

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000497-WC

JAMES LESTER CARR

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-70623

HARLAN-CUMBERLAND COAL COMPANY;
DONALD G. SMITH,
Administrative Law Judge; and
WORKER'S COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, HUDDLESTON and JOHNSON, Judges.

HUDDLESTON, Judge: James Lester Carr appeals from a Workers' Compensation Board opinion that affirmed a decision by an Administrative Law Judge granting Carr a 20% occupational disability award as the result of injuries he sustained on November 20, 1996, while working for Harlan-Cumberland Coal Company.

Carr was working in his capacity as a continuous miner operator when a severe explosion occurred in the section of the mine in which he was working. He sustained multiple injuries and was also marked permanently when small pieces of coal from the

explosion lodged under his skin. After being buried for nearly an hour, Carr was rescued by emergency technicians and was transported to a hospital where he underwent a number of medical procedures, including extensive surgery to his left knee and right leg. Carr was transferred to Holston Valley Hospital in Holston Valley, Tennessee, the following day.

Although he was no longer physically capable of working underground in his previous capacity, Carr returned to work in a position outside of the mines on January 7, 1997. His new duties included ordering parts, answering the telephone and keeping track of the reports prepared by mine inspectors. Since August 1997, Carr has worked in the repair shop, primarily repairing continuous miners. Carr does not believe he can return to the same working activities since he has a loss of grip strength and fine motor use of his right hand and, as a result of the injuries to his lower extremities, has difficulty squatting, climbing, walking, standing and lifting.

According to the medical evidence, Carr suffered an injury to the right medial epicondyle as well as an open fracture of the right fibula. He also sustained a fractured nose, a concussion and extensive soft tissue damage to both legs with a right lateral meniscal tear, and endured skin grafts on both legs and the left elbow. Due to the extent of his injuries, Carr is limited in his activities, particularly those involving the lower extremities and right arm. Dr. Templin assigned a 10% impairment to the body as a whole (5% due to the bilateral skin grafts), estimating that Carr suffers from a chronic pain condition 50% to

75% of the time which would ultimately interfere with his ability to engage in daily activities. Consistent with this finding, Dr. Klinar determined that an 11% impairment was appropriate, stating that Carr continues to suffer from knee pain primarily in the patella and femur, and concluded that additional operative intervention would be unlikely to benefit Carr. Both physicians concluded that Carr would be unable to return to any activity which would require crouching, kneeling, stooping, bending, squatting, lifting, carrying or any activities which would require repetitive use of the right arm for pushing, pulling, lifting, twisting and turning. Dr. Morfesis was neither asked nor gave an impairment rating.

On May 9, 1997, Carr filed an application for resolution of an injury claim alleging disability as a result of the explosion on November 20, 1996. The case was assigned to an arbitrator. After a benefit review determination on August 29, 1997, the arbitrator awarded Carr a 20% occupational disability noting that Carr had returned to work at the same or greater wage than he had at the time of his injury, and, accordingly, his percentage of disability was governed by Kentucky Revised Statutes 342.730 (1) (b).

Multiple issues were presented to the ALJ, only one of which, the percentage of occupational disability, is pertinent at this stage. After considering the evidence presented, the ALJ concluded that Carr had a 20% occupational disability as a result of the injury. The ALJ noted Carr's testimony that although he continues to work at an equal or greater wage, he works less

overtime and no longer receives a production bonus due to the change in his job classification. The ALJ indicated that despite Carr's testimony, he failed to present evidence of his post-injury earnings, making a determination of his post-injury average weekly wage impossible. The ALJ further concluded that Carr had the burden of proof to establish his post-injury wage and he failed to show that he was earning less now than he was at the time of his injury. Therefore, Carr was limited to no more than twice the impairment rating pursuant to the then existing Kentucky Revised Statutes (KRS) 342.730. Accordingly, the ALJ ordered that Carr receive permanent partial disability benefits in the amount of \$62.39 a week beginning January 9, 1997, and continuing for a period of no more than 425 weeks. Carr was also awarded total disability benefits in the amount of \$415.94 per week for the period from November 21, 1996, through January 7, 1997.

