

RENDERED: July 2, 1998; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-2897-WC

COSTAIN COAL, INC.

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-03194

DENNIS H. SWORD;
SPECIAL FUND;
HON. DENIS S. KLINE,
Administrative Law Judge;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** ** **

BEFORE: EMBERTON, GARDNER, and MILLER, Judges.

MILLER, JUDGE. Costain Coal, Inc. (Costain), asks us to review an opinion of the Workers' Compensation Board (board) rendered October 17, 1997. Ky. Rev. Stat. (KRS) 342.290. We affirm.

On December 19, 1989, Dennis H. Sword (Sword) injured his left foot while in the employ of Costain. He filed for benefits under the Kentucky Workers' Compensation Act (KRS Chapter 342) and

eventually entered into a settlement agreement with Costain and the Special Fund. This agreement was approved by the administrative law judge (ALJ) on May 6, 1992. Pursuant to the agreement, Sword received temporary total disability benefits from December 21, 1989, through August 22, 1991, and, thereafter, benefits based upon a 50% permanent partial disability, apportioned equally between Costain and the Special Fund.

On August 7, 1996, alleging an increase in occupational disability, Sword moved to reopen his claim. KRS 342.125. The motion was supported by Sword's own affidavit, and testimony from Drs. Panos Ignatiadis and L. Douglas Kennedy. The ALJ granted the motion and found that, since March 13, 1992, Sword's occupational disability had increased to 100%. Noting insufficient evidence of Special Fund liability, the increase in the award was apportioned entirely to Costain. Costain appealed to the board, which, in turn, affirmed the ALJ's decision. This petition followed.

Costain first argues that because Sword failed to meet his burden of proof, the ALJ erred when he found Sword to be totally disabled. Specifically, it maintains Sword failed to prove an "objective change in [his] physical condition" as required by KRS 342.125. In cases such as this, where the party bearing the burden of proof is successful before the ALJ, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

Having reviewed the record, we are of the opinion that the ALJ's decision was, indeed, supported by substantial evidence.

See Smyzer v. B.F. Goodrich Chemical Co., Ky. 474 S.W.2d 367 (1971). Dr. Ignatiadis testified prior to the 1992 hearing and on December 20, 1996. In his initial deposition, he diagnosed Sword with reflex sympathetic dystrophy (RSD) and specifically noted that there was no evidence of wasting of the muscles. At that time he diagnosed a 15% functional impairment and concluded that Sword could not return to his previous employment of a heavy manual laborer.

On December 20, 1996, Dr. Ignatiadis testified that Sword's condition had deteriorated to a marked degree. Although he indicated that Sword's functional impairment had not changed¹, he testified that Sword was basically unemployable as a result of increased pain, swelling, and the need to continually alter his position.

Dr. Kennedy testified that Sword's left foot was swollen and cooler than the right. He noted distinct wasting of the left thigh and calf and that Sword walked with a limp, which allowed for minimal weight bearing on the left lower limb. Dr. Kennedy also diagnosed RSD and indicated that Sword had a demineralized foot and ankle as a result thereof. It was Dr. Kennedy's opinion that Sword was 100% occupationally disabled and suffered a whole body functional impairment of 15-20%. In sum, we believe the aforementioned evidence as a whole is evidence of substance and supports the ALJ's decision.

¹Dr. Ignatiadis testified in 1996 that Sword's functional impairment was the same as it was in 1992.

Costain complains that the ALJ ignored medical evidence, presented by it, that indicates Sword's condition has not worsened. It is not enough to show that there is merely some evidence that would support a contrary conclusion. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Hence, as the ALJ's decision is supported by substantial evidence, we will not reverse. Id.

Costain next maintains that the ALJ erred by failing to apportion 50% of the liability to the Special Fund. Costain presented evidence from Dr. Daniel D. Primm, Jr., who examined Sword in 1992 and assigned 75% of Sword's functional impairment rating to an "arousal of a pre-existing condition or predisposition to develop RSD." Costain maintains that because this testimony was uncontradicted, the Special Fund should have been apportioned some liability. We disagree and adopt the portion of the board's opinion addressing this argument.

The ALJ, as fact finder, may reject even uncontradicted evidence if he explains why he did so. Commonwealth of Kentucky v. Workers' Compensation Board, Ky. App., 697 S.W.2d 540 (1985). . . . the ALJ explained in his order on petition for reconsideration that he did not find Dr. Primm to be credible. Further, a mere predisposition is not enough to compel apportionment. Newberg v. Sleetz, Ky. App., 899 S.W.2d 495 (1995). Having rejected the opinion of Dr. Primm, the ALJ was left with no evidence to support an assessment of liability to the [Special Fund].

Finally, Costain complains that the ALJ erroneously failed to apply the reopening standard under the 1996 amendment to KRS 432.125 which requires the claimant to prove a change of condition based on objective medical evidence. We agree with the board that the 1996 amendment cannot be applied retroactively, but

are of the opinion that Sword, nevertheless, met his burden under either the 1994 or 1996 standard.

Because we believe the board committed no error in construing the law or assessing the evidence, we will not disturb its opinion. See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

For the foregoing reasons, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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