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TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003100-WC

IRA A. WATSON DEPARTMENT STORE — APPELLANT

V.

PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-90489

DAVID HAMILTON; LLOYD R. EDENS,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION AFFIRMING

* * * * * * * *

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM and KNOX, Judges.

GUDGEL, CHIEF JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (board) affirming an opinion and award of an Administrative Law Judge (ALJ), which awarded appellee David Hamilton total disability benefits. On appeal, appellant employer contends that the board erred by concluding that the ALJ's total disability finding is supported by substantial evidence. We disagree. Hence, we affirm.

We have thoroughly reviewed the record, the arguments of the parties, and the applicable authorities. Based upon that

review, we are satisfied that the board's decision is "neither patently unreasonable nor flagrantly implausible." Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 688 (1992). Likewise, we are satisfied that the board "neither overlooked nor misconstrued a controlling statute or precedent in determining that there was substantial evidence to support the ALJ's decision." Whittaker v. Perry, Ky., 988 S.W.2d 497, 498 (1999) (citing Western Baptist Hosp., supra). Accordingly, we adopt the board's well-written opinion by Board Member Dwight Lovan as the opinion of this court as follows:

> Ira A. Watson Department Store ("Watson") appeals from the decision of Hon. Lloyd R. Edens, Administrative Law Judge ("ALJ"), awarding a total occupational disability to David Hamilton ("Hamilton") as the result of a work-related injury sustained on January 25, 1997.
>
> Hamilton worked at Watson's for 17 years. He began as a floor supervisor and, at the time of his injury, had advanced to assistant manager. His testimony indicated that as assistant manager he performed clerical and administrative duties but also a large part of his job was spent loading and unloading trucks, "moving freight and setting up fixtures and displays and stocking." His injury occurred when he was moving some fixtures and felt a pulling in his low back. He finished work that day, eventually seeing a doctor two days later. He began with his family physician, Dr. Nichols, who eventually referred him to Dr. Christopher Stephens. Hamilton continued to experience low back pain but did attempt to return to work. He found he was only able to work for slightly over three days and had to cease work because of back pain. But for those few days that he attempted to work, he has not returned to employment and is unaware of any jobs that he is now able to perform. He did undergo a vocational evaluation after a decision on his claim by an Arbitrator. A diskogram and the possibility of surgery were suggested to him

but he was unwilling at this time to undergo those procedures.

The medical evidence in this claim consisted of reports or testimony of Dr. Gregory Snider, Dr. Christopher Stephens and Dr. Christa Muckenhausen. Dr. Snider and Dr. Stephens each assigned a 5% functional impairment. Dr. Stephens testified that an MRI indicated degenerative disk disease with an annular tear at L5/S1. As of June 20, 1997, Hamilton had not improved and Dr. Stephens recommended a diskogram and, depending upon the result of that test, the possibility of the performance of a lumbar fusion. In a letter of August 5, 1997, he stated that Hamilton had reached maximum medical improvement and that Hamilton had chosen not to proceed with the diskogram. At that point, he assessed a 5% functional impairment, suggested limitations of no repetitive lifting greater than 40 pounds with no repetitive bending or stooping. He anticipated that these would be permanent restrictions.

Dr. Snider examined Hamilton on May 6, 1998, and also reviewed office notes from Dr. Stephens and Dr. Nichols. He did not find any evidence of disk herniation but did see an indication of disk degeneration of L5/S1. He believed there was an element of a somatization disorder, that Hamilton had achieved maximum medical improvement and needed no additional active medical treatment. He assigned a 5% functional impairment based upon a DRE lumbosacral Category 2 assessment. He did find positive Waddell signs.

Dr. Christa Muckenhausen assessed a 27% functional impairment based upon a total combined value with 15% to 18% of that relating to the lumbar spine. She was of the opinion that Hamilton could lift 5 pounds frequently, 10 pounds to a maximum and stand, sit or walk for less than 3 hours in an 8 hour day. She further indicated that he should not work at heights, should avoid temperature extremes and vibratory equipment.

Pursuant to the order of the Arbitrator during the initial determination in this matter, a vocational evaluation was conducted

at the Carl D. Perkins Comprehensive Rehabilitation Center. This included both a physical evaluation and vocational evaluation. That evaluation concluded, in part:

> Mr. Hamilton lacks significant potential for vocational training or competitive employment at the present time. He has numerous physical restrictions, according to Dr. Rayes, which would preclude employment requiring physical abilities. His current academic levels fall below the admission standards to all categories of occupational training in a state/vocational technical school. Overall data indicates that he lacks significant potential at the present time for training or competitive employment.

After a thorough review of the evidence, the ALJ concluded as follows:

> In light of the Petitioner's age, the nature of his injury which includes an annular tear, the type of work he customarily performed which, to a great extent, has involved manual labor, and the composite opinions of Drs. Muckenhausen and Stephens, I find the Petitioner, David Hamilton, has suffered a permanent total disability as the result of his injury of January 25, 1997. The Petitioner testified that he was off work for approximately two to three weeks and returned for 3 ½ days but was unable to continue working due to pain in his back. Accordingly, benefits awarded herein shall begin on January 26, 1997, and continue thereafter for so long as the Petitioner shall remain disabled. The Respondent shall receive credit for the 3 ½ days during this period in which the Petitioner returned to work and for temporary total disability benefits which were paid from April 4, 1997, through August 28, 1997.

