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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002452-WC

PHOENIX METAL TECHNOLOGIES — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 99-WC-60365

DAVID STEWART; HON. DONNA TERRY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, HUDDLESTON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Phoenix Metal Technologies (Phoenix) petitions for review of a decision of the Workers' Compensation Board which affirmed the decision of an Administrative Law Judge (ALJ). The ALJ found that David Stewart (Stewart) was entitled to permanent and total disability benefits because of injuries sustained during the course of his employment. We affirm.

Stewart was employed by Phoenix as a machine set-up and maintenance worker. Stewart's employment consisted of

repairing and maintaining various industrial machines. His duties required significant amounts of bending, stooping, climbing, lifting, and crawling over and under machines.

On October 6, 1999, while Stewart was repairing a wire bender machine, the hydraulic hose on another machine burst. This malfunction caused hydraulic fluid to be sprayed around the work area. While approaching this machine to repair the broken hose, Stewart slipped on hydraulic fluid and struck his lower back against the floor. Stewart timely reported this injury and sought treatment from a local urgent treatment center. The physician on duty prescribed medication and physical therapy to treat the injuries to Stewart's back. Stewart was also excused from his employment with Phoenix. He has not worked since sustaining this injury.

When Stewart's back condition failed to improve, he was referred to Dr. William Brooks, a neurosurgeon. Dr. Brooks prescribed pain and anti-inflammatory medication and eventually performed an interbody lumbar fusion at L5-S1 on March 3, 2000. After surgery, Stewart developed a serious staphylococcus aureus infection at the site of the surgery. On March 20, 2000, Stewart underwent the implantation of a PIC-line for I.V. administration of the antibiotic Nafcillin and was discharged. Unfortunately, Stewart was readmitted to the hospital on March 30, 2000, for acute renal failure and acute interstitial

nephritis caused by an allergic reaction to Nafcillin. Stewart experienced nausea, chills, high fever, and continued infection of the spinal surgical wound. Diagnostic testing revealed Stewart's creatinine[1] level had increased dramatically. An infectious disease expert, Dr. Mark Dougherty, discontinued the Nafcillin therapy and prescribed Vancomycin, another antibiotic, through the I.V. PIC-line. Prednisone and other steroids were also administered to help decrease Stewart's creatinine level.

Several facts herein are not contested by these parties. First, the record reveals that Stewart had an abnormally high level of creatinine in his blood prior to the March 3, 2000, surgery. The record indicates that Nafcillin, while being used to treat the staphylococcus aureus infection, caused Stewart to suffer an allergic reaction resulting in a kidney condition known as interstitial nephritis. This allergic reaction caused at least a temporary loss of significant renal function in Stewart's kidneys, making them unable to clear toxins from Stewart's blood stream. To make matters worse, Stewart cannot receive large doses of steroids to aggressively treat his elevated creatinine level due to the immunosuppressive

[1] Creatinine is a measure of the filtration function of the kidneys and their ability to clean poisons from the body and eliminate those poisons through urine.

properties of steroids[2]. These parties also recognize that, because of these events, Stewart will require kidney dialysis or a transplant within the next few years. The parties, however, have vigorously contested whether the Nafcillin treatment was a work-related cause of Stewart's permanent kidney damage.

During the litigation of this matter, two physicians testified concerning Stewart's kidney condition. Dr. Thomas Ferguson treated Stewart for his kidney condition following the surgery. Dr. Ferguson reviewed medical records that showed Stewart possessing creatinine levels of 1.6 mg/dl in 1997 and 2.5 mg/dl on March 3, 2000, the date of the surgery. Dr. Ferguson explained that the normal range for creatinine levels is usually .5 mg/dl to 1.0 mg/dl. According to Dr. Ferguson, when creatinine levels rise, kidney function decreases. A creatinine level of 1.6 mg/dl represented approximately a 25% loss of kidney function. Dr. Ferguson noted that Stewart's creatinine level by March 30, 2000, was 4.0 mg/dl and peaked at 6.4 mg/dl on April 1, 2000. Dr. Furgeson explained that Stewart had preexisting focal segmental glomerulosclerosis (FSGS), a progressive disease that damages the filtration system of the kidneys. While Dr. Ferguson refused to classify Stewart's FSGS as a preexisting active or dormant condition, he did state that

[2] These properties effectively neutralize the effects of antibiotics upon the persistent staphylococcus infection.

