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Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002323-WC

COOK FAMILY FOODS, LTD. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-71107

RANDY BOWLING, JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD APPELLEES

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

BEFORE: BARBER, GUIDUGLI, AND TACKETT, JUDGES.

TACKETT, JUDGE: Cook Family Foods, Ltd., appeals from the decision of the Workers' Compensation Board affirming the decision of the ALJ awarding a total occupational disability to Randy Bowling. We cannot improve upon the well-reasoned opinion of the Board and adopt it in its entirety as our own:

> Cook Family Foods, Ltd. (Cook) appeals from an opinion and award rendered April 21, 2000 by the Hon. James L. Kerr, Administrative Law Judge (ALJ) awarding a total occupational disability to Randy Bowling (Bowling) as a result of a work-related injury sustained on August 28, 1997. Cook maintains on appeal that Bowling has failed to sustain his burden of proof by

competent and substantial evidence and that the ALJ does not have discretion to disregard uncontradicted medical testimony. For the reasons hereinafter discussed, we affirm the decision of the ALJ.

Bowling is thirty-eight years old, has ten years of formal education and a GED. His employment history includes truck driving, carpentry and construction labor. He began his employment with Cook in April 1997. As a laborer for Cook, his job required constant bending, lifting and stooping. On August 28, 1997, Bowling sustained a serious work-related injury when a ham transporting conveyor system collapsed from the ceiling striking him in the back and shoulder. The combined weight of the conveyor and product was estimated to be anywhere from 800 to 1,000 pounds. As a result of the incident, Bowling suffered a shoulder injury requiring surgery, a back injury requiring two surgeries and has experienced bladder and sexual dysfunction. Bowling was immediately treated at Kings Daughters' Medical Center and was released. He was readmitted two days later and remained hospitalized for a period of six days.

An MRI performed during this hospitalization revealed a herniated disc. He was referred to the University of Kentucky Medical Center (UKMC) where back surgery was performed by Dr. Phillip Tibbs on September 12, 1997. According to Bowling, the surgery had to be performed again on December 12, 1997. Bowling testified that he tried to go back to work after the surgery, but simply could not work because of the pain. He testified that he could not stand or walk on concrete. Bowling also testified that his left shoulder was operated on at UKMC. Bowling stated that his shoulder condition is getting worse and that he experiences recurring snapping, popping and grinding in his shoulder. Bowling also testified to a decreased range of motion and that he is in almost constant pain. His testimony revealed that he suffers from a significant bladder problem. Bowling testified that he had to catheterize himself at least three times a day, that he had to go to the bathroom from four to five times per hour, but that there was leakage which he couldn't feel and left

him "in a mess." In describing his back pain, Bowling testified that even after surgery he couldn't bend nor could he stand for any longer than forty-five minutes. He testified that he could not walk without pain, that he has numbness in his calf and numbness in his foot which comes and goes. Bowling also stated that whether he was walking, standing or sitting, there was constant pain and that other than a few hours for Cook, he has not worked since the accident.

The medical evidence in this case comes by way of records and reports of Dr. Phillip A. Tibbs, Professor of Neurosurgery and Rehabilitation Medicine and the Director of the University of Kentucky Spine Center; Dr. Timothy Prince, a physician at UKMC; and Dr. J. William McRoberts, a urologist and professor of surgery at UKMC. Dr. Tibbs first examined Bowling on September 10, 1997. At that time, he took a history from Bowling which included severe left hip and leg pain and that he could not put his foot down flat. Bowling also reported poor rest even using Percocet; that he had bladder hesitancy and only partial erectile ability. Dr. Tibbs noted that Bowling was in extreme acute distress with severe left antalgic gait and that his left achilles reflex was absent. He further reported that sensation was decreased in the left S1. The straight leg raise was extremely positive on the left at 20%, and cross leg raise was positive at 30% on the right. He further noted that he reviewed the MRI scan performed on September 2, 1997. The MRI showed a very large extruded disc at L5-S1 on the left. Dr. Tibbs recommended a lumbar microdiscectomy as soon as possible. At that time, he advised Bowling not to return to work until eight weeks after the surgery.

The surgery was in fact performed on September 12, 1997 by Dr. Tibbs; however, on December 12, 1997, Dr. Tibbs reoperated on Bowling and found a large recurrent herniated disc fragment at L5-S1 on the left. Additionally, he found instability at L5-S1 and a posterior lumbar interbody fusion was performed using Titanium threaded cages. Dr. Tibbs reported that a January 7, 1998, follow-up with Bowling revealed that he was

doing well but was having some significant spasm. Dr. Tibbs prescribed Lorcet and Flexeril for pain. He also noted that at that time Bowling reported normal bowel and bladder ability.

A March 18, 1998, follow-up report by Dr. Tibbs indicated that Bowling was still having a lot of cramping from his coccyx to his shoulders and leg spasms. Bowling again denied bladder or bowel incontinence, but stated he was experiencing some limited sexual activity because of the pain. An October 7, 1998, report of Dr. Tibbs indicated that Bowling still suffered from back pain but that previously incapacitating leg pain had been relieved. Dr. Tibbs reported that he was starting Bowling on a program of iontophoresis for residual muscular spasm. He predicted that Bowling would be at maximum medical improvement in December 1998, and he noted that Bowling should consider vocational retraining.

