

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-002383-WC

MANALAPAN MINING COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-97-000830, WC-96-079320 & WC-97-000823

RONNIE SHORT; SPECIAL FUND;
HONORABLE DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: DYCHE, GUIDUGLI AND MILLER, JUDGES.

GUIDUGLI, JUDGE. Manalapan Mining Company (MCC) appeals from an opinion rendered by the Workers' Compensation Board on August 21, 1998, which affirmed an opinion and award entered March 18, 1998, by the Administrative Law Judge (ALJ) which held that Ronnie Short (Short) is suffering from total occupational disability. We affirm.

Before addressing the merits of MCC's appeal, we will address two procedural issues raised by Short. First, Short urges us to dismiss MCC's appeal on the ground that its petition

for review was not filed within thirty days after entry of the Board's opinion as required by CR 76.25(2). Our review of the record on appeal shows that MCC's petition for review was tendered for filing on September 21, 1998, the thirtieth day after entry of the Board's opinion. However, MCC failed to tender the filing fee with the petition. By order of this Court entered September 28, 1998, MCC was notified of its deficiency and given ten days to correct the deficiency. The order further provided that "[t]ime for any further steps will begin to run from the date this pleading is filed[.]" MCC tendered the filing fee on October 2, 1998, which was within the additional ten day period, and its petition was filed on the same day. Because MCC was given an extra ten days by this Court to perfect its filing and because the correction was made within the additional ten days, we find MCC's petition to be timely. See Smith v. Goodyear Tire and Rubber Co., Ky. App., 772 S.W.2d 640 (1989) (where claimant timely mailed petition for review and complied with deficiency order for tender of filing fee, dismissal was not proper).

Second, Short argues that dismissal is required due to MCC's non-compliance with Cr 76.25(4)(c), which provides:

The petition shall contain a clear and concise statement of (i) the material facts, and (ii) the questions of law involved, (iii) the specific reason(s) why relief from the Board's decision should be granted by the Court of Appeals.

We have examined MCC's petition for review and find that, while not broken down under specific headings, it does meet the

requirements of CR 76.25(4)(c). Again, under Smith substantial compliance will suffice.

Turning now to the merits. MCC contends that the Board's opinion finding Short to be totally disabled is not supported by substantial evidence. Having reviewed the parties' arguments, the record, and the relevant case law, we affirm the opinion of the Board and adopt the following portion of the Board's opinion as our own:

...

Short has worked in the past a roof bolter, laborer, and assembly line worker. He was employed by Manalapan as an underground miner. He testified that he did nearly all the jobs in the mines except for operating the miner. Short testified that he was first injured on July 19, 1996 while lifting a heavy rock. He stated that he felt pain in his low back. He left work and was seen at the emergency room at Harlan Appalachian Regional Hospital. He missed no other work as a result of this injury.

Short was again injured on August 28, 1996 when he was helping to move a pump. He felt a severe pain in his low back. He finished his shift that day but could not come into work the next day. Short saw Dr. Ahmad, his family physician, the following week. He has not returned to work. Short testified that he continues to have back pain that radiates down his leg. He stated that he needs a cane in order to walk. He relates that he is depressed and has problems with his nerves. Short did not feel that he could return to any of the work he has done in the past. He filed a claim as a result of his injuries and also filed claims on the basis of coal worker's pneumoconiosis and hearing loss.

In support of his injury claim, Short submitted records from Dr. Fazal Ahmad, his family physician. Dr. Ahmad's records indicate that he first saw Short on July 19, 1996 in the emergency room at Harlan ARH. X-rays indicated mild osteoporosis and

degenerative osteoarthritis. Dr. Ahmad suspected a possible lumbar disk herniation. He referred Short to Dr. James Bean, a neurosurgeon. Dr. Ahmad's records also indicate an MRI, performed in October 1996, revealed osteophytes at L4-L5 and S1 and degenerative disks at L4-L5 and L5-S1 but no evidence of herniation. Dr. Ahmad diagnosed chronic backache syndrome and possible degenerative joint disease. He did not believe Short could return to work, stating:

At the present time, I don't think he will be able to go back to work because by verbal expression and the way the patient moves and by examination, he appears to be incapacitated.

Short also submitted a report from Dr. William Kennedy, an orthopedic surgeon, who felt that Short suffered from degenerative disk disease at L4 and L5 and a displaced disk at L4. He assessed a 13% impairment under the AMA guides. He recommended that Short avoid any work that requires repeated bending, stooping, squatting, heavy lifting, or climbing. He restricted Short to lifting to no more than 20 pounds occasionally or 7 pounds frequently. Dr. Kennedy felt Short might benefit from epidural steroid injections or possibly surgery.

Short also submitted a report from Dr. Norman Davis, a psychologist, who diagnosed him as suffering from a mood disorder with depressed affect secondary to his back injury. Dr. Davis assessed a 35% impairment under the AMA guides. He felt Short's depression was interfering with his concentration and cognition and would prevent him from returning to the sort of work he has performed in the past.

