

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001461-WC

EQUITABLE BAG COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 96-074218

STANLEY GOINS; SPECIAL FUND; HON. MARK C. WEBSTER,
Administrative Law Judge; WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, Chief Judge; COMBS and DYCHE, Judges.

COMBS, JUDGE: This is a petition for review of an opinion of the Worker's Compensation Board. The decision affirmed an Administrative Law Judge's determination that Stanley Goins was entitled to total occupational disability benefits as a result of a work-related hip injury. Having reviewed the arguments, the record, and the applicable law, we note that the opinion of the Workers' Compensation Board appropriately addressed the questions presented to this court by the appellant, Equitable Bag Company. Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992). As a result, we adopt that opinion as follows:

Petitioner, Equitable Bag Company ("Equitable"), appeals from an opinion and award rendered by Hon. Mark C. Webster, Administrative Law Judge ("ALJ"), awarding the respondent, Stanley Goins ("Goins"), benefits for a total occupational disability as a result of a work-related hip injury. On appeal, Equitable contends the ALJ inappropriately considered Goins' preexisting, active, nonwork-related occupational disability in determining whether he was totally occupationally disabled. Equitable further contends the evidence does not support a finding that Goins is totally occupationally disabled without regard to his preexisting mental retardation.

Goins was employed by Equitable as an unskilled laborer. His job involved loading used paint pans into a washing machine and unloading them when they were clean. Goins began working for Equitable in 1953. During the first several years of his work there, he loaded trucks which required some heavy lifting. According to Dr. Larkin, Goins'[s] treating physician, he has some learning disability which require[s] him to work in a very structured work environment. Goins has a limited education, having only completed the sixth grade at age 16.

Goins was injured on October 3, 1996 in a slip-and-fall accident. He fractured his hip and also injured his left arm. Surgery was performed on the hip by Dr. Larkin on the same day. Goins received physical therapy and vocational rehabilitation following the surgery. He returned to work on January 13, 1997 and worked until January 24, 1997. On January 22, 1997, Goins notified Equitable of his intention to resign. Goins'[s] sister requested information regarding early retirement for Goins on January 17, 1997.

Goins now lives with his sister, Anna Hutchison, and has done so for the past six years. He had been unable to obtain a driver's license and walked to work for many years. He testified he now has trouble keeping his balance. He can no longer walk as far as he could. He states he cannot mow the grass or take out the garbage in a regular size trash can.

Goins submitted the testimony of Dr. John Schmitz, an orthopedic surgeon, who examined him on April 22, 1997. At that time, Dr. Schmitz stated that Goins had a mild antalgic gait, but he denied having any pain. Dr. Schmitz found Goins['s] left leg to be one-half to one centimeter shorter than the right. Hip flexion on the left was normal, but extension was about 50 percent of normal. Dr. Schmitz also noted atrophy of the left

thigh and calf. X-rays of the left hip indicated a healed fracture. X-rays of the left wrist were fairly normal. Dr. Schmitz assessed a 20 percent impairment rating under the AMA guides due to his hip problems. He recommended that Goins avoid squatting, climbing, kneeling, twisting, and walking for more than three to five minutes at a time. He felt there would be only minimal limitations due to Goins'[s] left wrist injury.

Equitable submitted testimony from Dr. John Larkin, Goins'[s] treating orthopedic surgeon, who performed an open reduction and internal fixation of a displaced intertrochanteric fracture of the left hip on October 3, 1996. Dr. Larkin performed a closed reduction of a left wrist fracture. Goins was later transferred to Health South Rehabilitation and discharged on October 28, 1996. Dr. Larkin assessed a 9 percent impairment rating under the AMA guides. He noted that Goins was "mentally compromised" and had worked in a protected environment for Equitable. Eventually, Dr. Larkin released Goins to return to his previous work after a transition period of light duty. He referred Goins for a functional capacity evaluation, which indicated that Goins could stand for 30 minutes, could safely lift up to 20 pounds, and could walk without a cane or walker. Dr. Larkin felt that Goins should perform work that gave him some flexibility in standing or sitting with no continuous standing. As of February 4, 1997, Dr. Larkin felt that Goins could return to his previous work from an anatomical point of view but not from a mental point of view.

Testimony was also presented from Al White, the general manager of printing at Equitable. He stated that when Goins returned to work in January 1997, he really did not do very much. He stated that Goins had talked about taking early retirement as early as August 1996. White stated that Goins'[s] previous work washing paint pans was not very strenuous because he only had to move the pans at waist level and could sit or move about while he was waiting for the pans to dry. White testified that it was his understanding that Goins would only work for a couple of weeks and then retire.

Nicole Carter, the human resources specialist for Equitable, stated that she spoke to Goins and his sister about early retirement in July 1996. She stated that she mailed Goins'[s] pension information at that time. Carter stated that Goins returned to work in 1997 in order to receive his 1997 vacation benefits and then apply for early retirement.

Testimony was also presented from Anna Hutchison, Goins'[s] sister, who testified that Goins has learning

difficulties and is unable to make decisions. She stated she tried to help him plan his retirement. She admitted she requested pension information from Equitable but denied ever indicating to anyone prior to the injury that Goins definitely planned to retire. Hutchison testified that prior to the injury, she and Goins had requested information regarding the amount of pension benefits he would be able to receive if he took early retirement in 1997. She stated that after Goins found out how much he would receive, he decided to continue working.

