an accident would occur. Coincidentally, there was a rock fall on that date which killed one of Hall's co-workers. Hall has not returned to work in the coal mines since that time.

Hall filed a claim for benefits against Steeles Creek following the 1974 accident. His claim was resolved pursuant to the terms of a settlement agreement approved by the Board on June 27, 1978. Pursuant to the terms of the settlement agreement, Hall was assigned a disability rating of 25% for his physical injuries. No psychiatric injury was alleged in the 1974 claim.

Hall also filed a claim for benefits against Maple Ridge and the Special Fund in January 1990 for coal workers' pneumoconiosis, anxiety syndrome, and post-traumatic disorder with depression. Evidence was introduced in support of Hall's physical and psychiatric claims, but once again a settlement was reached. Pursuant to the terms of the settlement agreement which was approved by the ALJ on November 22, 1990, Hall received a settlement equal to an occupational disability rating of 50% with 20% apportioned to the Special Fund. In return for the settlement, Hall agreed to forever waive "his rights to reopen on the grounds of worsening of condition on both his occupational

disease claim and psychological claim." The settlement agreement further provided that the settlement embodied "the complete agreement of the parties, and there are not [sic] other agreements, warranties, or promises which extend beyond the face hereof."

On June 29, 1994, Hall filed a motion to reopen his 1974 claim against Steeles Creek alleging a worsening of his condition and an increase in occupational disability. In support of his motion to reopen, Hall attached medical reports pertaining to his psychiatric condition from Dr. Max Lurie (Dr. Lurie) and the depositions of Dr. Donald George (Dr. George) and Dr. William Weitzel (Dr. Weitzel). This was the same evidence which was introduced in support of Hall's claim against Maple Ridge.

Dr. Lurie saw Hall on July 26, 1989. He indicated that during the two years following the 1974 accident, Hall was "anxious, apprehensive, scared [and] frightened" and would not return to work. Hall eventually returned to work, but began having premonitions of another accident in 1986. His feelings intensified following the 1987 incident, and were accompanied by frequent and recurrent nightmares and hyperventilation. Dr. Lurie diagnosed post-traumatic syndrome with anxiety. Dr. Lurie further noted:

Although apparently untreated at the time, this neurosis apparently developed after being severely injured in a rock fall in 1974 and interfered with his ability to return to mining for about two years. Currently this neurosis has resulted in a total occupational disability and a 30% psychiatric impairment from a body functional standpoint under the

1977 A.M.A. guidelines. Stated differently, he has a 20% psychiatric impairment stemming from a pre-existing, dormant and non-disabling emotional condition which was triggered into disabling reality by the accident in March 1987. In addition to this, there is a 10% psychiatric impairment which is directly and causally related to the accident of March 1987.

Dr. George saw Hall on March 2, 1990. His summary of Hall's symptoms and psychiatric condition was similar to that of Dr. Lurie. Dr. George also diagnosed post-traumatic stress disorder, and further testified:

This problem has gone back probably to the first injury in 1974 and gradually got worse and finally has reached the point that he became quite phobic and fearful and having more premonitions and nightmares and that lead to the final refusal to go back to work after eleven years in the mines. The fact that he is a deaf-mute has complicated this picture and must be considered a pre-existing and dormant problem since he did have difficulty in relating to people and communicating his feelings and that sort of thing. In my judgment he is probably about thirty percent disabled to the body as a whole on the basis of his current post-traumatic stress problem and about half of this is due to the pre-existing problem of his being a deaf-mute.

Dr. George also testified that because Hall was deaf and mute, he would not be able to communicate his fears and anxieties as a normal person would. He attributed his diagnosis of post-traumatic stress disorder to the 1974 accident, "the arousal of the pre-existing condition, and subsequent employment up to the time he stopped work."

Dr. Weitzel saw Hall on June 19, 1990. He diagnosed post-traumatic stress disorder and borderline intellectual functioning. Dr. Weitzel further stated:

The events of the 1974 seem to be very traumatic and to have involved an almost life-threatening injury. This gentleman was off work for a considerable period of time and then worked with difficulty the subsequent 11 years. The death of his friend in 1987 after a dream which he takes to be a premonition aroused further the already pre-existing, active Post Traumatic Stress Disorder symptoms to such an extent that he is now afraid to confront his fear and return to his former employment.

* * *

I believe this gentleman has a 25 percent impairment rating, using the 1977 AMA guidelines, because of his anxiety disorder and, specifically, his Post Traumatic Stress Disorder. I believe that 15 percent of that impairment is due to the pre-existing, active Post Traumatic Stress Disorder which he was regularly struggling with while employed (sic). Proof of that was that he was being treated for anxiousness and was regularly missing work and regularly troubled by nightmares even prior to the incident of 1987. I think that this pre-existing, active condition was further aggravated to the extent of 10 percent by the untimely death of his friend following a dream in March of 1987.

