RENDERED: April 16, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-001913-WC

UNITED STATES STEEL CORPORATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-77-14300

RANDALL WEBB;
WORKERS' COMPENSATION FUNDS/SPECIAL FUND;
WILLIAM BRUCE COWDEN, JR., Administrative Law Judge;
and WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: GUIDUGLI, MINTON, and VANMETER, Judges.

MINTON, Judge: United States Steel Corporation (US Steel) seeks review of a Workers' Compensation Board (Board) opinion that affirmed the decision of an Administrative Law Judge (ALJ) awarding Randall Webb total disability benefits for a work-related ankle injury and associated psychological overlay. The only issue on appeal concerns apportionment for that portion of Webb's disability due to his psychological problems. Finding

that Webb's psychological disability was caused by his physical injury and was not due to the arousal of a preexisting, previously dormant personality or psychological disorder, the ALJ assigned all liability for it to Webb's employer, US Steel. US Steel asserts that all liability for Webb's psychological disability should be assigned to the Workers' Compensation Funds (WCF)[1] and that the Board committed flagrant error in assessing the evidence on the etiology of Webb's psychological disability and the issue of apportionment.

Webb suffered a serious work-related injury to his right ankle on February 19, 1977,[2] when he was employed as a coal miner. He was twenty-seven years old at the time. US Steel began paying him temporary total disability (TTD) benefits on February 20, 1977. He filed an application for adjustment of claim concerning his ankle injury on August 23, 1978. On October 9, 1978, the Board entered an order granting US Steel's motion to hold the case in abeyance until one of the parties requested a hearing. Pursuant to Webb's request, a hearing was conducted in this matter on July 24, 1981. In August 1981, Webb

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[1] WCF is the statutory successor to the Special Fund.

[2] The initial injury date has been stipulated in the record as February 18, 1977, by US Steel, and as February 19, 1977, by Webb. The ALJ found the date to be February 19, 1977, but the Board found the date to be February 18, 1977. We have settled on February 19, 1977. Regardless, the date of the injury does not affect our holding.

amended his application for adjustment of claim to include traumatic neurosis and injury to his knee and back caused by alteration of his gait and posture due to his ankle injury. The Board, on its own motion, then ordered that the Special Fund be joined as a party. However, the Board also granted another motion by US Steel in August 1981 to hold the case in abeyance until the termination of TTD benefits or until one of the parties requested that it be removed from abeyance.

Throughout the 1980's, Webb attempted, by counsel, to have his case removed from abeyance based on evidence showing that he had reached maximum medical improvement. US Steel successfully opposed these efforts. Webb continued to receive TTD benefits, but his case remained in stasis. In July 2002, Shelia C. Lowther, Chief ALJ, ordered, pursuant to her own motion, that the case be removed from abeyance. On May 5, 2003, when Webb was fifty-two years old, William Bruce Cowden, Jr., ALJ, entered an opinion, order, and award in Webb's favor, finding him to be totally disabled as a result of his ankle injury and associated psychological problems caused by his ankle injury. The ALJ assigned all liability to Webb's employer, US Steel. On appeal before the Board, US Steel argued that all liability for Webb's psychological disability should be assigned to the WCF because his psychological disability was due entirely to a preexisting, previously dormant personality or

psychological disorder, specifically bipolar disorder, which was triggered into disabling reality by his ankle injury. The Board affirmed the ALJ's decision in an opinion entered August 20, 2003. US Steel then filed this petition for review.

The standard of review dictates that we correct the Board only when we perceive that it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[3] The only issue raised by US Steel on appeal concerns the assessment of the evidence. US Steel essentially reiterates its claims before the Board, arguing that the ALJ's determination that Webb's psychological disability is not due to the arousal of a preexisting, previously dormant, nondisabling disease or condition into disabling reality is an abuse of discretion because it is not supported by any substantial evidence.

Where the party bearing the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different result.[4] Compelling evidence is defined as evidence that is so overwhelming that no reasonable

[3] Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

[4] Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

person could reach the same conclusion as the ALJ.[5] It is not enough for US Steel merely to show that there is some evidence that would support a contrary conclusion.[6] So long as the ALJ's opinion is supported by any evidence of substance, then it cannot be said that the evidence compels a different result.[7] The authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence belongs solely to the ALJ as fact finder.[8] The ALJ may choose to believe parts of the evidence and disbelieve other parts, even if it comes from the same witness or the same party's total proof.[9] The Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence on questions of fact.[10]

Apportionment is governed by Kentucky Revised Statutes (KRS) 342.120. The relevant statute in effect in 1977 when Webb was injured stated that the then Special Fund could be made a party to a workers' compensation proceeding when "[t]he employe

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5 REO Mech. v. Barnes, Ky.App., 691 S.W.2d 224, 226 (1985).

