RENDERED: May 28, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-001595-WC

DAVID DEBERRY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 95-39220

BJ's RESTAURANT; HON. ZARING P. ROBERTSON, ADMINISTRATIVE LAW JUDGE; SPECIAL FUND; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFRIMING
** ** ** ** **

BEFORE: DYCHE, JOHNSON AND KNOPF, JUDGES.

JOHNSON, JUDGE: David Deberry (Deberry) petitions for review of a Workers' Compensation Board (Board) opinion rendered on June 6, 1997, affirming the Administrative Law Judge's (ALJ) award of 30% permanent partial occupational disability. Deberry contends that the award was contrary to the evidence and that the ALJ erred in not granting his motion to amend his application to add a claim of psychiatric disability. We affirm.

At the time of his work injury on October 3, 1995, Deberry had worked as a cook for fifteen years and had worked as a cook at BJ's Restaurant, Inc. (BJ's) since 1988. Deberry

injured his back when he lifted a garbage can to pour the garbage into a dumpster.[1] Deberry reported the injury that evening; and the next morning when Deberry got out of the bed, he experienced severe pain in his legs and back and sought medical treatment.

Deberry first saw Dr. Steven Sanders (Dr. Sanders), a neurosurgeon, on October 23, 1995, for low back pain which radiated into his right leg. Dr. Sanders diagnosed a disc herniation at L5-S1 and performed lumbar surgery. After the surgery Deberry initially experienced some improvement, but the improvement eventually gave way to left leg pain. Dr. Sanders last saw Deberry on February 23, 1996, and stated that a post-surgical MRI showed Deberry's back to be normal. Dr. Sanders concluded from that visit that while Deberry had not yet reached maximum medical improvement, he would be expected to do so within the next two months. Dr. Sanders did not place any restrictions on Deberry's physical activities and gave Deberry a 10% functional impairment rating. At Deberry's request,[2] Dr. Sanders referred him to another physician, an orthopedic surgeon named Dr. Gary McAllister (Dr. McAllister), whose office was located closer to Deberry's home.

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[1]There is conflicting testimony regarding whether Deberry unloaded supply trucks as part of his work assignment and the weight of the garbage that was in the can Deberry lifted. Deberry claims it weighed over 200 pounds and another worker testified that it could not have weighed over 75 pounds.

[2]Deberry claims that he changed from Dr. Sanders to Dr. McAllister because Dr. Sanders wanted to treat him by injecting steroids into his back to provide some relief. Deberry rejected that form of treatment.

In March 1996, Deberry saw Dr. McAllister, who determined that Deberry suffered from a "nerve root adhesion." While Dr. McAllister did read in Dr. Sanders' notes where scar tissue had formed at the surgical site, he never viewed the post-surgery MRI. Dr. McAllister gave Deberry a 24% functional impairment rating and restricted him to lifting no more than 10 pounds and sitting or standing for no more than three hours at a time. Dr. McAllister became Deberry's treating physician.

On May 15, 1996, Dr. Charles Hargadon (Dr. Hargadon), an orthopedic surgeon, evaluated Deberry and expressed the opinion that Deberry had magnified his symptoms. Dr. Hargadon noted that scar formation at that surgical site was normal. Dr. Hargadon determined that Deberry had reached maximum medical improvement, that he was capable of working as a cook and that he could perform work which required lifting up to 35 pounds occasionally and lifting 20 pounds regularly.

On June 17, 1996, Deberry filed a claim with the Department of Workers' Claims, claiming severely degenerative fibrocartilage in intervertebral disc L5-S1. On July 18, 1996, a scheduling order was entered which stated that the pre-hearing conference was to be held on November 15, 1996, and that the period of proof taking began as of the date of that order. On August 5, 1996, Deberry filed a motion seeking an extension of time through September 19, 1996, for the purpose of taking the deposition of Dr. McAllister. By an order dated September 12, 1996, this extension was granted.

