

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2002-CA-001088-WC

BOYD SIZEMORE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NOS. WC-93-51569 & WC-95-39084

DIVISION OF WORKERS' COMPENSATION FUNDS  
(SUCCESSOR TO SPECIAL FUND);  
HON. RONALD JOHNSON,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: JOHNSON, KNOPF, AND MILLER, JUDGES.

KNOPF, JUDGE: Boyd Sizemore appeals from an opinion and order by the Workers' Compensation Board (Board) which affirmed an order by the Administrative Law Judge (ALJ) dismissing his motion to reopen against the Special Fund.<sup>1</sup> Although there was conflicting evidence, we agree with the Board that the ALJ's determination was supported by substantial evidence and should not be disturbed. Hence, we affirm.

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<sup>1</sup> The Division of Workers' Compensation Funds has been substituted as successor to the Special Fund. In the interest of consistency, we will continue to refer to it as the Special Fund.

In 1995, Sizemore filed a workers' compensation claim, alleging that he had injured his back in the course of his employment with Leeco Coal Company. That claim resulted in an opinion and award entered on April 3, 1997, giving Sizemore a fifty percent permanent partial disability award. On September 20, 1999, Sizemore attempted to reopen his claim, alleging that his occupational disability had increased. Sizemore and Leeco entered into an agreement settling the claim on reopening. However, the reopening against the Special Fund was denied on March 30, 2000.

Sizemore filed his second motion to reopen against the Special Fund on April 2, 2001. In support of his motion, Sizemore introduced evidence from his treating physician, Dr. Stephen Spady, and from Dr. Christa Muckenhausen, who examined Sizemore in March of 2001 and in June of 1999. Both physicians expressed the opinion that Sizemore's functional impairment had increased since March 30, 2000. Sizemore also testified that the pain from his condition had increased since the prior reopening was denied.

In response, the Special Fund submitted evidence from Dr. Daniel Primm, who examined Sizemore in July of 2001. Dr. Primm expressed the opinion that Sizemore's impairment had not progressed, and that Sizemore had shown signs of symptom magnification. Based on the report of Dr. Primm and a comparison of Dr. Muckenhausen's reports of 1999 and 2001, the ALJ found that Sizemore did not have a worsening of his condition since March of 2000 that caused him to have any increase in

occupational disability. The ALJ also found unconvincing Sizemore's testimony as to his increased pain and occupational disability. Accordingly, the ALJ denied his motion to reopen. In a 2-1 opinion, the Board affirmed the ALJ's determination. Board member Stanley dissented without a separate opinion. This appeal followed.

Sizemore argues that the ALJ's finding was not supported by substantial evidence in the record and is therefore clearly erroneous. He contends that the evidence overwhelmingly compels a finding that he has suffered a worsening of his condition and that he is now totally disabled. Reluctantly, we disagree.

Certain basic principles exist in a reopening. First, the burden of proof falls upon the party seeking reopening.<sup>2</sup> Sizemore had the burden to prove not only a deterioration of his medical condition, but also some occupational transformation in his condition.<sup>3</sup> In ascertaining whether there has been a change, it was the ALJ's obligation to analyze not only the evidence presented at the time of reopening, but also that which was considered in the original claim.<sup>4</sup>

Where the decision of the fact-finder is against the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence was so overwhelming

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<sup>2</sup> Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972); Griffith v. Blair, Ky., 430 S.W.2d 337 (1968); Jude v. Cabbage, Ky., 251 S.W.2d 584 (1952).

<sup>3</sup> See KRS 342.125(1).

<sup>4</sup> W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946).

it compelled a finding in his favor and that no reasonable person could have failed to be persuaded by it.<sup>5</sup> As fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence.<sup>6</sup> The fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof.<sup>7</sup> Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal.<sup>8</sup> To obtain relief from the decision of the ALJ, the claimant must show that there was no substantial evidence of probative value to support the decision.<sup>9</sup>

Moreover, the function of further review of the Board in this Court is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.<sup>10</sup> We agree with Sizemore that there was substantial evidence which would

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<sup>5</sup> Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675 (1998).

<sup>6</sup> Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334 (1995).

<sup>7</sup> Magic Coal v. Fox, Ky., 19 S.W.3d 88 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999); Hall's Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000).

<sup>8</sup> Whittaker v. Rowland, *supra*, n. 9, at 482.

<sup>9</sup> Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

<sup>10</sup> Western Baptist Hospital. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

have supported a finding that he had suffered an increase in his occupational disability since March of 2001. A different ALJ could reasonably reach that conclusion based upon the same evidence. However, we must agree with the Board that the evidence did not compel that conclusion. Consequently, we cannot find that the ALJ's decision to deny Sizemore's motion to reopen was clearly erroneous.

Accordingly, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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