RENDERED: DECEMBER 27, 2002; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000849-WC

PAUL E. DAVIDSON, II — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-93-01043 & WC-94-34226

WHITAKER COAL CORPORATION; SHEILA C. LOWTHER, Chief Administrative Law Judge; ROBERT L. WHITTAKER, Director of WORKERS' COMPENSATION FUNDS, Successor to SPECIAL FUND; and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS and DYCHE, Judges; and, JOHN WOODS POTTER[1], Special Judge.

COMBS, JUDGE: Paul E. Davidson, II, petitions for review of an opinion of April 3, 2002, of the Workers' Compensation Board, which affirmed the opinion of the Chief Administrative Law Judge (CALJ) dismissing the motion to reopen his award. On appeal, Davidson contends that the CALJ ignored uncontradicted testimony

[1]Senior Status Judge, John Woods Potter, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

and erred in failing to find him to be totally occupationally disabled. Our review of the record reveals that the Board did not err in holding that the evidence before the CALJ did not compel a finding of an increase in the amount of Davidson's occupational disability award. Thus, we affirm.

Davidson sustained an injury to his lower back on April 21, 1994, while operating a rock truck for the appellee, Whitaker Coal Corporation (Whitaker). The seat of the truck malfunctioned, causing Davidson to strike his head on the roof of the cab and pinning his legs under the steering wheel. On November 26, 1996, Davidson was awarded workers' compensation benefits based on a 50% permanent occupational disability. Davidson was only twenty-eight years of age at the time of the award and had successfully completed training in welding, computers, and heavy equipment. Based on these factors, the ALJ provided that Davidson be referred to the Department of Vocational Rehabilitation for an evaluation at Whitaker's expense. For reasons not entirely clear from the record, Davidson did not obtain that evaluation until 2001 -- after he had moved to reopen his claim.

On December 11, 2000, Davidson filed a motion to reopen his award on the grounds that his physical condition had worsened and that his pain had increased. In support of his motion, he submitted the deposition testimony of Dr. Jeffrey Prater and an independent medical evaluation from Dr. James Templin. Dr. Prater testified that Davidson's pain had increased since 1996 and that he could not return to the same type of work he had been

performing at the time of the injury. Dr. Templin, who testified in the original proceeding and had then assigned a 10% functional impairment, reported that Davidson's subjective complaints were greater and assigned an 11% functional impairment rating on reopening. The record also contains the deposition of Dr. Timothy Lee Sexton, a chiropractor who treated Davidson, and the vocational rehabilitation assessment, which indicated that Davidson's reading and math levels (1st and 2nd grade, respectively) were far below his actual 9th grade formal education.

The CALJ did not agree that Davidson's occupational disability had changed since the original award and found that he failed to sustain his burden of proof. The CALJ summarized the evidence and concluded as follows:

> [T]he ALJ finds [Davidson's] own testimony to be the most compelling evidence. Mr. Davidson testified in the original proceeding that he could not return to any gainful employment. At no time since the injury has he made any effort to obtain a job. His vocational evaluation shows a marked inconsistency between his formal education and his test results. It also indicates that he had no serious interests. Essentially, [Davidson] is arguing that although he always considered himself to be totally disabled, his subjective complaints are now worse. The ALJ is not persuaded that this meets his burden of proof. In Central City v. Anderson, Ky.App., 521 S.W.2d 246 (1975), the Court indicated that on reopening, an additional award was not justified where there was no showing that [sic] was a greater burden on the employment market now than at the time of the original award. The ALJ believes that this is the case with Mr. Davidson. Therefore, this reopening is hereby dismissed.

In its review, the Board thoroughly analyzed the evidence presented to the CALJ. As we have no basis to depart from the meticulous reasoning of that opinion, we adopt the following portion of the Board's opinion as our own:

> On appeal, Davidson first argues the CALJ used the wrong standard in determining whether or not a change of occupational disability had taken place. Davidson contends the CALJ focused on change of condition instead of change in occupational disability. He argues the CALJ essentially looked at the case backwards beginning with his condition in 1996 and working forward. He contends the CALJ should have looked at his condition in 2001 and worked backwards. Davidson believes the CALJ has, in effect, changed the 50% occupational disability rendered in 1996 to a 100% occupational disability.
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> Next, Davidson argues that there is on [sic] evidence to overcome the proposition that he is 100% occupationally disabled. While the CALJ has wide discretion in choosing which evidence to rely upon, she must follow uncontradicted medical evidence. Davidson believes the CALJ has "gone behind" the physicians' testimony and second-guessed their opinion.
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> Finally, Davidson argues the CALJ failed to make any findings of fact regarding his pain. He contends it is uncontradicted that he was suffering from severe pain.
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> For Davidson's injury, the statute provided that an award may be reopened upon a showing of a change in occupational disability. That change in occupational disability may be supported by evidence of both physical changes and economic changes when those economic changes are not brought on by the willful intent of the employee not by mere changes in economic conditions, such as recession or plant closing. The claimant moving for reopening has the burden of showing that the decrease of wage earning capacity, whether the result of physical

deterioration or subsequent unemployability without a physical change, is due to the effects of the injury in order for an award to be increased. Peabody Coal Company vs. Gossett, Ky., 819 SW2d 33 (1991). Since Davidson had the burden of proof before the CALJ, and was unsuccessful, the question on appeal is whether the evidence compelled a different result. Wolf Creek Collieries vs. Crum, Ky.App., 673 SW2d 735 (1984). Compelling evidence is defined as evidence that is so overwhelming that no reasonable person could reach the same conclusion as the CALJ. Reo Mechanical vs. Barnes, Ky.App., 691 SW2d 224 (1985). It is not enough for Davidson to show there is merely some evidence that would support a contrary conclusion. McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974). The CALJ, as fact finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc., vs. Burkhardt, Ky., 595 SW2d 418 (1985). This Board may not substitute its judgment for that of the CALJ on matters involving the weight to be accorded the evidence in questions of fact. KRS[2] 342.285(2).

