

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000998-WC

ANDY VANOVER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-85-21717; WC-90-37727
& WC-93-30395

WHITAKER COAL CORPORATION;
WORKERS' COMPENSATION FUNDS;
SHEILA C. LOWTHER, Administrative
Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, CHIEF JUDGE; SCHRODER and TACKETT, JUDGES.

EMBERTON, CHIEF JUDGE: Three arguments are advanced in this appeal from an opinion of the Workers' Compensation Board upholding the denial of increased occupational disability benefits on reopening: (1) whether the Chief Administrative Law Judge utilized the wrong statutory standard in evaluating the claimant's case; (2) whether the CALJ ignored uncontroverted evidence; and (3) whether the CALJ failed to address the issue of pain. We affirm.

After sustaining a low back injury in 1985 while employed by appellee Whitaker Coal Company, the claimant Andy Vanover underwent a diskectomy at the L5/S1 level and was released to return to work. He subsequently settled his claim related to this injury based upon a 10% occupational disability. Vanover suffered a second injury in 1990 when he was struck in the head by falling rock. His neck injury was treated conservatively for a number of months but eventually required a cervical laminectomy and fusion. Vanover never returned to work after the 1992 surgery. In 1995, Vanover received an award of benefits for a 60% occupational disability related to the neck injury and the CALJ determined that the 1985 injury had in fact produced a 10% occupational disability. The Board thereafter affirmed the CALJ's finding of a 70% occupational disability.

In December 2000, Vanover moved to reopen his claim alleging that his physical condition had significantly worsened and that his pain had significantly increased. After reviewing all of the evidence, the CALJ concluded that Vanover failed to sustain his burden of proof in that the testimony as to his condition was essentially the same as it was in 1995 and that his complaints to his treating physician had remained essentially unchanged since that time. This appeal is the product of the Board's affirmance of the decision of the CALJ.

As a preliminary matter, we note that where the party who has the burden of proof is unsuccessful before the ALJ, the

issue becomes whether the evidence compels a different result.¹ Thus, in this case, Vanover cannot prevail by merely demonstrating that the evidence would support a contrary conclusion.² Furthermore, our role 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."³ No such error has been committed in this case.

The Board correctly observed that the CALJ did not apply the 1996 standards to Vanover's case. Rather, in weighing the medical evidence, she noted that Dr. Templin's opinion was not based on diagnostic studies or other objective evidence. We find this to be an entirely appropriate method of assessing the credibility of opinion evidence. Next, contrary to Vanover's assertion, the CALJ explained her reasons for discounting the testimony of Drs. Templin and Chaney. Dr. Chaney admitted that there was no objective evidence of a change and that his opinion was based on Vanover's subjective complaints which the CALJ found to be essentially the same as in 1995. Finally, a reading of the opinion and award dispels Vanover's contention that the CALJ failed to consider his complaints of pain.

¹ Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

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

³ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

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

ALL CONCUR.

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