

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002384-WC

ISLAND CREEK COAL COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-92-48639

ELVA SMITH; SPECIAL FUND;
DONALD G. SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: JOHNSON, KNOFF AND MILLER, JUDGES.

JOHNSON, JUDGE: Island Creek Coal Company has petitioned this Court for review of a Workers' Compensation Board opinion which affirmed the Administrative Law Judge's opinion and award on the claimant Elva Smith's motion to reopen his disability claim. Having concluded that the ALJ's determination that Smith's condition had worsened since his original award in 1993 is supported by substantial evidence, we affirm.

Smith was employed by Island Creek and suffered a work-related injury to his back on December 11, 1990. Smith last worked for Island Creek in February of 1991. On December 9,

1992, Smith filed an Application for Adjustment of Claim against Island Creek and the Special Fund. On July 13, 1993, the ALJ rendered an opinion and award in favor of Smith, adjudging him to be 65% occupationally disabled. On April 29, 1999, Smith filed a motion to reopen pursuant to KRS¹ 342.125². On October 11, 1999, the claim was assigned to an arbitrator who made a Benefit Review Determination. On October 19, 1999, Smith filed a request for a hearing before an ALJ. The evidence before the ALJ included the testimony of Smith and the medical reports of Dr. James W. Templin, Dr. Robert W. Lowe, Dr. Timothy R. Wagner, and Dr. Dennis H. Halbert. On April, 24, 2000, the ALJ found in favor of Smith, and ordered that his monthly award paid by Island Creek and the Special Fund be increased to a 100% disability.³ On September 13, 2000, the Workers' Compensation Board entered an opinion affirming the ALJ's award. This petition for review followed.

¹Kentucky Revised Statutes.

²KRS 342.125 reads in pertinent part:

- (1) Upon motion by any party or upon an arbitrator's or administrative law judge's own motion, an arbitrator or administrative law judge may reopen and review any award or order on any of the following grounds:

. . .
- (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

³Island Creek and the Special Fund split the payment 50/50.

A finding of the ALJ on a question of fact will not be disturbed on appeal if there is substantial evidence to support it.⁴ "Substantial evidence has been conclusively defined by Kentucky courts as that which, when taken alone or in light of all the evidence, has probative value to induce conviction in the mind of a reasonable person."⁵ This Court's function in reviewing the Board's decision is "to correct the Board only where the [] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."⁶

The issue before this Court is whether there is substantial evidence to support the finding of the ALJ that Smith's condition worsened since his original award in 1993. Island Creek argues that the ALJ's finding that Smith's condition worsened since 1993 was based solely on the testimony of Dr. Templin. Island Creek argues that after reexamining Smith in 1999, Dr. Templin made essentially the same medical finding and long-term prognosis, thus there was no evidence that Smith's condition was worse in 1999 than it was in 1993.

With respect to Dr. Templin's testimony, the ALJ found:

⁴Jackson v. General Refractories Co., Ky., 581 S.W.2d 10, 11 (1979).

⁵Bowling v. Natural Resources, Ky.App., 891 S.W.2d 406, 409 (1994) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972); and Blankenship v. Lloyd Blankenship Coal Co., Inc., Ky., 463 S.W.2d 62 (1970)).

⁶Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Dr. Templin again examined the Plaintiff on September 24, 1999. Plaintiff complained of chronic low back pain with radiation to the left leg. Physical examination revealed midline tenderness in the lower lumbar region and over the left SI joint, reduced range of motion, and positive straight leg raising. He diagnosed the Plaintiff with chronic low back pain syndrome; degenerative lumbar disc disease; atherosclerotic coronary vascular disease; peripheral vascular disease; atypical angina; history of lumbar facet disease; degenerative lumbar disc disease; history of BPH; status post TURT; status post tib/fib pinning; and history of left tip/fib fracture. He assessed a 10% impairment under the AMA Guides based upon Plaintiff's back condition. Plaintiff had a multiplicity of additional problems including carpal tunnel syndrome, angina pectoris, atherosclerotic coronary vascular disease, atypical angina, and degenerative lumbar disc disease. Plaintiff's condition had substantially deteriorated since an earlier examination on February 22, 1993. He restricted the Plaintiff from any activity requiring repetitive lifting or carrying; frequent bending, twisting, kneeling, lifting, carrying, or climbing; unable to walk and/or stand for periods greater than one and a half hours in an eight hour time frame; unable to sit for periods greater than four hours for an eight hour time frame; unable to sit for periods greater than one hour without being able to change positions and move to the standing, walking, or lying position; must be able to lie down for extended periods of time to reduce pain. Plaintiff is unable to return to any work at this time.

Island Creek argues that the only medical evidence of Smith's condition worsening involved Smith's non-work-related ailments: carpal tunnel syndrome, angina pectoris, atherosclerotic coronary vascular disease, atypical angina, and degenerative lumbar disc disease. We believe that the evidence before the ALJ was sufficient to support his finding that Smith's work-related condition had worsened in 1999 from his condition in 1993. Island Creek places great emphasis on the fact that in

1993 Dr. Templin assessed Smith at a 15% impairment under the AMA guidelines whereas his 1999 assessment was a 10% impairment under the AMA guidelines. However, in his report, Dr. Templin states:

While I have not seen the Workers' Compensation settlement, I believe that 65% is clearly indicative of the functional impairment rating together with vocational implications. I believe, in light of that fact, that Mr. Smith's condition has substantially deteriorated at this point. I believe his vocational impairment is 100%. In light of this fact, his overall impairment would be closer to 100% than to the 65% previously provided.

Thus, the evidence from Dr. Templin was that Smith's condition had deteriorated from the 1993 award of a 65% vocational impairment. Moreover, the evidence from Dr. Templin was not the sole basis for the ALJ's findings. In his opinion, the ALJ stated that Smith's testimony was "very credible regarding both his pain and restrictions."

We have reviewed the record and Smith's testimony. We cannot hold that there is not substantial evidence to support the ALJ's finding that Smith's pain had increased significantly since 1993. We believe of particular importance was Smith's testimony that due to his back injury and the numbness it caused in his legs, he is no longer able to participate in activities with his family and cannot drive an automobile. Smith's level of pain is something that cannot be measured by reviewing and comparing Dr. Templin's reports. It is clear that the ALJ believed Smith's testimony that his pain had increased since 1993 due to the condition related to his work injury becoming worse.

The Board affirmed this finding and stated:

In its brief before this Board, Island Creek sets forth a comparison of the objective medical findings in the original claim compared with those on reopening. While certainly the evidence pointed to by Island Creek would have supported a dismissal of the reopening before the ALJ as reviewed above, that is not the issue on appeal. Dr. Templin, in his supplemental report, indicates that Smith is now placed under greater restrictions than at the time of the original claim. As found by the ALJ, Smith himself testified as to his worsening condition. We must remember that while medical evidence may be probative on the issue of occupational disability, it is not determinative and it is the ALJ's function to look at the totality of the circumstances and the factors of occupational disability [citations omitted].

We agree with the Board's conclusion that there is evidence of record to support both positions. While a different ALJ may have made a different finding concerning the degree of Smith's occupational disability, as long as the findings of this ALJ are supported by substantial evidence, the Board and this Court cannot set those findings aside.⁷ The ALJ was in the best position to judge the credibility of Smith and to make a determination as to whether his increase in pain was due to a worsening of the original back injury or the other non-work-related injuries. As stated in his opinion, the ALJ found Smith to be persuasive and credible.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

⁷Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, ELVA
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