6 McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974).

7 Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

8 Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

9 Caudill v. Maloney's Disc. Stores, Ky., 560 S.W.2d 15, 16 (1977).

10 KRS 342.285(2).

[sic] is found to have a dormant non-disabling disease *or* condition which was aroused or brought into disabling reality by reason of a subsequent compensable injury by accident or an occupational disease."[11] Further, the statute provided that if the subsequent compensable injury or occupational disease results in a permanent disability which is greater than that which would have resulted from the subsequent injury or occupational disease alone, the employer is responsible only for the disability which would have resulted from the injury or occupational disease if there had been no preexisting dormant disease or condition and the Special Fund is liable for the remaining disability.[12] For purposes of apportionment, it does not matter whether the pre-existing disease or condition is characterized as a physical condition or a mental condition.[13] Both parties agree that whether any liability for Webb's psychological disability should be apportioned to WCF, the statutory successor to the Special Fund, depends on two things: 1) whether Webb had a preexisting, dormant, nondisabling disease or condition which was brought into disabling reality by his work-related ankle injury, and 2) whether this previously

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[11] KRS 342.120(1)(b) (emphasis in original).

[12] KRS 342.120(3)-(4). *See also* Whittaker v. Troutman, Ky., 7 S.W.3d 363, 364 (1999).

[13] Whittaker, 7 S.W.3d at 364, *citing* Young v. Bear Branch Coal Co., Ky., 465 S.W.2d 41 (1971).

dormant disease or condition resulted in a greater disability than the ankle injury alone otherwise would have. In this instance, the Board correctly applied the governing law, and the Court perceives no error in its assessment of the evidence. There was substantial evidence to support the ALJ's decision that Webb's psychological condition was not due to a preexisting, previously dormant condition and his decision to assign all liability for Webb's psychological disability to US Steel.

To place the evidence concerning Webb's psychological disability into perspective, it is helpful to understand his physical disability. Despite multiple surgeries on his right ankle, Webb continues to experience ankle pain. Even with the assistance of a leg brace and a cane, he walks with a severe limp and is unable to walk or stand for more than brief periods of time. The changes in his gait and posture due to his ankle injury have caused secondary pain in his back and knee. Since his work-related injury, Webb has also experienced psychological problems severe enough to require hospitalization. US Steel concedes that as a result of his combined physical and psychological conditions, Webb is totally disabled. The only issues on appeal concern the exact etiology of Webb's psychological problems and the significance of that etiology on the issue of apportionment. The evidence before the ALJ on the

Webb's psychological condition came primarily from the medical report of Robert Noelker, Ph.D., a licensed clinical psychologist, and the medical report and deposition of O. M. Patrick, M.D., a general surgeon.

Noelker evaluated Webb on August 7, 1981. He performed a comprehensive psychological evaluation, which included administering a battery of psychological tests, performing a diagnostic clinical interview, and obtaining an extensive history. In his medical report dated August 24, 1981, Noelker noted that Webb's IQ fell within the "bright, average range of development" and that he had "good basic academic skills," which combined to indicate significant academic rehabilitation potential. However, Noelker concluded that Webb would have to overcome "multiple psychological factors of serious consequence" before he could attempt any occupational or vocational rehabilitation. He estimated that overcoming these psychological factors would require a minimum of two to three years work, including extensive and intensive psychotherapy. Noelker diagnosed Webb with severe reactive depression, severe post-traumatic anxiety, and severe somatization disorder. Regarding the etiology of these conditions, Noelker stated as follows: "The cause in these particular instances seem obviously related to his industrial accident, his subsequent

disability, and those psychological characteristics have arisen out of his inability to perform productively."

Patrick examined Webb on November 16, 2002. His examination included obtaining a patient history, performing a physical examination, and reviewing x-rays. In his Form 107-I medical report, Patrick diagnosed Webb with the following: "(1) Ankylosis of the right ankle with arthritis of the ankle mortis producing pain, gait disturbance, secondary back pain, and (2) manic depression reaction (bipolar state depressive phase) and post traumatic stress syndrome." Patrick assessed Webb as having 68% whole body impairment[14] for his physical condition due to his February 19, 1977, work-related injury. However, he also noted that "[t]he patient has additional significant impairment due to bipolar reaction depressive phase preventing gainful employment."

