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NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-001657-WC

DAVID RITCHIE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-00462 AND WC-98-88575

FLEETWOOD ENERGY; FAITH COAL SALES;
DEPARTMENT OF WORKERS' COMPENSATION FUNDS;
AND HON. DONALD G. SMITH, ADMINISTRATIVE
LAW JUDGE

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, SCHRODER AND TAYLOR, JUDGES.

TAYLOR, JUDGE. David Ritchie appeals from an opinion by the Workers' Compensation Board that affirmed an order of an Administrative Law Judge. The ALJ dismissed Ritchie's motion to reopen his workers' compensation claim against a former employer, Faith Coal Sales, after finding that Ritchie failed to sustain his burden of proof in establishing any entitlement to benefits upon reopening. Finding no error, we affirm.

From September 1996 to August 1998, Faith Coal employed Ritchie as a roof bolter at its underground mine in Knott County, Kentucky. On September 27, 1997, during his employment with Faith Coal, Ritchie sustained a back injury while lifting mining cable. Ritchie timely filed a claim for workers' compensation benefits against Faith Coal and sought treatment for his back injury from Dr. Van Breeding. Dr. Breeding initially treated Ritchie's lower back pain with rest, medication and imposed restrictions on lifting heavy objects. Eventually, Dr. Breeding referred Ritchie to Dr. Phillip Tibbs, who attributed Ritchie's back pain to the September 27, 1997 work-related injury. Dr. Tibbs diagnosed Ritchie with a ruptured disc and performed surgery on February 23, 1998. Dr. Tibbs assessed Ritchie with a 10% permanent impairment, with 5% being attributed to the work-related injury and 5% caused by degenerative disc disease. Ritchie settled his claim with Faith Coal in October 1998 for 10% permanent partial disability.

The record reveals that Ritchie resumed his employment with various coal mining companies following his February 1998 surgery. In August 1998, Ritchie obtained employment with Adena Fuels as a general laborer and night watchman. In the spring of 1999, Ritchie went to work for Coastal Coal as a roof bolter.

In November 1999, Ritchie began working for Fleetwood Energy as a roof bolter, scoop operator and shuttle car driver.

While employed by Fleetwood Energy, Ritchie began to experience more pain in his back. Ritchie attributed this increased back pain to constant lifting, pushing, and pulling, as well as from the jarring caused by the operation of the scoop and shuttle car. Ritchie left his employment with Fleetwood Energy in April 2000 because of his back pain and accompanying anxiety attacks. Ritchie filed a workers' compensation claim against Fleetwood on April 2, 2002, claiming injuries to his lower back and depression. On May 30, 2002, Ritchie filed a verified motion to reopen his claim against Faith Coal, alleging that his back and mental health conditions had worsened due to the September 27, 1997 injury. The ALJ granted Ritchie's motion to reopen on June 12, 2002. Ritchie's claim against Fleetwood Energy was eventually dismissed on November 6, 2002 after Ritchie testified that all of his physical and mental problems were related to his employment with Faith Coal.

During the litigation of this matter, the ALJ received medical evidence concerning Ritchie's physical and mental conditions from several physicians. Dr. Joseph Rapier, during a June 2002 examination of Ritchie, diagnosed Ritchie with a back strain, degenerative disk disease and a post L5/S1 disk surgery.

Dr. Rapier assessed a 10% impairment pursuant to the AMA Guides and suggested that Ritchie engage in nothing more than sedentary work with occasional lifting up to 20 pounds.

Dr. Tibbs, Ritchie's treating physician at the time of the original injury, re-examined him on February 28, 2001. In February 1998, Dr. Tibbs had assessed Ritchie with an impairment of 10% under the AMA Guides and restricted Ritchie from engaging in heavy lifting on a repetitive basis. On re-examination, Dr. Tibbs opined that Ritchie's recurring back problems were caused by the natural progression of the original work injury. Dr. Tibbs also found no objective neurological or radiographic evidence indicating any progression of Ritchie's back injury. Thus, Dr. Tibbs refused to increase the 10% impairment rating he assigned Ritchie in 1998.

