

RENDERED: JUNE 4, 2004; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2003-CA-002585-WC

RUSSELL D. HUFF

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-70302

COLDIRON VOLUNTEER FIRE DEPARTMENT;
HON. DONNA H. TERRY, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, CHIEF JUDGE;¹ COMBS AND TACKETT, JUDGES.

TACKETT, JUDGE. Russell D. Huff petitions for review from an opinion of the Workers' Compensation Board (Board) which affirmed the opinion, award, and order of the Administrative Law Judge (ALJ) finding that Huff had sustained cervical and lumbar strains as a result of a work-related injury, but denying Huff's application for permanent occupational disability benefits.

¹ Chief Judge Emberton concurred in this opinion prior to his retirement effective June 2, 2004.

Because the evidence presented in the case does not compel an opposite result, we affirm.

In approximately March 1997 Huff began working as a fireman for the Coldiron Volunteer Fire Department. Huff was a volunteer and was not paid for his Fire Department work. Huff was, at the time, also self-employed as an automobile body repairman and mechanic. On September 7, 1997, Huff was paged by the Fire Department to respond to a fire. Huff was on his way to the fire as a passenger in a vehicle driven by a friend, Steve Mills. A pick-up truck traveling in front of the Mills vehicle made a U-turn in the highway. As Mills sought to avoid striking the truck, he lost control of his vehicle, ran off the road, and crashed the vehicle into a cliff. Huff was taken to the hospital, where he was x-rayed and kept overnight for treatment and observation before being released on the following morning.

As a result of the accident Huff complained of eye, head, neck, and back injuries. Emergency room medical records establish complaints of a bruise over Huff's left eye and bridge of his nose; neck pain; blurred vision; facial abrasions; and back pain. An ophthalmology consultation indicated a left subconjunctival hemorrhage.

Among the physicians who initially treated Huff was Dr. James Bean. Dr. Bean diagnosed a cervical sprain and left

orbital pain with headaches. An MRI of Huff's brain showed no evidence of infarcts or intracranial blood and an occult cerebral hematoma was apparently ruled out. A cervical MRI was interpreted as normal. Dr. Bean assessed no permanent impairment as a result of the automobile accident.

Following his injury Huff did not return to work. Huff was examined by a variety of physicians who treated Huff for a variety of diagnoses, including cervical sprain/strain; occipital neuralgia; mild facet arthropathy; cervicogenic headaches; mild closed head injury; and persistent seizure disorder.

In January 2000 Dr. Alexander Tikhtman, a neurologist, began treatment for headaches, neck and low back pain, and possible seizures. Dr. Tikhtman diagnosed seizures/spells secondary to non-epileptic causes and likely post-traumatic stress disorder related to the accident. In an October 2002 Form 107 medical report Dr. Tikhtman restricted Huff from driving and from manual labor.

Dr. C. Christopher Allen, a neuropsychologist, performed an independent medical evaluation on Huff. He diagnosed a conversion disorder; cognitive disorder NOS; major depressive disorder (single episode, moderate); generalized anxiety disorder; and a pain disorder associated with both psychological factors and a general medical condition. Dr.

Allen concluded that it is "quite possible" that Huff's neuropsychological profile is attributable to head injuries sustained in the accident and that it would be "virtually impossible" for Huff to return to employment due to his neuropsychological deficits. Dr. Allen found Huff to have a 30% impairment based on the AMA Guidelines, Chapter 14, and a 25% permanent impairment based on the AMA Guidelines, Chapter 13.

Dr. Andrew Cooley, a psychiatrist, also performed an independent medical evaluation. Dr. Cooley diagnosed dysthymia secondary to chronic pain, dependent personality traits, and chronic cervical strain. He assessed a 0% impairment under the AMA Guides to Evaluation of Permanent Impairment and stated that there was no evidence of psychosis or mood disorder and stated that Huff should be able to return to work from a psychiatric standpoint.

Dr. James Templin, a physician specializing in occupational medicine and pain management performed an independent medical examination in January 2003. Dr. Templin diagnosed chronic low back pain syndrome, chronic cervical musculoligamentous strain, history of whiplash injury, possible post-traumatic stress disorder, history of cerebral concussion, post-concussion syndrome, possible organic brain syndrome, and a history of seizures/spells. Dr. Templin did not assess any impairment rating as the result of the cervical condition, and

commented that Huff's cervical injury is primarily of a soft tissue nature. He recommended restrictions against activities requiring extensive use of the arms for pushing, pulling, lifting, twisting, turning, grasping, holding, and carrying as well as frequent bending, stooping, kneeling, squatting, crouching, lifting, or climbing.

On August 17, 1999, Huff filed an application for resolution of injury claim with the Kentucky Department of Workers Claims. On December 1, 1999, Acting Arbitrator Donald G. Smith issued a benefit review determination dismissing the appellant's claim. In his opinion the Arbitrator stated that he did not find Huff totally disabled and dismissed his claim for permanent partial disability due to the lack of an AMA guideline impairment rating; however, the Arbitrator did grant the Appellant's claim for future medical expenses. Huff subsequently requested a hearing on his claim before an Administrative Law Judge. The case was subsequently assigned to ALJ Donna H. Terry.

On February 28, 2003, a hearing was held before ALJ Terry. On April 24, 2003, the ALJ entered an opinion, award, and order finding that Huff had no permanent disability. The ALJ also denied an award for a seizure disorder Huff alleged was related to the accident. The decision, however, awarded

reasonable and necessary medical expenses for treatment of the cervical and lumbar sprains Huff suffered in the accident.

