

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2000-CA-002654-WC

CHARLES HAMLIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-93-11872

MARTIN COUNTY FISCAL COURT;  
HON. DONNA TERRY, ADMINISTRATIVE  
LAW JUDGE; SPECIAL FUND; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: BARBER, GUIDUGLI AND TACKETT, JUDGES.

GUIDUGLI, JUDGE. Charles Hamlin (Hamlin) appeals from an order of the Workers' Compensation Board (the Board) entered October 18, 2000, which affirmed an order of Administrative Law Judge Donna H. Terry (the ALJ) denying his motion to reopen. We affirm.

Hamlin sustained a work-related back injury on March 14, 1993, while employed by the Martin County Fiscal Court. Hamlin has not returned to work. In an opinion and award entered December 9, 1994, Hamlin was awarded benefits based on an

occupational disability rating of 20%. An initial motion to reopen Hamlin's claim was denied by order entered December 18, 1996.

Hamlin filed his second motion to reopen on June 17, 1999, in which he alleged an increase in occupational disability. In an affidavit filed in support of his motion, Hamlin stated that his pain has continued to increase since the date of his original award and is now a 10 on a scale of 1-10. He also indicated that the pain was constant. Hamlin stated that he has had an increase in stiffness and a worsening of his ability to sit, stand, or walk for long periods of time. According to Hamlin he does no lifting due to fear of re-injuring himself. Hamlin testified that although he had been diagnosed with diverticulitis before the work-related accident, he has experienced an increase in problems with bowel movements and bladder control.

In support of his motion to reopen, Hamlin filed medical records from Dr. Lon Lafferty (Dr. Lafferty), who treated him for the original injury. In a previous Form 107 filed in conjunction with Hamlin's original claim, Dr. Lafferty gave an impairment rating of 37%. In a second Form 107 dated May 10, 1999, Dr. Lafferty stated that Hamlin's "condition is in a general state of decline." Dr. Lafferty noted Hamlin's complaints of increased pain radiating into his legs, stiffness, and problems with bowel control. On examination, Dr. Lafferty noted a "markedly decreased" range of motion as well as severe muscle spasms. Dr. Lafferty diagnosed "chronic low back pain

with right lower extremity radiculopathy," as well as "cauda equina syndrome with bowel impairment." Dr. Lafferty assigned an impairment rating of 60%.

Hamlin also filed medical records from Dr. Joseph Rapier. On the Form 107 filed in Hamlin's original claim, Dr. Rapier gave an impairment rating of 14%. In a second Form 107 dated September 13, 1999, Dr. Rapier noted Hamlin's complaints of pain. On examination, Dr. Rapier noted the presence of muscle spasms. Dr. Rapier diagnosed "chronic low back strain aggravating preexisting dormant degenerative disc disease without radiculopathy," and assigned an impairment rating of 20%.

At his deposition, Hamlin testified that his pain was constant. In addition to back pain, Hamlin testified that an MRI showed a herniated disc and pinched nerves in his neck. According to Hamlin, he had been experiencing neck pain since the accident but did not report it to Dr. Lafferty until the pain increased to a point that he felt it necessary to seek medical attention. Hamlin testified that since the original award, his pain has steadily worsened to the point that he has to sleep in a chair. He also testified that he is unable to sit, stand or walk for long periods of time. Hamlin stated that his diverticulitis has worsened.

Finally, Hamlin introduced a report from Dr. William Weikel, a vocational evaluator. In Dr. Weikel's opinion, Hamlin's condition has worsened since the previous award. Dr. Weikel stated that assuming the reports of Drs. Rapier and

Lafferty to be correct, "Hamlin would have a 93% to 100% loss of access to the labor market."

The Fiscal Court presented a report from Dr. Russell Travis (Dr. Travis), who evaluated Hamlin on February 8, 2000. Dr. Travis diagnosed chronic neck and back strain, but gave an impairment rating of 0. Dr. Travis indicated that Hamlin showed all five of Waddell's criteria for symptom magnification. Dr. Travis also noted the absence of objective findings such as focal weakness, muscle loss, or reflex changes.

