

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001235-WC

DANA CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-67289

WILLIAM MICHAEL CARTER;
DONALD G. SMITH, ADMINISTRATIVE
LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, BUCKINGHAM AND MILLER, JUDGES.

BARBER, JUDGE: The Appellant, the Dana Corporation ("Dana"), asks us to review the ALJ's calculation of a pre-existing, active impairment in this appeal following remand. The Workers' Compensation Board concluded that the ALJ's calculation was reasonable, based upon the totality of the evidence. We agree and affirm.

On November 27, 2000, the Appellee, William Michael Carter ("Carter") filed a claim with the Kentucky Department of Workers' Claims, alleging a July 20, 1999 "[r]ight elbow, cervical, [and] psychological injury" due to repetitive motion

from his work loading piston rings at Dana.¹ On July 13, 2001, the ALJ rendered an Opinion and Award, finding Carter to have a 33% impairment rating - 8% for the elbow condition and 30% for the psychological condition. Dana appealed to the Board.² On October 31, 2001, the Board rendered an Opinion, affirming in part, reversing in part, and remanding:

Inasmuch as Dr Adams, upon whom the ALJ relied, found a portion of Carter's psychiatric impairment to be preexisting and active, we believe this matter must be remanded to the ALJ for consideration of whether a portion should be found non-compensable due to the pre-existing active Tourette's syndrome or, at a minimum, to provide some reasonable explanation for rejecting such a finding.

On December 14, 2001, the ALJ rendered an Order on remand:

[F]urther findings are necessary with regard to the impairment rating for the Plaintiff's psychiatric condition. The Administrative Law Judge continues to find Dr. Adams to be the most persuasive on this issue. . . . Dr. Adams specifically gave a 25% to 50% impairment for the Plaintiff's psychiatric condition, with 10% to 20% of that number to be considered pre-existing active disability due to turret syndrome [sic]. Since the Plaintiff had a 25% impairment due to the psychological condition, and 10% of that is considered pre-existing active disability, the Plaintiff would only have a 22.5% compensable impairment for the psychiatric condition.

Upon remand, the ALJ reduced the total impairment to 30.5% --8% for the elbow and 22.5% for the psychological

¹The cervical claim was ultimately dismissed on notice.

²Carter cross-appealed; however, the issue raised on cross-appeal is not at issue on this appeal.

condition [25% x 10% pre-existing active = 2.5%; 25% - 2.5% - 22.5%]. Dana filed a petition for reconsideration, contending that there should be a 10-20% active carve-out based upon Dr. Adams' opinion. By order of January 16, 2002, the ALJ denied the petition, because "the report of Dr. Adams indicates that 10-20% of the Plaintiff's 25-50% [psychological] impairment was considered an active condition."

On its second appeal to the Board, Dana argued that the ALJ "was clearly erroneous in his interpretation of Dr. Adams' report." Dana maintained that the ALJ should have subtracted a 10% prior active psychological impairment from the 25% overall psychological impairment, leaving Carter with 15% compensable psychological impairment, not 22.5%. On May 8, 2002, the Board rendered a unanimous opinion affirming the ALJ's decision. The Board explained that Dana had the burden of proof and was unsuccessful on the issue of an active carve-out; therefore, the standard of review on appeal is whether the evidence compelled a different result than reached by the ALJ, citing *Wolf Creek Collieries v. Crum*³ and *Special Fund v. Francis*⁴.

The Board concluded that the ALJ's interpretation of Dr. Adams' Form 107 report was reasonable, in light of the fact that: Section H of the form, dealing with *apportionment*, does not require the percentage to be expressed in terms of the "whole

³Ky. App., 673 S.W.2d 735 (1984).

⁴Ky., 708 S.W.2D 641 (1986).

body," unlike Section I, dealing with *impairment*, which specially requires an *AMA* rating for the whole body. Further, Dr. Adams clearly attempted to minimize the effect of the Tourette's syndrome upon Carter's ability to work. The Board explained that Dana's interpretation of Dr. Adams' report would be inconsistent with the doctor's opinion that Carter was able to work prior to the injury, despite the Tourette's syndrome, and Carter's own testimony to that effect. The Board believed that the evidence fell "far short" of compelling a finding of a greater degree of active psychological disability, than found by the ALJ.

On June 7, 2002, Dana filed a Petition for Review to this Court. Dana attempts to characterize this as a matter of "first impression," involving an erroneous method of calculation. We believe that this is simply a matter of interpretation - that is the ALJ's function, not ours.⁵ KRS 342.290.

According to Section G of Dr. Adams' Form 107, Carter's psychological complaints -that he became depressed, very angry and socially withdrawn -- are caused by his work-related injury.

As noted by the Board, Section F, dealing with "Apportionment," asks the physician to specify the percentage of impairment due to the prior active condition, but does not speak in terms of "whole body impairment." By contrast, Section I, dealing with "Impairment," does ask for the percentage of "whole body

⁵ *Jackson v. General Refractories, Ky.*, 581 S.W.2D 10 (1979)

impairment" using most recent *AMA Guides to Evaluation of Permanent Impairment*. We agree with the Board's analysis and affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Steven D. Goodrum
Lexington, Kentucky

BRIEF FOR APPELLEE, WILLIAM
MICHAEL CARTER:

Michael D. Lindsey
Bowling Green, Kentucky