RENDERED: OCTOBER 12, 2001; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000807-WC

JAMES TRACEY DEATON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-69968

NALLY & HAYDON, LLC;
HON. ROGER D. RIGGS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

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

BEFORE: JOHNSON, GUIDUGLI AND HUDDLESTON, JUDGES.

JOHNSON, JUDGE: James Tracey Deaton has filed a petition for review from an opinion by the Kentucky Workers' Compensation Board entered on March 14, 2001. The Board affirmed an opinion and award rendered by the Hon. Roger D. Riggs, Administrative Law Judge, that found Deaton to have a five percent permanent partial occupational disability and awarded Deaton $20.33 for 425 weeks; ordered Deaton to be evaluated for occupational rehabilitation and awarded medical benefits for injuries suffered while employed by Nally & Haydon, LLC. Having concluded that the Board has not overlooked or misconstrued controlling law or committed an error

in assessing the evidence so flagrant as to cause gross injustice,[1] we affirm.

In July 1993, Nally, which operates several rock quarries, hired Deaton as a haul back truck driver and a welder. Subsequently, Nally promoted Deaton to the position of crusher operator. As part of his duties, Deaton performed routine maintenance, including welding, on Nally's equipment. On July 26, 1999, while he was using a cutting torch on a piece of steel, Deaton tripped over an I-beam, fell backwards approximately three feet and landed on the left side of his lower back and buttocks. Deaton reported this accident to his immediate supervisor. He also claimed that he immediately experienced pain in his low back and left leg. Deaton left work that day and never returned.

After his injury, Deaton immediately sought medical treatment from his family physician, Dr. William Collins. Dr. Collins referred Deaton to Dr. G. Christopher Stephens for treatment. Dr. Stephens treated Deaton from September 14, 1999, to January 7, 2000. Dr. Stephens diagnosed Deaton with degenerative disc disease at L4-L5 and L5-S1 and mid-line annular tear at L4-L5. Dr. Stephens assessed Deaton to have a five percent whole body impairment, according to the American Medical Association Guides to Evaluation or Permanent Impairment (AMA Guides), although he opined that half of that was due to a pre-existing degenerative disc disease, a condition of natural aging. On January 7, 2000, Dr. Stephens released Deaton to return to work with no restrictions.

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[1] Daniel v. Armco Steel Co., Ky.App., 913 S.W.2d 797, 798 (1995).

On September 27, 1999, at the request of Dr. Stephens, Dr. Robert A. Davis performed a magnetic resonance imaging (MRI) examination upon Deaton. As a result of the MRI, Dr. Davis found that Deaton had a mild degenerative disc at L3-L4 and L4-L5; the L4-L5 disc space narrowed by facet overgrowth on the left side and there was a very slight central protrusion at L4-L5. Dr. Davis did not assess an impairment rating in accordance with the AMA Guides.

On May 18, 2000, at the request of Dr. Collins, Dr. Thomas Sweasy examined Deaton. Dr. Sweasy reviewed the results of the MRI and the results of a CT scan and diagnosed Deaton with low back pain and lower extremity pain. Dr. Sweasy assessed Deaton under the AMA Guides to have a five percent permanent whole body impairment. Dr. Sweasy opined that Deaton could return to the work he performed prior to his injury with the restrictions of no lifting greater that 30 pounds and no repeated bending or lifting.

On June 8, 2000, at the request of Deaton's attorney, Dr. James Templin examined Deaton. Dr. Templin diagnosed Deaton with chronic low back pain syndrome; left leg radiculopathy; lumbar disc tear at L4-L5; degenerative lumbar disc disease; disc herniation at L4-L5; recess stenosis at L4-L5 and lumbar facet disease. Dr. Templin assessed Deaton to have a 20 percent permanent whole body impairment, and opined that he was unable to return to the type of work he performed prior to his injury. Dr. Templin suggested work restrictions of no activities requiring prolonged walking, standing, bending, stooping, kneeling,

lifting, carrying, climbing or riding in vibratory vehicles for extended time or distance.

Deaton filed a workers' compensation claim against Nally that proceeded to hearing on August 28, 2000, in front of ALJ Riggs. On October 26, 2000, the ALJ handed down his opinion and award. The ALJ found Deaton to have a five percent permanent partial occupational disability and awarded Deaton $20.33 per week for 425 weeks. The ALJ found that Deaton was unable to perform the work for which he had prior training or experience and ordered Deaton to be evaluated for occupational rehabilitation. Deaton appealed the ALJ's opinion and award to the Workers' Compensation Board. The Board affirmed the ALJ, and this petition followed.

