

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000826-WC

HAROLD CLAPPER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-27899 & WC-89-34490

KENTUCKY-WEST VIRGINIA GAS COMPANY;
ROBERT L. WHITTAKER, Director of
SPECIAL FUND; SHEILA C. LOWTHER,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE and HUDDLESTON, JUDGES.

EMBERTON, CHIEF JUDGE: In this appeal from a decision of the Workers' Compensation Board upholding the denial of his motion for increased occupational disability benefits on reopening, appellant Harold Clapper advances three arguments for reversal: (1) whether the Chief Administrative Law Judge utilized the wrong statutory standard in evaluating his claim; (2) whether the CALJ ignored uncontroverted medical and vocational evidence; and (3) whether the CALJ failed to address the issue of pain. We affirm.

Clapper sustained his first work-related injury in 1989 when he was struck in the head by a steel post, injuring his neck. He was subsequently awarded benefits for a 15% permanent partial disability due to that injury. Clapper suffered a second work-related injury in 1994 in which he injured his low back while pulling on a piece of pipe. In his claim for benefits relating to the latter incident, Clapper also alleged development of a secondary psychological overlay. By opinion and award rendered December 23, 1996, the ALJ determined that Clapper had sustained an additional 60% permanent partial disability by reason of the 1994 injury. As part of this award, Clapper was granted vocational rehabilitation benefits under KRS¹ 342.710.

On December 11, 2000, Clapper moved to reopen his 1989 and 1994 claims, alleging a worsening of both his neck and low back conditions. After a hearing, and considering evidence submitted by deposition, reports, and records, the CALJ denied Clapper's claim on the basis that there did not appear to be any change in his occupational disability since the previous litigation. In reaching this conclusion, the CALJ undertook a thorough and well-reasoned examination of the evidence and the law, noting in particular that there has been no significant change in the nature of his conservative medical treatment and psychological counseling.

In upholding the decision of the CALJ, the Board characterized Clapper's arguments as merely an attempt to reargue the case he presented to the CALJ. Citing Paramount Foods, Inc.

¹ Kentucky Revised Statutes.

v. Burkhardt,² the Board rejected any attempt to have it substitute its judgment as to the weight of the evidence for that of the CALJ. Because Clapper failed in his burden of persuading the CALJ of a change in his occupational disability since his previous awards, he bears the additional burden on appeal of demonstrating that the evidence before the CALJ was so overwhelming that it compelled a finding in his favor. Wolf Creek Collieries v. Crum.³ Thus, he cannot prevail by merely demonstrating that the evidence would have supported a contrary result.⁴ Importantly, the role of this court in reviewing opinions of the Board is limited to a determination of whether the Board has "overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice."⁵ We find no such error by the Board in this case.

First, like the Board, we find nothing to suggest that the CALJ applied an inappropriate standard to Clapper's claim of increased occupational disability. The Board correctly observed that certain basic principles obtain in reopening proceedings regardless of the date of injury. It is not enough that Clapper demonstrate some change in his physical condition; he must also demonstrate that those changes resulted in increased occupational

² Ky., 695 S.W.2d 418 (1985).

³ Ky. App., 673 S.W.2d 735 (1984).

⁴ McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1975).

⁵ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

disability. Despite evidence of physical changes, the proof disclosed that Clapper's treating physician's most recent restrictions are substantially the same as he recommended in 1996. It is very well-settled that the ALJ has broad discretion in analyzing the evidence and in drawing reasonable inferences therefrom, as well as in translating that evidence into the overall vocational effects on the claimant.⁶ There is no abuse of that discretion evident in this case.

Next, as to the alleged failure to accept uncontradicted vocational testimony, it is clear that an ALJ is not required to accept such testimony, even if unrefuted.⁷ Nor is there any merit to the contention that the CALJ ignored testimony as to pain. Although Clapper's complaints as to increased pain are addressed by the opinion and award of the CALJ, such testimony alone does not compel any particular result.

Finding no evidence that the Board overlooked or misconstrued the law or committed flagrant errors in assessing the facts, we affirm its opinion in this case.

ALL CONCUR.

BRIEF FOR APPELLANT:

James D. Holliday
Hazard, Kentucky

BRIEF FOR APPELLEE KENTUCKY
WEST VIRGINIA GAS COMPANY:

Kenneth Williams, Jr.
Scott Sennett
HANBURY, WILLIAMS, HALL &
LATHEROW, P.S.C
Ashland, Kentucky

⁶ Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976).

⁷ Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985).

BRIEF ON BEHALF OF APPELLEE
ROBERT L. WHITTAKER, DIRECTOR,
WORKERS' COMPENSATION FUNDS:

Joel D. Zakem
Frankfort, Kentucky