Dr. Ashok Jain examined Ritchie on November 8, 2001. During his examination, Dr. Jain diagnosed Ritchie as suffering from severe depression. Dr. Jain found that Ritchie possessed a poor capability to handle stress, was unable to follow complex job instructions and had severe psychological problems. Moreover, Dr. Jain noted on his Form 107 that Ritchie possessed a history of panic disorder with agoraphobia and severe psychotic recurrent depression. Dr. Jain opined that Ritchie's psychological condition was caused by a work-related injury.

However, when asked to provide an impairment rating under the AMA Guides, Dr. Jain simply wrote the word "severe." In declaring Ritchie's mental condition as "severe," Dr. Jain made no reference to or provided any classifications under the AMA Guides.

Finally, Dr. David Shraberg performed an independent medical evaluation of Ritchie on July 26, 2002. Dr. Shraberg found a significant history of anxiety and depression existing in Ritchie's family.¹ Dr. Shraberg found that Ritchie, for conscious or subconscious reasons, wanted to give the appearance that he was, in fact, mentally disabled. Accordingly, Dr. Shraberg opined that Ritchie had a lifelong 5% psychiatric impairment under the AMA Guides, with this impairment existing prior to any work-related injuries. Dr. Shraberg further believed that Ritchie's psychological condition would not prevent Ritchie from returning to work.

In a January 17, 2003 opinion, the ALJ found that the medical records from Dr. Tibbs and Dr. Rapier clearly set Ritchie's lower back impairment at 10% at the time of his 1998 settlement and 10% upon reopening. Further, the ALJ accepted Dr. Shraberg's opinion that Ritchie had a 5% pre-existing psychological impairment. The ALJ recognized Dr. Jain's opinion

¹ Particularly, Dr. Shraberg noted that Dr. Jain was the treating psychiatrist for both of Ritchie's parents.

that Ritchie possessed significant psychological problems, but gave Dr. Jain's diagnosis little weight because Dr. Jain had failed to provide any impairment rating or classification pursuant to the AMA Guides. Moreover, the ALJ noted that Dr. Jain offered no comparison of Ritchie's condition from the time of the injury to the time of reopening. Thus, based upon the medical evidence from Dr. Rapier, Dr. Tibbs and Dr. Shraberg, the ALJ found that Ritchie failed to demonstrate an increase in his impairment rating upon reopening and dismissed his claim for additional income benefits against Faith Coal.² On appeal, the Board affirmed the ALJ's findings. This appeal follows.

Kentucky law is extremely clear concerning the scope of our review with regard to decisions of the Workers' Compensation Board. The function of our review is to correct the Board only where it "has overlooked or misconstrued controlling statutes 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, 687-88 (1992). In pursuing workers' compensation benefits, "[t]he claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim, and the decision of the ALJ is 'conclusive and binding as to all questions of

² The ALJ permitted Ritchie to recover his medical expenses from Faith Coal for his psychological condition. Faith Coal did not contest this award.

fact.’” Carnes v. Tremco Mfg. Co., Ky., 30 S.W.3d 172, 175-176 (2000) (internal citations omitted). When the party with the burden of proof is unsuccessful before the ALJ, “the issue on appeal is whether the evidence in that party’s favor is so compelling that no reasonable person could have failed to be persuaded by it.” Carnes, 30 S.W.3d at 176. Furthermore, where there exists evidence of substance supporting the ALJ’s finding, the conclusion cannot be labeled “clearly erroneous.” Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Guided by these legal principles, we now address Ritchie’s argument.

Ritchie asserts the Board erred in affirming the ALJ’s finding that he failed to demonstrate an increase in his impairment rating upon reopening. Ritchie relies heavily upon Transportation Cabinet v. Poe, Ky., 69 S.W.3d 60 (2001) and Knott County Nursing Home v. Wallen, Ky., 74 S.W.3d 706 (2002), in support of his belief that the ALJ should have interpreted and translated Dr. Jain’s findings into a percentage impairment rating under the AMA Guides. We disagree.

