

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000143-WC

ROBERT J. MARKS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-99453

LOWE'S OF PADUCAH;
THOMAS A. NANNEY, ADMINISTRATIVE
LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: An Administrative Law Judge (ALJ) denied Robert Marks's claims for disability benefits and for future medical benefits. Marks appeals from a December 22, 1999, opinion and order of the Workers' Compensation Board affirming the ALJ's decision. Marks maintains that the ALJ and the Board misconstrued the evidence, which, he contends, requires a decision in his favor. Unpersuaded by Marks's characterization of the evidence, we affirm.

At the time of the proceedings before the Board, Marks was in his early sixties and had been working for the appellee, Lowe's of Paducah, since April 1997. It is undisputed that in July 1997 Marks twice suffered injury to his back while lifting heavy boxes in the course of his employment. He was off work following the second injury until December 1997 and received chiropractic treatment throughout that period. In December 1997, he resumed working for Lowe's, but on a part-time basis and with restrictions on his activities. Chiropractic treatments continued until July or August 1998, when, following a "utilization review" that concluded that Marks had reached maximum medical improvement, Lowe's insurer stopped paying for treatment. In September 1998, Marks filed his claims for continued medical benefits and permanent disability benefits.

Marks was initially diagnosed as having severely strained his lower back. An MRI examination was interpreted by Marks's treating chiropractor as revealing two bulging disks in that area. The chiropractor testified that Marks had suffered a functional impairment of at least ten percent. Marks also consulted an orthopedic surgeon, who interpreted the MRI results as indicating two badly degenerated disks in the lower spine. This surgeon did not express an opinion regarding functional impairment. He did say, however, that the chiropractic treatments seemed to be working well and were, at the time of his examination, more appropriate than surgery.

At Lowe's behest, a neurosurgeon examined Marks in May 1999. In addition to the physical examination, he made x-rays of

Marks's back and reviewed the MRI scan. In his opinion, Marks's condition was normal for a person of his age. The x-ray revealed, he believed, only slight dextroscoliosis of the lumbar spine and mild degenerative changes. The bulges revealed by the MRI, he believed, were modest and normal. He found no evidence of neural impingement. In his opinion, Marks had a zero-percent impairment rating. An exercise program and over-the-counter anti-inflammatories might be recommended, but otherwise, this doctor testified, Marks was in need of no further treatment and could return to work without restrictions.

The issues before the ALJ were whether Marks's injuries had been disabling and whether he was entitled to continued chiropractic treatment. On the basis of the neurosurgeon's testimony that Marks was not permanently disabled and required no additional treatment and the utilization review, which also concluded that treatments were no longer appropriate or necessary, the ALJ ruled that Marks was not entitled to the relief he sought. The Board found the evidence relied upon by the ALJ to have been substantial and affirmed his ruling.

Further review of Board decisions in this Court, our Supreme Court has held,

is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Marks contends that the evidence relied upon by the ALJ and ratified by the Board was not substantial because the neurosurgeon did not examine him or review his test results impartially, but was predisposed to find him healthy and capable of working. As evidence for this contention, however, Marks has not pointed to any lack of qualification on the neurosurgeon's part, to any history of bias, or to testimony by another expert explaining why the neurosurgeon's opinion could be judged implausible. He contends only that, during his testimony, the surgeon expressed a lack of sympathy for injured and disabled persons. Whether this is an accurate characterization of the neurosurgeon's testimony we need not consider, for even if it is, we are not persuaded that the ALJ was therefore compelled to disregard the neurosurgeon's medical evaluation of Marks. Ordinarily the assessment of a witness's bias and the estimate of its effect on the witness's testimony are matters left to the finder of fact. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Marks has advanced no reason for us to depart from that rule here.

If, as we believe, the neurosurgeon's testimony was not disqualified because of bias, then the medical evidence bearing on Marks's claim was conflicting. It is well established that such conflicts are to be resolved by the finder of fact. Western Baptist Hospital v. Kelly, *supra*; Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977); Young v. Burgett, Ky., 483 S.W.2d 450 (1972). The Board believed that the ALJ's resolution of that conflict was supported by substantial evidence. We agree. In

any event, we are not persuaded that the administrative decision-makers flagrantly mis-assessed the evidence. We therefore affirm the December 22, 1999, opinion and order of the Workers' Compensation Board.

ALL CONCUR.

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