In an opinion and order dated June 15, 2000, the ALJ denied Hamlin's motion to reopen, stating:

It is clear from the record that Mr. Hamlin has felt incapable of working since the 1993 injury. He admitted that he has not attempted to lift anything heavier than a jug of milk since that time and that he has not attempted or contemplated a return to employment. He applied for and received Social Security disability benefits at some point after the injury and has continued monthly treatments with his physician, alternating only with different prescription medications, since 1993. While Dr. Lafferty's most recent impairment rating has escalated based upon the presence of cauda equina syndrome, this is an apparent reference to Mr. Hamlin's bowel difficulties which pre-existed the injury and do not appear to be causally related thereto. At any rate, the existence of this severe neurologic problem was not noted either by orthopedic surgeon Dr. Rapier or by neurosurgeon Dr. Travis during their examinations. Although both Dr. Lafferty and Dr. Rapier have placed significant restrictions on Mr. Hamlin's ability to return to work, the causation for any increased restrictions must be examined in light of Dr. Travis' findings regarding symptom magnification. It is a rare patient whose examination results are found to establish five of five Waddell's criteria for symptom magnification. Since any increased

restrictions by other physicians appear to be based upon Mr. Hamlin's subjective complaints of increased pain, the presence of the Waddell's criteria is especially significant.

. . . .

While increased complaints of pain might, in an appropriate case, support a finding of increased occupational disability, in this case they do not support such a conclusion due to the presence of very significant symptom magnification found by Dr. Travis. Therefore, it is found that Mr. Hamlin's occupational disability is not significantly different than on November 7, 1994, and that his motion to reopen must be overruled.

The Board affirmed the ALJ's decision in an opinion dated October 18, 2000, and this appeal followed.

Hamlin contends that he has succeeded in showing an increase in occupational disability and that the evidence compels a finding in his favor. As claimant, Hamlin bears the burden of showing that his condition has worsened since the original award. Jude v. Cabbage, Ky., 251 S.W.2d 584, 585 (1952). Because Hamlin did not prevail before the ALJ, he must show that the evidence presented to the ALJ compels a finding in his favor. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). To be compelling, the evidence must be such that a reasonable person could not reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985). If the opinion of the ALJ is supported by substantial evidence, it must be affirmed. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). It is not enough for Hamlin to show that there is evidence in the record to support a finding in his favor. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46, 47 (1974).

Turning to the record, we agree with Hamlin that there is evidence in the record which supports his contention that his condition has worsened. Hamlin's own testimony as well as the reports of Drs. Lafferty, Rapier, and Weikel would support a finding that his condition has worsened. However, in light of Dr. Travis's report we do not believe that the evidence compels a finding in his favor. As noted by the Board:

The ALJ was particularly impressed with Dr. Travis' testimony concerning the Waddell's signs indicating symptom magnification. As explained by the ALJ, though Dr. Travis did not see Hamlin in the original claim, the other physicians' increases in occupational disability were due to subjective complaints or the nonwork-related cauda equina syndrome. Though the medical opinions were divergent, those conflicts are to be resolved by the fact-finder and this Board is without authority to find otherwise concerning questions of fact. See, Pruitt v. Bugg Brothers, [547 S.W.2d 123 (1977)] and KRS 342.285.

Furthermore, though Hamlin stresses the opinion of the vocational expert, again the ALJ was not compelled to rely on the vocational expert's testimony. See, Eaton Axle Corp. V. Nally, Ky., 688 S.W.2d 334 (1985).

In conclusion, we believe the ALJ did not err in overruling Hamlin's motion to reopen. While there may have been evidence in the record to support a finding that Hamlin's condition is now worse than at the time of his award in 1994, the ALJ's conclusion is supported by the substantial evidence of Dr. Travis' findings. Inasmuch as Hamlin was the party with the burden of proving an increase in occupational disability due to the original injury, the ALJ's conclusion is not in error.

The opinion of the Workers' Compensation Board is affirmed.

TACKETT, JUDGE, CONCURS.

BARBER, JUDGE, DISSENTS AND FURNISHES SEPARATE OPINION.

BARBER, JUDGE, DISSENTING. I respectfully dissent.

The appellant presented a prima facie change of condition justifying reopening his claim and allowing presumption of evidence on his behalf and cross-examination of evidence presented against him.

BRIEF FOR APPELLANT:

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Inez, KY

BRIEF FOR APPELLEE, MARTIN  
COUNTY FISCAL COURT:

Tara R. Beckwith  
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BRIEF FOR APPELLEE, SPECIAL  
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Joel Zakem  
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