When asked if Hall's physical handicaps contributed to his psychiatric problems, Dr. Weitzel indicated that due to Hall's inability to communicate he would be more prone to develop post-traumatic stress disorder after the 1974 accident. Dr. Weitzel clearly felt that the 1974 accident caused the post-traumatic stress disorder and the 1987 incident aggravated it.

At the hearing, Hall indicated that since 1987 he occasionally works for his step-uncle at James Hall Builders. His job responsibilities include "picking up" and painting. He works sporadically when he is in need of money. On the average, Hall works seven days per month.

In the opinion, order and award upon reopening dated July 23, 1996, the ALJ held that Hall's right to reopen the 1974 claim was not waived by his settlement with Maple Ridge due to the fact that the medical testimony established that at least part of his psychological impairment was attributable to the 1974 accident. The ALJ also ruled that the fact that Hall failed to allege psychiatric disability in the 1974 claim did not preclude raising the issue upon reopening pursuant to Fisher Packing Co. v. Lanham, Ky., 804 S.W.2d 4 (1991).

In response to Steeles Creek's contention that Hall has failed to show that his condition has worsened, the ALJ held that Hall was 100% occupationally disabled as a result of the "psychological and physical ramifications" caused by the 1974 accident. The ALJ held pursuant to Gunderson v. City of Ashland, Ky., 701 S.W.2d 135 (1985), that the fact that Hall occasionally worked for his step-uncle did not negate a finding of 100% occupationally disability. The ALJ refused to hold that Hall's deafness and muteness was a pre-existing active condition. The ALJ further held:

The ALJ takes judicial notice of the fact that in File No. 90-00283, as noted previously in this Opinion and Award, involved a judgment for an occupational

disease claim filed against Maple Ridge Mining Company alleging coal workers' pneumoconiosis and anxiety syndrome as well as post-traumatic stress disorder and depression. The parties settled for a 50% occupational disability. The ALJ hereby ORDERS that the defendant employer, Steeles Creek Coal Company, receive dollar for dollar credit for those weeks of benefits that would overlap between the award being rendered in 1062612 on reopening and the settlement agreement contained in 90-00283 inasmuch as the plaintiff cannot be considered greater than 100% occupationally disabled at any one time.

The Board affirmed the ALJ's opinion and award, and this appeal followed.

Steeles Creek first contends that liability for Hall's psychological condition was settled by the terms of the 1990 settlement agreement between Hall and Maple Ridge. Steeles Creek points out that the evidence used by Hall on his motion to reopen the 1974 claim was the same as that presented in his claim against Maple Ridge and maintains that Hall's psychiatric condition in 1974 is indistinguishable from his condition in 1987. Steeles Creek argues that "[t]he fact that the settlement agreement in 1990 was between Hall and Maple Ridge and the original injury was between Hall and Steeles Creek is not dispositive due to the inextricable intertwining of all psychological conditions between these two employers and two dates of injury." Steeles Creek argues that the effect of the ALJ's order allows a double recovery for Hall for the same psychological condition. We disagree.

As pointed out by the ALJ and the Board, Steeles Creek was not a party to the 1990 settlement agreement between Hall and Maple Ridge. We agree with the ALJ's statement that "any waiver of rights to reopen contained in the [1990] settlement agreement...applies only to the defendant employer, Maple Ridge Mining Company, and not to Steeles Creek Coal Company[.]" The law clearly allows for an injured employee to reach a settlement with one defendant and continue to maintain an action against another defendant for its share of liability for the employee's claim. Newburg v. Sarcione, Ky., 865 S.W.2d 317, 329 (1993). See also, Palmore v. Helton, Ky., 779 S.W.2d 196, 197 (1989). Furthermore, the agreement clearly stated that aside from the settlement between Hall and Maple Ridge, no other agreement was contemplated by the parties.

We also disagree with Steeles Creek's contention that Hall's psychiatric condition in 1974 is indistinguishable from his condition in 1987. All of the doctors who testified regarding Hall's psychiatric problems were able to apportion their impairment rating between the 1974 accident and his friend's death in 1987. Thus, the evidence does not compel a finding that Hall's 1987 psychiatric condition is indistinguishable from that of 1974. Special Fund v. Francis, Ky., 708 S.W.2d 641, 644 (1986).

As to Steeles Creek's contention that the ALJ's order resulted in a double recovery for Hall, again the evidence shows otherwise. The ALJ specifically provided that Steeles Creek was

entitled to a dollar for dollar credit for any overlap between the award and reopening of the 1974 agreement and Hall's settlement with Maple Ridge.

