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Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-000790-WC

APPALACHIAN COLLIERIES CORPORATION — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NOS. WC-92-17234 AND WC-94-06897

ALBERT DAVIS; ROBERT L. WHITTAKER, DIRECTOR OF WORKERS' COMPENSATION FUNDS, SUCCESSOR TO SPECIAL FUND; HON. RONALD W. MAY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

AND NO. 2003-CA-001837-WC

ROBERT L. WHITTAKER, DIRECTOR OF WORKERS' COMPENSATION FUNDS, SUCCESSOR TO SPECIAL FUND — CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NOS. WC-92-17234 AND WC-94-06897

APPALACHIAN COLLIERIES CORPORATION; ALBERT DAVIS; HON. RONALD W. MAY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI AND JOHNSON, JUDGES; AND HUDDLESTON, SENIOR JUDGE.[1]

JOHNSON, JUDGE: Appalachian Collieries Corporation has petitioned for review of an opinion of the Workers' Compensation Board entered on March 20, 2002, which vacated and remanded that portion of the Administrative Law Judge's opinion regarding Albert Davis's motion to reopen his claim based on a worsening of his psychiatric condition.[2] Having concluded that the Board correctly vacated the ALJ's ruling with regard to Davis's alleged worsening of his psychiatric condition based on the ALJ's insufficient factual findings, we affirm. The Workers' Compensation Funds has filed a cross-petition for review claiming that relief cannot be granted against it on Davis's claim because it was not properly before the Board as a

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[2] The Board also affirmed the ALJ's denial of Davis's motion to reopen based on a worsening of his physical condition. Davis has not filed a cross-petition on that issue.

respondent.[3] Having concluded that the WCF was properly before the Board, we also affirm on the cross-petition.

Davis originally filed his workers' compensation claim[4] for occupational disability as a result of three neck injuries he suffered while working for Bennett Trucking and Appalachian.[5] Davis was injured on March 30, 1992, and July 28, 1992, while employed by Bennett Trucking, and on August 10, 1993, while employed by Appalachian.[6] Davis also filed a workers' compensation claim against Appalachian, alleging that he was entitled to retraining incentive benefits (RIB).[7]

On July 24, 1995, ALJ Thomas A. Nanney found under the principles of Osborne v. Johnson,[8] that Davis suffered from a 60% occupational disability. The disability was attributed to the effects of Davis's injury occurring on August 10, 1993, while employed by Appalachian.[9] The ALJ determined that Davis's injuries on March 30, 1992, and July 28, 1992, while employed by

[3] The WCF also joins in Appalachian's argument that the Board improperly reweighed the evidence.

[4] Claim No. 92-17234.

[5] Davis was employed by Bennett Trucking as a truck driver and by Appalachian as a coal miner.

[6] The reopening of the claim on the injury occurring on August 10, 1993, is the subject of this petition for review.

[7] Claim No. 94-06897. Davis's two claims were consolidated.

[8] Ky., 432 S.W.2d 800 (1968).

[9] The ALJ dismissed Davis's RIB claim.

Bennett Trucking, only resulted in periods of temporary total disability for which he had previously been compensated. The ALJ specifically found that Davis had a 15% impairment to the body as a whole as a result of the neck injury he suffered in 1993 and a 10% impairment to the body as a whole as a result of his psychological impairment related to the 1993 injury. The ALJ noted that Davis's "psychological impairment [was] directly related to the final injury occurring on August 10, 1993[,]"[10] and equally apportioned Davis's award between Appalachian and the Special Fund.[11] Davis appealed the ALJ's decision and the Board and this Court both affirmed.[12]

On September 27, 2000, Davis filed a motion to reopen[13] both the 1992 injury claim and his 1994 RIB claim. Davis's motion to reopen his RIB claim was denied, but his motion to reopen his 1992 claim for his 1993 neck injury and the resulting psychological overlay was granted.[14]

Davis's final hearing on this reopening was held before ALJ Ronald W. May on August 27, 2001. In an opinion and

[10] Davis was born on July 10, 1959, has an IQ of approximately 70, and is functionally illiterate in reading, spelling, and mathematics.

[11] The Special Fund is now known as the Workers' Compensation Funds.

[12] 1995-CA-003383-WC.

[13] Kentucky Revised Statutes (KRS) 342.125.

