

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000644-WC

CHARLES CLEARING CONTRACTORS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-92-24202
ACTION NO. WC-92-24206

HANSEL WEBB; SPECIAL FUND;
DONNA TERRY, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: BARBER, HUDDLESTON AND MILLER, JUDGES.

BARBER, JUDGE: The Appellant, Charles Clearing Contractors ("the employer"), seeks review of a Workers' Compensation Board opinion affirming the Administrative Law Judge's award of increased benefits upon reopening. The Board concluded that the Administrative Law Judge (ALJ) had thoroughly analyzed the evidence pertaining to both the original injury and the reopening, and that her decision was based upon substantial evidence. We affirm.

The Appellee, Hansel Webb ("Webb"), originally settled his claim for a June 11, 1990 low back injury and noise-induced hearing loss for 62.5% occupational disability. On December 15, 1992, an ALJ approved the settlement agreement. In 1999, Webb underwent back surgery. On December 8, 2000, Webb filed a motion to reopen, which was granted to the extent that the case was assigned to an ALJ for proof taking and further adjudication

On October 8, 2001, the ALJ rendered an Opinion and Award in the reopening, concluding that the 1992 settlement for 62.5% occupational disability accurately reflected Webb's disability at that time; further, that "[i]n contrast, Mr. Webb is now permanently totally disabled." The ALJ summarized the evidence, including the vocational evaluation of Dr. William Weikel, who stated that "assuming Mr. Webb's credibility, he is 100% disabled from all work." The ALJ relied upon Dr. Rapier, whose report established that Webb's condition had worsened over the years.

The employer appealed to the Board, and argued that the substantial evidence of record did not support the ALJ's finding that the 1992 settlement for 62.5% permanent partial disability accurately reflected Webb's occupational disability at that time. The employer asserted that "there is no possible way ... Webb could not have been deemed permanently and totally occupationally disabled" all along, so his condition could not have worsened. The Board disagreed, and affirmed the ALJ's decision, in a unanimous opinion rendered February 27, 2002.

On March 29, 2002, the employer filed a petition for review in this Court. On appeal, the employer complains that,

instead of addressing the issue of whether Webb was totally disabled when he settled his case in 1992, the Board "continued by rehashing portions of Appellant's argument, ... [and] began to cite case law identifying the burden of proof in proving an increase in occupational disability." The employer repeatedly reminds us that the issue raised is not whether the finding of *increased disability* is supported by substantial evidence; rather, that "an individual cannot become more than 100% occupationally disabled." We do not believe that the Board failed to address the employer's argument -- it simply was not persuaded by it:

We agree with Contractors that Webb's case **at all times** was governed by the factors contained in Osborne v. Johnson,¹ These factors include consideration of claimant's age, education and work experience. While it may be true that Webb's education and work experience have remained static over the years, the ALJ is not restricted to a comparison of those two factors. First, Webb has testified to significantly increased pain and symptomatology in his left leg as well as new pain and symptomatology in his right leg. Additionally, he has testified as to increased restrictions and limitations....

The ALJ was further buttressed in her opinion by the increased impairment rating and restrictions assigned by Dr. Rapier....

The ALJ thoroughly analyzed the entirety of the record and the totality of the evidence, including evidence upon which the original claim was settled....

(Emphasis added).

Further, we note, as did the ALJ, a medical report from Dr. Eugene Q. Parr, filed by notice on May 31, 2001. Dr. Parr

¹ Ky., 432 S.W.2d 800 (1968).

had examined Webb in the original proceeding on December 13, 1991, and assigned a 13% functional impairment, body as a whole, based upon the 3d Edition of the AMA Guidelines. Dr. Parr believed that Webb would benefit from a lumbar discectomy, and that "he would improve significantly from this surgery...." In fact, Dr. Parr saw "no reason why he could not return to his usual and customary work responsibilities as a heavy equipment operator subsequently." Thus, contrary to the employer's assertions, Dr. Parr's 1991 evaluation provides a substantial evidentiary foundation for the ALJ's determination that Webb was not totally and permanently disabled at the time of the original settlement.

We affirm the February 27, 2001 Opinion of the Workers' Compensation Board.

ALL CONCUR.

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