

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001281-WC

AUSTIN APPAREL COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-70816

SANDRA LAKE; HON. W. BRUCE COWDEN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: BARBER, McANULTY, AND SCHRODER, JUDGES.

BARBER, JUDGE: The employer, Austin Apparel Company ("Austin Apparel"), appeals from a decision of the Workers' Compensation Board, affirming the ALJ's award of 100% occupational disability benefits to the Appellee, Sandra Lake ("Lake"). Finding no error, we affirm.

Lake was employed by Austin Apparel. She filed a workers' compensation claim on March 9, 1999, alleging that she twisted her back while lifting on April 1, 1997. The record reflects that Lake underwent anterior cervical discectomies at C5-6 and C6-7 with iliac bone crest grafting on June 19, 1997, by

Dr. Steven Kiefer. Lake's diagnosis was cervical spondylosis with cervical radiculopathy.

The claim was ultimately assigned to an ALJ who rendered an opinion, order and award on December 29, 1999. The ALJ found in accordance with the parties' stipulations that Lake had not worked since August 1998, that she was born on July 27, 1945, has a tenth grade education, a GED, and has specialized work experience as a seamstress.

The ALJ further found that Lake testified she was receiving social security disability benefits, that she has not looked for work since she left Austin Apparel, and that she had hurt her neck and low back on April 1, 1997. At the hearing on November 4, 1999, Lake testified that her condition had not changed for the better and that she could not do anything. Lake claimed that she could not vacuum and had to sit down to wash dishes.

The medical proof included a report from Dr. James Owen who assigned 29% functional impairment, body as a whole, limited lifting to less than five pounds, and sitting to less than a half an hour. Dr. Kiefer's records were filed; the records documented significant degenerative conditions in the cervical spine. Dr. Primm, the employer's examining physician, assigned a 10% functional rating to the cervical spine, attributing essentially all of it to the arousal of a pre-existing degenerative disc condition. Dr. Primm advised against heavy work but would allow lifting of five to ten pounds regularly. Luca Conte performed a vocational evaluation. He

testified that Lake had a 38% occupational loss and acknowledged that, based upon Dr. Owens' restrictions, the occupational loss would exceed 75%.

The ALJ found that Lake had sustained her burden of proving a work-related cervical and shoulder injury; however, the ALJ was not persuaded that Lake had proven any work-related low back injury. The ALJ concluded that "from the cervical condition standing alone, [Lake] . . . is 100% disabled." The ALJ provided detailed findings to support this conclusion:

Based on [Lake's] . . . age, education, and prior work experience, and taking into account the medical and lay testimony, the ALJ is convinced that [Lake] . . . is 100% disabled based on the restrictions and diagnosis imposed. Dr. Kiefer has diagnosed significant left sided degenerative disc disease at the C5-C6 and the C6-C7 levels which has resulted in a two level cervical fusion. Dr. Owens has assessed a 25% impairment rating based upon the cervical condition standing alone and more importantly, opines that [Lake's] . . . restrictions should be lifting [handling and carrying] less than 5 pounds . . . and that [she] . . . would be unable to continue with her occupation. Dr. Conte further opined that based on Dr. Owens' restrictions standing alone, that [Lake's] occupational disability would be greater than 75%.

The ALJ found that there was no evidence that Lake, immediately prior to the work injury, was under any active restrictions; therefore, the ALJ declined to carve out any portion of the award as active and non-compensable. The ALJ also noted that none of the physicians had testified that Lake's condition was the result of the natural aging process; therefore, the ALJ determined that

"there shall be no carve out for the natural aging process as well."

On January 11, 2000, Austin Apparel filed a notice of appeal to the Workers' Compensation Board. On appeal, Austin Apparel raised one question of law:

Under current Kentucky law, the awarding of total occupational disability is controlled by KRS 342.730 and must meet the definition found at KRS 342.0011(11) which defines that form of disability:

Permanent total disability benefits [means] 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

Austin Apparel contended that the ALJ's award of total occupational disability is contrary to evidence, emphasizing that Luca Conte's vocational opinion was un rebutted.

On April 28, 2000, the Board rendered a unanimous opinion, affirming the ALJ. The Board stated:

Since Austin is the party without the burden of proof, we must view the evidence to determine whether there was substantial evidence of substance to support the ALJ's conclusion

Austin asserts on appeal that as a matter of law the ALJ was without authority to assess a total occupational disability. We, however, disagree and therefore affirm the ALJ. As we have noted on more than one occasion since December 12, 1996, the ALJ is clothed with a greater degree of discretion in assessing a permanent total occupational disability than he would be in assessing a permanent partial disability. See Ira A. Watson Dept. Stores vs. Hamilton, Claim No. 1998-CA-003100-WC, rendered November 19, 1999 . . . now on appeal to the Supreme Court.

The Board reviewed the evidence – that Dr. Owen had assigned a 29% impairment rating and Dr. Primm had assigned 10% – and explained that once an impairment rating is established, it is incumbent upon the ALJ to determine whether this condition prevents the individual from engaging in “work.” The Board noted that although the opinion of a vocational evaluator, such as Luca Conte, may be beneficial, it is not ultimately binding citing Eaton Axle v. Nally, Ky., 688 S.W.2d 334 (1985). The Board determined that the ALJ, within his discretion, certainly could have concluded that an individual with the restrictions imposed by Dr. Owen, who is older, and has limited work experience, has no real ability to compete for work as defined by the Act. The Board recognized that the ALJ could have found a lesser degree of disability, but the ALJ was not compelled to do so. Thus, the Board affirmed the ALJ’s decision.

On appeal to this Court, Austin Apparel contends that the ALJ erred in failing to exclude a portion of Lake’s disability due to her low back problem. Lake had alleged both low back and cervical problems as a result of the work-related injury. This issue was not raised before the Board; thus, it is not preserved for review. Notwithstanding, we fully agree with the Board that the ALJ’s determination of total occupational disability due to Lake’s cervical spine injury has a substantial evidentiary foundation.

Lake also argues that the 1996 revision of the Act effectively repealed Osborne v. Johnson. Since entry of the Board’s decision, the Supreme Court has rendered a final decision

in Ira A. Watson Dep't. Store v. Hamilton, Ky., 34 S.W.3d 48, 51

(2001), which is dispositive of the issue on appeal:

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. . . . 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, [Ky., 423 S.W.2d 800 (1968)] . . . remain 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.

The Supreme Court explained that, despite the extensive revision of the Act in 1996, the ALJ remains the factfinder. It is still the ALJ's function to translate lay and medical evidence into a occupational disability. Although the ALJ must consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ *"is not required to rely upon the vocational opinions of either the medical experts or the vocational experts."* (Emphasis added.) Id. at 52.

The April 28, 2000 opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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