

RENDERED: June 25, 1999; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court Of Appeals

NO. 1998-CA-001043-WC

BASS MAINTENANCE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE
WORKERS' COMPENSATION BOARD
NO. WC-96-079016

BILL KELLETT;
ROBERT L. WHITTAKER, Director
of Special Fund;
THOMAS A. DOCKTER, Administrative
Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, EMBERTON and HUDDLESTON, Judges.

HUDDLESTON, Judge. Bass Maintenance petitions for review of a decision by the Workers' Compensation Board affirming the ALJ's award of benefits to Bill Kellett for a February 8, 1996, work-related injury for a duration of 520 weeks pursuant to Ky. Rev. Stat. (KRS) 342.730(1)(d). The ALJ found that Kellett was 75 percent occupationally disabled, but carved out 25 percent as pre-existing active disability due to a 1974 work-related back injury which resulted in surgery. Because Bass asserts on appeal the same

arguments presented to the Board, we borrow heavily from the Board's opinion.

Kellett, born in 1940, has a tenth grade education and an expired license as a taxidermist. He had been working as an ironworker since 1968 and continued such employment through February 8, 1996, with Bass, for whom he had worked since May 1995. On February 8, 1996, Kellett suffered a work-related injury while moving steel mats. Kellett immediately experienced pain from a hernia and stated that he experienced pain in his back that evening. Kellett underwent surgery for the hernia on February 26, 1996, and never returned to work for Bass. Kellett and Bass stipulated before the ALJ that Kellett's hernia was the result of the work-related injury on February 8, 1996, from which he suffered no permanent occupational disability.

Kellett's prior medical history was significant in that he had suffered a work-related back injury in 1974 for which he underwent disc surgery in 1975. Kellett received for that injury a Workers' Compensation settlement of approximately \$33,000.00, including future medicals, from his employer, but returned to work afterwards as an ironworker. Kellett also underwent coronary artery surgery in 1991 and, although off work for about six weeks, soon returned to work without restrictions.

In awarding Kellett benefits, the ALJ relied upon the testimony of two neurosurgeons, Dr. Rex Arendall and Dr. John D. Noonan, that Kellett suffers a 10 percent functional impairment as a result of his back condition. However, the ALJ noted that

Arendall's and Noonan's testimony about the restrictions each would place on Kellett indicated that he suffered from a greater occupational disability than the 10 percent functional impairment allotted him and that such restrictions render Kellett unable to return to his occupation as an ironworker.¹ The ALJ also relied on testimony from Dr. Thomas Muehleman, a licensed clinical psychologist, that Kellett suffered from a learning disability since his reading, spelling and arithmetic skills were not at a level commensurate with his intellectual abilities.

Although the ALJ determined that Kellett has a substantial work-related disability, he was not convinced that Kellett is totally occupationally disabled. The ALJ negated any finding of total disability based partly on allegations that Kellett had performed some taxidermy following his 1996 injury. Evidence was presented that Kellett had been the target of a sting operation by two undercover officers who brought several animals to Kellett for mounting. Renzo Lewis Harper testified that he had approached Kellett for instruction in taxidermy and that Kellett had only sat in a chair reading magazines while directing him in taxidermy, but had showed him how to perform some of the more intricate work. Kellett pled guilty to several charges in relation to these activities.² The ALJ stated that although Kellett maintained he

¹ Both surgeons would prohibit repetitive bending, stooping or lifting, standing or sitting in one position for prolonged periods of time. Dr. Noonan placed a maximum lifting restriction of 20 to 25 pounds with no frequent lifting over 10 pounds.

² These included failure to maintain records or properly
(continued...)

did not perform any of the taxidermy work, as asserted by the testimony of his "helper," "the vast array of animals kept in his shop, den and freezer belie his assertion of innocence."

Thus, the ALJ apportioned the extent of occupational disability attributable to the 1996 injury as 25 percent, payments for which Bass is responsible. The remaining 25 percent occupational disability was established as the result of the arousal of previously dormant underlying conditions into a state of disabling reality, payments for which the Special Fund is responsible. Bass appealed the ALJ's award to the Board, asserting the same arguments to the Board as to this court.

