

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001486-WC

DAVID M. HOWARD

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-93414

ARCH OF KENTUCKY, INC.,
DIVISION OF APOGEE COAL;
HON. RICHARD L. WHITTAKER,
DIRECTOR OF SPECIAL FUND;
HON. RICHARD H. CAMPBELL,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. David M. Howard (Howard) appeals from an opinion of the Workers' Compensation Board (the Board) entered May 28, 1999 affirming an opinion and award of the Administrative Law judge (ALJ) which found him to have a 10% permanent occupational disability rating as a result of injuries sustained on January 27, 1996 and December 3, 1996 (the 1996 injuries), and a permanent partial disability rating of 2.25% for an injury

which occurred on February 12, 1997 (the 1997 injury). We affirm.

Howard, who is 41 years of age, has a high school education and a two-year associate degree in mining technology. He has been employed as an underground miner for Arch of Kentucky, Inc./Division of Apogee Coal Company (Arch) and/or its predecessor since May 1977. He has no other employment experience.

Howard alleges that he sustained three separate injuries in the course of his employment with Arch which led to his claim for benefits. On January 27, 1996, he allegedly fell and struck his head on a monorail bracket and over-extended his arms when he tried to break his fall by grabbing a beltline. Howard reported experiencing some head and neck pain following this accident for which he sought medical treatment from Dr. Schecker and Dr. Holt. It appears that Howard's main complaint following this injury was constant wrist pain and fingertip numbness. Despite these complaints, Howard returned to work at the same position. It appears that Howard missed a minimal amount of work following this accident, but the exact amount of time missed is not clear. It appears that Howard underwent a right carpal tunnel release in April 1997.

Howard alleges that his second injury occurred on December 3, 1996, when he twisted his lower back while carrying machinery pieces through a door. Howard sought no medical treatment for this injury aside from a visit to the emergency room, and was able to continue working without missing any time.

The third injury allegedly occurred on February 2, 1997 when a vehicle he was riding in struck an object and caused him to fall on the floor of the vehicle and strike his right knee on a metal plate. Following this accident Howard continued to work until February 28, 1997, at which time he left work due to neck, back and knee pain. After a course of conservative treatment he returned to work on July 21, 1997. He continued to work until February 28, 1998, when he alleged that his neck, back and knee pain became totally disabling. He has continued a course of conservative treatment, but still complains of neck, back, and knee pain as well as left arm pain and numbness in both hands.

The medical evidence submitted before the ALJ was conflicting. Howard presented the records of Dr. Neal Jewell (Dr. Jewell) and Dr. Gary McAllister (Dr. McAllister), while Arch and the Special Fund relied on the records and/or depositions of Dr. Robert Goodman (Dr. Goodman), Dr. Kenneth Graulich (Dr. Graulich), Dr. Ben Kibler (Dr. Kibler), and Dr. William Brooks (Dr. Brooks).

Dr. Jewell saw Howard for an independent medical evaluation on August 30, 1996. Howard related the details of the January 27, 1996 accident, and complained of arm pain, fingertip numbness, gripping problems, and neck pain. Dr. Jewell diagnosed mild cervical strain, mild right upper extremity radicular syndrome, a C6-7 degenerative cervical disc with slight bulging, and mild bilateral carpal tunnel syndrome. Dr. Jewell gave a 6% impairment rating for carpal tunnel syndrome only, and indicated that there were "[i]nsignificant findings to qualify for a rating

of the cervical level." Dr. Jewell found "no evidence of disability from pre-existing condition." Dr. Jewell did not give any restrictions.

Dr. McAllister saw Howard for an orthopedic evaluation on January 21, 1998. Howard gave a history of three separate injuries and complained of severe lower back and left leg pain, numbness in the toes of his left foot, cervical pain radiating into both arms, and left wrist pain. Dr. McAllister diagnosed: (1) chronic musculoligamentous cervical spine injury with neuroforaminal encroachment at C3-4 and a bulging disc at C6-7; (2) chronic musculoligamentous lower back injury; (3) chondromalacia of the right knee; and (4) post carpal tunnel release of the right wrist. Dr. McAllister gave a total impairment rating of 31%, which was apportioned 20% to the lumbar spine injury, 8% to the cervical spine injury, and 3% for the knee injury. Dr. McAllister apportioned each equally between the individual injuries and arousal of a dormant pre-existing condition. Dr. McAllister also indicated relatively severe limitations and restrictions in regard to future activity. In Dr. McAllister's opinion, Howard lacks the physical capacity to return to his prior employment.