On October 23, 1996, Deberry filed another motion for an extension of time to the date of the pre-hearing conference, November 15, 1996, for the purpose of submitting a report from psychiatrist Dr. Arnold Ludwig (Dr. Ludwig). BJ's opposed the extension of time. On November 4, 1996, Deberry filed another motion for an extension of time in which to depose Norman E. Hankins, Ed.d (Dr. Hankins), a vocational rehabilitation expert on November 7, 1996.[3] On November 11, 1996, Deberry filed a "motion to amend claim to add psychological disability." On November 14, 1996, BJ's filed an "objection and motion to strike" the testimony of Drs. Ludwig and Hankins. BJ's argued that the time for proof had ended and that no formal cause of action for psychological disability existed since Deberry had not pled a claim for psychological disability, and therefore, Dr. Ludwig's psychiatric testimony should be stricken from the record. BJ's objected to Dr. Hankins' testimony on the grounds that proof time had expired and that it was not rebuttal testimony. At the November 15, 1996 pre-hearing conference, the ALJ overruled Deberry's motion to amend his claim and to introduce evidence from Dr. Ludwig as untimely, but ruled that Dr. Hankins' testimony would be admitted into evidence.

[3]Hankins evaluated Deberry and determined that he read and performed arithmetic on a fourth grade level. Hankins indicated that Deberry was totally disabled and based that finding upon testimony from Dr. McAllister and psychiatric records which had not been admitted into evidence. However, he did not view Drs. Sanders' or Hargadon's testimony.

The hearing was held on December 2, 1996, and the only contested issues were the extent and duration of disability.[4] Deberry testified regarding how his injury occurred, to what extent he was injured, and how badly he wanted to return to work.[5] Deberry testified that he considered himself totally and permanently disabled, while BJ's contended that Deberry had exaggerated his symptoms. In his opinion dated January 31, 1997, the ALJ stated as follows:

> This Administrative Law Judge certainly attaches more weight to the evidence from the latter two physicians, but I am not convinced that the plaintiff's medical impairment rating represents his true occupational disability. Dr. McAllister had no objective basis for his suspected diagnosis of the plaintiff's problem, and his impairment rating seemed to be an attempt to inflate the value of the plaintiff's claim. The restrictions suggested by Dr. McAllister are likewise based upon subjective symptoms. On the other hand, it is undeniable that the plaintiff suffered a significant back injury, requiring surgery. Dr. Hargadon was aware of the plaintiff's tendency to exaggerate, yet still recommended limitations. The Moses family testimony describing the requirements of the plaintiff's former job is rejected as self-serving, and the undersigned finds it likely that the plaintiff assisted with stocking supplies and other heavy chores in the restaurant, which are beyond his current capabilities. However, this Administrative

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[4]It was stipulated between the parties that any award would be apportioned 50% to BJ's and 50% to the Special Fund.

[5]At the hearing, Deberry was cross-examined about statements made in his deposition: "I ain't going back to work, and I don't see, you know, why I should suffer through this pain and crap and try to work around." Deberry stated that "I kind of remember, you know, saying that I would like—that I want to go back to work but I can't go back to work, you know. . . . If I could go back to work I'd go back to work. I like working. I enjoy it. I liked the people I worked for, you know. I can't go back to work."

> Law Judge is convinced that the plaintiff is physically able to return to work as a cook, so long as his restrictions are accommodated. Considering the factors delineated in KRS 342.0011(11) [as effective at the time of the plaintiff's injury], I conclude that the plaintiff is 30% occupationally disabled.

Deberry appealed the ALJ's decision to the Board and argued that he had met his burden of proving complete and total disability and that the ALJ "has incorrectly assessed the medical evidence presented in this claim, specifically by not giving greater weight to the treating physicians' opinions. . . ." Deberry also alleged that the ALJ erred as a matter of law in refusing Deberry's request to amend his claim to include psychiatric disability because denying the amendment created piecemeal litigation and Deberry had a right to have each injury claim litigated. BJ's argued that the ALJ had broad discretion in making the award and that the ALJ's decision was supported by the evidence. BJ's also argued that the ALJ had broad discretion regarding the taking of proof and that the ALJ had not abused that discretion in denying Deberry's motion to amend his claim.

The Board in a well reasoned opinion determined that Deberry's evidence did not compel a different result and that the ALJ had not abused his discretion in refusing to allow Deberry to amend his claim. This petition for review followed. We agree with the Board and adopt portions of its opinion as our own as follows:

> DeBerry, having the burden of proof before the ALJ, must establish on appeal that the evidence compelled a contrary result. Special Fund vs. Francis, Ky., 708 SW2d 641 (1986). Compelling evidence is evidence which is so overwhelming that no reasonable

person could be failed to be persuaded by it. Reo Mechanical vs. Barnes, Ky.App., 691 SW2d 224 (1985). When there is conflicting evidence, it is the ALJ who has the sole right and authority to resolve the conflict and determine weight and credibility. Pruitt vs. Bugg Brothers, Ky., 547 SW2d 123 (1977); and Smyzer vs. B. F. Goodrich Chemical Co., Ky., 474 SW2d 367 (1971). Although there may be evidence which would support the conclusion sought by the appealing party, so long as the decision of the ALJ is supported by other evidence of record, it may not be disturbed on appeal. McCloud vs. Beth-Elkhorn Corp., Ky. 514 SW2d 46 (1974).