Steeles Creek also argues that Hall's psychological claim is barred by the holding of the Kentucky Supreme Court in Slone v. Jason Coal Co., Ky., 902 S.W.2d 820 (1995). In Slone, the plaintiff suffered a work-related back injury and filed for workers' compensation and social security benefits at roughly the same time. While the claim for social security alleged both physical and psychiatric injury and was accompanied by evidence demonstrating a psychiatric impairment, a psychiatric injury was not alleged in his workers' compensation claim. The plaintiff ultimately received a workers' compensation award.

Several years later, the plaintiff sought to reopen his workers' compensation claim, alleging that a dormant mental condition was manifesting itself as a result of the work-related accident. The Court held that the plaintiff could not reopen his claim, stating "a motion to reopen cannot be based on a condition known to the claimant during the pendency of his original action, but which for some reason, he did not choose to litigate." Slone, 902 S.W.2d at 822. The Court focused on the fact that the plaintiff had sufficient knowledge of his psychiatric condition which enabled him to file a social security claim, and held that to allow the plaintiff to use the reopening procedure to settle a claim which was known to exist at the time

the original claim was filed but not litigated would result in piecemeal litigation. Id. at 821.

This case is easily distinguishable from Slone. As noted by the Board:

...there was no evidence that Hall's psychological condition was known by him during the pendency of his original claim. In fact, the psychiatric evidence before the ALJ compelled a contrary conclusion. While the medical evidence from Dr. Max L. Lurie, given July 28, 1989; Dr. Charles J. Hieronymus given May 14, 1990; Dr. Donald I. George given April 10, 1990; and Dr. William Weitzel given July 2, 1990, is consistent that Hall, following the 1974 injury, was apprehensive about going back into the mines and became increasingly phobic after that accident, he was neither treated, diagnosed or had knowledge by evidence in this record of a psychiatric or psychological condition related to the original 1974 injury.

The psychological medical evidence in connection with the 1974 injury was only developed during the 1989 and 1990 psychiatric evaluations during the adjudication of Hall's claim against Maple Ridge. This evidence supports the ALJ's determination that the psychological condition became manifest following the original settlement/award for his 1974 injury.

In light of the fact that Hall's psychiatric condition was undiagnosed and untreated following the 1974 accident, the fact that no psychiatric disability was alleged in Hall's original application filed in the 1974 claim does not preclude raising the issue on reopening. See Fisher, supra.

Steeles Creek further contends that the ALJ erred in holding that Hall's psychological and physical condition had worsened since the 1974 injury. After reviewing the totality of the evidence concerning Hall's physical and psychiatric condition contained in the record, we find that the ALJ's decision is

supported by substantial evidence and as such is not subject to further review or reversal. Francis, 708 S.W.2d at 644.

Steeles Creek argues that the ALJ erred in finding Hall to be 100% disabled in light of the fact that he occasionally works for his step-uncle. We note that it is well-accepted in Kentucky that the fact that an employee who has been found to be 100% disabled is able to perform some type of work following his injury does not negate a finding of 100% disability. See Gunderson v. Ashland, Ky., 701 S.W.2d 135 (1985); Yocum v. Yates, Ky., 566 S.W.2d 796 (1978). The evidence established that Hall's employment is sporadic at best, and we believe that a reasonable inference could be made that Hall would not be working at all but for the compassionate treatment of his step-uncle.

Finally, Steeles Creek contends that the ALJ erred in not finding that Hall's congenital deafness was a pre-existing dormant or pre-existing active condition. In support of its argument, Steeles Creek relies on Hall's testimony that his deafness kept him from working and Dr. George's testimony that half of Hall's 30% disability rating was attributable to Hall being deaf and mute. Again, we disagree.

The evidence is clear that Hall was born deaf and mute. Congenital deformities or handicaps alone are not to be treated as disease conditions for the purposes of determining apportionment. Young v. Wright, Ky., 474 S.W.2d 76, 78 (1971). Additionally, in determining whether a claimant is suffering from an active disability, we are to consider "the degree of

occupational disability which existed immediately prior to the subsequent injury, without regard to the effect of the subsequent injury." Wells v. Bunch, Ky., 692 S.W.2d 806, 808 (1985).

There is no evidence in the record which shows that Hall's deafness or muteness resulted in any occupational disability prior to 1974. Although Dr. George testified that half of Hall's 30% impairment rating was attributable to his deafness and muteness, it is clear that Dr. George felt that Hall's handicaps kept him from communicating his feelings after the 1974 accident. Absent any evidence that Hall's deafness and muteness caused an active disability prior to 1974, we cannot say that the ALJ erred in finding no active disability.

Having considered the parties' arguments on appeal, the opinion of the Board entered on November 22, 1996, is affirmed.

ALL CONCUR.

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