[14] Claim No. 92-17234 was assigned to Davis's case in 1992 following the filing of the first report of injury pertaining to the injury of March 30, 1992, but the application for adjustment of claim was not filed until after the injury of August 10, 1993.

order rendered on November 26, 2001, the ALJ found that Davis had sustained no worsening of the physical injury of August 10, 1993, and that there was no evidentiary basis on which to apportion the work-relatedness of any worsening of his psychological impairment. The ALJ's opinion summarized the various medical evidence which included reports from Dr. David Shraberg and Dr. Rosa Riggs.

Dr. Shraberg, who is a psychiatrist and neurologist, had performed an independent evaluation of Davis on March 22, 2001, and he conducted an extensive review of Davis's medical records. Dr. Shraberg diagnosed Davis as suffering from psychological symptoms associated with the systemic illnesses of throat cancer, chronic obstructive pulmonary disease and chemical dependency. He also diagnosed Davis as suffering from a personality disorder involving symptom magnification with passive dependent and passive aggressive features. Dr. Shraberg stated that under the American Medical Association (AMA) Guidelines, Davis had a Class I impairment, producing a 0% impairment rating.

Dr. Riggs, who is a medical doctor and a psychologist, evaluated Davis on May 23, 2001, and also conducted an extensive review of his medical records. Dr. Riggs diagnosed Davis as suffering from major depression, generalized anxiety disorder with panic attacks, chronic pain with both psychological factors

and general medical conditions of his left arm, upper back, and neck due to the 1993 injury. Dr. Riggs stated that after Davis was injured while working in the mines in 1993 "[h]e has not been able to work [ ] and the pain has caused his depression, anxiety and chronic pain." Dr. Riggs stated that Davis was suffering a Class IV impairment, producing a 55% psychiatric impairment to his body as a whole.

As to Davis's claim of worsening of his psychological condition, the ALJ stated:

> [E]ven if the ALJ were to determine any worsening of plaintiff's emotional condition, I have no evidentiary basis on which to determine how much would be due to the work injury of August 10, 1993 and how much would be due to the other non-work causes reported by both Dr. Riggs and Dr. Shraberg. Accordingly, plaintiff's motion to reopen must be over-ruled.

Davis appealed and on March 20, 2002, the Board entered its opinion affirming in part, vacating in part, and remanding the claim to the ALJ. As to Davis's psychological claim, the Board determined that its interpretation of the ALJ's decision "indicates he simply failed to make any ruling on this aspect of Davis'[s] cause of action, in spite of the fact that evidence from Dr. Riggs was present which could have supported an increase in occupational disability from a psychiatric standpoint." The Board then stated:

> Consequently, we interpret the ALJ's determination on this issue as indicating that he either misinterpreted or misconstrued Dr. Riggs'[s] medical opinions. Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985).
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> While it is not incumbent upon an Administrative Law Judge, in rendering a decision, to provide either a detailed summary of the facts, a discussion of the law or the merits, details of his reasoning when, as here, there are substantial conflicts in his summary of the testimony of witnesses he specifically rejects, it is not only reasonable, but necessary that the opinion accurately reflect consideration of the totality of that evidence. Big Sandy Community Action Program v. Chaffins, Ky., 502 S.W.2d 526 (1973). While this Board consistently gives great deference to the fact-finding of Administrative Law Judges, as we are obligated to do by the standard of review, such deference is not without limits. Golden v. Anaconda Wire and Cable, Ky.App., 556 S.W.2d 174 (1977); Cook v. Ward, Ky., 381 S.W.2d 168 (1964). We therefore vacate the opinion of the ALJ with regard to his interpretation of the psychiatric evidence submitted in this reopening and remand this action for entry of a new decision containing an accurate summary of all the evidence of record. In so ruling, we wish to clearly state that we are not ordering any particular result with regard to this issue on remand. We acknowledge that depending upon whether the ALJ finds the testimony of Dr. Riggs or Dr. Shraberg to be more credible, different potential outcomes may result.

In its petition for review, Appalachian argues that the record "had conflicting medical evidence on the issues of claimant's reopening[,]" and that the ALJ's 13-page opinion

"makes abundantly clear that upon his consideration of the conflicting medical evidence on the issues involved he was not persuaded the claimant had fulfilled his burden of establishing by supporting evidence any increase of occupational disability by either physical injury or psychological condition."