Stewart was not aware of the existence of FSGS until a kidney biopsy was performed following his March 3, 2000, surgery. Dr. Ferguson explained that the allergic reaction to Nafcillin caused Stewart's interstitial nephritis. This accelerated Stewart's FSGS and caused more intensive renal damage than would have normally occurred with the gradual FSGS process. Even absent any preexisting FSGS, Dr. Ferguson noted that an allergic reaction to Nafcillin could have resulted in permanent kidney damage, although the damage is more likely in a patient who already has some preexisting kidney problems. Further, Dr. Ferguson stated that the kidney biopsy performed on Stewart revealed that some of the interstitial nephritis was acute and some was chronic. Dr. Ferguson, however, explained that he could not determine exactly when the nephritis became chronic.

Dr. Ferguson also testified that FSCS is a progressive disease that develops over the course of ten to fifteen years unless other things accelerate it. Dr. Ferguson opined that the administration of Nafcillin caused Stewart's interstitial nephritis, which accelerated Stewart's FSCS and adversely affected Stewart's kidney function. With this diagnosis, Dr. Ferguson assigned a whole body impairment of 35% to 60% to Stewart for his kidney damage following surgery. Dr. Furgeson also estimated that Stewart would have had a 15% to 30% whole body impairment prior to surgery, but also noted that the pre-

surgery impairment includes damage attributable to non-steroidal anti-inflammatory medications administered as a result of the work injury.

Dr. Kenneth McLeish, a nephrologist from the University of Louisville Medical Center, evaluated Stewart pursuant to KRS 342.315 on February 7, 2002. Dr. McLeish testified that, through the University of Louisville, he was asked by the workers' compensation coordinator to do a review of Stewart's medical records. Dr. McLeish reviewed the history of Stewart's October 6, 1999, work injury and the post-surgical complications. During his review, Dr. McLeish found two pieces of data to suggest that Stewart's kidney problems predated his back injury. Dr. McLeish explained that, in October 1997, Stewart had some lab work performed which indicated an elevated creatinine level of 1.6 mg/dl. Further, Dr. McLeish noted that Dr. Dougherty learned that Stewart had protein in his urine for years. Also, lab work performed on March 1, 2000, two days prior to Stewart's back surgery, indicated a creatinine level of 2.3 mg/dl. Concerning a baseline, Dr. McLeish testified that a single value does not mean that it is a baseline, but the two values he examined indicated a baseline.

Dr. McLeish admitted that Stewart had an allergic reaction to Nafcillin, which caused acute interstitial nephritis in the kidneys. This condition resulted in a deterioration of

Stewart's kidney function. Dr. McLeish further explained that in 80% to 90% of the cases, this condition is temporary. According to Dr. McLeish, the permanency of this condition can be determined by blood tests or by obtaining a twenty-four hour urine collection to measure the level of creatinine in the urine. Dr. McLeish further noted that, after the corticosteroid treatment, Stewart's creatinine value returned to ranges between 2.1 mg/dl and 2.6 mg/dl through May 29, 2001, with the exception of a July 11, 2001, value of 3.9 mg/dl caused by a temporary reaction to a different medication. Dr. McLeish believed that Stewart suffered from preexisting FSGS and the elevated creatinine levels found prior to surgery indicated an abnormality in the kidneys' filtering units prior to the October 6, 1999, work injury. Further, Dr. McLeish believed that, because Stewart had scarring of the glomeruli, FSGS had been occurring for an extended period of time. In light of his evaluation, Dr. McLeish diagnosed Stewart's chronic renal insufficiency as a result of preexisting FSGS that was not caused by the Nafcillin or the surgery. Dr. McLeish further believed that, while Nafcillin caused Stewart's interstitial nephritis, this condition was only temporary. At no time, however, did Dr. McLeish physically examine Stewart.

