

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000968-WC

SIDNEY COAL COMPANY

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-00-85213

CHARLES FINLEY; HON. DONALD G.
SMITH, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUDGEL, JOHNSON AND McANULTY, JUDGES.

JOHNSON, JUDGE: Sidney Coal Company has petitioned this Court for review of the Workers' Compensation Board's opinion affirming in part, reversing in part and remanding the Administrative Law Judge's opinion and award. Specifically, Sidney Coal is appealing the Board's holding that the ALJ, pursuant to KRS¹ 342.730(1)(c)(1), properly enhanced Charles Finley's award for his leg injury by the multiplier of three.² Having concluded

¹Kentucky Revised Statutes.

²In this appeal, Sidney Coal only contests the ALJ's
(continued...)

that 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.

Finley is currently a 43 year-old resident of Belfry, Kentucky. He completed high school, but has no specialized or vocational job training. Finley's work history consists primarily of employment in the coal mining industry. In 1996 he was certified as a mine foreman. Finley began his employment with Sidney Coal in August 1999 first as a roof bolter and then as a section foreman.

From 1995 to 2000, Finley injured his back three times while working in the coal mining industry. None of these prior back injuries were severe enough for Finley to receive any type of benefits. On April 3, 2000, during the course and scope of his employment with Sidney Coal, Finley re-injured his back while lifting a roof bolt. Sidney Coal immediately placed Finley on light duty until he was taken off work on April 25, 2002. Finley received temporary total disability benefits from April 25, 2000, until he was released to return to full duty on June 18, 2000.

On September 14, 2000, while carrying coal samples at Sidney Coal's Peg Branch mine, Finley slipped on some rock, resulting in a broken left leg. He was immediately transported to the emergency room of a local hospital where his left leg and

²(...continued)
application of the three multiplier concerning Finley's leg injury. The portion of the Board's opinion reversing Finley's claim for additional fact-finding concerning the ALJ's application of the .5 modifier pursuant to KRS 342.730(1)(c)(2) was not brought before us by any party herein.

ankle were placed in a cast for six weeks. Finley received temporary total disability benefits from September 14, 2000, to January 3, 2001. Thereafter, Finley attempted to return to his employment with Sidney Coal, but was informed that he had been replaced. At no time after January 3, 2001, did Sidney Coal re-employ Finley.

In April 2001 Finley became employed by J.H. Taylor Mining Company. The next month, however, he was laid off. Finley obtained unemployment benefits for 26 weeks until recalled by this employer. Finley, citing the effects of his back and leg injuries sustained during his employment with Sidney Coal, refused to return to his employment with J.H. Taylor Mining Company.

On June 5, 2001, Finley filed a workers' compensation claim. In his application, Finley initially alleged that he was entitled to disability benefits as a result of his April and September 2000 injuries only. During the litigation of his claim, however, Finley amended his application to include a September 1999 back injury.

ALJ Smith was assigned Finley's claim for final adjudication. In addition to Finley's testimony at the hearing and by deposition, evidence submitted for the ALJ's consideration consisted of medical records and reports from Dr. Joseph Rapier, Jr., Dr. John Iaquinto, Dr. Designu Raja³, Dr. Timothy Wagner and Dr. Daniel Primm. The ALJ also received a vocational evaluation

³Dr. Raja was Finley's treating physician with regard to the left ankle fracture. Dr. Raja's medical records as included in the record were handwritten and illegible.

report submitted by Dr. Ralph Crystal. Dr. Crystal also testified by deposition.

Dr. Rapier performed an independent medical examination of Finley on April 17, 2001. During this examination, Dr. Rapier interpreted x-rays of Finley's leg and ankle as showing a non-displaced spiral fracture of the distal fibula in good position and alignment. The x-rays also showed that the fracture had completely healed. Dr. Rapier's review of x-rays, taken April 2, 2000, of Finley's lumbar spine showed the vertebral bodies and appendages to be intact and in normal alignment. Some mild degenerative changes of the spine were present, manifested mostly by vertebral body spurring. Dr. Rapier's physical examination further revealed Finley had mild muscle spasms in his lumbar spine, a 3/4 inch atrophy of the left calf and a 1/4 inch atrophy of the left thigh.

