

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000325-WC

LARRY SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-93-18538

BATTLE RIDGE COMPANIES;
ROBERT WHITTAKER, DIRECTOR OF SPECIAL FUND;
HON. DONALD G. SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: COMBS, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: This is a petition for review of a decision of the Workers' Compensation Board reversing an opinion and award of the Administrative Law Judge finding that the claimant upon reopening had shown a worsening of occupational disability warranting an award of total occupational disability. We agree with the Workers' Compensation Board that the Administrative Law Judge's finding was not supported by substantial evidence. Hence, we affirm.

In an opinion and award rendered in 1995, an Administrative Law Judge ("ALJ") found Larry Smith to be 65% occupationally disabled due to work-related cervical injuries he sustained on December 31, 1992 and January 26, 1993, in his employment with Battle Ridge Companies ("Battle Ridge"). The first injury occurred when Smith was driving a drill machine and was jolted as it went over a rock. The second injury occurred when Smith and two co-employees were in the process of lifting a three-hundred-pound drill part into a truck. The award was based on an impairment rating of 10% to 18% and restrictions that precluded him from lifting more than twenty pounds on a frequent basis, working above shoulder level, constantly looking down, or using his left hand for handling or fingering. Smith was born on February 6, 1954, has an eighth grade education, and no vocational training.

On December 11, 2000, Smith filed a motion to reopen, alleging an increase in disability. A hearing on the motion was held on June 18, 2001, in which Smith testified. Smith also submitted the deposition testimony of himself, his wife, Elizabeth Smith, and Dr. James Adams, Smith's treating physician. Battle Ridge presented the medical report of Dr. Robert Goodman, who examined Smith on behalf of Battle Ridge in the original claim and on reopening. Proof from the original claim was also considered in evidence.

On August 2, 2001, the ALJ rendered its opinion and award finding that Smith had suffered an increase in occupational disability and that he was now 100% occupationally disabled. On

appeal to the Workers' Compensation Board ("the Board"), the Board reversed the ALJ, determining that the ALJ's finding of a worsening of occupational disability was not supported by substantial evidence. This petition for review by Smith followed.

Smith argues that the Board erred in adjudging that there was not substantial evidence to support the ALJ's decision. As fact finder, the ALJ has the discretion "to determine the degree of functional disability on the basis of conflicting medical evidence and to translate functional impairment into occupational disability." Kentucky Carbon Corp. v. Dotson, Ky.App., 573 S.W.2d 368, 370 (1978). The ALJ has the sole authority to judge the weight, credibility, and inferences to be drawn from the record. Miller v. East Kentucky Beverage/Pepsico Inc., Ky., 951 S.W.2d 329 (1997). When the party with the burden of proof is successful before the ALJ, the question on appeal is whether there is substantial evidence to support the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Substantial evidence is defined as evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). This Court may reverse the Board only where "it 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." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

Smith's injuries occurred in 1992 and 1993, and the Board ruled in Smith's favor in determining that the pre-1996 version of KRS 342.125 applied as to the standard for reopening.¹ The Court in Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 36 (1991), interpreted that standard as follows:

When a claimant seeks an increase in compensation because of a change in occupational disability in a reopening proceeding, he or she must prove by competent evidence that a significant change in occupational disability in fact exists, and that the disability is the result of the injury or disease which was the subject of the original award.

Since the 1996 version of KRS 342.125 does not apply, there is no requirement that the change in occupational disability be shown by objective medical evidence.

Smith has not worked since his injury in 1993. At his original hearing in 1994, Smith testified that he had constant pain in his neck and shoulders that went up his neck, down his arms and back and into his legs. He stated that he spent his days walking, sitting, and lying down and that he could drive no more than 18 miles because of pain in his legs, arms, and back.

On reopening, Smith complained of pain in his arms, back, and constant pain in his shoulders. Smith testified that his pain had worsened because he now had pain in both legs, down his hips, and into both arms and his neck was stiffer. He further testified that he spends his time walking around and sitting watching television. He admitted that he is still able to drive 18 miles.

¹Battle Ridge did not appeal this ruling.

Elizabeth Smith testified that her husband complains more of pain and wakes up more often at night than he did at the time of the original award. She also confirmed that he is still able to drive.

Dr. Adams reported that Smith's condition had worsened since the original award and that his functional impairment rating was now 75%. However, Dr. Adams conceded that this rating was not made in accordance with the AMA Guidelines. Dr. Adams testified that Smith's pain was not better and opined that it was probably worse. When asked about Smith's functional limitations, Dr. Adams stated that they had not changed since 1995. Dr. Adams testified that in his view, Smith was totally incapacitated at the time of the original award and that he remained about the same. Dr. Adams's treatment of Smith at the time of reopening was the same as in 1993, except for changes in some of Smith's medications to newer drugs.

Dr. Goodman indicated in his report that when he examined Smith in 2001, his condition was the same as in 1993 except for some slight loss of range of motion in the lumbar spine. Dr. Goodman noted that his diagnosis and cervical spine range of motion remained identical. He assessed a 25% impairment rating to Smith's body as a whole due to the cervical spine in 2001, compared to a 10% impairment rating he assessed in 1993. Dr. Goodman explained in his report that the change in impairment rating was due solely to application of the Fifth Edition of the AMA Guidelines in 2001, whereas in 1993 the Third Edition of the Guidelines was used. Finally, Dr. Goodman stated that in

reviewing his reports, the original award, and the report of Dr. Phillip Tibbs, the neurosurgeon who performed the discectomy and cervical fusion on Smith, he was "unable to document any objective change in condition or restrictions."

Although Smith maintained that his pain had worsened, by his own admission he was able to engage in the same level of activity as in 1993 - sitting, walking, and driving relatively short distances. Likewise, his treatment and functional limitations imposed by Dr. Adams remained the same as in 1993. Although Dr. Adams opined that Smith's functional impairment rating had increased to 75%, that rating was not based on the AMA Guidelines. Dr. Goodman reported that Smith's condition was essentially the same as in 1993 and specifically noted that he could not document any objective change. Further, the impairment rating he assessed for 2001 would have been the same as in 1993, but for the application of the more recent edition of the AMA Guidelines.

From the above evidence, we cannot say the Board committed flagrant error in assessing the evidence. See Western Baptist Hospital, 827 S.W.2d at 687-688. The ALJ's finding of a worsening of occupational disability was simply not supported by substantial evidence. While Smith and his wife testified that he experienced more pain now and that he woke up more frequently in the night, those subjective complaints alone do not translate into any increase in occupational disability.

For the reasons stated above, the decision of the Workers' Compensation Board is affirmed.

McANULTY, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FURNISHES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: From my review of this case, I cannot agree with the Board that the ALJ's decision was not adequately founded upon substantial evidence. The ALJ had the best opportunity to evaluate the compelling evidence of worsening of Smith's condition. He apparently believed the direct testimony of Smith over medical reports refuting his claims of increased pain. The ALJ properly exercised his considerable discretion in electing to believe Smith despite conflicting medical evidence. Therefore, I would reverse the Board and reinstate the decision of the ALJ in this matter.

BRIEF FOR APPELLANT:

Randy G. Slone
Hindman, Kentucky

BRIEF FOR APPELLEE, BATTLE
RIDGE COMPANIES:

Bonnie Hoskins
Lexington, Kentucky

BRIEF FOR APPELLEE, WORKERS'
COMPENSATION BOARD:

Joel D. Zakem
Frankfort, Kentucky