

RENDERED: December 31, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-001693-WC

AERO ENERGY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-01-75327; WC-02-00943

PHILLIP JOHNSON; DONALD G.
SMITH, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, Chief Judge; BUCKINGHAM and KNOPF, Judges.

BUCKINGHAM, JUDGE. Aero Energy, Inc., petitions for review from an opinion of the Workers' Compensation Board affirming the determination of an administrative law judge (ALJ) that Phillip Johnson is totally occupationally disabled as the result of a work-related injury. Aero contends that the ALJ erred by relying upon the impairment rating of Dr. James Templin in his determination that Johnson is totally disabled and by not carving out from Johnson's award the impairment rating assessed

by Dr. Templin for Johnson's carpal tunnel syndrome. For the reasons stated below, we affirm.

Johnson was born on March 21, 1947. He has a high school education and is certified as a mine foreman and electrician. Johnson's past relevant work experience has consisted primarily of employment in various capacities in the coal mining industry beginning in 1966. In August 1994 Johnson sustained an injury to his right arm and shoulder for which he received a 10% occupational disability award. (Claim No. 96-06095). On December 1, 2000, Johnson moved to reopen the opinion and award in Claim No. 96-06095 alleging that his occupational disability had increased substantially. On January 27, 2001, his motion to reopen this claim was denied.

On June 21, 2000, Johnson was first informed that he had carpal tunnel syndrome in his hands and wrists. On July 10, 2000, Johnson suffered a work-related injury when he bumped his right knee against a conveyor belt. On August 22, 2001, he incurred a work-related injury when he slipped and fell, causing him to injure his back. On August 27, 2001, Johnson incurred a work-related injury to his left wrist and hand. In addition, he was exposed to loud noises at work on a daily basis and had developed cumulative work-related hearing loss. Johnson has not returned to work since August 27, 2001.

On June 20, 2002, Johnson filed an application for resolution of injury claim with the Board of Claims. Johnson alleged in the application that he sustained work-related injuries to his right arm on June 21, 2000; his right knee on July 10, 2000; his back on August 22, 2001; and his left arm on September 24, 2001. Johnson later clarified that the injury to his left arm occurred on August 27, 2001. On the same day, June 20, 2002, Johnson filed an application for resolution of hearing loss claim against Aero. The claims were subsequently consolidated and heard by an ALJ.

On January 17, 2003, the ALJ entered an opinion and award dismissing Johnson's carpal tunnel syndrome claim, his right knee claim, and his hearing loss claim.¹ However, the ALJ awarded Johnson total disability benefits based upon his back injury. The ALJ carved out 15% of that disability as a pre-existing active injury due to Johnson's prior injuries and complaints involving his lower back and the 10% permanent partial disability award in the claim involving his right arm and shoulder.

On July 16, 2003, the Board entered an order affirming the ALJ's decision. This petition for review followed.

Aero contends that the ALJ erred by relying upon the impairment rating of Dr. James Templin in finding that Johnson

¹ These claims were dismissed on the basis that, pursuant to KRS 342.270, Brown should have joined the claims in his December 2000 motion to reopen.

is totally disabled as a result of his August 22, 2001, back injury. Aero alleges that Dr. Templin's medical report expressly attributes Johnson's entire impairment rating to his August 1994 injury and that, accordingly, Dr. Templin has not assessed a valid permanent impairment attributable to any of the injuries alleged by Johnson in the present application.

In his opinion and award the ALJ addressed the issue of Johnson's disability as a result of his August 22, 2001, back injury as follows:

The next issue to be decided by the Administrative Law Judge is the extent and duration of Plaintiff's disability as a result of his work-related back injury. Based upon the date of injury, Plaintiff would be governed under the amendments found under the 2000 amendments to the law. Disability under those amendments are to be determined by the use of impairment ratings under the AMA Guides. The Administrative Law Judge relied on the impairment ratings under the AMA Guides. The Administrative Law Judge relied on the impairment ratings and restrictions by Dr. Mirani and Dr. Templin, and Plaintiff's credible testimony. Plaintiff lacks the ability to perform "work" in a competitive economy (not limiting that analysis to the local economy). Plaintiff is found to be totally occupationally disabled under KRS 342.730(1)(a). This Administrative Law Judge found the Plaintiff to be very credible regarding both his pain and restrictions. Based upon the totality of the evidence, this Administrative Law Judge does find that the Plaintiff is totally disabled as a result of his injury.