On December 2, 1998, Dr. Tibbs again saw Bowling and reported that he was using a TENS unit for his back and his medications consisted of Voltaren, Ultram and Amitriptyline. Dr. Tibbs released Bowling to work on a trial basis. He restricted Bowling as follows: 1) working no longer than four hours a day; 2) lifting no more than ten to fifteen pounds; 3) avoid repetitive bending and twisting at the waist; and, 4) be able to change from standing to sitting position as needed. At that time, he further prescribed Restoril and Doxepin in addition to Ultram and Voltaren. Dr. Tibbs concluded that Bowling had significant residual symptoms and restrictions but it was his opinion that Bowling could work safely in the light duty range.

On February 17, 1999, Dr. Tibbs reported that Bowling had completed his functional capacity evaluation and had unsuccessfully attempted a trial return to work. He stated at that time that it was his opinion that Bowling had attained maximum medical improvement and he assigned an impairment rating pursuant to the AMA Guides of a 20% permanent partial impairment to the body as a whole. He attributed 50% of this impairment to his work-related injury and 50%

to the presence of pre-existing dormant degenerative disc disease.

Dr. Timothy Scott Prince examined Bowling on April 8, 1999. He also reviewed Bowling's medical records and reports. Dr. Prince diagnosed Bowling as having a left shoulder partial rotator cuff tear which had been surgically repaired; chronic low back pain, status post-herniated necleous pulposa at L5-S1 with radiculopathy, status post laminectomy and discectomy x 2 with fusion x 1; neurogenic bladder and erectile dysfunction. He placed Bowling under significant restrictions and indicated that Bowling did not have the physical capacity to return to the type of work performed at the time of the injury. He recommended that Bowling be restricted to light work, lifting twenty pounds maximum with frequent lifting or carrying of objects weighing up to ten pounds. He further recommended walking or standing for no more than one to four hours or sitting no more than five to eight hours; no stooping, crouching, bending or squatting; no overhead work - left; and no lifting, pushing or pulling floor to waist, or shoulder level or above on the left side. His report also indicated that he would restrict Bowling from working near moving and/or hazardous machinery and that any employment allow for frequent changes in posture and ready access to the bathroom. Dr. Prince, using the most recent AMA Guides to the evaluation of permanent impairment, assessed a total impairment of 26% with 4% related to the shoulder, 10% to the low back, 9% to the bladder and 4% to sexual dysfunction.

Dr. William McRobers treated Bowling and assessed an impairment of 24% based upon the Second Edition of the AMA Guides. He assigned 15% of the impairment for loss of sexual function and 10% for bladder dysfunction.

The ALJ reviewed and thoroughly summarized the evidence of record and ultimately concluded as follows:

> Utilizing the prerogative allowed to the undersigned by virtue of KRS 342.730(1)(a), the Administrative

> Law Judge concludes that the plaintiff is totally occupationally disabled as a result of his work-related injury. His work history has included only heavy manual labor and plaintiff has no specialized or vocational training. While the restrictions of the various physicians may allow the plaintiff to return to light work, plaintiff's credible testimony regarding pain convinces the undersigned that the plaintiff lacks the ability to be employed on a full-time basis. In addition, plaintiff's requirement that he frequently change positions and have ready access to a restroom indicate to the undersigned that the plaintiff does not have the ability to sustain employment on a regular basis. Accordingly, the undersigned concludes that the plaintiff should be awarded total disability as a result of his work-related injuries.

The crux of Cook's argument is that it was error for the ALJ to conclude that Bowling was totally disabled when the uncontradicted medical testimony established that Bowling could return to sedentary or light duty work with certain restrictions.

True enough, it is error in this Commonwealth for the fact finder to reject the uncontradicted medical evidence of record without providing a significant explanation for his rejection. See Commonwealth v. Workers' Compensation Board of Kentucky, Ky.App. 697 S.W.2d 540 (1985); Mengel v. Hawaiian-Tropic Northwest & Central Distributors Inc., Ky.App., 618 S.W.2d 184 (1981); Collins v. Castleton Farms, Ky.App., 650 S.W.2d 830 (1977). This occurs typically, when the causal relationship between the trauma and the injury is not readily apparent to a layman. The question is one properly within the province of medical experts, and the ALJ may not disregard the uncontradicted medical evidence of record. Mengel, 618 S.W.2d at 186-87, see also Elizabethtown Sportswear v. Stice, Ky.App., 720 S.W.2d 732, 733 (1986). This,

however, is not the typical case and we . . . are not writing on a clean slate. In Ira A. Watson Department Store v. Hamilton, 1999 WL 1086225,[1] the Court of Appeals adopted the Board's opinion in its entirety.