We are of the opinion the CALJ applied the correct standard. In this case, Davidson offered no basis for the reopening other than an alleged change in his physical condition and resulting increase in pain. The evidence, as summarized above, indicates essentially the same diagnosis and the same type of complaints at the time the claim was originally decided at on reopening. The claim turns upon Davidson's own testimony that his pain in now worse. The CALJ is free to assign little credibility to self-serving testimony. Paramount Foods vs. Burkhardt, supra. Here, it is evident that the CALJ did not find Davidson's testimony that he was unable to work any more credible now than he believed himself to be totally disabled at that time. The CALJ clearly considered the evidence in light of an occupational disability standard and did not believe Davidson's evidence was sufficient to establish he was a greater burden on the

[2]Kentucky Revised Statutes.

> employment market now than at the time of the original Award.
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> We do not believe the CALJ erred in not relying on Dr. Prater's opinion that Davidson's condition was worse. Where a physician's opinion is based upon the history and complaints provided by a patient, the history and complaints are not necessarily entitled to any greater weight simply because they have been provided to the physician. If the fact finder does not find the claimant's testimony regarding pain to be credible, she may disregard the physicians' opinions based upon that same testimony. If the history given to a physician is sufficiently impeached, the CALJ need not follow that doctor's medical opinion even if uncontradicted. Osborne vs. Pepsi Cola, Ky., 816 SW2d 643 (1991).
>
> Finally, in this instance, we do not believe it was necessary for the CALJ to make a specific finding of fact regarding Davidson's pain. The CALJ was clearly aware of Davidson's testimony regarding his pain but was not convinced by that testimony. In our opinion, the evidence presented falls far short of compelling a finding in Davidson's favor.

In his appellate brief, Davidson is quite candid and does not allege any error in the Board's reasoning nor does he challenge any of the legal authorities cited by the Board. His brief is nearly identical to the one he filed before the Board and assigns the same instances of error allegedly committed by the CALJ. He highlights the evidence which he believes reveals an arbitrary decision by the CALJ and argues that the injury of 1994 has left him totally and permanently disabled.

Our role is to determine whether "the Board has overlooked or misconstrued controlling statutes or precedent, or committed error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827

S.W.2d 685, 687-88 (1992). In reviewing the record under the dictates of that rather strict standard, we observe that Davidson has not worked nor attempted to work since his 1994 injury; he has been drawing Social Security Disability prior to and since the date of the original award. While the evidence indeed could support a finding that Davidson will never return to the work force, the evidence is conflicting and — in the words of the Board — falls "far short" of compelling a conclusion that his degree of occupational disability has changed. A comparison of the work restrictions placed on Davidson by Dr. Templin — both before the original award and again upon reopening -- reveals no change. Dr. Templin's increase of 1% in the impairment rating on reopening also supports the finding that Davidson's occupational disability has not changed significantly. In 1995, Dr. Templin stated:

> Mr. Davidson is unable to set [sic] for any extended period of time or ride in or on vibratory vehicles. He is also unable to lift items weighing greater than 20 pounds or carry same for any extended distance or prolonged time. Additionally, he is unable to do any repetitive bending, stooping, crouching, kneeling, walking, standing, or climbing.

In 2001, Dr. Templin reported the following restrictions:

> Mr. Davidson is unable to stand and walk for periods greater than 20 to 30 minutes at one time or 2 hours per 8 hour timeframe. He is unable to sit for periods greater than 1 hour at one time or 4 to 5 hours per 8 hour timeframe. He is unable to lift items weighing greater than 20 pounds from waist level with no repetitive or frequent lifting of items weighing from floor level. He is unable to be put in an environment where he is required to do frequent bending, stooping, kneeling, squatting, crouching, climbing, for

> periods greater than 30 minutes per 8 hours timeframe. He is unable to repetitively operate foot controls and should avoid working in cold, damp environments. He is unable to ride in or on vibratory vehicles for any extended distance or time.

There is no doubt that Mr. Davidson is plagued with great pain, that his employment limitations remain severe, and that his prospects of future employment are grim. Despite the fact that we may have found differently had we been filling the role of the CALJ or the Board, we are carefully circumscribed by the standard of Western Baptist, supra. We cannot find any clear error or gross departure from precedent in the Board's assessment of the evidence as being less than compelling.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

James D. Holliday
Hazard, Kentucky

BRIEF FOR APPELLEE WHITAKER COAL CORPORATION:

Charles W. Berger
Harlan, Kentucky

BRIEF FOR APPELLEE WORKERS' COMPENSATION FUND:

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