Bass first contends that Kellett did not suffer an injury as defined by KRS 342.0011(1), which provides in relevant part that: "'Injury' means any work-related harmful change in the human organism, arising out of and in the course of employment" Dr. Arendall testified that Kellett suffered from a low back sprain which resulted from the February 1996 injury superimposed on extensive spinal canal stenosis. Dr. Noonan diagnosed Kellett as suffering from a combination of pre-existing spondylosis and spondylolisthesis. The medical evidence causally related Kellett's condition to the February 1996 work-related injury. Since substantial evidence was presented supporting the finding that Kellett suffered an injury, as defined under the Act, this Court

²(...continued)
identify illegally taken wildlife prior to mounting; taking or hunting wildlife without a license or stamp; failure to maintain and send monthly reports to the Department of Fish and Wildlife; and possession of protected wildlife or a raw fur out of season.

may not rule otherwise. Smyzer v. Goodrich Chemical Company, Ky., 474 S.W.2d 367 (1971).

Bass also contends that there was no evidence supporting the finding that Kellett had an increase in occupational disability as a result of the alleged injury in February 1996. The medical evidence, as stated above, is evidence of substance which supports the ALJ's determination of occupational disability in Kellett's case. If there is any evidence of substance to support the finder of fact's determination of occupational disability, this Court must sustain it. Millers Lane Concrete Co., Inc. v. Dennis, Ky. App., 599 S.W.2d 464, 465 (1980). The ALJ is given a broad discretion in translating functional impairment into occupational disability. Newberg v. Davis, Ky., 841 S.W.2d 164 (1992).

While medical evidence may be probative on the issue of occupational disability, it is not determinative, and it is the ALJ's function to look at the totality of circumstances and all the factors enumerated in KRS 342.0011(11) and Osborne v. Johnson, 432 S.W.2d 800 (1968), in making a determination of occupational disability. Such factors were considered in this case. Bass also argues that there was no increase in Kellett's occupational disability because the medically-imposed restrictions would, in substantial measure, have been the same following the 1974 injury and surgery as that currently imposed as a result of the February 1996 injury. The ALJ was not obligated to ignore the reality of evidence demonstrating that Kellett had performed iron work activity for many years following the first injury and surgery to

his back. Bass asserts that the ALJ was prohibited from considering the fact that Kellett had worked prior to the February 1996 injury as evidence that he suffered an increase in occupational disability from that date, citing Wells v. Bunch, Ky., 692 S.W.2d 806 (1985). Wells does not command that the ALJ decline to consider such evidence, but only holds that the fact that a claimant is employed prior to a compensable injury does not mandate a finding that the claimant suffered from no active disability prior to the injury. Id. at 808.

Bass' primary thrust on appeal is that because the ALJ's finding of disability was based on Kellett's subjective presentations to the physicians and his testimony, it was not based on substantial evidence because Kellett is not credible as a matter of law. Bass is asserting a falsum in uno, falsus in omnibus argument. See Black's Law Dictionary, 603 (6th ed. 1990). The ALJ did not solely rely upon Kellett's statements. Drs. Noonan and Arendall based their medical opinions upon objective medical evidence. The medical evidence clearly supported that portion of Kellett's testimony regarding his occupational capabilities, particularly as they relate to the future opportunity to engage in strenuous manual labor such as he had performed as an iron worker for most of his working career. Moreover, where evidence is conflicting on the issue of occupational disability, the ALJ is given the sole responsibility to determine credibility and the weight to be given to the evidence, including evidence from the same witness. Caudill v. Maloney's Discount Stores, Ky., 560

S.W.2d 15 (1977). Because there was substantial evidence to support the ALJ's finding that Kellett is occupationally disabled, Smyzer v. B. F. Goodrich Chemical Company, Ky., 474 S.W.2d 367 (1971), in accordance with the applicable standard of review, we affirm the Board's decision to affirm the ALJ's order. Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992).

Finally, we decline Kellett's request for sanctions against Bass, pursuant to KRS 342.310. Although we view Bass' appeal as not compelling considering that the Board adequately addressed its arguments, we are unable to conclude that Bass did not act in good faith.

The Board's decision is affirmed.

ALL CONCUR.

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