RENDERED: FEBRUARY 9, 2001; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-003051-WC

HARLAN/CUMBERLAND COAL COMPANY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-88210

JERMA MADON; HON. THOMAS A. NANNEY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: BARBER, HUDDLESTON AND JOHNSON, JUDGES.

JOHNSON, JUDGE: Harlan/Cumberland Coal Company petitions for review of an opinion of the Workers' Compensation Board rendered on November 6, 1998, which affirmed the Administrative Law Judge's award of total occupational disability benefits to Jerma Madon. After reviewing the record and the Board's opinion, we are unable to conclude that the Board has committed an error in construing the law or in assessing the evidence.[1] Thus, we affirm.

---

[1] See Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

Madon, a 45-year-old mine superintendent, sustained a work-related injury to his back on April 7, 1997, while setting timbers in a mine. Madon's entire work history consisted of working in coal mines and he worked for Harlan/Cumberland from 1989 until he was injured in 1997. He has not worked anywhere since his injury. The only contested issues for the ALJ's consideration were the extent and duration of Madon's disability pursuant to the provisions of KRS[2] 342.0011(11)(c) as amended effective December 12, 1996.[3] After considering the lay and medical evidence, the ALJ found Madon to be permanently and totally disabled as follows:

> Based upon the diagnosis of Dr. Brooks, I find [Madon] to be suffering from spondylolisthesis, secondary to congenital spondylolysis. The pre-existing abnormality was aggravated by the work injury. I further find that [Madon] has sustained a 10% impairment to the body as a whole pursuant to the DRE Model of the Fourth Edition of the AMA Guidelines. [Madon] will be restricted from lifting more than 15 lbs. on occasion with the lifting of no weight on a repetitive or frequent basis. He will be limited in his ability to crawl, kneel or crouch. He cannot stand, walk or sit for more than 20-30 minutes without having to change his position. These restrictions essentially preclude [Madon] from performing his past work as an underground coal miner. [Madon] has no other training in any other field of endeavor. He has a somewhat limited education which will preclude him from most clerical and other sedentary jobs requiring

---

[2]Kentucky Revised Statutes.

[3]The prehearing order listed both "active disability" and "effects of [the] normal aging process" as contested issues; however, at the hearing, the appellant acknowledged that there was no evidence to establish that Madon's disability was the result of the normal or natural aging process or that he had an active disability.

> good skills in reading, writing and mathematics. While it may be true that [Madon] retains the functional capacity to perform some menial tasks on an occasional basis, as set forth above, I do not believe that this was the intent of the law as passed in December 1996. I, hereby, find that [Madon] is permanently incapable of selling his services as an employee in the competitive labor market.

In its appeal to the Board, Harlan/Cumberland opined that the ALJ did "not like the new Workers' Compensation Act" and that he erred in relying upon the principles outlined in Osborne v. Johnson.[4] Essentially, the employer argued that while Madon had significant impairment which precluded him from working in the mining industry, he was not precluded from working at light or sedentary type work and, for that reason, was not entitled under the 1996 changes to the workers' compensation scheme, to an award for permanent total disability. Harlan/Cumberland also argued that the ALJ erred in allowing Madon to introduce the testimony of Dr. Norman Hankins, a vocational expert.

In its review, the Board addressed these issues as follows:

> "Work" is defined in KRS 342.0011(34) as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." The ALJ's recognition that Madon may be able to perform menial tasks on an occasional basis does not fall within the definition of work as found in KRS 342.0011(34). Based on Dr. Brooks' testimony as to Madon's severe restrictions, along with the claimant's own testimony of his intractable pain, clearly there is evidence in the record to support the ALJ's finding of total occupational disability. Simply stated, the claimant is not able to

[4]Ky., 432 S.W.2d 800 (1968).

> perform "any work" as defined in KRS 342.0011(34). The ALJ's quotation from Osborne v. Johnson, supra, concerns the employee's ability to work in a competitive labor market. Although Osborne v. Johnson has largely been done away with, the definition of work in the statute still considers regular work in a competitive economy. We therefore find the ALJ did not err in relying on Osborne v. Johnson, supra, in a limited manner.
>
> Further, we find the ALJ did not err in permitting vocational testimony to be entered into the record. While Harlan/Cumberland argues there is no provision for the allowance of vocational testimony in either the administrative regulations or the Workers' Compensation Act itself, there was no such provision in the previous Act. It has always been recognized that vocational testimony is not accorded in workers' compensation cases the same deference as medical testimony [citation omitted]. Rather, vocational testimony is accorded legal weight similar to that of a lay witness. That remains the same under the 1996 Act, and it is within the discretion of the ALJ as to the weight to accord said testimony.