Prior active impairment has also been raised as an issue. It is undisputed that the Plaintiff did have a prior injury to his right shoulder and bicep in 1994 for which he received a 10% occupational disability by Opinion and Award. It is further noted that the Plaintiff did have some prior back pain, for which surgery was recommended in 1998. Plaintiff's testimony was credible regarding his prior problems. Dr. Templin found no active impairment prior to the Plaintiff's injury. Dr. Wagner gave the Plaintiff a 5% impairment rating for the back, which he indicated was the same ongoing process that was merely exacerbated by the 2001 back injury. Dr. Mirani did not address prior active impairment. The Administrative Law Judge is bound by res judicata to the 10% occupational disability awarded to the Plaintiff for the 1994 injury. The Administrative Law Judge further believes that the Plaintiff was having problems with his back prior to the 2001 injury sufficient to support an active impairment of 5% as given by Dr. Wagner; however, the 2001 injury was also sufficient cause for the remainder of the Plaintiff's current disability. Therefore Plaintiff is found to have a 15% (10% for right shoulder and 5% for back) prior active disability in this matter.

In his February 22, 2003, order denying Aero's petition for reconsideration, the ALJ further addressed this issue as follows:

The Administrative Law Judge specifically finds that the 2001 back injury was sufficient to cause the Plaintiff to be totally disabled, however, the Administrative Law Judge was bound by res judicata to carve out 10% prior active impairment for the right shoulder pursuant to a prior Opinion and Award and further

believe[s] that a 5% prior active impairment existed with regard to the back. Regardless of the Plaintiff's other physical problems, the 2001 back injury would still have resulted in a total occupational disability for the Plaintiff.

The fact-finder, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974); Burton v. Foster Wheeler Corp., Ky. 72 S.W.3d 925, 929 (2002).

It is elementary that a claimant bears the burden of proof and risk of nonpersuasion before the fact-finder with regard to every element of the claim. Roark v. Alva Coal

Corporation, Ky., 371 S.W.2d 856, 857 (1963); Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984); Snawder v. Stice, Ky. App., 576 S.W.2d 276, 279 (1979).

Where the party with the burden of proof is successful before the ALJ, the issue on appeal is whether substantial evidence supported the ALJ's conclusion. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971).

The sum and substance of Aero's argument is as follows:

In the report of Dr. James Templin filed into evidence by Johnson's counsel with a service date of September 25, 2202 [sic], Dr. Templin expressly attributes his entire impairment rating to Johnson's work related August 19, 1994 injury. Accordingly, Dr. Templin has not assessed a valid permanent impairment which he has attributed to any of the injuries alleged in this claim, and it was error for the Administrative Law Judge to rely on his impairment rating, for any of his opinions for that matter, in concluding that Johnson was totally disabled as a result of his August 22, 2001 back injury.

The report referred to by Aero is contained in the record on appeal at pages 000102 - 000118. Aero does not refer us to where in the report "Dr. Templin expressly attributes his

entire impairment rating to Johnson's work related August 19, 1994 injury." We are unable to locate such an express statement in Dr. Templin's report or to reconcile Aero's claim with the contents of the report. We are, however, able to reconcile the report with the ALJ's summary of Dr. Templin's impairment rating: "[Dr. Templin] assessed a 29% impairment rating under the Fifth Edition of the AMA Guides. This impairment was apportioned 8% impairment to the back; 8% impairment to the right shoulder; 14% impairment to the upper extremities bilaterally; and 3% impairment to the right knee." While these assessments may indicate that Johnson's 1994 arm and shoulder injuries are totally disabling, this does not mean that Dr. Templin found that the 8% impairment to Johnson's back as a result of his August 2001 injury was not totally disabling.

Further, we note that the ALJ did not rely solely upon Dr. Templin's report in assessing Johnson with a total occupational disability; rather, he also relied upon the report of Dr. Scott C. Mirani, who assessed an 8% impairment of the whole person under the AMA Guides, and the testimony of Johnson himself. In addition, we agree with the Board's discussion of this issue:

[W]e find no merit in Aero Energy's second issue regarding the reliance by the ALJ on the opinions of Dr. Templin. Our reading of the opinion convinces us that, although not stated as effectively as we would prefer,

the ALJ relied upon Dr. Templin for the primary purpose of establishing little if any pre-existing active occupational disability with regard to Johnson's history of low back complaints. We believe the reference made by the ALJ to Dr. Templin's impairment rating and restrictions concerns the fact that Dr. Templin conducted his independent medical evaluation of Johnson in April 2001, some four months prior to the work-related low back injury that produced his total disability. Although Dr. Templin's evaluation included extensive examination and testing of Johnson's low back, the doctor assessed no impairment rating and imposed no restrictions attributable to that portion of the respondent's anatomy. Consequently, we interpret the ALJ's allusions to Dr. Templin to be part of his basis for finding no more than 5% disability due to pre-existing and active, despite the fact that Johnson had a long history of back problems.

