RENDERED: May 5, 2000; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001706-WC

PEABODY COAL COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-98050

WILLIAM STONE;
DICK ADAMS;
HONORABLE DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS, GUIDUGLI AND SCHRODER, JUDGES.

GUIDUGLI, JUDGE. Peabody Coal Company (Peabody) appeals from an opinion of the Workers' Compensation Board (the Board) rendered June 18, 1999 which affirmed the Administrative Law Judge's (ALJ) award of total occupational disability benefits to William Stone (Stone). We affirm.

Stone sustained a work related injury to his left arm and shoulder on January 17, 1997, as a result of a fall in a mine. Stone, age 58, had been employed by Peabody since 1971. Prior to that his work history consisted of manual labor jobs,

including factory and assembly line work. He has a ninth grade education and has not obtained his GED. He has not returned to work at Peabody since his injury, and testified at his deposition that he has been terminated by Peabody because he cannot perform his job. Stone further testified that he can no longer perform his prior job, and that he has not looked for other work. Stone admitted to drawing SSI disability benefits as well as a miner's pension. Stone testified that if he works at a job in which he would make more than $1,000 per month he would lose his medical card. Stone stated that he has problems with heavy lifting over his head, loss of flexion, problems with rotating his hand, and constant pain.

Stone's treating physician was Dr. Agustin Sierra (Dr. Sierra). According to Dr. Sierra's medical records, he treated Stone for "a rupture of the long head of the biceps and rotator tendonitis of the left shoulder." Dr. Sierra assigned an impairment rating of 16.8% which he indicated was permanent and related to the January 1997 injury. In regard to restrictions, Dr. Sierra indicated:

> Modification in activities. Work that does not require heavy lifting, pushing and pulling and that will not require elevation of the left arm to shoulder level or above shoulder level.

Stone was evaluated by Dr. Jeffrey Lawrence on January 28, 1998. Dr. Lawrence agreed with Dr. Sierra's diagnosis of rupture of the left biceps muscle, but also noted the presence of degenerative osteoarthritis in the left AC joint and elbow as

well as a degenerative tear in the rotator cuff of the left shoulder. According to Dr. Lawrence's written report:

> only the rupture of is [sic] his biceps tendon is work related. The other changes in his elbow and his left shoulder are due to degenerative process and not work-related.

Dr. Lawrence also indicated that Stone would be unable to "return to full duty" due to diminishment of strength in his left arm. Permanent restrictions would include:

> no lifting up to his shoulders more than 35 pounds and no lifting over his shoulders more than 25 pounds. I would also limit one arm pulling with his left arm to less than 20 pounds.

Dr. Lawrence assigned a 3% impairment rating. At his deposition, Dr. Lawrence testified that this impairment rating did not take into account any of the arthritic changes.

Stone underwent a vocational evaluation with Dr. Joel Dill (Dr. Dill) on November 7, 1998. According to Dr. Dill's written report, Stone

> will not be able to return to coal mining work. . . . At his age and with his background, the chances of being employed at light work activity outside the coal mines are slim.

At his deposition, Dr. Dill stated that Stone had no transferable job skills and that his age would be "a significant factor in terms of his being able to compete effectively on the job market." Dr. Dill further testified as follows:

> Q: Would there be a way that you could state what percent of the jobs that you're aware of that Mr. Stone could perform under the assessment by Dr. Lawrence and the assessment by Mr. Stone himself of his restrictions?

> A: Well, I think in terms of performing that it would all be fairly consistent. I think he could perform light and sedentary, which I think would get into approximately thirty percent of the jobs of unskilled, entry-level jobs that he could perform.

Dr. Dill agreed that this translated into a 70% vocational loss.