Regarding the causation of Webb's complaints, Patrick indicated that, within reasonable medical probability, the "[i]njury that occurred on February 19, 1977," was the cause of Webb's complaints. He also checked the box on the Form 107-I indicating that Webb did not have an active impairment prior to this injury. However, Patrick did not address the issue of

[14] Based on the American Medical Association's Guides to the Evaluation of Permanent Impairment, Fifth Edition.

apportionment in his Form 107-I medical report.[15] He did not check the appropriate box to indicate whether Webb's condition was due in part to arousal of a preexisting, dormant, nondisabling condition or congenital abnormality. However, in a deposition, Patrick elaborated further on the etiology of Webb's psychological condition. He first explained that bipolar disorder or bipolar reaction is the same thing as manic depression, with bipolar disorder or reaction being the preferred, current nomenclature. In response to questions by US Steel's counsel, Patrick explained the etiology of Webb's bipolar reaction or manic depression and its connection to his physical injury:

> Q. Doctor, isn't it true that physical trauma does not in and of itself cause manic depression?
>
> A. It can.
>
> Q. Sir?
>
> A. It can. It can cause the onset of it.
>
> Q. Well, but the trauma in and of itself, does that cause manic depression?
>
> A. I don't think the trauma itself, but it can bring it into activity.

[15] The instructions under the section entitled "APPORTIONMENT" on Patrick's Form 107-I report read as follows: "Answer only if injury occurred before December 12, 1996. (NOT APPLICABLE)." The Court notes that these instructions may have given the erroneous impression that apportionment would not be available in Webb's case under any circumstances.

Q. That brings me to the next question, isn't it also true that where there is bipolar reaction or manic depressive reaction to physical trauma, that reaction occurs because of a psychiatric or personality disorder that preexisted the physical trauma but was dormant and nondisabling prior to the physical trauma?

A. That's true.

Q. In your opinion, did this man have a preexisting dormant nondisabling psychiatric or personality disorder in the form of manic depression by the 1977 trauma?

A. I think the 1977 trauma is what triggered it, yes.

Q. Was that preexisting psychiatric or personality disorder a departure from the normal state of health even though it was dormant and nondisabling and even though no one would have ever known plaintiff had that psychiatric or personality disorder but for the trauma that brought it into disturbing reality?

A. I think it was dormant before the injury which brought it into reality.

Q. And that is a departure from the normal state of health even though it's not manifest?

A. Well, in retrospect looking at it it [sic] is. At the time you wouldn't know it before, but in retrospect I would say yes, it is.

Q. But for the preexisting dormant nondisabling psychiatric or personality disorder, would the 1977 trauma have caused the manic depression?

> A. I think in this case it would not have caused it had there not been that potential for it to be there to trigger it.[16]

US Steel's counsel also elicited Patrick's testimony that he had treated "a lot of patients" with manic depression or bipolar reaction and had witnessed the disorder's affect upon a person with whom he had a thirty-year partnership. When US Steel's counsel asked Patrick to address Webb's aggregate impairment and the appropriate apportionment, the following exchange took place:

> Q. ....How would you apportion the percentage of this man's overall aggregate disability between the physical condition of his right ankle and the manic depression?
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> A. I give him a 68-percent partial permanent functional impairment rating according to the impairment that he had from the injury to the ankle, and I feel that he has another 32-percent impairment as a result of the disability from the bipolar [sic].
>
> Q. So from your standpoint if you apportioned the total aggregate disability that he has, which is we agree total disability, you would apportion 68 percent of that to the physical condition of the ankle from the injury and 32 percent to the traumatic arousal of the psychiatric or dormant [sic] personality disorder?
>
> A. I think that's a reasonable assumption, yes.[17]

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[16] Patrick Deposition at 7-9.

[17] *Id.* at 10.

The ALJ ultimately found that Webb's psychological disability was not due to the arousal of a preexisting, previously dormant, psychological disease or disorder into disabling reality, as described by Patrick, but rather evolved from his ankle injury, as described by Noelker. In reaching this conclusion, the ALJ engaged in an explicit weighing of the evidence as follows:

> The Administrative Law Judge notes for the record that Dr. Patrick indicates that his specialty is that of General Surgeon. The Administrative Law Judge finds that Dr. Patrick's expertise is not in the field of psychiatry and, therefore, any opinion he renders as to the etiology of the Plaintiff's mental condition is suspect. Assuming arguendo that Dr. Patrick does have the expertise to render an opinion on apportionment as it applies to the Plaintiff's mental condition, the Administrative Law Judge must adopt Dr. Noelker's opinion as to the etiology of the Plaintiff's mental condition and will find that this opinion has more credibility. In particular, the Administrative Law Judge cites to the medical report of Dr. Noelker dated August 24, 1981 who opined that the etiology of the Plaintiff's severe reaction depression, severe post traumatic anxiety and severe somatization disorder is obviously related to the industrial accident, his subsequent disability and those psychological characteristics arising out of his inability to perform productively. The Administrative Law Judge interprets this language so as to attribute the entirety of the Plaintiff's psychiatric impairment to the work-related injury in question.

