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Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-001467-WC

ADDINGTON, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-61466

REX KILBURN, JR.;
HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD APPELLEES

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

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: This matter comes before us on a petition for review of an opinion of the Workers' Compensation Board (Board) affirming an opinion and award by the Administrative Law Judge (ALJ) awarding total disability benefits to the employee. The appellant/employer, Addington, Inc., contests the ALJ's finding that the appellee/employee, Rex Kilburn, Jr., is totally disabled. Addington argues that the evidence was insufficient to support such a finding based upon the 1996 amendements to the Workers' Compensation Act. Finding that the ALJ's findings were

based on substantial evidence of probative value, we affirm the Board.

Since the sufficiency of the ALJ's findings are in dispute, we shall set out the Board's factual summary in its entirety: "Kilburn, born March 3, 1959, has an eighth grade education and testified he is barely literate. He served in the U.S. Army as a truck driver and attended vocational school where he studied auto body; however he has never worked in that field. He began working in the coal mining industry in 1981 and has driven a rock truck and primarily been employed as a bulldozer operator".

"Kilburn sustained a work injury on November 19, 1997 when he was pushing a load of rock with a bulldozer. A piece broke out from under the dozer, causing it to spin around. Kilburn was thrown around inside of the cab and felt immediate pain in his lower back and neck. He continued to work that day and went to Hazard Appalachian Regional Hospital that night. He was x-rayed and remained in the hospital the rest of the night. He has been seen by his family physician, Dr. James Chaney, who referred him to Dr. John Gilbert in Lexington. He has also been seen by Dr. Russell Travis. In May or June of 1998, Dr. Gilbert recommended an epidural, a discogram, and an MRI, but compensation did not approve these recommendations."

"At his hearing held on December 10, 1998, Kilburn testified he believes his condition is worsening. He testified that his neck hurts constantly and he cannot turn his head from side to side. He has a sharp pain that runs down his arm and tingling in his hands and fingers. He testified the pain is worse when he tries to move his neck and nothing gives him

relief. He further testified his low back hurts all the time and so does his right leg. He stated sitting or standing too long increases his back and leg pain. He further testified that he possesses a drivers licence and passed the written test for it. He stated that Dr. Travis did release him to return to work but he did not feel he was able to do so."

"The records of Dr. Russell Travis, a neurosurgeon, are filed into the record. A letter to Dr. Chaney, dated December 15, 1997, indicates that although Kilburn has been receiving physical therapy, he has not made significant improvement. His primary problem is back and right leg pain. He advised a lumbar MRI and renewed a prescription for Loracet Plus. On January 5, 1998, the lumbar MRI was reviewed and was essentially negative, as were x-rays of the lumbar and cervical spine. The MRI of the cervical spine revealed a mild bulge at C5-6. Dr. Travis' records indicate that on February 10, 1998, a myelogram and post-myelogram CT were accomplished. The post-myelogram CT of the lumbar area was entirely normal and the cervical area was essentially normal. There was a mild bulge at C5-6 but it did not compress the cord or nerve roots. Dr. Travis felt there was no objective reason why Kilburn could not return to normal activity."

"Several reports from Dr. John Gilbert, a neurosurgeon in Lexington, are contained in the record. Dr. Gilbert first saw Kilburn on March 6, 1998 on referral from Dr. Chaney for chief complaints of back, neck, and right shoulder, arm, and leg pain. Dr Gilbert diagnosed: (1) herniated disc; (2) cervicalgia; (3) cervical herniated disc; (4) neck strain/sprain; (5) whiplash;

(6) status post concussion syndrome; (7) degenerative disc disease lumbar; (8) lumbago; (9) muscle spasm; and (10) anxiety. Dr. Gilbert thought Kilburn should undergo a functional capacity evaluation to determine any limitations or restrictions he might have to return to work and further suggested cervical and lumbar epidurals and complete cervical and lumbar discogram. An April 8, 1998 report indicates no changes in Dr. Gilbert's findings, other than a review of an MRI on December 12, 1997 showed a degenerative disc at L3-4 and L4-5. At Kilburn's request, he placed him on light duty with no lifting over 10-25 pounds. Kilburn was seen again on June 8, 1998. Dr. Gilbert noted that as of the last office visit, there was an attempt to pre-authorize epidurals, as well as a discogram, but the workers' compensation insurance denied it. Furthermore, while Kilburn was placed on light duty, he informed Dr. Gilbert that there was no light duty program with his company. Kilburn expressed that his symptoms had worsened over the last couple of months. He now had a positive Spurling's test bilaterally, with associated numbness and tingling in the arms bilaterally. On September 9, 1998, Dr. Gilbert noted no changes in his findings, but expressed that Mr. Kilburn's symptoms were worsening."

