

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002395-WC

DAVID RANDALL OUSLEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-88-05046

SUN GLOW COALS, INC.; HON. J. KEVIN
KING, ADMINISTRATIVE LAW JUDGE;
SPECIAL FUND; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, HUDDLESTON, AND McANULTY, JUDGES.

McANULTY, JUDGE: This matter is before us on a petition for review of an opinion of the Workers' Compensation Board (Board) affirming an opinion and award of an Administrative Law Judge (ALJ). Appellant contends that the ALJ and the Board erred in denying his reopening of a prior Opinion and Award awarding 60% occupational disability. We disagree. Hence, we affirm.

The opinion filed by the Board carefully and thoroughly analyzes the law and facts of this case. We have examined said opinion under the requirements of Western Baptist Hospital v. Kelley, Ky., 827 S.W.2d 685, 687 (1992). As we cannot improve

upon the Board's written opinion we adopt their reasoning as our own. The Board stated in pertinent part:

Ousley filed a motion to reopen his workers' compensation claim on November 20, 2000. Ousley claimed that since the time of his original award, his condition had deteriorated and he suffered from an increase in his occupational disability. In support of his reopening, he relied on the medical evidence of Dr. Christa Muckenhausen and Dr. Rondal E. Goble, both treating physicians. Sun Glow countered with medical evidence from Dr. Robert P. Goodman and Dr. Russell Lee Travis, both evaluating physicians. Also contained in the record is the medical evidence introduced in the original claim.

Ousley testified by deposition and at his hearing on reopening. He testified he had not worked since January 28, 1988, the date of his work injury. He stated he sees Dr. Goble twice a month for pain medication. According to Ousley, his back pain is worse, he takes more medication, and he cannot sleep or do things he was normally able to do. He testified he could not drive for more than five miles and he can no longer participate in sports. Ousley testified he has to have help taking a shower. Ousley was questioned concerning his capabilities at the time of his original award. In the original claim he testified he did not do much other than get out of the chair when he was not in bed. He testified he could not drive at all and could not ride in a car for more than five to six miles. He testified his wife had to help him bathe and there were some nights where he had trouble sleeping. Before his original award, Ousley testified he did not know of any work he could perform.

In a letter dated March 12, 1997, Dr. Gobel opined that Ousley continued to have significant problems with his lower back with pain and stiffness, especially with pain into his left hip. He was currently being prescribed Elavil, Valium, and Loritab. Dr. Goble opined Ousley had not progressed and had actually regressed in some capacity. He felt Ousley remained totally occupationally disabled.

Dr. Muckenhausen, in a report dated September 26, 2000, rendered the following diagnoses concerning Ousley's back condition: (1) status post low back injury, secondary to work-related incident on 1/28/88, with progressive degenerative disc disease and osteoarthritis, as well as lumbosacral radicular component, maximally left and (2) sleep disturbance, anxiety, and depression in context with chronic pain syndrome since injury on 1/28/88. She recommended a repeat MRI of the lumbar spine. She found tenderness on palpation in the lower thoracic and lumbosacral spine areas. She noted toe and heel gait was difficult and balancing on left leg was more difficult than on the right. She further found tandem gait was difficult.

In a supplemental report dated April 20, 2001, Dr. Muckenhausen opined Ousley's condition had worsened since her first evaluation because of (1) increased complaints of low back pain radiating into both legs, maximally left, with more flare-ups of severe pain and (2) objective findings include increased muscle spasms and trigger points, further decreased range of motion, depressed reflexes and sensory changes. She concluded he had a worsening of his condition as a result of the January 28, 1988 injury which resulted in greater occupational disability since September 18, 1989. Dr. Muckenhausen noted that an MRI taken April 3, 2001 revealed herniated discs at L4-5 and L5-S1. She assessed a 15% to 16% impairment to the body as a whole pursuant to the AMA Guides and would limit Ousley to a maximum ten pound lifting restriction with lifting less than ten pounds frequently. She further would limit him to standing or sitting less than one to two hours per day. Attached to Dr. Muckenhausen's report was the April 3, 2001 MRI report from Lexington Diagnostic Center signed by Dr. George Privett.

