

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002285-WC

PLEASANT VIEW MINING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-74726

MICHAEL CATES; HON. DONALD SMITH,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, KNOFF, and TACKETT, Judges.

COMBS, JUDGE: This is a petition for review of a Workers' Compensation Board's decision which affirmed in part, reversed in part, and remanded the administrative law judge's decision awarding the appellee benefits for a permanent total occupational disability. Following our review of the briefs and the record, we conclude that the opinion of the Board appropriately addresses the questions presented to the court by the appellant, Pleasant View Mining. As a result, we adopt the majority opinion of the Board, authored by Chairman Greathouse, as follows:

Pleasant View Mining ("PVM") appeals from an opinion and award rendered by the Hon. Donald G. Smith, Administrative Law Judge ("ALJ"), awarding respondent, Michael Reed Cates ("Cates"), benefits for a permanent total occupational disability due to an injury in his left leg. On appeal, PVM contends it was error for the ALJ not to exclude Cates' preexisting functional impairment in determining whether he is totally disabled, that the ALJ should have found noncompensable that portion of Cates' disability that is due to dormant degenerative conditions as being part of the "natural aging process," that the evidence does not support a finding that Cates is totally occupationally disabled, and that the ALJ's finding of a work-related knee injury is erroneous.

Cates is currently 48 years of age. His work experience includes employment in the construction industry and in the mining industry. He has worked as a driller, mechanic, electrician, and foreman in the coal mines. Cates fractured his left ankle in a non-work accident in 1977. Cates admitted that his ankle has remained stiff since that injury. He suffered a work-related injury to his right knee in the mid 1980s. He underwent arthroscopic surgery on the knee. He denied having any problems with his knee since the surgery but stated his leg is somewhat curved outward from his body.

The injury that is [the] subject of this claim occurred on July 31, 1997. Cates stated that a scoop rolled forward and that his leg was caught between the scoop and a continuous miner. He suffered a fracture to his left leg a few inches below his knee. Surgery was performed on his leg by Dr. Donley. After about four months of therapy, Cates attempted to return to work in November 1997. He was able to work for about four shifts but then had to return to using crutches because of pain and swelling in his leg. He then returned to physical therapy. A total knee replacement was performed in April 1998. Dr. Donley also performed a fusion of his left ankle at the same time. Cates stated that since the knee replacement, he no longer has swelling in his leg but continues to have pain. He continues to do water exercises for his left leg. He can

only walk perhaps 100 feet without using crutches. He does not feel he can return to any sort of work he has done in the past.

Cates submitted testimony from Dr. James Donley, his treating orthopedic surgeon, who saw him in 1995 for his right knee problem and treated him again following his July 31, 1997 injury. Dr. Donley stated that the medical records he reviewed indicated that Cates had suffered an open fracture of the medial femoral condyle on the right knee. He stated that surgery was performed on the knee and that Cates did not return for follow-up for any complaints referable to his right leg. Dr. Donley stated that in 1997, Cates suffered a fracture of the proximal tibia and transection of some of his leg muscles. He stated that an open reduction and internal fixation of the fracture was performed. Dr. Donley stated that the fracture healed with no evidence of infection but that Cates complained of a lot of pain in the knee and tibial area. Because of this, a total knee replacement was performed in April 1998. Dr. Donley stated that a fusion was done on the left ankle at the same time. He stated that Cates' knee replacement healed well but that Cates still complains of pain in his left tibia.

Dr. Donley felt that Cates may be able to do some sort of sedentary work but would not be able to return to mining. He assessed a 27 percent impairment under the *AMA Guides*. Dr. Donley felt that 11.5 percent of this impairment was preexisting, apparently due to the left ankle problem. Dr. Donley apparently felt that the left ankle condition was previously dormant and non-disabling. Later in his deposition, however, Dr. Donley stated that Cates would have had a 14 percent impairment prior to the July 1997 injury. Dr. Donley stated that Cates had arthritis in the left ankle. He felt this arthritis was due to the 1977 injury. Dr. Donley further stated that the 1997 injury left Cates' left foot fixed in a flexed position. He stated that walking with his foot in this position placed stress on his left knee that caused it to develop arthritis. He stated that the arthritis in the left knee became symptomatic following the 1997 injury and that this was

what caused the need for a total knee replacement.