Nevertheless, even if Aero Energy's accusations were true regarding the ALJ's reference to Dr. Templin, we would affirm. As pointed out above, by way of Dr. Mirani's testimony, in combination [with] Johnson's own declarations, there is sufficient evidence to support a finding of total and permanent occupational disability in this instance, independent of any opinion expressed by Dr. Templin. Hence, the ALJ's mention of Dr. Templin, whether inopportune or misplaced, as worst constitutes nothing more than harmless error.

Aero also contends that the ALJ erred by not carving out Johnson's impairment rating for carpal tunnel syndrome from the award. The ALJ determined that Johnson's carpal tunnel syndrome injury was barred under KRS 342.270 for failure to join

the claim upon the reopening of Claim No. 96-06095 in December 2000.

Dr. Templin assessed a 14% impairment rating for Johnson's bilateral carpal tunnel syndrome. Aero argues that because the ALJ expressly found that Johnson's carpal tunnel syndrome claim met the statutory definition of an injury, found Dr. Templin persuasive in concluding that the syndrome was work-related, found Johnson credible when he testified he had first learned that his carpal tunnel syndrome was definitely work-related on June 21, 2000, and had given due and timely notice of the alleged injury, an additional 14%, representing Johnson's carpal tunnel impairment rating, should be carved out of the total disability award and found to be noncompensable as a pre-existing active condition.

A worker who has sustained both compensable and noncompensable disability is entitled to receive income benefits for the full extent to which compensable, work-related harmful change causes a complete inability to work. See International Harvester Co. v. Poff, Ky., 331 S.W.2d 712 (1959). "Therefore, a worker with an AMA impairment from a nonwork-related condition who sustains a work-related injury may receive income benefits for total disability if there is substantial evidence that the work-related harmful change, by itself, is sufficient to cause an AMA impairment and to cause the worker to be unable

to perform any work." Hill v. Sextet Min. Corp., Ky., 65 S.W.3d 503, 508-09 (2000). We agree with the Board's discussion of this issue in its July 16, 2003, opinion:

Of course had ALJ Smith determined that Johnson's carpal tunnel syndrome, although not compensable, was working in concert with the effects of his low back injury rendering him totally occupationally disabled, then Aero Energy would be correct in its argument that some consideration regarding the occupational impact of Johnson's carpal tunnel injuries would be required by the ALJ. Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001). Even so, the ALJ would not be confined to a carve out based solely on the exact percentage of impairment assessed by a medical expert relative to Johnson's carpal tunnel syndrome. Rather, because this is a total disability case, the issue would be one measuring the existence of any contributing occupational disability generated by the effects of the carpal tunnel syndrome, and would comprise a determination to be made solely within the ALJ's wide-ranging discretion. Ira A. Watson Department Stores v. Hamilton, Ky., 34 S.W.3d 48 (2000); Osborne v. Johnson, Ky., 432 S.W.2d 800(1968); Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976). Had the ALJ been convinced that although Johnson's carpal tunnel syndrome resulted in a measurable impairment rating under the AMA Guides, its presence did not significantly impair his ability to engage in his customary job activities for Aero Energy, no carve out would have been necessitated.

That having been said, contrary to Aero Energy's assertions, the above standard is not the one applied by ALJ Smith in the instant action. Instead, given the proof before him, the ALJ determined that the most credible evidence more appropriately fit

within the long recognized and well established "whole man doctrine." International Harvester Co. v. Poff, Ky., 331 S.W.2d 712 (1959). Under that doctrine, an employee who sustains a work-related injury may receive income benefits for total disability where the evidence establishes that the work-related harmful change, in and of itself, is sufficient to warrant an AMA impairment rating and to render the employee unable to perform any work, despite the presence of a concurrent, noncompensable source of impairment or disability. Hill v. Sextet Mining Corp., supra.

The question then becomes is there substantial evidence sufficient to support the ALJ's application of the whole man doctrine in the case *sub judice*? Since we find that to be more than ample evidence within the record to provide for the doctrine's application, we affirm as to this issue. . . .

. . . .

Consequently, given the record as a whole, we find no fault with the ALJ's determination that Johnson is 100% occupationally disabled when taking into account his age, limited education, prior work experience, and medical restrictions. More importantly, we find more than enough evidence to support the ALJ's determination that Johnson's back injury, absent all other alleged ailments, was sufficient to produce the entire measure of his disability. Dr. Mirani's findings and conclusions, when viewed in light of Johnson's own testimony, is certainly sufficient to support ALJ Smith's ruling regarding this issue.

The function of this court in reviewing the Board "is to correct the Board only where the . . . Court perceives the

Board has overlooked or misconstrued controlling statute or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992). We do not find that the Board has misconstrued the applicable law in this case or committed an error in assessing the evidence so flagrant as to cause an injustice.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Jeffrey D. Damron
Baird & Baird, P.S.C.
Pikeville, Kentucky

BRIEF FOR APPELLEE:

William Grover Arnett
Salyersville, Kentucky