

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001184-WC

RONNIE W. CLAYBORN

APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
v. CLAIM NO. WC-98-80530

R & R MINING CONTRACTORS, INC.;
DENIS S. KLINE, Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, Judge: Ronnie W. Clayborn petitions for review of an opinion of the Workers' Compensation Board affirming the opinion of an Administrative Law Judge that found him to be permanently partially disabled due to an impairment to his back. Clayborn asserts that the evidence as a whole compelled a finding of total permanent disability rather than partial permanent disability.

Clayborn, who was born in August 1959, has worked over twenty-two years in the coal mining industry. He has limited

literacy skills with an eighth grade education and no specialized vocational training. On April 1, 1998, he experienced sharp pain in his lower back when twisting and bending to pick up a five gallon can of hydraulic oil off the belt line. He went to the hospital emergency room and was released the same day. He has not returned to work since that date.

Following the incident, Clayborn continued to suffer pain in his lower extremities, especially his left leg. In July 1998, his primary care physician referred Clayborn to Dr. James Bean, a neurosurgeon. Clayborn first saw Dr. Bean on July 20, 1998, with complaints about weakness in his lower extremities and lower back pain radiating down his left foot. At that time, Clayborn walked with a limp and used a cane. Dr. Bean's review of an MRI taken on April 22, 1998, indicated a central disc herniation at the L5-S1 level. Upon examination of Clayborn, his straight leg raising was positive on the left at 45 degrees with back pain and 60 degrees on the right. Sensation was intermittently diminished in the left foot but not constant. Clayborn's knee jerks and ankle jerks were symmetrical.

On July 31, 1998, Dr. Bean had a myelogram and enhanced lumbar spine CT with intrathecal contrast performed. His impression of the myelogram suggested severe chronic disc degeneration at the L5-S1 level and a large ventral extradural abnormality at the L1-L2 level. Dr. Bean's review of the CT scan revealed a large right paracentral extradural defect at the L1-L2 level composed of both soft tissue and bone that compressed the thecal sac. There was severe disc degeneration at the L5-S1 level

with severe fault arthropathy and obliteration of the nerve root canals bilaterally with a broad based central disc protrusion. He also noticed a mild diffuse annular disc bulge at the L2-L3 level. However, he found no definite compression of the dural tube or nerve root. Dr. Bean recommended physical therapy, but this did not result in any significant amelioration of Clayborn's symptoms. On August 31, 1998, Dr. Bean opined that given the absence of nerve root compression as opposed to arthritic deterioration, surgical disc excision or lumbar fusion would not relieve Clayborn's pain or restore his ability to return to his prior job. He recommended heat treatment and pain medication.

In a deposition taken September 14, 1998, Dr. Bean testified that he had assessed Clayborn's medical impairment at 5% based on the American Medical Association (AMA) Guidelines using the DRE model. He recommended restricting Clayborn's activity to lifting no more than 15 pounds frequently and 35 pounds occasionally and only occasional bending or twisting. Dr. Bean stated that Clayborn's left leg problems appeared to be caused by the degenerated disc condition at the L5-S1 level that could have been exacerbated by the lifting incident on the job. He felt that Clayborn was unable to perform heavy manual labor in the coal industry.

On January 29, 1999, Clayborn filed an application for resolution of injury claim seeking permanent total disability benefits. While awaiting a benefit review conference before an arbitrator, Clayborn was examined by Dr. Gary McAllister, an orthopaedic specialist, who had an x-ray taken of his spine.

Clayborn told Dr. McAllister that he suffered constant back pain, severe pain and weakness in his left leg. A physical examination indicated that Clayborn's range of motion was 14 degrees of sacral flexion, 14 degrees of true lumbar flexion, 8 degrees of extension, and 10 degrees of lateral bending to either side. His knee and ankle jerks were one plus bilaterally. His straight leg raising in the seated position was positive bilaterally, while straight leg raising in the supine position caused pain at 40 degrees on the right and left. Dr. McAllister found no decreased sensation in either leg. Based on the x-ray and prior MRI and myelogram, Dr. McAllister stated that Clayborn had disc herniations at the T12-L1 level, the L1-L2 level, and the L5-S1 level; degenerative disc disease at the T12-L1 level, the L1-L2 level, the L2-L3 level, and the L5-S1 level; and retrolisthesis. Utilizing the AMA Guide for Permanent Impairment range of motion model, Dr. McAllister assessed Clayborn's permanent medical impairment rating at 33% split evenly (16.5%) between the April 1998 injury and his pre-existing dormant spinal condition. Dr. McAllister recommended that Clayborn not return to his prior job and restrict his activities to lifting no more than 10 pounds; standing, walking or sitting no more than 3 hours of over an 8 hour day; limited pushing or pulling; no climbing, balancing or crawling; and only occasional stooping, kneeling, crouching or bending.

On April 15, 1999, an arbitrator held a benefit review conference. The arbitrator found Clayborn permanently totally

disabled and recommended a vocational rehabilitation evaluation. On June 1, 1999, R & R Mining requested a hearing before an ALJ.¹

On October 6, 1999, the ALJ conducted a hearing with Clayborn as the only witness. Clayborn testified that he continues to suffer constant pain and weakness in his lower back and left leg. He said that he can sit or stand only approximately 10-15 minutes before experiencing severe pain and has trouble sleeping. The parties also submitted medical documents from Drs. Bean and McAllister, Dr. Beans's deposition and Clayborn's prior deposition. The ALJ held that Clayborn was entitled to benefits based on a permanent partial disability of 5.625% pursuant to KRS 342.730(1)(c)(1).² He found Dr. Bean's testimony the most persuasive on the issue of the appropriate AMA Guidelines medical impairment rating, and therefore utilized his rating of 5%. The ALJ also found that while Clayborn was unable to return to work in the underground coal mining industry, he was capable of performing some form of gainful employment within the restrictions recommended by Dr. Bean. Finally, the ALJ held that the award should not be reduced based on the impact of Clayborn's pre-existing spinal condition related to the natural aging process.³

On December 20, 1999, Clayborn appealed the decision to the Board contending the ALJ erred by failing to find that he was totally occupationally disabled. On April 14, 2000, the Board

¹ See 803 Kentucky Administrative Regulation (KAR) 25:010 Section 12 (1999).