In addition to his significant kidney problems, Stewart's lumbar fusion surgery was unsuccessful and has

resulted in pseudoarthrosis, or failed fusion. Dr. Brooks noted that Stewart's range of lumbar motion is only 20% of normal, with positive bilateral straight leg raising symptomatology. Dr. Brooks reported no evidence of inappropriate illness behavior or symptom magnification following surgery, and assessed a 25% impairment under the AMA Guidelines. Dr. Brooks recommended restrictions against repetitive bending, stooping, climbing, crawling, or squatting and further opined that Stewart would not be able to return to his employment with Phoenix. Dr. Brooks did believe, however, that Stewart could perform sedentary work.

Dr. G. Christopher Stephens, an orthopedic surgeon, performed an independent medical examination on behalf of Phoenix on June 4, 2001. Dr. Stephens diagnosed back pain that had worsened post-surgery secondary to spinal instability and psuedoarthrosis at L5-S1. Dr. Stephens also assessed a 25% whole body impairment based upon chronic radiculopathy and loss of motion segment integrity. Dr. Stephens opined that Stewart should not lift more than ten pounds on a repetitive basis and that Stewart should avoid bending, stooping, kneeling, or crawling. Further, Dr. Stephens believed that Stewart would require substantial modifications in the work place, such as rest periods and the ability to change positions. Finally, Dr. Stephens noted that the antibiotic therapy for treatment of the

post-operative staphylococcus infection caused Stewart's renal failure and renal insufficiency.

The ALJ reviewed the lay and medical testimony found within the record in considerable detail. The ALJ noted that Dr. McLeish only reviewed medical records and did not personally examine Stewart or attempt to extract a medical history. The ALJ determined that Stewart was totally occupationally disabled due to his back injury alone. Concerning the kidney injury, the ALJ chose to rely on the evidence from Dr. Ferguson rather than the evidence from Dr. McLeish. Despite the directive of Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000) that presumptive weight should be afforded the physician evaluating a claimant pursuant to KRS 342.315, the ALJ elected to rely on Dr. Ferguson's opinion because Dr. McLeish only performed a records review. Thus, the ALJ ruled that Phoenix was responsible for payment of reasonable and necessary medical expenses for treatment of Stewart's end-stage kidney condition, which would require dialysis or a transplant within two to five years. The ALJ concluded that, while these conditions might have developed in the distant future, the effects of the back injury accelerated that remote problem to a more immediate crisis. Phoenix filed a petition for reconsideration that was eventually overruled by the ALJ. The Board affirmed the decision of the ALJ. This petition for review followed.

On appeal, Phoenix presents two arguments for our review. First, Phoenix argues that the ALJ erred in failing to give presumptive weight to the university evaluator. Phoenix also asserts that the evidence before the ALJ compels a finding that the kidney condition is not work-related.

We note that our review of decisions from the Workers' Compensation Board is to be deferential. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992), the Kentucky Supreme Court outlined this Court's role in the review process as follows:

> The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] 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.

It is well established that a claimant in a workers' compensation action bears the burden of proving every essential element of his cause of action. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Since Stewart was successful before the ALJ, the question on appeal is whether substantial evidence supports the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence has been conclusively defined by Kentucky courts as evidence which, when taken alone or in light of all the evidence, has probative value

to induce conviction in the mind of a reasonable person. Bowling v. Natural Resources and Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994), citing Kentucky State Racing Comm'n v. Fuller, Ky., 481 S.W.2d 298, 308 (1972). In order to reverse the decision of the ALJ, it must be shown that no substantial evidence exists to support his decision. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 482 (1999).