The crux of Watson's appeal and argument on appeal is as follows:

> This is a "new law" claim and is thus bound by the revised provisions of KRS 342.732. Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), is gone. Under this new regime, the Administrative Law Judge is limited to a strict mathematical formula per KRS 342.730. The Petitioner's position is that the Administrative Law Judge should have performed the disability calculations using the functional impairment ratings in evidence from one of the three physicians testifying in this case, and should have applied the mathematical factor formula as found in KRS 342.730 in order to determine Mr. Hamilton's occupational disability. This simply was not done, and for this reason, the Petitioner believes that the Administrative Law Judge's Opinion, Order and Award of August 17, 1998, was incorrect as a matter of law and must be overturned. (Watson's brief at pg. 6)

Since December 12, 1996, many things in the Kentucky Workers' Compensation Act have changed. Some things have not. It is the interaction of what has changed and what has not that must be analyzed in the instant appeal. One thing that has not changed is that the burden of proof rests with the injured worker to establish his entitlement to benefits. When, however, the party without the burden of proof is unsuccessful before the Administrative Law Judge, in this case Watson, we must view the evidence of record and the law to determine whether there was substantial evidence of probative value to support the ALJ's ultimate conclusion. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

Prior to December 12, 1996, there was a single definition of disability contained in KRS 342.0011(11). Effective December 12, 1996, the Legislature created three specific subsections defining "temporary total

disability," "permanent partial disability," and "permanent total disability." While additional sections of the Act severely limit an adjudicator's ability to assess occupational disability in permanent partial disability situations, the adjudicator has more discretion to evaluate the evidence in determining total occupational disability. The determination of permanent total disability continues to be a factual finding. The strict restrictions referred to by Watson apply only to the determination of permanent partial disability in accordance with KRS 342.730(1)(b). If, however, the adjudicator decides that an individual is permanently and totally disabled, those mathematical factors are not applicable.

Contrary to the issue as phrased by Watson herein, the question before us is whether there is substantial evidence of probative value to support the ALJ's determination of total and permanent occupational disability pursuant to KRS 342.0011(11)(c). There, permanent total disability is defined as:

> The condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury . . . .

"Work" is defined in KRS 342.0011(34) as follows:

> "Work" means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy.

These two provisions of the Act mandate two specific findings by an adjudicator in assessing a total disability award. First, the adjudicator must conclude that the evidence establishes that there is a "permanent disability rating." Here, there is no serious challenge but that Drs. Snider and Stephens each assessed a 5% permanent impairment rating which, based upon the statutory definition, results in a "permanent disability rating." Dr. Muckenhausen found even more. The second aspect of the analysis

requires the adjudicator to determine whether there has been a complete and permanent inability to perform any type of work as a result of the injury. This portion of the definition of permanent total disability provides discretion with an ALJ or Arbitrator as he or she interprets the evidence in light of the definition of "work."

While permanent partial disability assessments provide for very little discretion on the part of the fact finder, total disability assessments are not so strictly limited. Although the full impact of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), has been modified, Watson's assertion that it is "gone" is not totally correct. In Osborne, the court thoroughly analyzed the needed requirements for finding disability. The court emphasized that medical percentages are not determinative. While that statement is no longer controlling for permanent partial disability, it remains applicable to permanent total disability. The statute, as it existed at the time of the decision in Osborne and thereafter until December 12, 1996, also required the fact finder to analyze the worker's competitive abilities based upon the "local labor market." However, with the changes in the Kentucky Workers' Compensation Act as effective December 12, 1996, the local labor market analysis is no longer appropriate. The ALJ in the instant action in concluding Hamilton was experiencing total occupational disability did not limit his assessment to the local labor market and, therefore, appropriately disregarded that aspect of Osborne. We believe that the Legislature's definition of "work" as set out above follows a great deal of the language used by the court in Osborne, particularly in their quotations from Larson. Larson noted that if the worker's physical condition is such as to disqualify him for regular employment in the labor market, then total disability may be found. See Osborne at 803. The court went on to state also at page 803 "if the Board finds the workman is so physically impaired that he is not capable of performing any kind of work of regular employment . . . the man will be considered to be totally disabled." In a footnote, the court further stated at 803:

> We are talking about hired employment, not self-employment. We do not believe the law contemplates that consideration shall be given to the workman's ability to sell apples or pencils on the street.

In defining normal employment conditions, the court adopted Larson's test of probable dependability to sell services in a competitive labor market. This definition considers whether the individual will be dependable, whether his physiological restrictions prohibit him from using skills within his individual vocational capabilities and accepts that one is not required to be homebound to be determined totally occupationally disabled.

Here, while no physician may have specifically testified Hamilton was incapable of performing any work on a regular and competitive basis, such a standard is not required. In total disability claims, medical assessments remain one of many elements to be considered. The ALJ, as was his right, considered the individual's own testimony, vocational testimony, physiological testimony and arrived at a finding to total disability. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985); and Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971).

The evidence presented to the ALJ in the instant action, in our opinion, would support and did support a finding of either total occupational disability or partial occupational disability. The former assessment grants to the ALJ a greater degree of discretion on fact finding than does the latter. While things have changed, the Board now has no greater authority to second guess an ALJ's reliance upon evidence of record than it did prior to December 12, 1996. See McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). It matters not whether an Arbitrator concluded that the individual was partially disabled nor does it matter whether this Board may have found differently than did the ALJ. The ALJ, in our opinion, was

within his authority in reaching the conclusion that he did.

To paraphrase Watson, "if this seems too great an award to give Mr. Hamilton and if there is greater discretion with the Administrative Law Judge in finding total disability than in finding partial disability, it was and is a policy decision made by the Kentucky Legislature." If Watson believes an ALJ has too much discretion in determining total disability, the proper redress is through the Legislature and not this Board.

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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