Based upon his overall examination, Dr. Rapier diagnosed Finley as suffering from a history of multiple strains to his back, aggravating pre-existing dormant degenerative changes without radiculopathy, and a sustaining fracture of the distal fibula that has healed. With this diagnosis, Dr. Rapier assessed Finley as suffering from a nine percent whole body impairment based upon the American Medical Association Guidelines. Five percent of this amount was attributed to the back injuries, with four percent attributed to the healed ankle fracture, which produced atrophy in the left calf and thigh. Dr. Finley recommended that Finley be restricted from any lifting in excess of 20 pounds and that Finley not engage in employment

requiring frequent bending, lifting, turning and twisting. Dr. Rapier also opined that Finley was no longer physically capable of returning to work as a coal miner.

Finley's treating physician was Dr. Iaquinto. Dr. Iaquinto diagnosed Finley as suffering from recurrent lumbosacral strain. Dr. Iaquinto interpreted x-rays as showing mild degenerative changes to Finley's spine, with loss of normal lumbar lordosis. Dr. Iaquinto concluded that Finley experienced a complete resolution of his lower back problems and released him to return to work with no restrictions.

Dr. Wagner evaluated Finley on August 16, 2000. From his evaluation, Dr. Wagner diagnosed Finley as suffering from complaints of lower back pain, but he found no evidence of any permanent impairment as a result of Finley's work injuries.

Dr. Primm diagnosed Finley as suffering from a status post healed distal left fibula fracture and lumbar strain superimposed upon early pre-existing degenerative changes. Dr. Primm believed that Finley could return to work and, based only upon Finley's lower back complaints, assessed a functional impairment rating of zero to five percent. In his report, Dr. Primm disagreed with Dr. Rapier's four percent assessment for the left leg and ankle. This disagreement stemmed from Dr. Primm's opinion that atrophy was not a permanent condition. Finally, Dr. Primm indicated that Finley retained the physical capacity to return to his prior employment.

Dr. Crystal, a vocational expert, evaluated Finley on August 31, 2001. In his report and testimony, Dr. Crystal opined

that Finley was physically able to return to the eastern Kentucky work force in a wide variety of jobs.

The ALJ, in an opinion and award rendered on December 20, 2001, found Finley's ankle and low back conditions to be compensable. The ALJ further determined that Finley no longer retained the ability to return to his normal and customary employment in the coal mining industry, thus entitling Finley to the 1.5 modifier under the 1996 version of KRS 342.730(1)(c)(1), with respect to Finley's lower back condition. Further, the ALJ opined that Finley was also entitled to the three modifier as provided in the 2000 version of KRS 342.730(1)(c)(1),⁴ for the ankle injury. In obtaining this result, the ALJ stated as follows:

The Administrative Law Judge must determine the extent and duration of Plaintiff's disability as a result of the work-related back injury, including the computation of such benefits. In doing so, the Administrative Law Judge must first determine whether the Plaintiff retains the physical capacity to return to the type of work performed at the time of the injury. Dr. Rapier placed significant restrictions on the Plaintiff due to the back injury that would prevent him [sic] returning to his past work. Plaintiff's testimony was credible regarding his pain and restrictions. Based on this evidence, the Administrative Law Judge does not believe that Plaintiff could return to his prior work because of the back condition. However, the Administrative Law Judge is not convinced that the Plaintiff is totally disabled at this time. It is noted that Dr. Rapier is the most persuasive doctor

⁴KRS 342.730(1)(c)(1) provides that if an employee, because of an injury, does not retain the physical capacity to return to the type of work undertaken at the time of the injury, the benefit for permanent partial disability as determined by the statutory formula shall be multiplied by three.

to give an impairment rating under the AMA Guides, and therefore Plaintiff is found to have a 5% impairment rating for the back. Therefore it appears that the Plaintiff's benefits would be calculated as follows: \$381.77 [average weekly wage multiplied by two-thirds, but limited to 75% of the state average weekly wage] x 5% [impairment rating] x .75 [factor under KRS 342.730(1)(b)] x 1.5 [multiplier under KRS 342.730(1)(c)(1) when Plaintiff does not retain the physical capacity to return to prior work] = \$21.47. It is noted that Dr. Rapier is also the most persuasive doctor to give an impairment rating under the AMA Guides for the leg, and therefore Plaintiff is found to have a 4% impairment rating. Therefore it appears that the Plaintiff's benefits would be calculated as follows: \$381.77 [average weekly wage multiplied by two-thirds, but limited to 75% of the state average weekly wage] x 4% [impairment rating] x .65% [factor under KRS 342.730(1)(b)] x 3.0 [multiplier under KRS 342.730(1)(c)(1) when Plaintiff does not retain the physical capacity to return to prior work] = \$29.78. Those are the amounts Plaintiff would be entitled to on a weekly basis in this claim.