US Steel asserts that it was an abuse of discretion for the ALJ to rely upon the medical report of Noelker because Noelker did not establish his qualifications in compliance with 803 Kentucky Administrative Regulation (KAR) 25:010, § 10(4).[18] Indeed, Noelker's report does not appear to contain a statement of his medical qualifications as required by that administrative regulation. The only information about Noelker's academic or professional qualifications is found in his letterhead, where he refers to his Ph.D. degree, and his typed signature which reads "Robert W. Noelker, Ph.D. / Licensed Clinical Psychologist." In the medical report, Noelker also states that Webb has significant academic rehabilitation potential, "[u]nlike many individuals who [sic] I see with significant work related injuries or personal injuries," suggesting that Noelker has some experience with evaluating injured patients. Even though US Steel did not timely object to the filing of Noelker's medical report, it argues that it was an abuse of discretion for the ALJ to consider the report because of the omission of a statement of qualifications. US Steel analogizes that this is comparable to the ALJ considering a medical report prepared by

[18] 803 KAR 25:010 § 10(4) states in relevant part as follows: "Medical reports shall include, within the body of the report or as an attachment, a statement of qualifications of the person making the report."

Charles Manson, Saddam Hussein, or Osama Bin Laden.[19] If, as US Steel claims, 803 KAR 25:010 § 10(4) applies to Noelker's report,[20] then it must be interpreted in conjunction with 803 KAR 25:010 § 10(6)(b). 803 KAR 25:010 § 10(6)(b) states that "[o]bjection to the filing of a medical report shall be filed within ten (10) days of the filing of the notice or the motion for admission." Significantly, the administrative regulation uses the obligatory "shall" rather than the permissive "may." US Steel admits that Noelker's August 24, 1981, medical report was first filed in the administrative record on March 5, 1982, as an exhibit to a motion by Webb. On November 18, 2002, Webb, by counsel, filed a document entitled Statement of Notice of Filing of Additional Medical Evidence in Behalf of Plaintiff in which he designated Noelker's August 24, 1981, medical report as evidence to be considered by the ALJ. Based on the plain meaning of 803 KAR 25:010 § 10(6)(b), US Steel had ten days from November 18, 2002, to file any objection to the admission of Noelker's report into evidence. US Steel filed no such objections within the ten-day time period. Its failure to do so

[19] The Court notes with disapproval the questionable nature of this analogy which compares a licensed clinical psychologist to infamous criminals or terrorists.

[20] We make no decision concerning whether this administrative regulation applies to a medical report taken in 1981 and filed in 1982 concerning a worker injured in 1977 whose claim was adjudicated by the ALJ in 2003 because, for the reasons noted *infra*, the result is the same either way.

would presumably constitute a waiver of any error. However, we decide this issue on the fact that US Steel did not raise the issue of Noelker's omitted statement of medical qualifications until the appeal before the Board. Even if this issue were not previously waived by US Steel's failure to file objections within ten days after the filing of notice for admission pursuant to 803 KAR 25:010 § 10(6)(b), it was waived by US Steel's failure to raise this issue before the ALJ. As the Kentucky Supreme Court stated in Urella v. Kentucky Board of Medical Licensure, "[i]t is well settled that failure to raise an issue before an administrative body precludes the assertion of that issue in an action for judicial review...."[21]

US Steel takes issue with the ALJ's statement that he placed more credence in Noelker's testimony than in Patrick's on the etiology of Webb's mental condition in part because "Dr. Patrick's expertise is not in the field of psychiatry." US Steel correctly points out that Noelker's field of expertise is also not psychiatry. Psychiatry is "the branch of medicine concerned with the study, diagnosis, and treatment of mental disorders."[22] Noelker is not a medical doctor and, therefore, not a psychiatrist. Instead, he is a clinical psychologist with

[21] 939 S.W.2d 869, 873 (1997).