Dr. Robert Goodman evaluated Ousley, both prior to the original award and on reopening. He made the same diagnosis on reopening as before the original award of pre-existing aging, degeneration, with arousal. He found that since the injury Ousley still had symptoms of magnification and nothing really objective. Dr. Goodman

thought his present complaints were related to aging and deconditioning, rather than to his injury twelve years ago. He could not note any objective evidence of worsening. His opinion remained the same, either under the third or fourth edition of the Guides, believing Ousley had a maximum impairment of 5%, half due to arousal. He felt Ousley's only restriction would be a fifty pound lifting limitation.

Dr. Russell Travis evaluated Ousley on February 2, 2001. He also reviewed both the medical evidence presented in the original claim and on reopening. His impression was chronic low back pain and left lower extremity pain since January 28, 1988. He found absolutely no objective findings on examination and thought there was evidence of overt and gross symptom magnification. Likewise, he found absolutely no imaging studies on which to base any objective findings as to whether or not Ousley's condition had progressed. He found that by Ousley's own description, there was absolutely no change in his pain and disability since 1988. Dr. Travis itemized the indicators of what he found to be gross symptom magnification. Dr. Travis concluded there was absolutely no evidence on examination of objective findings that would indicate any reason for worsening. He was astonished that Ousley received a 60% occupational disability when he never had a lumbar MRI. He noted the previous award was based on simple bulging disc at L5-S1 and apparently some mild degenerative changes at L5-S1. Dr. Travis strongly recommended Ousley have a lumbar MRI to see if there were any significant degenerative changes and progression. Based on the Fifth Edition of the AMA Guides, he assessed a 5% impairment to the body as a whole.

A lumbar MRI was performed on April 3, 2001 and after reviewing the MRI, Dr. Travis rendered an addendum to his original report dated May 15, 2001. It is the filing of this addendum to which Ousley objects and has filed a motion to strike. In any event after reviewing the MRI, Dr. Travis opined it was essentially normal. He found no evidence of a herniated disc or nerve root entrapment either on examination or by recent lumbar

MRI. The MRI made no change in his initial impairment rating of 5%. In fact, Dr. Travis opined there was a strong argument that Ousley fit the 0% impairment rating.

The procedure concerning the introduction of the addendum to Dr. Travis' report is as follows: The April 3, 2001 MRI report was attached to the April 30th supplemental report of Dr. Muckenhausen. The benefit review conference was held on May 7, 2001. Apparently, there was an oral motion by Sun Glow at the benefit review conference for an extension of proof time in which to obtain the actual film of the MRI scan referred in Dr. Muckenhausen's report and to have the same interpreted by Dr. Travis. At any rate, at the final hearing held on May 22, 2001, there was further discussion concerning extensions of time for obtaining the report of Dr. Travis. The ALJ indicated the record would be left open for update of Dr. Travis' report, at least to the date of the June 14, 2001 submission. Attorney for Ousley stated that if he had a specific problem with the report, he would file a written objection at that time. Dr. Travis' report was filed May 31, 2001. Ousley filed a motion to strike on June 4, 2001 wherein he averred that the ALJ gave no leave to supplement the record after the final hearing and therefore Dr. Travis' report should be stricken from the record. He requested, in the alternative, that the ALJ should note the radiologist who read the MRI film read the test as abnormal. He argued that Dr. Travis' opinion that everyone has an abnormal MRI represents an obvious bias against injured workers. The ALJ overruled the motion to strike in an order rendered June 20, 2001.

