

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001978-WC

ARCH OF KENTUCKY, INC.
(DIVISION OF APOGEE COAL COMPANY)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-95511

KENNETH A. RUSSELL;
HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** ** * * * * *

BEFORE: DYCHE, GUIDUGLI, AND MILLER, JUDGES.

MILLER, JUDGE: Arch of Kentucky, Inc. (Division of Apogee Coal Company) (Arch) asks us to review a July 21, 1999 decision of the Workers' Compensation Board (board). We affirm.

On February 4, 1997, while in the employ of Arch, Kenneth A. Russell suffered work-related injuries to his low back and leg. Russell filed for benefits under the Workers' Compensation Act. Kentucky Revised Statutes (KRS) Chapter 342. On March 2, 1999, the administrative law judge (ALJ) rendered an Opinion and Award finding Russell to be 100% occupationally

disabled. The ALJ based this determination, not only on the medical evidence, but on Russell's "age, education and work experience . . ." Arch appealed to the board, which, in turn, affirmed the ALJ's decision. This appeal followed.

Arch contends that the ALJ erred by utilizing the factors set forth in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) in finding Russell was 100% occupationally disabled. It maintains that Osborne has been statutorily overruled by KRS 342.0011(11) (c).

On appeal, we review the board's decision and ascertain whether it overlooked or misconstrued controlling statutes or precedent in determining that there was substantial evidence to support the ALJ's decision. Whittaker v. Perry, Ky., 988 S.W.2d 497 (1999) (citing Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992)). Having reviewed the record, we believe the board correctly applied and interpreted the law.

KRS 342.0011(11) (c) defines "permanent total disability," in relevant part, 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:

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

Initially, the fact finder must determine that the evidence establishes a "permanent disability rating." Arch does not dispute that Russell has a permanent disability rating. Each

doctor who testified assessed some degree of permanent impairment rating. This results in a permanent disability rating. Next, the fact finder must determine whether, as a result of the injury, the claimant has a complete and permanent inability to perform any type of work. Contrary to Arch's allegations, we are of the opinion the fact finder still retains great discretion in making this latter determination. Medical assessments are but one consideration in this process. We view it as proper for the ALJ to weigh certain factors enumerated in Osborne.

Specifically, we believe it appropriate to consider claimant's age, education, and work experience. If a claimant does not possess the education or training to perform work that he would otherwise be physically capable of performing, we think it axiomatic that he does not possess the ability to perform such work on a "regular and sustained basis in a competitive economy." We agree with Arch that the 1996 amendment to KRS 342.0011(11) eliminated the Osborne requirement of analyzing the claimant's competitive abilities based upon the "local labor market." In the instant case, however, the ALJ appropriately disregarded that aspect of Osborne. In sum, we cannot say the board's legal analysis was flawed.

We further agree with the board that the ALJ's decision was based on substantial evidence. Russell was 45 years old at the time of the accident. He had a high school education and no vocational training. Since approximately 1976, Russell has worked for Arch as an underground coal mining laborer. He was injured on February 4, 1997 when he was proceeding on a "mantrip"

and it collided head-on with a 16 ton battery motor. His left leg was left "dangling." Although surgery was performed on it, Russell states that he still has a great deal of pain from the injury. He experiences numbness in the leg and knee. He also has problems with his back which causes frequent pain and prevents him from bending for any length of time.

Dr. James R. Bean, a neurosurgeon, confirmed Russell's complaints of leg and back pain. Dr. Bean diagnosed Russell with a degenerative disc problem, possibly with a superimposed lumbar sprain or strain. He believed Russell had a 5% impairment and recommended he only perform sedentary work which required no bending or lifting over 10 to 12 pounds.

Dr. Gary McAllister felt that Russell suffered a musculoligamentous injury of the low back, superimposed on degenerative disc disease at L5-S1 and spinal stenosis at L4-5. He also believed Russell suffered from osteoporosis of the left ankle and a tear of the long flexor tendon of the left great toe. He assessed a 44% impairment under the AMA Guidelines but believed one-half of this was due to the injury and one-half was due to arousal of a pre-existing dormant condition. Dr. McAllister recommended restrictions of lifting less than 10 pounds maximum, standing or sitting for less than 3 hours out of an 8 hour day, and avoiding all climbing, balancing, stooping, kneeling, crouching, crawling, and bending. Upon the whole, we cannot say the board erred. See Western Baptist, 827 S.W.2d 685.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Timothy C. Bates
Hazard, Kentucky

BRIEF FOR APPELLEE,
KENNETH A. RUSSELL:

Otis Doan, Jr.
Harlan, Kentucky