Stone filed his application for benefits on May 7, 1998. Following a benefit review determination in which the arbitrator assigned a permanent partial disability rating of 37.8%, Stone sought a de novo review before an ALJ, arguing that he was totally disabled. In an opinion and award entered February 26, 1999, the ALJ found Stone to be totally disabled, stating:

> Plaintiff's disability must be based upon an impairment rating unless the Plaintiff is found to be totally disabled. KRS 342.0011(11) defines "permanent total disability" 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." KRS 342.001(34) also defines "work" as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." Based on these definitions, this Court does believe that the Plaintiff is now suffering a total occupational disability of 100% pursuant to statute. This Court found the Plaintiff's testimony to be very credible regarding both his pain and restrictions. Dr. Sierra also placed restrictions on the Plaintiff's activities that severely limit his ability to do any sort of work. This Court believes that one must still be able to "compete" for any type of work based on KRS 342.0011(34) which considers work "in a competitive economy." Even if one were not to consider Plaintiff's ability to compete for jobs, this Court seriously doubts Plaintiff would be able to perform a job "on a regular and sustained basis" due to his pain and restrictions.

The Board affirmed the ALJ's award of total disability benefits in an opinion rendered June 18, 1999, holding:

> In order to accurately define the meaning of permanent total disability under the Workers' Compensation Act as it was modified on December 12, 1996, one must consider the definition of "work" as contained in KRS 342.0011(34). Placing these two definitions together, one is directed to consider the following:
>
> > 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 (providing services to another in return for remuneration on a regular and sustained basis in a competitive economy) as a result of an injury . . . KRS 342.0011(11)(c); and KRS 342.0011(34).
>
> The Legislature by defining work in part with the use of the phrase "competitive economy", establishes that in determining whether an individual is totally occupationally disabled not only is their performance of a job at issue but their ability to "compete" for a job is at issue. Here, we believe the evidence upon which the ALJ relied probably established that on a theoretical basis Stone could "perform" some work. That evidence, including the testimony of Stone himself, however, led to a reasonable conclusion, reasonable inference, that he could not effectively compete for a job.
>
> . . .
>
> The remaining analysis in determining whether an individual is totally occupationally disabled is to determine whether there is a permanent disability rating and there was. Dr. Lawrence assigned a 3% functional impairment . . . and Dr. Sierra a 16.8 functional impairment. . . . Further, the ALJ did not limit himself in considering the

> impact of this injury on Stone's vocational opportunities to the "local labor market" and, therefore, we believe he performed a supportable analysis in reaching his conclusion.

This appeal followed.

Peabody contends that Stone is not permanently and totally disabled for purposes of the December 1996 amendments to Kentucky's Workers' Compensation Act (Chapter 342). Peabody maintains that in order to be totally disabled, Stone must prove that: (1) he has a permanent disability rating; and (2) he is completely and totally unable to perform any work as a result of his injury. Pointing to evidence in the record which showed that there were jobs available to Stone which would accommodate the restrictions placed on him, Peabody maintains that Stone is not totally disabled. We disagree.

For purposes of Chapter 342, "permanent total disability" and "work" are given specific definitions. Under the provisions of KRS 342.0011, "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[.]

KRS 342.0011(11)(c). "Work" is defined as the act of "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011(34). Peabody would have us find that in order to be totally disabled, Stone must show that he is unable to work 40 hours per week in a

job available in the competitive economy as opposed to a "make work" job designed to accommodate a disability.

When a particular word contained in a statute is given a particular definition by the Legislature, we must use that definition in construing the statute. Baker v. Commonwealth, Ky., 677 S.W.2d 876 (1984). We believe that the Board's construction of "work" in light of the definition contained in KRS 342.0011 is correct in that an injured worker must be unable to compete with other potential employees for available jobs before being found to be totally disabled. We believe that this construction of the statue is similar to that relied upon by Peabody in that it requires the injured employee to compete for a job on the open market instead of falling back on "make work" jobs or relying on the largesse of friends or family members who may be able to carry him on the payroll. If Stone is truly able to perform at any type of work but is unable to compete with others in the job market to obtain those jobs, under the terms of KRS 342.0011 he is totally disabled.[1]

Having considered the parties' arguments on appeal, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Peter J. Glauber
Walter E. Harding
Louisville, KY

BRIEF FOR APPELLEE, WILLIAM STONE:

Dick Adams
Madisonville, KY

[1]The same conclusion was reached by a separate three-judge panel of this Court in Ira W. Watson Department Store v. Hamilton, 1998-CA-003100-WC. Discretionary review of Hamilton is currently pending before the Kentucky Supreme Court.