"It is well established that the ALJ, as fact-finder, has the authority to believe part of the evidence and disbelieve other parts, even if it came from the [same] witness or the same adversary party's total proof."[15] "As long as the ALJ's determination is suggested by any evidence of substance, it cannot be said that the record compels a different result."[16] "The [Board] is suppose to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result."[17] "[T]he Board may not substitute its judgment for that of the ALJ concerning the weight of evidence on questions of fact."[18] This Court's further review of the Board's decision "is to correct the Board only where the [ ] Court perceives the Board has

[15] Roberts v. Estep, Ky., 845 S.W.2d 544, 547 (1993) (citing Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977)).

[16] Id. at 547 (citing Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986)).

[17] Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

[18] Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609, 612 (1995) (citing KRS 342.285(2)).

overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[19]

In its opinion, the Board emphasized that the ALJ's relevant findings on the worsening of Davis's psychological condition were limited to the following:

> 12. The ALJ would first note that plaintiff's original claim was filed alleging no injuries other than neck injuries. The claim was later amended to include depression and anxiety. The claim was never amended to cover any type of hand injury nor of any lumbosacral injury nor any impairment of radiculopathy into the lower extremities. The ALJ points this out as both Dr. Shraberg and Dr. Riggs listed conditions or circumstances other than the neck injury of August 10, 1993 as causative agents and there was no attempt on the part of either of those witnesses to apportion between the contributing causes. Even if the ALJ should determine that plaintiff had sustained a worsening in his psychiatric/psychological condition, I have no basis from the reports of Dr. Riggs and Dr. Shraberg to determine how much of [sic] emotional problem would be the result of the neck injury of August 10, 1993.
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> 13. The report of Dr. Ghory did not even contain a history of the work related injury of August 10, 1993 on which plaintiff's earlier award was based. To the contrary, although the year was given wrong as 1994, the only injury

[19] Western Baptist Hospital, 827 S.W.2d at 687-88.

event Dr. Ghory had in his history was plaintiff's first neck injury that occurred in a head-on collision when plaintiff was driving a coal truck for Bennett Trucking on March 30, 1992. It may be that Dr. Ghory is not an accurate history taker but it also could be that plaintiff considers that first neck injury to have been the most severe injury and that his two subsequent injuries were of less severity.

14. Dr. Muffly is an orthopedic surgeon respected by this ALJ. However, Dr. Goodman is also an orthopedic surgeon and Dr. Graulich is a neurologist and both of them are also equally respected by this ALJ. However, both Dr. Graulich and Dr. Goodman have the advantage of having examined [plaintiff] both before and after the ALJ decision of July 24, 1995. Niether of those physicians must speculate as to how or why other physicians arrived at their own prior impairment ratings as they have their own prior examination work product for reference for determining whether there has been any worsening.

15. Although the evidence is in conflict, the ALJ is more persuaded by the evidence of Dr. Goodman and Dr. Graulich that plaintiff has sustained no worsening in the physical residuals from his injury. As noted earlier herein, even if the ALJ were to determine any worsening of plaintiff's emotional condition, I have no evidentiary basis on which to determine how much would be due to the work injury of August 10, 1993 and how much would be due to the other non-work causes reported by both Dr. Riggs and Dr. Shraberg. Accordingly, plaintiff's motion to reopen must be over-ruled.

The requirement that the ALJ make adequate findings of fact was addressed by our Supreme Court in Wilder v. Great Atlantic & Pacific Tea Co.,[20] as follows:

> KRS 342.275 directs the administrative law judge in workers' compensation cases to file an award, order, or decision with "a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue . . . ." The purpose of the statute is to have the Workers' Compensation Board record the "relevant basic considerations upon which its ultimate decision rests." Blue Diamond Coal Company v. Pennington, Ky., 424 S.W.2d 122, 124 (1968). Similarly, in Shield v. Pittsburgh and Midway Coal Mining Company, Ky.App., 634 S.W.2d 440 (1982), the court stated that
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> > "[t]he case law dealing with administrative bodies clearly indicates that it is required that basic facts be clearly set out to support the ultimate conclusions (citations omitted). The Workers' Compensation Board is not exempted from this requirement. . . . [T]he statute [KRS 342.275] and the case law require the Board to support its conclusion with facts drawn from the evidence in each case so that both parties may be dealt with fairly and be properly apprised of the basis for the decision." Id. at 444 [emphasis original].

In R.J. Corman Railroad Construction v. Haddix,[21] the Supreme Court affirmed this Court which had affirmed the Board's

[20] Ky., 788 S.W.2d 270, 272 (1990).