"Dr. Robert Nickerson, a specialist in physical medicine and rehabilitation was appointed as a university evaluator and examined Kilburn on June 23, 1998. In addition to his physical examination of Kilburn, he reviewed numerous diagnostic tests. Dr. Nickerson diagnosed: (1) lumbosacral sprain/strain; (2) cervical sprain/strain; and (3) muscle spasms in the paraspinal region. Under the DRE model of the AMA

Guidelines, he assessed a 10% impairment, 5% due to the lumbosacral spine and 5% due to the cervical spine. He placed restrictions on Kilburn's activity and felt his physical capacity was extremely limited, not only by his objective findings, but also by evidence of chronic pain syndrome. He would restrict Kilburn to lifting a maximum of 20 pounds and occasionally lifting no more than 10 pounds. He further felt he should not bend, twist, stoop or crawl, and noted he had difficulty walking without a cane. He further placed restrictions on walking, climbing, standing for more than 30 minutes, and sitting for more than 45 minutes at a time. Dr. Nickerson opined that Kilburn did not have the physical capacity to return to any type of work he had previously performed. He expressed that it was a non-surgical case and admitted that Kilburn showed some signs of symptom magnification. Dr. Nickerson was questioned concerning a vocational assessment performed by Dr. Ralph Crystal of the University of Kentucky, and stated that he respected Dr. Crystal's opinion. By the time of his deposition, Dr. Nickerson had been supplied with further diagnostic test results. He testified it was difficult to say, from these tests, whether or not the findings were actually capable of producing the symptoms of which Kilburn complained. Dr. Nickerson did find muscle spasm at both the cervical and lumbar levels which he testified were significant objective signs of pain."

"Dr. Daniel Primm, an orthopedic surgeon, evaluated Kilburn on August 20, 1998 and reviewed other treatment reports and diagnostic studies. Dr. Primm diagnosed: (1) possible cervical and lumbar strain superimposed on early degenerative

changes; and (2) symptom exaggeration. Dr. Primm did not believe that Kilburn sustained a serious or permanent injury to the body as a whole. He assessed a 0% impairment rating under the AMA Guides. Dr. Primm felt Kilburn could return to work with the first six weeks not lifting over 25 pounds on a frequent basis and no more than 50-60 pounds occasionally. After that, he could perform his regular work without restrictions. At his deposition, Dr. Primm explained how Kilburn's physical findings indicated symptom magnification and they were not consistent with the diagnostic studies."

"Also appearing in the record is a report from Dr. James Chaney, apparently completed for the consideration of Social Security disability insurance benefits. Dr. Chaney indicated he first saw Kilburn on June 23, 1997 and last examined him on September 22, 1998. His report indicates Kilburn is severely restricted in his physical activities."

"Dr. Ralph Crystal performed a vocational evaluation of Kilburn on September 3, 1998. The evaluation included an interview, vocational testing, and a review of medical reports. He reported that Kilburn could read at the 3.5 grade level, spell at the 2.1 grade level, and do arithmetic at the 3.9 level. He was found to be in the borderline range of intellectual functioning. He felt, however, that the vocational testing was not a valid assessment of Kilburn's actual vocational and academic abilities since he had been able to work in a semi-skilled occupation as a bulldozer operator. Furthermore, he noted that passing a written driver's test requires a reading level at least the fifth or sixth grade level. He was asked to

consider various medical reports and, based on Dr. Nickerson's which he found the most detailed, he believed Kilburn would be limited to light duty and sedentary work."

"Dr. William Weikel conducted a vocational evaluation of Kilburn on October 12, 1998. He found Kilburn scored below the third grade level for reading and at the end of the fourth grade level for arithmetic and considered him illiterate. Dr. Weikel felt Kilburn would be unable to return to work. Based on Nickerson's assessment, he felt Kilburn had an 80% loss of access to the labor market. He expressed that Kilburn's complaints of pain were a limiting factor in his ability to work."

"The ALJ reviewed the lay and medical testimony in the record in considerable detail. In the opinion section of his decision, the ALJ reviewed the evidence from Dr. Nickerson, the university evaluator. He discussed the Board's decision in Magic Coal Co. v. Fox, and the term 'presumptive weight.' The ALJ concluded that he did not believe Dr. Nickerson's clinical findings and opinions had been overcome and therefore afforded them presumptive weight. Thus, the ALJ decided, based on the report of the university evaluator which is entitled to presumptive weight that the work injury of November 19, 1997 rendered Kilburn totally and permanently occupationally disabled. Thereafter, Addington filed a petition for reconsideration which was overruled by the ALJ. Addington's appeal before the Board ensued."

After reviewing the evidence and the applicable law, the Board affirmed the ALJ. The Board concluded that the ALJ properly accorded presumptive weight to the university evaluator.

The Board further found that the ALJ did not err in finding Kilburn totally disabled. The Board viewed the ALJ's finding that Kilburn is totally disabled as supported by substantial evidence, after considering both the objective medical evidence and the evidence of his chronic pain syndrome.

Primarily, Addington raises two issues in this appeal. First, Addington argues that the ALJ erred in according presumptive weight to the university evaluator's diagnosis. In a related argument, Addington asserts that the ALJ's finding that Kilburn is totally disabled was not supported by evidence meeting the standard of KRS 342.0011(1) and (11)(c).