[22] Random House Webster's College Dictionary 1089 (McGraw Hill ed. 1991).

a Ph.D. Psychology has been defined as "the science of the mind and mental states and processes."[23] However, as a psychologist is qualified to give a medical report as well as a psychiatrist,[24] this is a distinction without a difference. This is not a case in which the ALJ was somehow confused about Noelker's status and believed him to be a medical doctor. Notwithstanding this one minute error in terminology, the ALJ's opinion makes it clear that he knew and understood Noelker to be a licensed clinical psychologist. Moreover, the apparent reasoning of the ALJ's decision is still sound. It is well within the ALJ's discretion to decide to accord more weight to the testimony of a clinical psychologist, an expert in the science of the mind and mental states and processes, than to that of a general surgeon on an issue involving the etiology of a mental disease or disorder. This falls within the matters of weight and credibility to be determined by the ALJ.

US Steel also seems to assert that a licensed clinical psychologist is not qualified to give medical testimony; and, therefore, it was unreasonable and an abuse of discretion for the ALJ to have placed any weight in Noelker's testimony. In its brief, US Steel states that that ALJ "has essentially accorded" Noelker the status of a physician, as if that were

[23] *Id.* at 1090.

[24] *See infra*.

somehow suspect behavior on the part of the ALJ. However, the definition of "[p]hysician" for purposes of the workers compensation act specifically includes "psychologists...acting within the scope of their license issued by the Commonwealth."[25] US Steel presents no evidence to show that Noelker is anything other than a licensed clinical psychologist acting within the scope of his license. Therefore, US Steel has failed to show that the evidence compels a result contrary to the ALJ's decision to accept the medical report of Noelker as a licensed clinical psychologist.

On a related matter, the Court notes with disapproval Footnote 1 of US Steel's brief. In this footnote, counsel for US Steel recounts an unfortunate tale of the alleged failure of a clinical psychologist, who has no apparent connection to Noelker, to properly diagnose counsel's son as suffering from bipolar disorder. This footnote could be viewed as an attempt to skirt the prohibition on introducing new evidence on appeal.[26] However, even if this matter were not raised for the first time on appeal, "evidence" of this type violates Rule 3.130-3.4(e) of the Rules of the Supreme Court (SCR). SCR 3.130-3.4(e) states, in relevant part, that no lawyer shall "[i]n trial, knowingly or intentionally allude to any matter that the lawyer does not

[25] KRS 342.0011(32).

[26] *See* White v. White, Ky.App., 883 S.W.2d 502, 505 (1994).

reasonably believe is relevant or that will not be supported by admissible evidence" or "assert personal knowledge of facts in issue except when testifying as a witness."[27] Counsel for US Steel virtually conceded that this evidence, which was based on his personal knowledge, was not relevant, stating that the facts concerning his son's misdiagnosis "do not constitute evidence and are included out of frustration." Nevertheless, he included these facts in his brief. A brief is not the proper place to vent one's frustration.

US Steel also implies that it was unreasonable of the ALJ to give more credence to Noelker's medical report than Patrick's because the latter was much more recent. Noelker's evaluation was performed in 1981 while Patrick's was performed in 2002. However, US Steel does not present any evidence to suggest that Webb's psychological condition has changed between 1981 and 2002 in any relevant way. US Steel speculates that there have been advances in the understanding of psychological diseases and disorders between 1981 and 2002 but fails to show any specific advances and how they might undermine Noelker's report. In any event, this matter goes toward the weight of the evidence, which is a matter to be decided by the ALJ.

[27] When an attorney may testify in a case in which he is also acting as an advocate is further restricted by SCR 3.130-3.7.

Finally, US Steel asserts that it was an abuse of discretion for the ALJ not to find, in accordance with Patrick's testimony, that Webb's psychological disability was due entirely to a preexisting, previously dormant condition, bipolar disorder, and that liability for the psychological disability should be apportioned to WCF. US Steel asserts that this was an abuse of discretion because Patrick's testimony on the etiology of Webb's psychological disability was uncontradicted. US Steel claims that Noelker simply never addressed the possibility of a preexisting psychological condition or predisposition and hence the issue of apportionment. Noelker did not expressly address the issue of apportionment. However, he did state the cause of Webb's multiple psychological diseases or disorders "seem obviously related to his industrial accident, his subsequent disability, and those psychological characteristics have arisen out of his inability to perform productively." As the Board noted:

> [Noelker's] opinion that Webb's current psychological profile has 'arisen out of his inability to perform productively' provides more than a substantial basis for the ALJ to conclude that Webb's condition evolved from the injury and was not an aroused pre-existing, dormant condition. Based on the medical evidence of record, we cannot say as a matter of law the ALJ's opinion is wholly unreasonable.

We agree with the Board's reasoning on this matter and adopt it as our own.

For the foregoing reasons, the opinion of the Worker's Compensation Board entered August 20, 2003, is affirmed.

ALL CONCUR

BRIEF FOR APPELLANT:

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NO BRIEF FOR APPELLEE RANDALL WEBB