PVM submitted testimony from Dr. Joseph Polio, an orthopedic surgeon, who examined Cates in February 1998 prior to his total knee replacement. Dr. Polio stated that Cates had full range of motion in his left knee. He stated that due to the flexed position of Cates' left ankle that he tended to "back knee" in order to get his foot flat on the ground. Dr. Polio initially felt that Cates' left leg pain could be either to an injury to his medial meniscus sustained in the July 1997 incident or due to osteoarthritis in the knee. After reviewing an MRI of Cates' left knee, Dr. Polio felt that he was suffering osteoarthritis and that this had been caused by changes to his gait after the 1977 ankle injury. Dr. Polio also felt that Cates' knee replacement was inevitable even if the 1997 injury had not occurred. However, Dr. Polio admitted it was possible Cates' osteoarthritis in the knee represented a dormant, previously non-disabling condition that was aroused by the 1997 injury into a symptomatic state.

Cates submitted lay testimony from Donald Horn, superintendent for PVM, who testified he was not aware of any problems that Cates had with his left knee prior to the 1997 injury. He stated that Cates did have a limp as a result of a prior left ankle injury. Horn was not aware of Cates missing any work because of the leg problems and stated that Cates' ankle problem had never caused any difficulties in his work performance.

Cates also submitted lay testimony from Paul Cotton, PVM's safety director. Cotton stated he did not recall Cates' missing any work prior to the 1997 injury. He did not believe Cates had any problem with his left knee prior to that injury. However, he did state that Cates had prior problems with his left leg describing it as "partially crippled." He stated that this problem did not affect Cates' ability to work. He did notice that Cates walked with a limp.

After reviewing the evidence, the ALJ concluded that Cates' new condition was work-related. In so finding, the ALJ relied upon

Dr. Donley's testimony. Regarding the extent and duration of Cates' disability, the ALJ stated:

[T]his Court [sic] found the Plaintiff's testimony to be very credible, particularly regarding his pain and restrictions. Dr. Donley has further indicated that the Plaintiff could not return to his past work but may be retrained in a different occupation. That testimony implies that there is no current work that the Plaintiff could do without some sort of retraining. Having considered the entirety of the evidence, not only as summarized here, but as contained in the record, the ALJ is of the opinion that Plaintiff is now suffering a total occupational disability of 100%.

Regarding PVM's argument that Cates suffered some degree of preexisting active disability, the ALJ stated:

It is undisputed that the Plaintiff did have a serious ankle injury in the 1970's, with residual stiffness in the ankle thereafter. Plaintiff also had a prior right knee injury in the 1980's. Yet the evidence fails to indicate that the Plaintiff's work activities were ever restricted in any manner. Plaintiff has indicated that he continued to work the arduous labor of a coal miner following these injuries without any restrictions. This testimony was supported by both Paul Cotton and Donald Horn. These individuals indicated that the Plaintiff did have a limp but worked extremely long hours without any apparent physical difficulties. Based upon this evidence, the Court [sic] fails to find any prior active disability in this matter.

The ALJ also awarded Cates vocational rehabilitation benefits pursuant to KRS 342.710. In finding that vocational rehabilitation was proper, the ALJ stated, "His injury has rendered him unable to perform some of the work which he has previously done in the past."

PVM filed a petition for reconsideration from the ALJ's opinion in which it argued that under the 1996 amendments to KRS 342.730(1)(a), preexisting impairment must be excluded from a determination of whether a claimant is totally occupationally disabled, not merely preexisting active disability. PVM argued that the evidence was clear that Cates had a preexisting impairment due to his left ankle injury and that this should have been excluded when determining whether Cates was totally occupationally disabled. The ALJ overruled PVM's petition for reconsideration without explanation. PVM now appeals from the ALJ's opinion first arguing that the ALJ erred by not excluding Cates' preexisting impairment in determining whether Cates was totally occupationally disabled. We agree.

Prior to December 12, 1996, KRS 342.730(1)(a) provided, in part, that "non-work-related disability shall not be considered in determining whether the employee is totally disabled for purposes of this subsection." This language was inserted in the statute by the 1994 amendments to KRS Chapter 342. This language partially did away with the doctrine set forth in Teledyne-Wirz v. Willhite, Ky.App., 710 S.W.2d 858 (1986), which allowed a claimant to receive lifetime payments of a partial disability award if he was found to be totally occupationally disabled as a result of the combination of both work-related disability and non-work-related disability. Under the 1994 amendments to KRS 342.730(1)(a), only a preexisting, work-related disability can be considered in applying the Teledyne doctrine. Kearns Bakery v. Tackett, Ky.App., 964 S.W.2d 815 (1998).