Addington contends that the ALJ's finding of total permanent disability was not based upon objective medical evidence. It points out that the ALJ's decision and award was based, in part, upon Kilburn's subjective complaints of pain and the limitations this pain would place on his availability in the labor market. Addington further notes that the university evaluator agreed that Kilburn is capable of performing some sedentary and light duty work on a limited basis. Consequently, Addington argues that Kilburn is not totally disabled from performing *any* type of work, as set out in KRS 342.0011(11)(c).

Under KRS 342.315(2), "The clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by arbitrators and administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of such evidence." The particular language used by the legislature shows that it is clear that the presumption

applies to the level of credibility to be given to certain evidence rather than a presumption on an overall issue in the claim. As the Board correctly pointed out, if the party claiming benefits cannot produce evidence to rebut the finding of the university evaluator which is adverse to him or her, then the party loses.

Since Kilburn's work-related injury occurred after the effective date of the statute, it is clear that the provisions of KRS 342.315(2) apply. To our knowledge, there have been no previous court decisions regarding what proof is necessary to rebut the presumptive weight accorded to the findings of the university evaluator. Nonetheless, we consider this determination to fall within the purview normally assigned to the fact-finder.

The ALJ, as the finder of fact, has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. See, Paramount Foods, Inc., v. Burkhart, Ky., 695 S.W.2d 418 (1985). When faced with conflicting medical evidence, the question of which evidence to believe remains the exclusive province of the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). Where the party with the burden of proof was successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Substantial evidence has been defined as evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). Although a party may note

evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence alone is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

The more significant issue presented in this case is whether there is substantial evidence of probative value to support Dr. Nickerson's assessment of total and permanent occupational disability. Addington argues that the objective findings do not establish that Kilburn is permanently unable to perform any type of work. Moreover, Addington asserts that Kilburn does not meet the standard for total disability because he remains able to perform some light duty or sedentary jobs. For the reasons that follow, we find that the ALJ did not abuse his discretion in finding Kilburn totally disabled.

As amended in 1996, KRS 342.0011(11)(c) 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 . . ." "Injury" is defined at KRS 342.0011(1) as follows;

> "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. [Emphasis added].

KRS 342.0011(33) further defines "objective medical findings" as "information gained through direct observation and testing of the patient applying objective or standardized methods."

There has been considerable discussion and a fair measure of disagreement as to the correct interpretation of "objective medical findings" that substantiate the diagnosis of an injury. Yet while empirical, observable data is highly indicative of the existence of an injury, we cannot agree that they should wholly occupy the field diagnostically and supplant the critical element of judgment, observation and experience of a skilled professional. Certainly empirical, observable data are necessary to the determination that an injury exists. Nevertheless, we cannot agree that the judgment, observation, and experience of a skilled profession counts for naught under KRS 342.0011(33). We conclude that "objective medical findings" may include a combination of the tangible and intangible components of medical diagnosis: the use of testing techniques and other standardized modes of examination where available as well as recourse to the direct observation and evaluation drawn from the experience of expertise of the physician.

Addington also argues that Dr. Nickerson's diagnosis, even accepted at face value, does not meet the standard for a finding of permanent total disability. Addington focuses on the section of KRS 342.0011(11)(c) which requires that an employee have a "complete and permanent inability to perform any type of work as a result of an injury" to support a finding of permanent total disability. "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, Dr. Nickerson assessed a 10% permanent impairment rating which, based upon the statutory definition, results in a "permanent disability rating." 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 gives discretion to an ALJ or arbitrator to interpret the evidence in light of the definition of "work." Addington focuses on the portions of Dr. Nickerson's testimony in which he agreed with the majority of the vocational assessment performed by Dr. Crystal. Dr. Crystal was of the opinion that Kilburn could return to a range of sedentary and light-duty jobs. As a consequence, Addington contends that there was insufficient evidence to support Dr. Nickerson's conclusion that Kilburn is totally and permanently disabled. By contrast, the ALJ and the Board noted that Dr. Nickerson expressed that Kilburn's physical capacity was extremely limited, not only by his objective findings, but also by evidence of chronic pain syndrome and Kilburn's limited employment skills.

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, it is not entirely "gone." In Osborne, the

court thoroughly analyzed the 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 Kilburn 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 its quotations from Larson.[1] 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 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

[1] For current edition discussion, *See* Larson's Worker's Compensation Law, Vol 3, Ch. 80 (November 1999 update).

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.

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. If, however, the adjudicator decides that an individual is permanently and totally disabled, those mathematical factors set out in KRS 342.730(1)(b) are not applicable.

The evidence presented to the ALJ in this action would have supported a finding of either total occupational disability

or partial occupational disability. In total disability claims, unlike partial disability claims, medical assessments remain only one of the 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 of 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). Since there was substantial evidence in the record to support the ALJ's finding that Kilburn is now totally disabled, the ALJ was within his authority in reaching the conclusion that he did.

Accordingly, the opinion and order by the Workers' Compensation Board is affirmed.

ALL CONCUR.

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