Finally, neither vocational testimony nor the fact that an individual is a treating physician requires any special deference on the part of the ALJ. Eaton Axle Corp. vs. Nally, Ky., 688 SW2d 334 (1985); and Yocom vs. Emerson Electric, Ky.App., 584 SW2d 744 (1979).

The evidence presented to the ALJ herein would have supported a multitude of results. One of the results that it would and does support is a finding of 30% occupational disability. Occupational disability is uniquely a factual finding on the part of the ALJ after taking into consideration all of the relevant factors as contained in KRS 342.0011(11) and no single factor is determinative. Seventh Street Road Tobacco Warehouse vs. Stillwell, Ky., 550 SW2d 469 (1976). Here, the ALJ specifically concluded that the more credible testimony came from Dr. Hargadon and that within the restrictions of Dr. Hargadon DeBerry possessed the physiological capability of returning to active gainful employment, including employment that he had performed in the past. The evidence of Dr. Hargadon is evidence of substance and it supports the ALJ's conclusion.

DeBerry also challenges the ALJ's decision to prohibit the amendment of his claim. Subsequent to the rendering of the ALJ's decision, DeBerry filed a separate Form 101 alleging occupational disability as a result of a psychological injury. Although the parties make reference to that filing, any issues concerning it are not now before us.

The sole question we must answer relates to the propriety of the ALJ's refusal to permit at a very late date the amendment of this claim. The controlling and presentation of proof is within the unique discretion of the ALJ. Searcy vs. Three Point Coal Co., 280 Ky. 683, 134 SW2d 228 (1939). Such discretion is not without its limits however. The failure of a party to assert a potential claim may have long term ramifications, particularly upon reopening. Slone vs. Jason Coal Co., Ky., 902 SW2d 820 (1995). However, although piecemeal litigation is disfavored in workers' compensation law, it is not prohibited for cases occurring before December 12, 1996. See Woodbridge INOAC, Inc. vs. Downs, Ky.App., 864 SW2d 306 (1993).

In our opinion, the question frequently must be based upon what might be considered fundamental fairness and the exercise of reasonable diligence in asserting a claim. Here, we have Dr. McAllister testifying in September of 1996 that he has been prescribing antidepressant medications and has recognized psychological symptomatology since he began caring for DeBerry in March 1996. We have DeBerry himself asserting that sometime prior to his motion for extension of time filed in October of 1996 he had previously been scheduled to be seen by Dr. Ludwig, but he himself was unable to keep that appointment. Within that context, it is not until November 11, 1996[,] that DeBerry moved to amend his claim. Based upon this chronology of events, it is apparent that DeBerry, at the earliest, knew of a potential psychological condition arguable related to his back injury in the Spring of 1996 even before the initial filing of this claim and, at the every [sic] latest, on September 16, 1996[,] when Dr. McAllister testified and, yet, no effort was made to amend the claim until November 11. Our statutory provisions are designed for expeditious resolution of workers' compensation claims. New evidence does occur during the prosecution of a claim, but failure to act upon that evidence cannot, in our opinion, be a sound basis to challenge either the reasonableness or the fairness of an ALJ's control in the taking of proof. Under these circumstances, we believe the ALJ was well within his authority and within the

spirit of the Kentucky Workers' Compensation Act in overruling DeBerry's motion.

Accordingly, we conclude that the Board did not err in affirming the ALJ's disability award and the denial of Deberry's motion to amend his claim. The Board did not "overlook[] or misconstrue[] controlling statutes or precedent, or commit[] an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992). For the foregoing reasons, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT, DEBERRY:

Hon. Ronald C. Cox
Harlan, KY

BRIEF FOR APPELLEE, BJ'S:

Hon. Steven R. Armstrong
Lexington, KY

BRIEF FOR APPELLEE, SPECIAL FUND:

Hon. Joel D. Zakem
Louisville, KY