² The ALJ's calculation under the statutory formula was $5\% \times 75 \times 1.5 = 5.625\%$.

³ See KRS 342.0011(1).

rendered an opinion affirming the ALJ after concluding that his decision was supported by substantial evidence. The Board stated that the evidence did not compel a finding that Clayborn was unable to perform any type of work as defined in KRS 342.0011(34). This appeal followed.

In a workers' compensation action, the employee bears the burden of proving every essential element of a claim.⁴ As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence.⁵ Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence.⁶ The fact-finder also may reject any testimony and believe or disbelieve various parts of the evidence even if it came from the same witness.⁷ When the decision of the fact-finder is against the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence was so overwhelming that it compels a finding in his favor.⁸ Compelling evidence has been defined as evidence so

⁴ Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000); Jones v. Newberg, Ky., 890 S.W.2d 284, 285 (1994); Snawder v. Stice, Ky. App., 576 S.W.2d 276, 279 (1979).

⁵ Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

⁶ Miller v. East Kentucky Beverage/ Pepsico, Inc., Ky., 951 S.W.2d 329, 331 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334, 336 (1995).

⁷ Magic Coal, 19 S.W.3d at 96; Whittacker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999); Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 329 (2000).

⁸ Bullock v. Peabody Coal Co., Ky., 882 S.W.2d 676, 678 (1994); Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986);
(continued...)

overwhelming that no reasonable person would have failed to be persuaded by it.⁹ A claimant with the burden of proof and an unfavorable decision must do more than show there is some evidence to support his position.¹⁰ As long as the ALJ's opinion is supported by any evidence that is not patently unreasonable or flagrantly implausible, it cannot be said that it compels a different result.¹¹ Upon review of the Board's decision, the appellate court's function is limited to correcting the Board "only where the the [sic] 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."¹²

Clayborn argues on appeal that the ALJ erred in failing to award him benefits based on a total permanent occupational disability. While acknowledging the legal standards of review as set forth above, he contends that the Board failed to fully consider the differences between occupational disability and

⁸ (...continued)
Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 679 (1998).

⁹ Bullock, 882 S.W.2d at 678; Neace v. Adena Processing, Ky. App., 7 S.W.3d 382, 385 (1999); REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

¹⁰ Special Fund v. Francis, 708 S.W.2d at 643.

¹¹ Whittaker v. Rowland, 998 S.W.2d at 482; Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 688 (1992).

¹² Western Baptist Hospital, 827 S.W.2d at 687. See also Huff Contracting v. Sark, Ky. App., 12 S.W.3d 704, 707 (2000); Duff Truck Lines, Inc. v. Vezolles, Ky. App., 999 S.W.2d 224, 227 (1999).

functional disability. Relying on the case of Osborne v. Johnson,¹³ Clayborn asserts that the appropriate standard for determining compensable occupational disability is not solely whether the claimant is unable to perform any kind of regular employment, but it also includes the situation where the regular employment in the kind of jobs claimant is physically capable of performing are unavailable on the labor market. Clayborn argues that the severe restrictions placed on his activities prevent him from being able to perform any regular employment in the local job market. He suggests that his limited education, absence of vocational training, and past work history of heavy manual labor in a single industry (coal) constitute additional limitations on his ability to find employment.

Both Drs. Bean and McAllister found that Clayborn suffered some physical impairment due to the pain he was experiencing in his back and leg. Both placed him under some restrictions on his ability to lift, carry, sit, stand, etc. Nevertheless, the ALJ stated that he was convinced that Clayborn could find some form of gainful employment. Although both Drs. Bean and McAllister opined that Clayborn was unable to return to his prior occupation in heavy labor as an underground coal miner, neither indicated that he was incapable of performing less physically demanding jobs. The ALJ enhanced the award according to the formula in KRS 342.730(1)(c)(1) based on Clayborn's inability to return to his previous employment.

¹³ Ky., 432 S.W.2d 800 (1968).

As the Board noted, under the 1996 amendments to the workers' compensation statutes in order to establish permanent total disability, a claimant must prove his condition is due to a work-related injury, he has a permanent disability rating, and he has "a complete inability to perform any type of work as a result of an injury" ¹⁴ "Work" is defined as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." ¹⁵ Dr. Bean assessed Clayborn's condition as a 5% medical impairment utilizing the DRE model under the AMA Guides, while Dr. McAllister assigned a 33% impairment rating using a range of motion model. The DRE model is the preferred ratings method, and Dr. McAllister did not explain why he chose to use another method.

Simply stated, the ALJ has discretion in weighing the evidence and determining the extent of an occupational disability. Clayborn has failed to show that the evidence compelled a finding of total disability. His reliance on Osborne v. Johnson, supra, is misplaced in light of the statutory standards and would not require a different result in any event. We conclude that the ALJ did not misconstrue controlling statutory or case law or err in assessing the evidence in so flagrant a manner as to cause gross injustice. Accordingly, the Board did not err in affirming the ALJ's decision awarding Clayborn benefits based on a finding of permanent partial disability, rather than permanent total disability.

¹⁴ KRS 342.0011(11)(c).

¹⁵ KRS 342.0011(34).

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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