In 1996, the General Assembly modified the language in KRS 342.730(1)(a) to read, "Nonwork-related impairment and conditions compensable under KRS 342.732 and hearing loss covered in KRS 342.7305 shall not be considered in determining whether the employee is totally disabled for purposes of this subsection." We must therefore determine what the Legislature intended with this change in language.

It is a commonly accepted rule in statutory interpretation that "in the absence of a

specific statutory definition, statutory terms are to be construed according to the common and approved usage of language." KRS 446.080(4). The phrase "permanent impairment rating" is defined in KRS 342.0011(35) as the "percentage of whole body impairment caused by the injury or occupational disease as determined by 'Guides to the Evaluation of Permanent Impairment' American Medical Association, latest available edition." However, the term "impairment" is not separately defined. It has long been held in Kentucky law that "disability" and "impairment" are separate and distinct concepts. See Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968); E. & L. Transport Co. v. Hayes, Ky., 341 S.W.2d 240 (1960). In a general sense, disability refers to the limitation of a claimant's occupational opportunities. See, Osborne, supra, at 802. See also, Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985). It has also long been held that the assessment of impairment is a medical question that must properly be determined only by medical experts while disability may be determined by the fact finder based on the evidence as a whole. Mitsch v. Stauffer Chemical Co., Ky., 487 S.W.2d 938 (1972).

We must presume that the General Assembly, by enacting a provision of the statute, did so with some intended purpose. See, Griebv. National Bond & Investment Co., Ky., 487 S.W.2d 612 (1936). We must also presume that the Legislature was aware of previous constructions of statutory provisions and previously enacted legislation and the common law. Manning v. Kentucky Bd. of Dentistry, Ky.App., 657 S.W.2d (1983); Cook v. Ward, Ky., 381 S.W.2d 168 (1964).

Given these rules of statutory construction, the only reasonable interpretation that we can give to the language in question is that it requires that any preexisting impairment must be excluded in determining whether a claimant is totally occupationally disabled regardless of whether that preexisting condition is disabling. In this case, the ALJ only considered whether the left ankle condition was disabling prior to the July 31, 1997 injury. While this approach would have been correct prior to December 12, 1996, we

do not believe it is in accord with the current statutory language. We must therefore reverse the ALJ's finding on the existence of a preexisting active condition.

At first blush, this interpretation would seem to imply that any employer in whose service a claimant suffered a serious injury would be able to escape liability for a total disability award if the claimant had some preexisting condition that warranted an impairment rating regardless of how minor the impairment was and without regard to whether the condition in any way affected his ability to perform any sort of services for remuneration in a competitive economy. However, in such situations, we believe that a "whole man" analysis would be particularly applicable. The "whole man" doctrine holds that if the work-related injury was sufficient, in and of itself, to render the claimant totally occupationally disabled without regard to any preexisting conditions, the claimant is entitled to a total disability award with no offset for those preexisting conditions. International Harvester v. Poff, Ky., 331 S.W.2d 712 (1959). Thus, in the instant case, if Cates' leg fracture and its residuals were sufficient to render him totally occupationally disabled, in and of themselves, then the impairment due to his left ankle condition need not be excluded from his total disability award.

PVM next argues that the ALJ erred in failing to exclude from Cates' award that portion of his disability due to the arousal of dormant degenerative conditions. PVM points out that the 1996 amendments to Chapter 342 change the definition of injury to include the statement, "'[I]njury' does not include the effects of the natural aging process." PVM acknowledges this Board previously held in Abell Construction Co.v. Perry, that this language merely indicates the effects of the natural aging process that are actively disabling prior to the injury must be excluded, but that natural aging conditions that are aroused by the work-related injury are still compensable albeit by the employer rather than the Special Fund.

This Board has recently modified its view of the compensability of the effects of the

"natural aging process." In Wolverine Janitorial Service v. Harold R. Wheatley, 97-WCB-91736, rendered August 13, 1999, this Board held that the 1996 amendments to KRS 342.0011(1) meant that a claimant could not be compensated for a dormant, non-disabling condition that is the result of the natural aging process even if the condition was aroused into disabling reality by a work-related injury.

We do not believe that the 1996 amendments to KRS 342.0011(1) make any difference in the instant case, however. The language in question merely excludes the effects of the "natural aging process" from the definition of injury. We point out to PVM that not all degenerative conditions are due to the "natural aging process." Both Dr. Donley and Dr. Polio stated that the arthritic condition in Cates' left knee was the result in changes in his gait following the 1977 left ankle injury. There is no evidence that any of his left knee problems are due to the "natural aging process." We therefore find no error in the ALJ's failure to find any portion of Cates' disability noncompensable as being due to the natural aging process.