Carr filed a petition for reconsideration pursuant to KRS 342.281 noting that 803 Kentucky Administrative Regulations (KAR) 25:010 Sec.19 establishes that whenever wages are at issue the employer is required to file an AWW-1 (average weekly wage form). Subsequently, the ALJ entered an order sustaining the petition for reconsideration to the extent that Carr was awarded occupational disability benefits in the amount of 20% without considering the limits of KRS 342.730 (1)(b).

Carr filed a notice of appeal to the Board. His appeal was held in abeyance while the case was remanded to the ALJ for consideration of an outstanding petition for reconsideration. In the interim, Harlan-Cumberland filed a motion to reopen and an

amended motion to reopen in order to contest medical bills associated with Carr's treatment for a back condition. The ALJ denied the motions finding that the contested medical expenses were work-related. In due course, the Board affirmed the ALJ's decision and Carr appealed to this Court.

The only issue on appeal to the Board related to the limitation of the award to a 20% occupational disability. Initially, the Board observed that Carr inadvertently misstated in his brief that the ALJ erred in reducing his benefits by one half. Since the ALJ did not reduce Carr's benefits by half, we join in the Board's assessment of this contention. Likewise, the Board is correct in its evaluation of the applicability of KRS 342.730 (1) (c). Carr's injury occurred before December 12, 1996, thereby rendering that section inapplicable as it was not in effect at the time. The Board went on to note that the ALJ did not apply that provision. Although the ALJ did seem to indicate in one part of his opinion that he was applying the twice functional impairment factor, the Board correctly stated that any question derived from that finding was resolved by the ALJ upon petition for reconsideration.

In Millers Lane Concrete Co., Inc. v. Dennis,¹ this Court held that if there is any evidence of substance to support the ALJ's findings, we must sustain them. If, however, there is no evidence of substance to support the findings, they are arbitrary and must be reversed. In this case, there was evidence of substance to support the ALJ's findings.

¹ Ky. App., 599 S.W.2d 464, 465-66 (1980).

The claimant in a workers' compensation claim has the burden of proof and risk of persuasion, and if unsuccessful, the question on appeal is whether the evidence is so overwhelming upon consideration of the record as a whole as to compel a finding in claimant's favor.² Compelling evidence is that which is so overwhelming that no reasonable person could reach the conclusion reached by the ALJ.³ The ALJ clarified the basis for his holding following the filing of the petition for reconsideration when he unequivocally stated that the limitations of KRS 342.730 (1) (b) did not play a part in his decision.

It is beyond dispute that fact finding authority and the assessment of occupational disability in accordance with the record rests solely with the ALJ.⁴ In support of its belief that the ALJ reached his ultimate conclusion without regard to the pre- and post-injury wage question, the Board refers to the discussion of the standard the ALJ used in determining Carr's occupational disability in the original claim. The record reveals that the ALJ reviewed the evidence and took into account Carr's age, education and physical limitations, relying upon Osborne v. Johnson,⁵ to conclude that Carr had a 20% occupational disability. For this reason, the Board did not feel that a genuine issue existed in the appeal before it.

² See Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984); Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979).

³ REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985).

⁴ See Wolf Creek Collieries, Inc., supra; Millers Lane Concrete Co., Inc., supra; KRS 342.285.

⁵ Ky., 432 S.W.2d 800 (1968).

The Board gave appropriate deference to the ALJ's resolution as required by relevant case law. The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence.⁶ The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof.⁷ It is intentionally difficult to meet this standard and, while the Board went on to elaborate on the reasons which further support its affirmation of the ALJ's decision with which we are inclined to agree, the discussion is unnecessary as we cannot say that the ALJ was presented with evidence which compelled a different result.

Accordingly, the Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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⁶ Paramount Foods, Inc., v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

⁷ Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977).