The ALJ, in an opinion rendered June 20, 2001, dismissed Ousley's reopening. In his opinion, he reviewed the lay and medical testimony on reopening, as well as evidence from the original claim. He noted specifically the May 15, 2001 addendum to Dr. Travis' report. He reviewed Dr. Travis' findings as follows:

Dr. Travis stated that he reviewed Ousley's 4/3/01 MRI film, which revealed no nerve root compromise, no evidence of decreased disc

space, and a small central bulge at L4-5 and L5-S1. Based on these findings, Dr. Travis stated that Ousley's condition has not changed and that the limited abnormal findings are of no significance. He reiterated that Ousley has, at most, a 5% impairment, and stated that 'there is a strong argument that (Ousley) fits in the DRE Lumbosacral Category I with 0% impairment in the absolute absence of objective findings.'

The ALJ found most persuasive the opinions of Drs. Goodman and Travis and, as stated, therefore dismissed Ousley's reopening.

On appeal, Ousley first argues the ALJ committed an abuse of discretion by allowing the filing of Dr. Travis' supplemental report after the date of the hearing. He contends the record shows the employer was allowed up to the date of the final hearing to supplement the report of Dr. Travis. Ousley contends that Dr. Travis' opinion that there was no objective medical evidence is inconsistent and highly prejudicial. He argues the record contains no specific motion for extension of time, no order allowing for the extension of time, and no order allowing rebuttal on his part.

As pointed out by Sun Glow, the ALJ actually gave the employer up to the date of submission, June 15, 2001, in which to supplement the record. This was discussed at the hearing held on May 22, 2001. Dr. Travis' supplemental report was filed May 31, 2001. Ousley filed a motion to strike June 4, 2001 that was overruled by the ALJ in an order rendered June 20, 2001.

Having reviewed the procedures, arguments of counsel, and applicable case law, we disagree with Ousley that the ALJ abused his discretion by allowing the filing of the supplemental report of Dr. Travis. As pointed out by Sun Glow, it was agreed at the hearing that the employer would have until the date of submission to file Dr. Travis' supplemental report. It was not until Ousley had a chance to read the report that he

objected to the filing of it. Clearly, Ousley could have objected to the extension of time for evidence at the hearing, but he failed to do so. As argued by Sun Glow, this constituted a waiver of the objection of the extension. See, Department of Highways v. Porter, Ky., 388 S.W.2d 366 (1965).

Notwithstanding the fact that Ousley has, in effect, waived any objection to the introduction of Dr. Travis' records, we believe the ALJ did not commit an abuse of discretion in allowing the introduction of the supplemental report into evidence. It is well settled that the ALJ has the authority to control the taking of evidence before him. Searcy v. Three Point Coal Co., Ky., 134 S.W.2d 228 (1939). The ALJ, within his discretionary powers, could have denied the introduction of the medical report, however, there is a substantial difference between what the ALJ may do and what he is required to do by law. See, Cornett v. Corbin Materials, Inc., Ky., 807 S.W.2d 56 (1971) and Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). In this case, the ALJ's decision to allow the introduction of the evidence does not constitute an abuse of discretion and it was not an arbitrary action, nor a capricious disposition under the circumstances. See, Kentucky Nat. Park Com'n v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945). Rather, we believe the consideration of Dr. Travis' report simply goes to the weight of evidence. That brings us to Ousley's second argument that the ALJ's dismissal of his reopening was not based on substantial evidence. The ALJ, in his opinion, noted Dr. Travis' opinion in his addendum that the MRI revealed no root compromise and no evidence of decreased disc space. Instead Dr. Travis found a small central bulge at L4-5 and L5-S1. As argued by Ousley, the MRI report, as well as Dr. Muckenhausen's findings characterize the findings as herniated discs. In any event, it is well established that it is within the discretion of the ALJ to believe or disbelieve the medical evidence of his choice when it is conflicting. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977) and Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Clearly, Dr. Travis' evidence, along with Dr. Goodman's evidence,

as well as that of the claimant himself indicating that his complaints are much the same now as they were before the original award, constitutes substantial evidence upon which the ALJ could base his decision. Therefore, we are without authority to find otherwise. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Accordingly, the decision by Hon. J. Kevin King, Administrative Law Judge, is hereby AFFIRMED and the appeal by David Randall Ousley is DISMISSED.

The Board's opinion is affirmed.

ALL CONCUR.

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