Deaton presents one issue on appeal: whether the ALJ erred as a matter of law by not finding him permanently and totally disabled.[2] Deaton argues that the ALJ's findings are inconsistent with the evidence presented and that the evidence compels that he should have been found permanently and totally disabled. Deaton contends that since the ALJ agreed with Dr. Templin that he was unable to return to the type of work he performed prior to his injury, the ALJ erred by failing to find that Deaton was permanently and totally disabled. Deaton also contends that since the ALJ ordered him to be evaluated for occupational rehabilitation, then he must be permanently and

[2]Deaton also argued in his petition that the ALJ erred by failing to award a disability higher than five percent. However, this issue has not been preserved for our review since the only issue Deaton argued before the Board was that the ALJ erred by not awarding him a total permanent disability.

totally disabled at least until he has been successfully rehabilitated. We disagree.

As the claimant, Deaton bore the burden of proof before the fact-finder, the ALJ.[3] Since Deaton, as the claimant, appealed from both the ALJ and the Board, our standard of review is whether the evidence was so overwhelming, upon review of the entire record, to have compelled a finding in the claimant's favor.[4] Further, the ALJ, not the Board and not this Court, had the sole discretion "to determine the quality, character, and substance of evidence."[5] As fact-finder, the ALJ may choose to believe or disbelieve any part of the evidence presented, regardless of its source.[6]

According to the record provided, Dr. Stephens, who provided the majority of Deaton's treatment, opined that under the AMA Guides Deaton was only five percent whole body impaired. Further, Dr. Stephens concluded that one half of Deaton's impairment was due to a pre-existing degenerative disc disease caused by the natural aging process. Also, Dr. Sweasy, who also examined Deaton at the request of his family physician, opined that Deaton was only five percent permanent whole body impaired. Only Dr. Templin, who examined Deaton at the request of his

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[3]Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984); see Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999).

[4]Id.; see Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986); and Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979).

[5]Whittaker, supra at 481 (quoting Paramount Foods supra); see Snawder, supra.

[6]Whittaker, supra at 481 (quoting Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977)).

attorney but did not treat him, opined a different and greater impairment rating.

To prevail on appeal, Deaton must show that the evidence presented to the fact-finder, the ALJ, was so overwhelming that the ALJ's finding against him was unreasonable, and the evidence compelled a finding in his favor.[7] As fact-finder, the ALJ had sole discretion to weigh all the evidence presented. Further, the ALJ has the sole responsibility to take the medical evidence as to percentage of impairment and translate it into percentage of disability.[8] As stated above, the ALJ can choose to believe or disbelieve all or part of any witness' testimony.

After reviewing the record, the ALJ obviously found Dr. Stephens and Dr. Sweasy more credible than Dr. Templin and relied upon their opinion as to Deaton's percentage of impairment. The fact that the ALJ agreed with Dr. Templin regarding Deaton's inability to return to his prior work does not mean that the ALJ endorsed Dr. Templin's opinion as to percentage of impairment. Also, we agree with Nally and the Board that under the current definition of "permanent total disability" no special weight is given to the claimant's former employment.[9] Given the evidence, the ALJ's opinion and award was reasonable and was supported by substantial evidence. Furthermore, while Deaton presented evidence that may support a contrary conclusion, he presented no

[7]Francis, supra at 643.

[8]Kilgore v. Goose Creek Coal Company, Ky., 392 S.W.2d 78, 79 (1965).

[9]KRS 342.001(11)(c).

evidence that overwhelmingly compelled a contrary conclusion. Absent such evidence, we cannot and will not substitute our judgment for that of the ALJ's regarding the weight and character of the evidence as to questions of fact.[10]

Deaton also argues that since the ALJ ordered him to be evaluated for occupational rehabilitation, he must have been permanently and totally disabled, at least until he has been successfully rehabilitated. We disagree. To be entitled to occupational rehabilitation, Deaton must be unable to perform his prior work; but there is no requirement that he be permanently and totally disabled.[11] Finding that Deaton was unable to return to his prior work, the ALJ appropriately ordered Deaton to submit to occupational rehabilitation. The ALJ acted within the scope of KRS 342.710 and within his discretion.

Since Deaton presented no evidence that compelled a contrary conclusion, we cannot substitute our judgment for the ALJ's; therefore, we are compelled to affirm the opinion of the Board which affirmed the opinion and award of the ALJ.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Ronald G. Polly Whitesburg, Kentucky	John S. Harrison Louisville, Kentucky

[10]Whittaker, supra.

[11]Edwards v. Bluegrass Containers Division of Dura Containers, Inc., Ky.App., 594 S.W.2d 900, 902 (1980).