In that case, as this, the employer contended that the Board erred in concluding that the ALJ's total disability finding was supported by substantial evidence. Hamilton injured his low back while moving stock. He received medical treatment but continued to suffer from back pain. He attempted to return to work but was unsuccessful because of the pain. The medical evidence contained functional impairment assessments from 5% to 27%. Restrictions placed on the claimant limited repetitive lifting from five to forty pounds, no repetitive bending or stooping, or no sitting or walking for more than three hours in an eight-hour day. Other restrictions of record were that claimant could not work at heights and extreme temperatures and vibratory equipment should be avoided. A vocational evaluation was performed in which it was ultimately concluded that the claimant lacked significant potential for training or competitive employment. The ALJ determined that Hamilton was totally and permanently disabled. In that case, as in the appeal presently before us, no physician testified that the claimant was totally occupationally disabled or was incapable of performing any work on a regular and competitive basis. As was pointed out by the Court of Appeals, this is simply not required in claims for total disability.

Permanent total disability is defined in KRS 342.0011(11)(c) as "[t]he 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. . . ." "Work" is defined in KRS 342.0011(34) as "[p]roviding services to another in return for remuneration on a

[1]Subsequent to the Board's decision, the Kentucky Supreme Court granted discretionary review and affirmed the Court of Appeals' decision in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (2001).

regular and sustained basis in a competitive economy."

The Court in Ira A. Watson Department Store v. Hamilton, supra, stated "[m]edical assessments remain one of many elements to be considered. The ALJ, as was his right, considered the individual's own testimony, vocational testimony, physiological testimony and arrived at a finding of total disability. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Eaton Axle Corp. V. Nally, Ky., 688 S.W.2d 343 (1985); and Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971)."

Thus, when a party without the burden of proof is unsuccessful, the question on appeal is whether the findings of the ALJ are supported by substantial evidence. Id. Substantial evidence is "evidence of substance and relevant consequences having fitness to induce conviction in the minds of reasonable men." Union Underwear Co. v. Scearce, Ky., 896 S.W.2d 7, 9 (1995). If the findings of the ALJ are supported by substantial evidence the reviewing court must affirm the fact finder's decision.

In determining whether an award of total permanent disability is appropriate, the statutes cited above mandate a two-pronged finding by the ALJ. First, whether the medical proof establishes a "permanent disability rating," and second, a finding that there has been a complete and permanent inability to perform any type of work as a result of the injury. Evidence establishing the first prong was provided by Dr. Timothy Prince who assessed a 26% impairment rating and by Dr. Tibbs who assessed a 20% impairment rating. The second prong is and continues to be a discretionary function of the fact finder. The question that the ALJ must answer is whether the claimant's injury has rendered him or her incapable of regular employment in the labor market. It is abundantly clear that the restrictions and limitations placed on him by his treating and examining physicians were as stringent, if not more so, than those placed on the claimant in Ira A. Watson Department Store v. Hamilton, supra. Given this evidence and

Bowling's testimony, we believe that there is substantial evidence of record to support the ALJ's award of total disability benefits.

Cook also argues that Bowling's claim did not include testimony by way of vocational experts. We conclude however that the presence or absence of testimony of vocational experts is not in and of itself determinative of anything. Our appellate courts have held that vocational expert testimony simply does not take precedence over any other testimony of record, and further, that an uncontradicted opinion by a vocational expert is not such evidence as compels any finding. See Eaton Axle v. Nally, 688 S.W.2d at 347; Parson v. Union Underwear Co., Ky. App., 758 S.W.2d 43 (1988) (overruled on other grounds in Beale v. Faultless Hardware, Ky., 837 S.W.2d 893 (1992)).

Cook finally argues that the report of Dr. McRoberts should be totally disregarded as he assessed an impairment rating of 24% which he reported was under the second edition of the AMA Guides. This edition is long outdated and we agree with Cook that any reliance on Dr. McRoberts' one paragraph report was error. Dr. McRoberts' report reads as follows:

> This is regarding our phone conversation on Randy Bowling and your request for an AMA Impairment Rating. I have determined according to the Guide to the Evaluation of AMA Impairment Ratings, 2nd Edition, p. 240-241, that he is a class 2 (15%) impairment for his sexual function and a class 1 (10%) for his bladder dysfunction. By the values on this chart, his total impairment is calculated to be 24%.

Any attempt by this Board to justify the use of this evidence would amount to nothing more than sophistry. The Legislature, in its amendment to KRS 342.730, and since 1987, has required impairment ratings to be determined under the Guides to the Evaluation of Permanent Impairment, American Medical Association, latest edition available. The

> latest edition available currently is the 4th edition. That having been said, we believe that error, if any, was harmless. While the ALJ did find that Dr. McRoberts assessed a 24% impairment rating, that assessment fell between the assessments made by Dr. Tibbs and Dr. Prince. The ALJ relied on the reports of Dr. Tibbs and Dr. Prince concerning Bowling's physical condition and the restrictions that were placed on him. Bowling's bladder dysfunction was fully addressed by Dr. Prince. Irrespective of Dr. McRoberts' report, the mandates placed on the ALJ by KRS 342.0011(11)(c) and KRS 342.0011(34) have been satisfied by evidence of substance contained in the records. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).
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> For the foregoing reasons, the opinion and award of ALJ James L. Kerr is **AFFIRMED**.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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