Dr. Goodman saw Howard on January 20, 1998 for an independent medical evaluation. Howard related the occurrence of the three accidents and complained of constant back pain and problems with dropping things. Dr. Goodman noted that Howard had a low back brace, a right knee brace, and walked with a cane. Based on his physical examination and review of x-ray and other

diagnostic films, Dr. Goodman diagnosed pre-existing degenerative changes in the cervical and lumbar spine and right knee. Dr. Goodman also found evidence of symptom magnification. In Dr. Goodman's opinion, Howard had reached maximum medical improvement and could best improve his condition through exercise and conditioning. Dr. Goodman indicated that the degenerative changes were normal for a man Howard's age. Dr. Goodman assigned a total impairment rating of 5%, apportioning 3% to the lumbar spine injury and 2% to the cervical spine injury. Half of the cervical and lumbar impairments were apportioned to "arousal." Dr. Goodman stated that Howard's wrist complaints were related to the cervical spine injury. He found no impairment resulting from Howard's knee injury.

Dr. Graulich also saw Howard for an independent medical evaluation on January 20, 1998. Howard gave Dr. Graulich basically the same history given to Dr. Goodman, and stated that his most severe problem was lower back pain. Howard also complained of neck pain radiating into his left arm accompanied by numbness as well as popping and cracking in his right knee. Howard stated that his right knee problems cause him to fall frequently. Based on his review of past medical records and a physical examination, Dr. Graulich diagnosed chronic pain syndrome in the cervical and lumbar spine and gave a 10% impairment rating in regard to this area. In regard to Howard's knee complaints, Dr. Graulich stated that he would defer an impairment rating to Dr. Kibler, but at any rate would not assign a rating greater than 5%.

Dr. Kibler saw Howard for an evaluation of his right knee. Howard complained of pain with any motion of the knee along with locking and giving way. An examination showed tenderness and "herky jerky movements of catching as the knee is both actively and passively moved." A review of x-rays showed nothing of note. Dr. Kibler diagnosed mild traumatic chondromalacia and some synovitis, but found no internal derangement. Dr. Kibler recommended a course of range motion exercises. No impairment rating was given.

Dr. Brooks saw Howard on April 17, 1997. Howard complained of back pain radiating into the right leg which he related to the December 3, 1996 accident. Howard also stated that his leg had given way several times, causing him to fall. Based on a physical examination and review of an MRI, Dr. Brooks diagnosed a "ligamentous injury in and around the left sacral iliac joint" which he felt would resolve with physical therapy. Dr. Brooks found no evidence of a neurological condition, and stated that Howard had reached maximum medical improvement and could return to work.

In an opinion and award entered February 16, 1999, the ALJ found that Howard sustained a 10% permanent occupational disability rating for the 1996 injuries and a permanent partial disability rating of 2.25% for the 1997 injury.¹ Liability for the 1996 injuries was apportioned equally between Arch and the Special Fund. In reaching his conclusion, the ALJ stated:

¹The disability rating for the 1997 injury was calculated based on the provisions of KRS 342.730(1)(b) as amended effective December 12, 1996.

[the] proof when considered in its entirety established that the work injuries of January 27 and December 3, 1996, involved strain- or sprain-type trauma to petitioner's cervical and lumbar spine; that the February 12, 1997, injury to petitioner's right knee produced "some mild traumatic chondromalacia and a little bit of synovitis," but did not result in any internal derangement; that, in large part, petitioner's upper extremity complaints stem from carpal tunnel syndrome, an ailment unrelated to the work injuries that are the subject matter of this claim, notwithstanding Dr. Jewell's conclusion to the contrary; and that petitioner's ongoing complaints involved a substantial degree of symptom magnification.

After considering the findings of Dr. McAllister, the ALJ found that:

the more convincing and probative proof from Drs. Goodman and Graulich indicated that petitioner's back and neck impairment is minimal, no more than 5% or so in the aggregate, and unaccompanied by any significant limitations.

Finally, the ALJ stated:

[The] injuries have produced just a modicum of functional impairment that, in all likelihood, would preclude petitioner from only the heaviest or most strenuous forms of work activity; and while petitioner would have it believed that his symptoms are so severe and debilitating that he is limited to a sedentary lifestyle, his testimony and demeanor at hearing indicated that he was exaggerating, either consciously or not, his symptomatology and the effects thereof. Furthermore, his symptom magnification was confirmed by the bulk of the medical evidence.

The Board affirmed that ALJ's opinion and award in an opinion rendered May 28, 1999, finding it to be supported by substantial evidence. This appeal followed.

