

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-001982-WC

WILLIAM BOWLING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-92-49288 AND WC-93-34608

BIG ELK CREEK COAL COMPANY, INC;
HON. JAMES L. KERR, ADMINISTRATIVE LAW
JUDGE; HON. ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BUCKINGHAM, DYCHE AND JOHNSON, JUDGES.

JOHNSON, JUDGE: William Bowling has petitioned this Court for review of a Workers' Compensation Board opinion which affirmed the Administrative Law Judge's opinion and award on his motion to reopen his original award from December 19, 1994. Having concluded that the evidence did not compel a finding by the ALJ that Bowling's injury had worsened since his original award, we affirm.

Bowling injured his back on November 27, 1992, and on March 23, 1993, while lifting bags of powder. Later on August 12, 1993, he injured his back again while moving rock from a bore hold. In February 1994 Bowling filed an application for adjustment of claim with the Board and the parties proceeded to take proof concerning his claim. On December 19, 1994, ALJ Roger D. Riggs found that Bowling had a 50% occupational disability.

On October 3, 2000, Bowling filed a motion to reopen his claim on the grounds that his condition had worsened and he had an increase in occupational disability. The claim was assigned to an ALJ and a hearing was held on February 19, 2001. On April 5, 2001, ALJ James L. Kerr dismissed Bowling's petition to reopen his claim. On August 15, 2001, the Board affirmed ALJ Kerr's decision, and this petition for review followed.

Bowling claims that the ALJ erred by denying his motion to reopen because the evidence in support of an increase in his disability compelled a finding in his favor. The party seeking a modification of an award bears the burden of proof upon reopening;¹ and when the party with the burden of proof is unsuccessful before the ALJ, he must show on appeal that the evidence compelled a finding in his favor.² To be compelling evidence the evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ.³ Bowling must

¹Jude v. Cabbage, Ky., 251 S.W.2d 584, 585 (1952).

²Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

³REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224, 226 (1985).

do more than show that there was substantial evidence that would support a finding in his favor.⁴ If the ALJ's award was supported by substantial evidence, it cannot be held that the evidence compelled a contrary result.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

In his brief, Bowling argues:

In the 1994 award, the ALJ found the evidence of Dr. Muffly to be the most credible. In light of the more credible medical evidence of Drs. Muckenhausen, Sandlin and Keifer [sic], Mr. Bowling's restrictions now greatly surpass those imposed by Dr. Muffly in 1994. Clearly the weight of the more probative and credible evidence compels a finding that Mr. Bowling has suffered a worsening in his condition resulting in total and permanent occupational disability.

We have reviewed the record and the findings of the ALJ and conclude that his findings were supported by substantial evidence and a contrary result is not compelled. In his opinion and order, the ALJ stated:

At issue is whether plaintiff has had an increase in occupational disability. The plaintiff argues that his condition has worsened over the years and he has had [as] a result [an] increase in occupational disability. He cites his own complaints of

⁴Special Fund v. Francis, Ky., 708 S.W.2d 641, 644 (1986).

⁵Id. at 643.

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

pain, need for additional medication, and the reports of Drs. Muckenhausen, Sandlin, and Kieffer. The Administrative Law Judge has considered the testimony of the physicians testifying herein, as well as those who testified before Judge Riggs in the original claim and is not convinced that plaintiff has had a worsening of his condition which has resulted in an increase in occupational disability. The plaintiff himself testified that he has not been able to work since the original hearing and acknowledges that he filed for social security disability in early 1994. Three physicians evaluated the plaintiff in the original claim and upon reopening and the Administrative Law Judge finds the credible medical testimony to be Drs. Goodman and Sheridan and not Dr. Muckenhausen. Plaintiff did not demonstrate objective findings of a worsening of his condition to Dr. Goodman or Dr. Sheridan and the Administrative Law Judge finds their testimony on this issue credible. It appears to the undersigned and the undersigned so finds that the plaintiff has not had an increase in occupational disability since Judge Riggs' [s] decision on December 19, 1994 and his claim upon reopening must be dismissed.

In reviewing the findings of the ALJ, the Board noted that Dr. Muckenhausen's findings were based on a newer edition of the AMA Guides and that her assessment that Bowling's condition had worsened since her 1993 examination was unsupported by objective medical evidence. Dr. Sheridan assessed a 0% impairment under the AMA Guides. Dr. Sheridan thought that Bowling could return to his pre-injury employment. Dr. Goodman also examined Bowling and concluded that there was some loss of subjective range of motion, but he found no change in the objective findings since the 1994 exam. Dr. Goodman concluded that any worsening of Bowling's condition was due to his lack of physical exercise and general inactivity since his original injury rather than an actual worsening of the original injury.

In his brief, Bowling argues that the findings of Drs. Sheridan and Goodman are not credible and that the ALJ's decision was not supported by substantial evidence. However, the ALJ specifically stated that he found the findings of Drs. Sheridan and Goodman to be more credible than the findings of Dr. Muckenhausen. As the Board duly noted, as the finder-of-fact, the ALJ has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence.⁷ We hold that the ALJ's decision was supported by substantial evidence and the evidence did not compel a finding in Bowling's favor.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Edmond Collett
John Hunt Morgan
Monica Rice Smith
Hyden, Kentucky

BRIEF FOR APPELLEE, BIG ELK
CREEK COAL COMPANY:

Ralph D. Carter
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BRIEF FOR APPELLEE, SPECIAL
FUND:

David R. Allen
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⁷Daniel v. Armco Steel Co., L.P., Ky.App., 913 S.W.2d 797, 800 (1995) (citing Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985)).