PVM next argues that the ALJ's finding that Cates is totally occupationally disabled is not supported by the evidence and that the ALJ's own findings indicate that Cates is not totally disabled. PVM points out that Cates indicated that he had made inquiries about an electrical technician job. Cates testified that he felt he could perform such work. It also points out that Dr. Donley points out that Cates could perform some sedentary work and that Dr. Polio felt that Cates had no limitations as a result of his leg fracture. Lastly, PVM points out that in awarding Cates vocational rehabilitation benefits, he stated that the injury "has rendered him unable to perform some of the work which he has done in the past." (Emphasis added.) PVM argues that if the ALJ felt that Cates was only unable to perform some of his past work, then he must be able to perform some other types of jobs.

The claimant in a workers' compensation case must prove each of the essential elements of his claim. Snawder v. Stice, Ky.App., 576

S.W.2d 276 (1979). Where the party who does not bear the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the ALJ's opinion is supported by substantial evidence. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). It is not enough for PVM to show that there is merely some evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). So long as the ALJ's decision is supported by any evidence of substance, we must affirm. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (197). 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 v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, this Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(20).

We believe there is substantial evidence supporting the ALJ's finding that Cates is totally occupationally disabled. We are mindful that KRS 342.0011(11)(c) provides that "'permanent total disability' means the condition of an employee who, due to an injury, has a permanent disability rating and has complete and permanent inability to perform any type of work as a result of an injury." We are also mindful that KRS 342.0011(34) defines "work" as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." We believe that the Legislature's reference to providing services on a "regular and sustained basis in

a competitive economy" indicates that the ALJ is able to apply the factors set out in Osborne v. Johnson, supra, in a limited manner in determining whether the claimant is totally occupationally disabled. When the definitions of permanent total disability and work are taken together, it indicates that a claimant must be able both to perform work and to compete to obtain work on a regular and sustained basis in order not be found totally disabled.

There is substantial evidence in the record indicating that Cates is currently unable to compete to obtain work on a regular and sustained bases. While Dr. Donley stated Cates might be able to perform some sedentary work, he stated he would not be able to return to the sort of work he has done in the mines. Cates also testified that he did not feel he could return to any of the sort of work he has done in the past. We point out to PVM that the reference by Cates to an electrical technician "job" was actually a reference to the possibility of undergoing vocational training in an electronic technician school. We believe there is substantial evidence supporting the ALJ's finding that absent vocational training, Cates is not presently able to obtain work on a regular and sustained basis.

We also do not believe that the ALJ's statement that the injury has rendered Cates' [sic] unable to perform some of the work that he has performed in the past indicates that the ALJ did not feel that Cates was totally occupationally disabled. The common definition of the word "some" as it is used here is "being of a certain unspecified (but often considerable) number, quantity, degree, etc." Webster's New World Dictionary (1956). Saying that Cates is able to perform some of the work he has performed in the past does not necessarily indicate there is some work he has performed in the past that he is still able to perform. We agree that this is perhaps not a particularly good choice [of] words by the ALJ but do not believe that it indicates that he felt Cates was not totally disabled.

Lastly, PVM argues that the ALJ's finding of a work-related injury knee injury [sic] is

erroneous. PVM points out that the current definition of injury requires that the work-related injury traumatic event be the "proximate cause producing a harmful change in the human organism." PVM contends that even if Cates' injury somehow "lit up" his degenerative knee condition, that the injury was not the "proximate cause" of his knee problems. PVM contends that the evidence indicates that his knee condition was caused by preexisting arthritis. We disagree.

Under the current version of KRS Chapter 342, a dormant, non-disabling condition that is not the result of the natural aging process that is aroused by a work-related injury is still compensable. We believe that the change of the knee condition from an asymptomatic to a symptomatic state would qualify as a "harmful change in the human organism." Dr. Donley testified, albeit somewhat vaguely, that Cates' leg injury "lit up" the preexisting, dormant knee condition. We therefore believe that the leg injury can be said to be the "proximate cause" of the current symptomatic state of Cates' left knee. We therefore find no error with the ALJ's finding of a work-related left knee injury.

Accordingly, the decision of the ALJ is hereby **AFFIRMED IN PART** and **REVERSED IN PART** and this matter **REMANDED** for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Morton
Samuel J. Bach
Henderson, KY

BRIEF FOR APPELLEE MICHAEL
CATES:

C. Terry Earle
Greenville, KY