[21] Ky., 864 S.W.2d 915 (1993).

remand to the ALJ for appropriate factual findings concerning a claim arising out of a psychological condition. The Supreme Court stated that "a more thorough discussion is warranted and therefore the Board's decision to remand was proper."[22] Likewise, we conclude that the Board properly remanded this matter to the ALJ for the purpose of making more complete factual findings which include an accurate summary of all the evidence of record.

In its cross-petition, the WCF argues that it was not a proper party to Davis's appeal to the Board. The WCF claims that since it was not named in the caption or the body of the notice of appeal as a respondent, "a proper appeal was not perfected against [it]," and Davis is thus precluded from obtaining any additional benefits from it.[23]

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[22] Id. at 917.

[23] Davis's notice of appeal reads in relevant part as follows:

> ALBERT DAVIS, PLAINTIFF,
>
> VS. NOTICE OF APPEAL
>
> APPALACHIAN COLLIERIES CORP, ET AL., DEFENDANT.
>
> The Petitioner, ALBERT DAVIS, though counsel, hereby gives notice of his appeal from the Opinion of the Administrative Law Judge dated November 26, 2001 in the matter styled Albert Davis v. Appalachian Collieries Corporation and Special Fund, Claim number 94-06897 & 92-17234, before the Kentucky Department of Workers' Claims.

The Special Fund was also included in the certificate of service.

CR[24] 73.03(1) provides, in pertinent part, that "[t]he notice of appeal shall specify by name all appellants and all appellees ('et al.' and 'etc.' are not proper designation of parties) . . . ." Moreover, this Court has stated:

> Under CR 73.03, the remaining parties to the action were not made parties to the appeal by the use of "et al." in the caption. Not being specifically named, they were not parties to the appeal, but this would not prevent the appeal from being perfected as to the parties who were specifically named in the caption.[25]

In Milligan v. Schenley Distillers, Inc.,[26] a workers' compensation case where the Special Fund and the Board were not properly named as appellees, this Court stated that if the appellant "failed to name an indispensable party to the appeal, the appeal must be dismissed" [citations omitted].[27] "An indispensable party is one whose absence prevents the Court from granting complete relief among those already parties."[28]

In the case sub judice, it can be argued that the Special Fund/WCF is not an indispensable party since the award for psychological impairment related to Davis's 1993 injury was previously apportioned equally between Appalachian and the

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[24] Kentucky Rules of Civil Procedure.

[25] Schulz v. Chadwell, Ky.App., 548 S.W.2d 181, 184 (1977).

[26] Ky.App., 584 S.W.2d 751 (1979).

[27] Id. at 753.

[28] Id. at 753 (citing CR 19.01).

Special Fund. Thus, while Davis's failing to name the Special Fund as a party would preclude him from pursuing his claim against the WCF, he could still pursue any apportioned claim against Appalachian. However, as Davis desires to also pursue his claim against the WCF, we must determine whether by naming the Special Fund in the body of the notice of appeal and in the certificate of service, Davis substantially complied with CR 73.03.

In Morris v. Cabinet for Families & Children,[29] our Supreme Court stated:

> In Blackburn v. Blackburn, Ky., 810 S.W.2d 55 (1991), this Court held that a notice of appeal was adequate under CR 73.03 if it contained a listing of parties sufficient to give the opposing party notice of the identities of the parties against whom the appeal was filed. The principal objective of a pleading is to give fair notice to the opposing party. Id. at 56, citing Lee v. Stamper, Ky., 300 S.W.2d 251 (1957).

Morris involved a termination of parental rights by a circuit court. In the notice of appeal, the minor child was not named as an appellee, but the child was named in the caption of the case, to wit: "In Re the Interest of [CJM], a Child." While the child was not included in the certificate of service, copies of the pleadings were provided to the child's guardian ad litem. The Supreme Court determined that "[t]hese factors together

[29] Ky., 69 S.W.3d 73, 74 (2002).

substantially comply with the requirements of CR 73.03 and provided sufficient notice to all parties concerned that the minor child was also an Appellee." Similarly, in the case sub judice, we hold that the listing of the Special Fund/WCF in the body of the notice of appeal and in the certificate of service was sufficient to substantially comply with the requirements of CR 73.03. Accordingly, the Board is affirmed on WCF's cross-petition.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

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