Poe and Wallen are distinguishable from the matter currently before us. In Poe, our Supreme Court held “that so long as a psychological condition produces medical restrictions, is work-related, and is a direct result of the same traumatic event for which an impairment rating has been assigned, an ALJ

has the discretion to deem said condition contributory and compensable when making a finding of total disability." Poe, 69 S.W.3d at 63. Poe, however, involved a worker who was totally disabled by both physical and mental injuries. As such, the presence of totally disabling physical injuries made any finding of a permanent impairment rating for the mental condition completely unnecessary. Here, since Dr. Tibbs and Dr. Rapier both agree that Ritchie's lower back condition had not worsened since the time of his original settlement, the central issue upon reopening is whether Ritchie can prove that his mental disability was caused by the original injury and was worsened since settlement.

According to Wallen, when a mental injury is an issue in a workers' compensation case, the ALJ is authorized to translate an AMA Guides assessment of the severity of a mental impairment into a percentage, to properly determine the workers' disability rating. Wallen, 74 S.W.3d at 710. Wallen, however, clearly requires medical evidence of some specific AMA class impairment before the ALJ can translate that class impairment into a percentage impairment. Id. Here, Ritchie asserts that Dr. Jain placed him in a Class IV to Class V impairment under the AMA Guides. Ritchie arrives at this assertion by analyzing Dr. Jain's summary of his findings into either a Class IV or

Class V impairment under the AMA Guides. Dr. Jain, however, not only omitted an impairment rating, but also failed to provide the class for which Ritchie's psychiatric condition would fall under the AMA Guides. If Dr. Jain had provided the class impairment, pursuant to Wallen, the ALJ could have interpreted such impairment into a percentage impairment and determined Ritchie's disability rating. Yet, Dr. Jain merely described Ritchie's psychiatric condition as "severe." Ritchie's analysis of Dr. Jain's medical findings was of little benefit to the ALJ, the Board or this Court. It has been held that the proper interpretation of the AMA Guides, and the assessment of an impairment rating for the purposes of assessing a workers' compensation claimant's disability claim, are medical questions that must be resolved by a competent physician. Kentucky River Enterprises, Inc. v. Elkins, Ky., 107 S.W.3d 206, 210 (2003).

KRS 342.125(1)(d) requires that the change of disability must be shown by objective medical evidence "of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order." Under this statute, in order to successfully reopen a workers' compensation claim, the claimant must establish a change in his impairment rating, as well as show a worsening of occupational disability.

The record herein clearly reveals that Ritchie simply failed to show that his impairment ratings had increased or that his occupational disability had worsened. The ALJ implied in his opinion that Ritchie was worse both physically and psychologically upon reopening. However, it is not enough for the ALJ to believe that Ritchie possessed a greater degree of occupational disability. Under Kentucky law, the ALJ is required to ascertain from the evidence whether the worker has suffered an increase in occupational disability since the settlement or award. Newberg v. Davis, Ky., 841 S.W.2d 164 (1992). The record provides no comparisons between Ritchie's lower back and mental impairments, as those conditions existed at the time of the October 1998 settlement and upon reopening. In fact, Ritchie's own treating physicians, Dr. Tibbs and Dr. Rapier, found no significant increase in Ritchie's impairment or occupational disability ratings with respect to Ritchie's lower back. Moreover, Dr. Jain provided no comparison of Ritchie's psychological impairment as it existed at settlement and upon reopening. As such, the ALJ placed more weight on the medical reports from Dr. Rapier, Dr. Tibbs and Dr. Shraberg, who provided comparisons of Ritchie's medical conditions on the dates of injury and upon reopening. As a finder of fact, the ALJ has the sole authority to assess and to evaluate the

quality, character, and substance of the evidence. Square D. Co. v. Tipton, Ky., 862 S.W.2d 308 (1993). The weight given to the evidence and the credibility accorded to the witnesses are matters within the sole province of the fact-finder. Paramount Foods v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The ALJ "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." Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 329 (2000)(internal citation omitted).

From our review of the record herein, we believe Ritchie failed to meet his burden of proof upon the reopening of his claim. Since the ALJ's findings herein were supported by evidence of substance, we conclude that the ALJ properly dismissed the reopening.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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