KRS 342.315(2) provides that a university evaluator's opinion should be afforded presumptive weight by the ALJ and, when the ALJ rejects the opinions of the designated evaluator, the ALJ's decision shall state the reasons for rejecting the evidence. The Kentucky Supreme Court, in Magic Coal Co. v. Fox, supra, set forth the criteria for overcoming the presumption of KRS 342.315(2):

> We do not view KRS 342.315(2) as restricting the fact-finder's authority to weigh conflicting medical evidence. We construe it to mean only that because it is presumed that the clinical findings and opinions of a university evaluator will accurately reflect the worker's medical condition, a reasonable basis must be specifically stated by the fact-finder. In other words, the parties are entitled to be informed of the basis for the decision. See Shields v. Pittsburgh & Midway Coal Mining Co., Ky. App., 634 S.W.2d 440, 444 (1982). The presumption created by

> KRS 342.315(2) neither shifts the risk of non-persuasion to the defendant nor 'raises the bar' with regard to the claimant's burden of persuasion.

Magic Coal Co. v. Fox, 19 S.W.3d at 97.

This provision, however, does not restrict the ALJ's authority to weigh conflicting evidence and to choose which evidence to believe. Bright v. American Greetings Corp., Ky., 62 S.W.3d 381, 383 (2001). In fact, an ALJ can disregard the clinical findings and opinions of a university evaluator, but must state a reasonable basis for so doing. Id.

In the instant case, the ALJ stated a reasonable basis for choosing to disregard Dr. McLeish's testimony in favor of the testimony of Dr. Ferguson. Dr. Ferguson physically examined Stewart and retrieved a medical history from him. Moreover, Dr. Ferguson's findings and diagnosis of Stewart's kidney condition were based upon that physical examination. Dr. McLeish, on the other hand, opted to review only Stewart's medical records to conduct his evaluation. At no point did Dr. McLeish examine Stewart personally. The Supreme Court found that evidence produced from a physician's personal evaluation of a claimant constitutes a sufficient, reasonable basis to rely on that evidence over the opinion of a university evaluator who only performs a review of medical records. See Magic Coal Co v. Fox, 19 S.W.3d at 98. Accordingly, we agree with the Board's finding

that the ALJ provided a rational basis for disregarding Dr. McLeish's opinion.

We also find no merit in Phoenix's assertion that the ALJ should not have given less weight to Dr. McLeish's opinion because the procedure by which this university evaluator performed his evaluation was flawed. On appeal, Phoenix asserts that the original ALJ in this action, Richard H. Campbell, Jr., contacted counsel for both parties and asked if either party had any reservations with the university evaluator doing only a records review in this case. According to Phoenix, ALJ Campbell discussed the evaluation with the University of Louisville system coordinator and was informed that a physical examination was unnecessary because everything needed to conduct a proper evaluation was available in Stewart's medical records. There is no record of any of these discussions before us. Rather, the only actual evidence in the record concerning this issue is the university evaluation referral order, which indicates that Stewart was directed to attend an examination and evaluation by a physician at an assigned university medical school for his kidney condition. Furthermore, in his undated written report, Dr. McLeish stated that a review of Stewart's medical records from various sources "provide[s] adequate information of the relation of Mr. Stewart's renal disease to his injury." Thus, it becomes apparent to us that Dr. McLeish never requested to

personally examine Stewart. We agree with the Board that Dr. McLeish's failure to conduct a physical examination does not appear to be a request from the original ALJ, but was a preference exercised by the university evaluator. Accordingly, we find no error in the ALJ's refusal to give Dr. McLeish's opinion presumptive weight pursuant to KRS 342.315.

We also disagree with Phoenix's argument that the evidence compels a finding that Stewart's kidney condition is not work-related. Dr. Ferguson explained that, while Stewart may have had preexisting FSGS, this condition was accelerated due to his allergic reaction to Nafcillin. The acceleration of the FSGS, according to Dr. Ferguson, will require Stewart to undergo dialysis or a kidney transplant within two to five years instead of ten to fifteen years. Dr. Ferguson's testimony, coupled with the medical records submitted herein, constitutes substantial evidence supporting the ALJ's conclusion that Stewart was entitled to benefits because the kidney damage resulted from a dormant condition aroused by a work-related injury.

For the foregoing reasons, the judgment of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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