

Commonwealth Of Kentucky

Court Of Appeals

No. 1998-CA-000166-WC

RICHARD WILLIAMS

APPELLANT

v.

PETITION FOR REVIEW
OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
Action# WC-93-048130

SPECIAL FUND;
HON. MARK C. WEBSTER,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING AND REMANDING

* * * * *

BEFORE: GUIDUGLI, JOHNSON and KNOPF, Judges.

GUIDUGLI, JUDGE: Richard Williams (Williams) appeals from an opinion of the Workers' Compensation Board (the Board) rendered December 12, 1997, which affirmed an order of the Administrative Law Judge (ALJ) entered July 21, 1997, which denied Williams' petition to reconsider a previous order dismissing the Special Fund. We reverse and remand.

Williams sustained a severe work-related injury to his left arm on September 22, 1993. Dr. Thomas Wolff, the physician who treated Williams' arm injury, stated in a letter to Williams' attorney "I know of no pre-existing condition that would contribute to permanent partial impairment which was calculated as a result of the injury."

Medical records were also submitted from Dr. Bailey Binford (Dr. Binford). Dr. Binford, a psychiatrist, began treating Williams on April 21, 1994, for psychological problems which developed following the accident. Dr. Binford indicated that Williams reported experiencing no mental illness prior to the accident. In Dr. Binford's opinion, Williams was suffering from significant depression which was caused by the work-related accident. Dr. Binford further found that:

Regarding a preexisting dormant condition that was aroused, or anything like that, with respect to the depression: I looked for that, and, I really couldn't see that. He's never been treated before, I could not really get from him anything that really affected him emotionally to any real degree until this accident took place. This is why, when I used the diagnosis, I said single episode, rather than recurrent, because I feel like this is really the first time he's ever had this.

On May 7, 1997, Williams' employer moved to extend proof time to allow Williams to be examined by Dr. Robert Granacher (Dr. Granacher), a psychiatrist. The motion was granted. However, before Dr. Granacher's report was received,

the Special Fund was dismissed by a pre-hearing order dated June 16, 1997.

On June 20, 1997, Williams' employer filed a motion to admit Dr. Granacher's report into evidence. In his report, Dr. Granacher found that Williams had a 15% psychiatric impairment due to post-traumatic anxiety. Dr. Granacher further found that one-half of the impairment was caused by the accident and one-half by arousal of pre-existing personality disorder which was dormant and nondisabling prior to the accident. Dr. Granacher also believed that Williams' personality disorder was a "departure from the normal state of health and was capable of being aroused by the ordinary stresses of life." Both Williams and his employer petitioned the ALJ to reconsider the order dismissing the Special Fund based upon Dr. Granacher's report.

In an order entered July 21, 1997, the ALJ ordered that Dr. Granacher's report be admitted into evidence but denied the motions for reconsideration. The ALJ stated:

There is no testimony that the underlying injury was caused in any part by the arousal of a pre-existing condition. KRS 342.120. Where there is no Special Fund liability on the underlying injury, there is no Special Fund liability from the work related psychiatric condition. Fischer Packing Co. v. Lanham, Ky., 804 S.W.2d 4 (1991). Heartland Health Care Center v. Maupin, Ky., 887 S.W.2d 553 (1994). Another way to put it is that the underlying apportionment for the injury controls the apportionment for any accompanying psychiatric disability. I am aware of the unpublished Board Opinion in the case of Coleman v. Chisolm Mines (WCB #94-42267). That case is not binding on me

because it is not published. I also do not believe it will be upheld.

I dismissed the Special Fund at the prehearing. The parties signed the prehearing agreement even though the parties knew Dr. Granacher's examination was scheduled the next day. The parties did the correct thing because at that time there was no way the Special Fund would have had any liability. As it turned out, Dr. Granacher awarded 15% for mild post traumatic anxiety. Although he apportioned one half to a personality disorder, it supports my determination that this is a trauma case for which the defendant should pay all liability.

Williams and his employer were able to reach a settlement as to Williams' claims. The ALJ approved the settlement on October 13, 1997. Under the terms of the settlement Williams reserved his right to proceed against the Special Fund. The Board affirmed the order of the ALJ denying the petitions to reconsider and this appeal followed.

Williams contends that in denying his petition for reconsideration both the ALJ and the Board erred in relying on Fischer and Heartland. We agree.

In Fischer, plaintiff suffered a back injury in 1980. The Board found that the plaintiff was 50% disabled due to the injury, and apportioned liability equally between the employer and the Special Fund. In 1987, plaintiff sought to reopen his case due to a change in condition based on the report of a psychologist who stated that plaintiff's disability had increased as a result of severe depression and that plaintiff was now 100% disabled. The ALJ agreed, and placed the liability totally on

the employer. The Board affirmed the ALJ's finding that the plaintiff was 100% disabled, but ordered that liability be apportioned equally between the employer and the Special Fund. The Kentucky Supreme Court affirmed the Board's decision, stating that "liability for the back injury was apportioned equally and, because the subsequent condition was found to be related to the prior injury, the apportionment of liability as to the increased disability remains 50% to the employer and 50% to the Special Fund." Fischer, 804 S.W.2d at 6 (emphasis added).

Fischer can easily be distinguished from this case. In Fischer, it is apparent that the plaintiff's depression was not a dormant pre-existing condition which was activated by the back injury, but rather a condition which developed as a result of the back injury. In this case, Williams' psychological problems were only partially caused by his injuries. The underlying psychological disorder may have been dormant prior to the work-related accident, but Dr. Granacher's report indicates that the condition did, in fact, exist prior to the injury.

In Heartland, the plaintiff sustained an injury to his back. Due to a pre-existing back condition, liability for the plaintiff's back injury was apportioned equally between the employer and the Special Fund. In holding that liability for the accompanying psychological condition arising from the back injury was also equally apportionable, the court held that "if any injury has two causative components; an accident and a pre-existing condition, any psychological condition resulting from

that injury must likewise be attributed to the same causative components.” Heartland, 887 at 554. Furthermore, the Court held that apportionment was required because under KRS 342.1202, any disability which is based in whole or in part on a pre-existing back condition is to be automatically apportioned equally between the employer and the Special Fund. Heartland, 887 S.W.2d at 554.

Heartland is also easily distinguishable. In that case, the plaintiff’s physical disability was the result of the work-related accident and a pre-existing physical condition. When a psychological problem arose, the Court found that liability for it would have to be attributed to the same causative components. Furthermore, Kentucky Revised Statutes (KRS) 342.1202 mandated the result. In this case, Williams’ physical disability was a result of the accident alone as opposed to an accident and pre-existing condition. Furthermore, as Williams’ injury was not to his back or heart, KRS 342.1202 has no applicability to this case. In addition, the Kentucky Supreme Court recently affirmed an earlier opinion of this Court which distinguished Fisher and Heartland in the same manner. See Whittaker v. Huff, Ky., 962 S.W.2d 878 (1998).

Under KRS 342.120, a claimant may join the Special Fund as a party if a dormant nondisabling condition was aroused by a subsequent compensable injury. KRS 342.120(2)(b). That is the situation in this case. Therefore, the ALJ erred in denying Williams’ petition to reconsider.

Having considered the parties' arguments in this case, the opinion of the Board is reversed and this matter is remanded to the ALJ with instructions to reverse its prior order dismissing the Special Fund.

ALL CONCUR.

BRIEF FOR APPELLANT:

Charles A. Saladino
Paducah, KY

BRIEF FOR APPELLEE/
SPECIAL FUND:

David W. Barr
Labor Cabinet
Louisville, KY