RENDERED: OCTOBER 27, 2000; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000719-WC

JOEL DENNIS FOGLE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-01461

KROGER COMPANY; ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND;
HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: BUCKINGHAM, GUIDUGLI, AND HUDDLESTON, JUDGES.

BUCKINGHAM, JUDGE: Joel Dennis Fogle petitions for review of an opinion of the Workers' Compensation Board (Board) which affirmed an opinion and award by an administrative law judge (ALJ). Fogle asserts that the evidence as a whole compelled a finding of total permanent disability rather than permanent partial disability. We disagree and thus affirm.

Fogle was born in 1948 and has a high school education with no specialized or vocational training. He worked as a clerk

for Kroger in its various departments from September 1965 until April 1997. He suffered a work-related back injury in January 1991 and underwent lumbar disc surgery performed by Dr. Henry Garretson. He filed a claim for this injury, and the claim was settled in January 1992 based on a 20% permanent partial disability. The settlement provided that Fogle be paid a lump sum of $19,738.19, and apportionment was made between Kroger and the Special Fund.

Fogle again injured his low back in a lifting incident at Kroger on November 27, 1996, and he last worked on April 15, 1997. On February 6, 1998, Dr. John Guarnaschelli performed a second back surgery. On July 9, 1998, he filed a motion to reopen the 1992 settlement agreement, alleging that his condition had worsened. On September 4, 1998, he filed a new claim which related to the second injury. The two claims were thereafter consolidated.

In August 1999, the ALJ issued an opinion and award finding no persuasive evidence that the effects of the 1991 injury had worsened or had caused Fogle to suffer any greater vocational disability than the 20% permanent disability for which the case was settled. The ALJ further determined that the 20% permanent disability settlement made on the 1991 injury was "a reasonably accurate representation of the vocational disability that plaintiff then suffered which remains unchanged."

The ALJ further determined that Fogle was presently suffering from a vocational disability of 55%, 20% of which was pre-existing active and 35% of which was a result of the work-

related injury of November 1996 and the injury arousal of pre-existing dormant degenerative changes in Fogle's lumbar spine. The award was apportioned one-half to Kroger and one-half to the Special Fund. Further, the ALJ computed benefits based on an average weekly wage of $467.94.

Fogle appealed to the Board, arguing that the ALJ erred by failing to find that he was totally occupationally disabled. The Board concluded that the evidence did not compel such a finding and that the ALJ's decision was supported by substantial evidence. Thus, the Board affirmed the ALJ, and this petition for review followed.

Because Fogle was unsuccessful in establishing that he was totally disabled, the issue before the Board was whether the evidence was "so overwhelming as to compel a finding in his favor of permanent occupational disability." Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). "For the evidence to be compelling, the evidence produced in favor of the claimant-appellee must be so overwhelming that no reasonable person could reach the conclusion of the Board." REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

In his petition for review, Fogle again argues that he should have been awarded benefits for total permanent disability. He acknowledges the legal standards of our review as set forth above, but he nonetheless asserts that the evidence compelled a finding of total disability. We disagree.

Dr. Charles Hargadon, who examined Fogle in September 1997 prior to his second surgery, stated that he believed Fogle

could go on light-duty status as long as he avoided heavy or repetitive lifting of more than 25 pounds. He also stated he felt Fogle exhibited some symptom magnification and exaggeration. Dr. John Nehil, an orthopedic surgeon who examined Fogle in November 1998 after his second surgery, believed that Fogle should be able to perform sedentary work, such as a customer care center person in a Kroger store with duties such as cashing checks, answering telephones, and selling lottery tickets. Dr. Luca Conte, who conducted a vocational evaluation of Fogle in September 1998, stated that he believed Fogle had the capacity to work beyond the level of work he had been doing when he was injured. He stated there were a number of jobs which Fogle could perform in the Louisville metropolitan area where he resides.

Kroger presented evidence of at least three different jobs at its store which it believed Fogle could perform within his medically imposed restrictions concerning lifting. These jobs included setting up and stocking seafood, loading and unloading meat, and manning the service desk. Fogle testified, however, that he did not believe he had the physical capacity to perform even these light-duty jobs at Kroger. He further stated that due to a poor disposition caused by the pain in his back, he did not believe he would be able to deal with the public so as to work at the service desk.

As noted by the Board, Fogle has essentially argued that his own testimony would support a finding of total permanent disability. As we view the evidence as a whole, however, it does not compel a finding in Fogle's favor. Rather, there is

substantial evidence in the form of testimony from the various doctors who examined Fogle to support the ALJ's finding of only permanent partial disability.

Fogle's second argument is that the ALJ's opinion and award was incorrect as it related to his average weekly wage. As we have noted, the ALJ based Fogle's benefits on an average weekly wage of $467.94. Subsequent to the award, Fogle and Kroger entered a stipulation agreeing to an average weekly wage of $576.00. Fogle did not file a petition for reconsideration with the ALJ nor did he appeal that issue to the Board. Since the error was not properly preserved, it may not be the subject of judicial review. Smith v. Dixie Fuel Company, Ky., 900 S.W.2d 609, 612 (1995); Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334, 338 (1985).

The opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, KROGER:

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BRIEF FOR APPELLEE, SPECIAL FUND:

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