We agree with the Board that the decision of the ALJ is supported by substantial evidence and therefore adopt the following portion of the Board's opinion as our own:

Howard had the burden of proving each of the essential elements of his claim. Snawder vs. Stice, Ky.App., 576 SW2d 276 (1979). Since he was unsuccessful before the ALJ, the question on appeal is whether the evidence is so overwhelming as to compel a contrary result. Wolf Creek Collieries vs. Crum, Ky.App., 673 SW2d 735 (1984). Compelling evidence is defined as evidence that is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. Reo Mechanical vs. Barnes, Ky.App., 691 SW2d 224 (1985). It is not enough to show that there is merely some evidence which would support a contrary conclusion. McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974). As long as the ALJ's decision is supported by evidence of substance, we are without authority to reverse. Special Fund vs. Francis, Ky., 708 SW2d 641 (1986). The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance and inferences to drawn [sic] from the evidence. Paramount Foods, Inc. vs. Burkhardt, Ky., 695 SW2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt vs. Bugg Brothers, Ky., 547 SW2d 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 vs. Maloney's Discount Stores, Ky., 560 SW2d 15 (1977). Further, this Board may not substitute its judgment for that of the ALJ in matters involving the weight to be accorded the evidence in questions of fact. KRS 342.285(2).

Here, the ALJ was faced with conflicting evidence and, as was his right, found the evidence from Drs. Goodman and Graulich to be more persuasive. The evidence from Drs. Goodman and Graulich is substantial evidence which supports the ALJ's findings regarding Howard's back and neck condition. Evidence from Dr. Goodman would support a finding of 0 to 5% functional impairment while evidence

from Dr. Graulich would support a finding of 0 to 10% functional impairment. For the 1996 injuries, it is the exclusive function of the ALJ to determine occupational disability. The ALJ is required to translate functional impairment ratings into occupational disability, utilizing the principles and factors enumerated in KRS 342.0011(11) and Osborne vs. Johnson, Ky., 432 SW2d 800 (1968). The ALJ is given great leeway in making this determination. Seventh Street Road Tobacco Warehouse vs. Stillwell, Ky., 550 SW2d 469 (1976). While a different ALJ may have reached a different conclusion as to Howard's degree of occupational disability, the law does not mandate that a greater or lesser degree of occupational disability be found. Millers Lane Concrete Co., Inc. vs. Dennis, Ky.App., 599 SW2d 464 (1980). The ALJ's finding of a 10% occupational disability is supported by substantial evidence. Further, the ALJ was not required to accept Howard's testimony concerning his restrictions, especially where the ALJ found his testimony was not credible. Further, we find the ALJ correctly determined Howard's entitlement to benefits for his 1997 injury. The ALJ concluded that the record, when taken as a whole, failed to indicate that Howard's 1997 knee injury would prevent him from returning to the type of work which he was engaged in when injured. In our opinion, there is substantial evidence of record to support this finding and we, therefore, affirm.

Howard also contends on appeal that if a physician such as Dr. McAllister:

states (either along with or without a disability percentage estimate) that the claimant cannot perform certain kinds of physical functions such opinion is an opinion on a medical question, but if the kinds of physical functions which the physician says the claimant cannot perform are such as are essential in the performance of the only occupation the claimant is qualified by training and experience to perform, the Workman's Compensation Board is required as a matter of logical deduction to find that the claimant's occupational disability is total.

Whitis v. Southern Belle Dairy, Inc., Ky., 434 S.W.2d 645, 647

(1968). However, the Whitis decision further provides:

This last rule has been modified somewhat in [Osborne], but since the instant claim was filed before the effective date of that decision the [pre-Osborne] rules apply.

Whitis, 434 S.W.2d at 647.

In Osborne, the Court set forth the following factors which are to be considered in assigning occupational disability:

(1) What kind of work normally available on the local labor market was the man capable, by qualifications or training, of performing prior to injury; (2) what were the normal wages in such employment; (3) what kind of work normally available on the local labor market is the man capable of performing since his injury; and (4) what are the normal wages in such employment?

Osborne, 432 S.W.2d at 803. Here, aside from Howard's own testimony that he is unable to work and Dr. McAllister's opinion regarding restrictions and Howard's inability to return to his previous job, there was no other evidence offered in regard as to whether Howard would be unable to work at any job. In particular, there was no evidence offered in regard to the third factor set forth in Osborne. In light of the foregoing, the evidence presented might support a finding that Howard cannot return to his previous job as a coal miner, but it does not compel a finding that Howard is totally disabled from an occupational standpoint.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

BRIEF FOR APPELLEE, ARCH OF

Otis Doan, Jr.
Harlan, KY

KENTUCKY, INC.:

Ralph D. Carter
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