Sidney Coal filed a petition for reconsideration arguing that the ALJ should not have applied the three multiplier with regard to Finley's ankle injury. The ALJ overruled the petition for reconsideration and clarified his opinion and award as follows:

The Administrative Law Judge continues to find Dr. Rapier to be persuasive. He related that the Plaintiff's condition was due to the injury, from which it is inferred that both the back and leg injuries were involved. Plaintiff's impairment rating was given for both such injuries. Likewise, the restrictions given by Dr. Rapier was [sic] based upon these injuries. Therefore, the Administrative Law Judge does find that the multipliers contained in the opinion and award was [sic] correct.

Sidney Coal appealed the ALJ's adverse ruling on this issue to the Workers' Compensation Board. The Board found the ALJ's ruling that applied the three multiplier to be appropriate and to be supported by substantial evidence in the record. In support of its conclusion, the Board stated:

Dr. Rapier stated that as a result of his injuries, Finley could no longer perform his job duties at Sidney. The ALJ reasonably interpreted Dr. Rapier's finding to mean that the residuals from Finley's left ankle injury, at least in part, contributed to his inability to return to the type of work he was performing on September 14, 2000. We remind Sidney that an Administrative Law Judge is granted broad discretion as a matter of law to make such inferences. Jackson v. General Refractories Co., Ky. 581 S.W.2d 10 (1979).

Sidney Coal now petitions this Court for review on the issue as to whether the award for the leg fracture was improperly enhanced by the multiplier of three, as required by KRS 342.730(1)(c)(1). Sidney Coal argues that the ALJ's decision to apply the multiplier of three to the award for the left leg fracture was not supported by substantial evidence. Particularly, Sidney Coal submits that the three multiplier should be applied only if the residuals of Finley's left leg fracture had, in any way, contributed to Finley's decision to stop working.

In support of its argument, Sidney Coal points to Finley's deposition testimony where Finley stated that he intended to abandon his employment with J. H. Taylor Mining because of his back injury. In fact, the record is devoid of any references to Finley's left leg complaints contributing to his

decision to stop working. Thus, Sidney Coal argues that because Finley failed to specifically point out that his leg fracture contributed to his decision to stop working, the ALJ's enhancement of Finley's award for the left leg fracture was not supported by substantial evidence.

As the fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence.⁵ 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.⁶ Furthermore, the Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact.⁷ And, a finding of fact cannot be disturbed on appeal if there is substantial evidence to support it.⁸ 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.⁹

⁵Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

⁶Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

⁷See KRS 342.285(2).

⁸Jackson, supra at 11.

⁹Bowling v. Natural Resources & Environmental Protection Cabinet, Ky.App., 891 S.W.2d 406, 409 (1994) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). See also Blankenship v. Lloyd Blankenship Coal Co., Inc., Ky., 463 S.W.2d 62 (1970).

This Court's function in reviewing the Board's decision is "to correct the Board only where [we perceive that] 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."¹⁰ Guided by these legal principles, our analysis will focus on whether the ALJ's actions were impermissible, and the affirmance thereof by the Board amounted to an error so flagrant as to cause gross injustice.

As explained by the Board, there was evidence from Dr. Rapier's report to support the ultimate conclusion reached by the ALJ. Dr. Rapier assessed a four percent impairment rating directly attributable to the Finley's ankle injury. This physician also found evidence of atrophy in Finley's left calf and thigh. Dr. Rapier also states in his report that he is aware of the physical requirements of Finley's employment activities and that, due to Finley's medical conditions, Finley no longer retains the physical capacity to return to the coal mining occupation. We believe that this evidence is sufficient to support the ALJ's decision to utilize the three multiplier. Additionally, the ALJ considered the entire record and simply determined that Dr. Rapier's medical report was the most credible evidence concerning Finley's medical condition. The ALJ acted well within his discretion as fact-finder by determining that Finley's inability to return to coal mining was caused by both

¹⁰Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

his back and leg injuries. Therefore, the Board's affirmance of that decision in no way caused an injustice.

Accordingly, the decision by the Board upholding the ALJ's application of the three multiplier with regard to Charles Finley's ankle injury is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

A. Stuart Bennett
Lexington, Kentucky

BRIEF FOR APPELLEE:

Randy G. Clark
Pikeville, Kentucky