After reviewing the evidence, the ALJ determined the extent and duration of Goins'[s] disability as follows:

Based on Goins'[s] age, the severity of his hip injury, Dr. Larkin's surgery and impairment, and, most significantly, Goins'[s] low intelligence and need for a structured work environment, I find that Goins is permanently and totally disabled. KRS 342.0011. Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). KRS 342.730(1)(a).

The ALJ also stated:

I admit his old job was easy, self-paced, and allowed frequent position changes, but I find Goins no longer has the ability to walk to work, walk any distance in the plant, stand long enough to do his washing job, or work a full day.

The ALJ therefore awarded Goins benefits for a permanent total occupational disability.

Equitable now appeals from the ALJ's opinion arguing that it was error for the ALJ to consider Goins'[s] mental retardation in determining whether he is totally occupationally disabled. It argues that his mental retardation represents a preexisting, active occupational disability and points out that the current version of KRS 342.730 provides that a nonwork-related active disability cannot be combined with a work-related disability for the purposes of determining whether the claimant is totally occupationally disabled. Equitable further contends that the ALJ's finding that Goins is totally occupationally disabled is not supported by the evidence, even if his mental limitations are considered.

The claimant in a workers' compensation case must prove each of the essential elements of his claim. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Where the party who does not bear the burden of proof in

unsuccessful 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). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W.2d 367 (1971). It is not enough for Equitable to show that there is merely some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's decision is supported by any evidence of substance, we must affirm. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The ALJ, as fact[-]finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, this Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(2).

We believe there is substantial evidence to support the ALJ's finding that when Goins'[s] mental retardation is taken into account, along with his physical restrictions, he is totally occupationally disabled. It is uncontradicted that Goins requires a very structured work environment. It is also apparent that Goins has extremely limited work experience and education. Dr. Schmitz felt that Goins should avoid squatting, climbing, kneeling, twisting, and walking for more than three to five minutes at a time. Goins testified that he had to stand constantly while performing his job and so had to frequently bend and lift things.

Equitable has argued that Goins'[s] testimony is not credible since it has been noted by both his own attorney and his sister that he tends to agree with any statement put to him. However, as we noted above, questions regarding the weight and credibility to be afforded the evidence are for the ALJ and not for this Board. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); KRS 342.285(2). Given the testimony of Dr. Schmitz regarding Goins'[s] physical

capabilities, of Dr. Larkin regarding his need for a structured work environment, and of Goins regarding his job requirements, there is substantial evidence supporting a finding that Goins is totally occupationally disabled.

We do not believe that in this case Goins'[s] preexisting mental retardation represents a preexisting active occupational disability. The facts of this case are very similar to those found in Commonwealth Transportation Cabinet v. Blackburn, Ky., 890 S.W.2d 627 (1994). In that case, a claimant with mild mental retardation had worked his entire adult life for the Kentucky Transportation Cabinet. The evidence indicated that regardless of the claimant's injuries, his occupational opportunities were limited because of his borderline intelligence. After considering the claimant's physical limitations and his limited intellect, the ALJ concluded that he was totally occupationally disabled. There was no apportionment of preexisting active occupational disability due to the claimant's limited intellectual capacity. The Transportation Cabinet appealed arguing that the claimant's mental retardation should be considered a preexisting active disability and therefore excluded as noncompensable. In its opinion, the Kentucky Supreme Court stated:

In KRS 342.0011, the legislature has defined occupational disability as:

a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives, taking into consideration his age, occupation, education, effect upon employee's general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement.

As is apparent, KRS 342.0011 requires an individualized determination of a worker's occupational disability as a result of a work-related injury. KRS 342.0011 does not establish as uniform benchmark of occupational ability against which injured workers are measured. It does not penalize workers who, before they are injured, have limited occupational ability due to their innate intellectual capacity or their degree of education or training. Instead, the focus of KRS 342.0011 is on determining the impact of the impairment or disfigurement caused by a work-related injury on the particular worker's ability

to earn an income, in other words, on determining what that particular worker has lost as a result of the injury.

In the instant case, the ALJ determined that claimant was employed in a work setting that was consistent with his limited capabilities, a finding that has not been challenged. Therefore, his income from that employment and the skills required in that employment fairly can be viewed as taking into account his limited intellectual capacity and as reflecting his occupational ability before the work-related injury. This factual situation is distinguishable from that addressed in Wells v. Bunch, supra, and Griffin v. Booth Memorial Hospital, supra. The ALJ determined that it was the physical effects of the 1986 injury that prevented claimant from returning to his former employment or from engaging in other employment for which he was qualified. Under those circumstances, the award of total occupational disability benefits, without an exclusion for prior, active disability, was proper.

Id. at 628.

In the instant case, the ALJ has found that Goins was employed in a work setting consistent with his limited capabilities. The ALJ also determined that the effects of Goins'[s] injury prevented him from returning to his former employment or from engaging in other employment for which he was qualified. We therefore believe that an award of total occupational disability without exclusion for prior active disability was proper.

Accordingly, the decision of the ALJ is hereby AFFIRMED and this appeal DISMISSED.

The decision of the Worker's Compensation Board is

affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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