Manalapan submitted a report from Dr. Robert P. Goodman, an orthopedic surgeon, who diagnosed preexisting degenerative changes of the lumbar spine with arousal. He felt that Short had a 0-4% impairment under the AMA guides and that one-half percent of this impairment was due to arousal of preexisting dormant conditions. Dr. Goodman stated that Short's 1996 injuries did not result in the need for any restrictions on his activities,

but his age and degenerative changes made it advisable that he avoid lifting more than 75 pounds maximum.

Manalapan also submitted the report of Dr. Daniel Primm, an orthopedic surgeon, whose impression was of degenerative disk disease of the lumbar spine with a history of superimposed injuries and arousal as well as de-conditioning. Dr. Primm did not feel that Short suffered a significant back injury and found no evidence of a significant back condition. He believed Short could return to light work immediately with occasional lifting up to 25 pounds and frequent lifting of 10 to 15 pounds. He felt that with some exercise Short would be able to return to medium level labor. Dr. Primm assessed a 5 to 7% impairment under the AMA guides and attributed one-half of this to the arousal of preexisting conditions.

Manalapan also submitted the report of Dr. Andrew Cooley, a psychiatrist, who diagnosed Short as suffering from an adjustment disorder with depressed and anxious features and who also felt that Short was attempting to exaggerate his symptoms. Dr. Cooley assessed an 8% impairment under the AMA guides. However, from a psychiatric standpoint, he felt Short could return to any sort of work for which he had previous training, education, or experience.

The Special Fund submitted the report of Dr. James Bean, a neurosurgeon. Dr. Bean stated that on his examination, Short had intact dorsa flexion and planter flexion. He found no evidence of sensory loss or reflect abnormalities. He diagnosed Short as suffering from a degenerative disk at L3-L4 and L5-S1 and felt he was engaging in symptom magnification. He assessed a 5% impairment under the AMA guidelines based upon CT scan findings of degenerative disk disease.

...

This claim was initially assigned to Arbitrator Vonnell Tingle who found that Short was suffering a 30% occupational disability as a result of his back injury but no occupational disability as a result of his hearing loss.

...

Regarding Short's injury claim, the ALJ found him to be totally occupationally disabled, relying primarily upon the testimony of Drs. Kennedy, Primm, and Ahmad.

...

Manalapan now appeals from the ALJ's opinion, first arguing that the ALJ's finding of total occupational disability as a result of the back injury is not supported by substantial evidence. It asserts that the fact that the Arbitrator found only a 30% disability while the ALJ found a 100% disability indicates that the ALJ's opinion is not supported by substantial evidence. Manalapan points out that Dr. Ahmad based his opinion that Short would be able to return to work upon "verbal expression and the way the patient moves." Manalapan asserts this is not objective medical evidence. It further argues that since Dr. Ahmad is only a family doctor, greater weight should be given to the opinion of the various specialists testifying in this claim. Manalapan further points out that Drs. Bean, Goodman, and Primm all gave fairly low impairment ratings. Finally, Manalapan points out that Dr. Goodman felt that Short needs no restrictions due to his injury and Dr. Primm was of the opinion that Short could experience significant improvement.

The claimant is a workers' compensation claim bears the burden of proving each of the essential elements of his claim. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Where the party does not bear the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the ALJ's opinion 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 Manalapan 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 find no merit in Manalapan's argument that the fact that the Arbitrator found Short to be 30% occupationally disabled while the ALJ found him to be totally occupationally disabled indicates that the ALJ's finding is unreasonable and without substantial basis in fact. We point out that the discrepancy between the occupational disability ratings reached by the ALJ and the Arbitrator could just as easily indicate that the Arbitrator's assessment was unreasonably low as it could that the ALJ's assessment was unreasonably high. The discrepancy between the two assessments signifies nothing. The question to be answered is whether the ALJ's finding of total occupational disability is supported by substantial evidence.

All of Short's work experience has been in heavy manual labor. Short testified that he has constant pain in his low back and right leg and that he often has to use a cane. Dr. Ahmad felt that Short would be unable to return to work. Dr. Kennedy felt that he should avoid bending, stooping, and climbing as well as lifting more than 20 pounds maximum or 7 pounds frequently. Dr. Primm felt that he should lift no more than 25 pounds maximum of 10 to 15 pounds frequently although he felt that Short could have some improvement. Dr. Davis felt that Short's

depression interfered with his concentration and cognition making it difficult for him to perform the sort of work he has done in the past. This is substantial evidence supporting the ALJ's conclusion.

We point out to Manalapan that there is no requirement for the ALJ to give greater weight to the testimony of a specialist over that of a family doctor. See, Yocom v. Emerson Electric, Ky. App., 584 S.W.2d 744 (1979); General Tire & Rubber Co. v. Rule, Ky., 479 S.W.2d 629 (1972); Republic Steel Corp. v. Justice, Ky., 464 S.W.2d 267 (1971); Maynard v. Pond Creek Collieries, Ky., 184 S.W.2d 991 (1945). We therefore find no error with the ALJ's finding of total occupational disability.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Antony Saragas
Harland, KY

BRIEF FOR APPELLEE, RONNIE
SHORT:

Sherry Brasher
Harlan, KY

BRIEF FOR APPELLEE, SPECIAL
FUND:

Benjamin C. Johnson
Louisville, KY