In its petition for review in this Court, Harlan/Cumberland contends that the Board erred in affirming the ALJ's award of total occupational disability benefits and in failing to give a literal interpretation to KRS 342.0011(11)(c). This statute defines "[p]ermanent 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[.]" In its brief, Harlan/Cumberland argues that the ALJ's finding that Madon was capable of performing menial jobs, when applied to KRS 342.0011(11)(c), precludes an award for total disability benefits as a matter of law:

> In order to be awarded total benefits, the Legislature means exactly what it said, an employee must have a permanent disability rating and a complete and permanent inability to perform any type of work. "Complete means full and an entire inability to do any type of work. "Any" means some, just one out of many types of jobs, not that the injured worker is precluded from his usual employment [emphasis original].

Harlan/Cumberland is not the first employer to assert that by amending the workers' compensation scheme, and specifically in defining "permanent total disability," the Legislature intended to overrule the definition of occupational disability in Osborne. This case was placed in abeyance pending the review of another opinion from this Court which addressed this same issue in Ira A. Watson Department Store v. Hamilton.[5] The Supreme Court of Kentucky has now resolved the issue in a manner consistent with the opinion of the Board in the case sub judice:

> Pursuant to the 1996 amendments to KRS 342.730, awards for permanent, partial disability are a function of the worker's AMA impairment rating, the statutory multiplier for that rating, and whether the worker is capable of returning to the pre-injury employment; thus, it is clear that the ALJ has very limited discretion when determining the extent of a worker's permanent, partial disability. See KRS 342.730(1)(b) and (c)1. However, determining whether a particular worker has sustained a partial or total occupational disability as defined by KRS 342.0011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy. For that reason, we conclude that some of the principles set forth in Osborne v. Johnson, supra, remain

[5]Ky., ___S.W.3d___ (rendered 10-26-2000).

> viable when determining whether a worker's occupational disability is partial or total.
>
> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled. See Osborne v. Johnson, supra, at 803.[6]

Our Supreme Court also reiterated that despite the vast changes in the workers' compensation scheme made by the Legislature in 1996, "the ALJ remains in the role of the fact-finder,"[7] and where a finding of total disability has been made, the "inquiry on appeal" is whether the finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law."[8]

Harlan/Cumberland has never argued that the ALJ's findings lack the support of substantial evidence. Indeed, in

---

[6] Id., Slip Op. at 4-5.

[7] Slip Op. at 5.

[8] Slip Op. at 6 (citing Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986)).

addition to the medical testimony and Madon's own testimony, the testimony of the owner of the coal company provides compelling evidence supporting the ALJ's award.[9] Thus, there being no issue with respect to the sufficiency of the factual underpinning of the ALJ's award, and since the ALJ and the Board properly interpreted and applied the law, the award must be affirmed.

Lastly, Harlan/Cumberland argues that the ALJ erred in allowing Madon to introduce the deposition of a vocational expert. It contends that since the Legislature has made no provision for vocational testing or for the introduction of vocational testimony, the ALJ erred in denying its motion to strike the deposition. It further faults the Board for failing to address the issue of the admissibility of such evidence, rather than the weight the evidence is to be afforded.

We find no error in the Board's resolution of this issue. Harlan/Cumberland has not cited any statute or regulation prohibiting the introduction of vocational testimony. As far as we can tell, the 1996 amendments made no change with respect to the admissibility of testimony of vocational experts. Obviously, as the ALJ opined, such evidence would have no relevance in a

---

[9]Clyde Bennett, the owner of Harlan/Cumberland and the person for whom Madon had worked for over twenty years at Harlan/Cumberland and other mines, testified that he was certain that Madon could not return to any type of work in the mining industry or anywhere else, and that Madon would "love to be working" if he were able. Madon's attorney asked Bennett how he knew Madon was in pain, to which Bennett answered, "I've seen him. I know he's in pain." Bennett had no doubt about Madon's condition and gratuitously explained during his counsel's questioning: "The thing I don't like is too many of these people fake stuff and this guy [Madon] has been one of the best workers I've had for years, and I think I'm a pretty good judge of somebody faking it or being actually hurt."

partial disability case. However, where the injured employee is seeking permanent, total disability benefits, vocational testimony is clearly pertinent as recognized by the Court in Watson Department Store, supra.[10]

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Denise M. Davidson
Hazard, KY

BRIEF FOR APPELLEE:

Ronald C. Cox
Harlan, KY

[10]Slip. Op. at 5 ("the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts").