

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000556-WC

LOUISVILLE FIRE AND BRICK WORKS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-20576

JOHN D. ROAR; DIVISION OF WORKERS'
COMPENSATION FUNDS, SUCCESSOR TO
SPECIAL FUND; DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION FUND

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: Louisville Fire and Brick Works (LF&B) petitions for review from a decision of the Workers' Compensation Board affirming the decision of the Administrative Law Judge (ALJ) that John D. Roar is totally disabled as a result of a May 1995 injury to his back, and determining that, following remand from the initial round of appeals, the ALJ did not violate the law of the case doctrine by assessing a total occupational disability for the injury. We affirm.

On May 8, 1995, Roar injured his lumbar spine in a work accident while lifting a kiln at Louisville Fire and Brick Works. At the time of the incident, Roar felt a sharp pain in his back which radiated down his leg. Later that week, he sought medical treatment and, ultimately, underwent a diskectomy. In December 1995, Roar returned to light-duty work at LF&B.

Subsequent to the accident, Roar developed psychological problems. Mental status examinations revealed that Roar had abnormalities of judgment, insight, and low average intellectual functioning. On March 10, 1997, Roar sustained a heart attack and underwent coronary artery bypass graphing. Roar has not returned to work since that date.

On December 1, 1997, Roar filed an application for resolution of injury claim with the Department of Workers' Claims. In the application, Roar alleged that he sustained a work-related injury to his back and legs on May 8, 1995, and subsequently developed depression. A hearing was held before the ALJ on June 10, 1999. On July 22, 1999, the ALJ entered an opinion and award determining that Roar was suffering a total occupational disability "based solely upon Plaintiff's physical and psychiatric conditions." LF&B subsequently appealed to the Board.

On February 11, 2000, the Board rendered an opinion reversing and remanding the case to the ALJ on the basis that the ALJ had considered Roar's psychiatric condition in his award of benefits. The Board concluded that the ALJ had erred in determining that Roar's psychological condition was related to

his May 8, 1995, injury. However, the Board also determined that the medical evidence presented to the Board did not preclude a finding of total occupational disability absent the effects of his psychological condition. The Board remanded the case to the ALJ for a benefit award determination which excluded consideration of Roar's psychological condition. In response to the Board's ruling, LF&B petitioned, and Roar cross-petitioned, for review by this Court. On April 6, 2001, we rendered an opinion affirming the Board's decision.¹ The case was subsequently remanded back to the ALJ.

On July 23, 2001, the ALJ entered an order which, consistent with the Board's decision, determined that Roar's psychological condition was noncompensable. However, the ALJ determined that Roar was totally occupationally disabled solely as a result of his back injury. On August 30, 2001, the ALJ entered an order denying LF&B's petition for reconsideration. LF&B subsequently appealed to the Board. On February 13, 2002, the Board entered an opinion upholding the ALJ's determination that Roar was 100% occupationally disabled as a result of his back injury alone. LF&B then petitioned for review by this Court.

LF&B contends that the ALJ's determination on remand that Roar was totally disabled solely because of his back injury was a violation of the law of the case doctrine. LF&B alleges that because in his original opinion the ALJ determined that Roar was totally occupationally disabled due to the combination of the

¹See Case No. 2000-CA-000631-WC

back injury and his psychiatric conditions, the subsequent reversal by the Board on the basis that Roar's psychiatric condition was noncompensable necessarily determined that Roar's disability solely as a result of the back injury was something less than total.²

The law of the case doctrine provides that "[w]hen an appellate court decides a question concerning evidence or instructions, the question of law settled by the opinion is final upon a retrial in which the evidence is substantially the same and precludes the reconsideration of the claimed error on a second appeal." Siler v. Williford, Ky., 375 S.W.2d 262, 263 (1964); H.R. ex rel. Taylor v. Revlett, Ky. App., 998 S.W.2d 778, 780 (1999). The court to which the case is remanded is without power to entertain objections or make modifications in the appellate court decision. City of Lexington v. Garner, Ky., 329 S.W.2d 54, 55 (1959); E'town Shopping Center, Inc., v. Holbert, Ky., 452 S.W.2d 396, 397 (1970). Questions decided by the Board, unless reversed by a higher tribunal, establish the law of the case as to further proceedings before the ALJ. See Whittaker v. Morgan, Ky., 52 S.W.3d 567, 569-570 (2001).

We are persuaded that neither the Board's decision of February 11, 2000, nor this Court's opinion of April 6, 2001, affirming the Board precluded a finding by the ALJ on remand that Roar suffered a total permanent disability solely as a result of his May 8, 1995 back injury. To the contrary, we construe the

²LF&B does not suggest a proposed occupational disability assessment.

two decisions as having not placed a limitation on the ALJ's deliberations on remand.

One of the issues in the initial round of appeals was whether Roar's returning to light duty work precluded a finding by the ALJ of total occupational disability. In its February 11, 2000 opinion, the Board stated as follows:

Given the evidence in the instant case, we do not believe the fact that Roar returned to work at light duty for over a year precludes a finding of total disability due to the May 1995 injury. We note that Roar testified that his back condition continued to worsen while he was working. Roar also testified that he did not feel he could return to his regular job or any work he has done in the past because of his back condition. The claimant's own testimony can be evidence of probative value in making a determination of occupational disability. (Citation omitted). Given these facts, we do not find that the fact that Roar returned to work for a period of time precludes a finding of total occupational disability. (Emphasis added.)

The Board, however, determined that the ALJ erred in considering Roar's psychological condition in his analysis of Roar's occupational disability because the medical evidence reflected that, at best, Roar's psychological condition may be related to his low back injury. In reversing the ALJ, the Board stated

Although it may have been possible for the ALJ to have made a valid finding of total occupational disability based solely upon Roar's physical problems, we believe it was error for the ALJ to include Roar's psychological condition in assessing the extent and duration of his disability. (Emphasis added.)

In our April 6, 2001, opinion, we affirmed the Board, citing portions of the same language quoted above. There is

nothing in this Court's opinion which would have mandated that, on remand, the ALJ determine that the work injuries to Roar's back resulted in something less than a total occupational disability.

The initial round of appeals determined as the law of the case that Roar's psychological condition was not work-related. However, those appeals did not decide that the work-injuries alone could not support an award of a total occupational disability. We reject LF&B's interpretation that the opinions precluded a finding of total disability on remand. To the contrary, the opinions in the initial appeals explicitly left open this possibility, and, if anything, it was the law of the case on remand that it was permissible for the ALJ to assess a total disability based solely on the work-related accident.

We further adopt the following language of the Board's February 13, 2002, opinion:

[W]e believe that ALJ Smith acted properly in issuing his orders of July 23, 2001 and August 30, 2001. By revisiting Roar's claim on remand as to the extent and duration of disability caused solely by the effects of his physiological injuries, the ALJ was simply following the directives established by both [the] Board and the Court of Appeals. The ALJ also properly excluded any disability potentially resulting from the respondent's alleged secondary psychological overlay.

Consequently, we find nothing inconsistent with regards to the "law of the case" doctrine in the ALJ's application of his instructions on remand. As was within his authority as fact-finder, after further deliberation and review, the ALJ remained persuaded that Roar suffers from total and permanent occupational disability as a result of his back condition alone. In that there is substantial evidence of record to support

the determinations made by ALJ Smith in completing this process, as a matter of law, we affirm. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986); Hush v. Abrams, Ky., 584 S.W.2d 48 (1979).

As the Board has not overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice, we affirm. Western Baptist Hospital. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

ALL CONCUR.

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