On May 12, 2003, Huff filed a petition for reconsideration of the ALJ's April 24 decision, and on May 13, 2003, for some reason, also filed his notice of appeal of the ALJ's decision to the Board. The Board subsequently entered an order placing Huff's appeal in abeyance and remanding the case to the ALJ for a ruling on Huff's petition for reconsideration. On June 9, 2003, the ALJ entered an order denying Huff's petition for reconsideration. The Board thereafter removed the case from abeyance, and on November 5, 2003, the Board entered an opinion affirming the decision of the ALJ. This petition for review followed.

Huff contends that the Board erroneously affirmed the decision of the ALJ because the ALJ failed to consider Kentucky Administrative Regulation 803 KAR 25.010 §10 insofar as that section provides that the ALJ may permit the introduction of reports other than Form 107's. Huff argues that although the ALJ permitted other medical reports to be introduced as evidence, the ALJ failed to consider the reports sufficient for an AMA rating, thereby denying Huff's claim for income benefits.

A review of Huff's brief filed in his appeal to the Board discloses that the appellant did not raise this argument before the Board. A party who seeks to appeal a decision of the

Board to the court system must have preserved an assertion of error by having raised it first to the Board. Breeding v. Colonial Coal Co., Ky., 975 S.W.2d 914, 916 (1998).

This issue is accordingly not preserved for our review.

Huff also argues that the 4th and 5th editions of the AMA Guidelines make no provision for numerical ratings for a psychological disability and that it would therefore be impossible for Huff to demonstrate a permanent rating attributable to his psychological condition. Again, Huff did not raise this argument in his appeal to the Board, and the issue is not preserved for our review. Id.

Huff additionally argues that the Board erred in affirming the ALJ's decision finding that Huff was not totally disabled from the head injuries suffered in the accident.

Because of the way in which Huff has framed his appeal in this case, i.e., by raising issues not presented to the Board, there is a gap in the appeal concerning Huff's neck and back injuries. Because the ALJ's discussion of whether Huff suffered a permanent impairment as a result of his head injuries is intermixed with her discussion regarding his other injuries, we address the ALJ's overall determinations regarding whether Huff incurred a permanent occupational disability as a result of the September 7, 1997, automobile accident. In relevant part, the ALJ made the following findings of fact:

It is undisputed that Mr. Huff sustained painful injuries in the September 7, 1997 motor vehicle accident which have continued to cause ongoing symptoms. The nature and extent of the symptoms which are causally related to the work injury have been vigorously contested.

After careful review of the voluminous record in this case, the Administrative Law Judge finds that Mr. Huff has sustained soft tissue injuries to his neck and low back and also has developed some symptoms consistent with post-traumatic stress disorder as the result of the injury based upon the expert opinions of Drs. Tikhtman and Bean. However, Dr. Bean found only a cervical sprain and assessed no permanent impairment as a result of Mr. Huff's musculoskeletal injuries. Dr. Tikhtman ordered extensive testing, including a multiple day inpatient admission to the University of Kentucky Epilepsy Monitoring Center before concluding that Mr. Huff did not develop and does not have epilepsy or true epileptic seizures. Dr. Tikhtman felt that Mr. Huff had developed post-traumatic stress disorder but deferred to a psychiatrist for more expert analysis in that area.

Dr. Cooley provided the most credible and authoritative expert opinion regarding Mr. Huff's psychiatric symptoms and he found no evidence of any neuropsychiatry injury or significant psychiatric condition. He did find that Mr. Huff had developed dysthymia secondary to chronic pain from the injury, but that this was not significant enough to engender a permanent impairment rating.

Based upon the foregoing, the Administrative Law Judge finds that Mr. Huff did sustain cervical and lumbar strains, which probably causes some musculoligamentous pain more than three years later. However, none of the treating or evaluating physicians assessed permanent impairment ratings as the

result of these conditions and the Administrative Law Judge awards only temporary total disability benefits already paid and reasonable medical expenses for treatment of these musculoligamentous conditions.

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The extent and duration of disability arising from the work injury must be determined. Having concluded that Mr. Huff sustained cervical and lumbar sprains, and a head injury which did not result in seizures or other ratable physical or psychiatric condition, the Administrative Law judge cannot conclude that Mr. Huff is permanently and totally disabled as the result of this work injury. None of the work-related conditions have resulted in any permanent impairment rating. This is not a case such as Gibbs v. Premier Scale Company, Ky., 50 S.W.3d 754 (2001), in which there is some occult damage which can be established only through observation by a physician; rather, this is a case in which neither testing nor observation by the more credible medical experts have established the presence of seizures or of a significant psychiatric condition related to the injury.

Permanent total disability is defined in KRS 342.0011(11)(c) as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. Hill v. Sextet Mining Corporation, Ky., 65 S.W.3d 503 (2001). "Work" is defined in KRS 342.0011(34) as providing services to another in return for remuneration of a regular and sustained basis in a competitive economy. The statutory definition does not require that a worker be rendered homebound by his injury, but does mandate consideration of whether he will be able to work reliably and whether his physical

restrictions will interfere with his vocational capabilities. Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000).

In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000).

Based upon the opinions of Drs. Bean, Tikhtman, and Cooley, Mr. Huff is not totally disabled. He should be able to resume at least light duty work and probably his previous self-employment as a mechanic and auto body repairman. While he has restrictions against test driving a vehicle, these restrictions are unrelated to the work injury and are the result of the largely subjective symptoms which were initially believed to represent epileptic seizures.

Further, an award of permanent partial disability requires a permanent impairment rating arising from the work injury. Having rejected the neuropsychological rating assessed by Dr. Allen, the Administrative Law Judge has not been provided with any permanent impairment rating for the work-related conditions. Therefore, no permanent disability award may be entered herein.

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 (1974). In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977).

Where the decision of the fact-finder is in opposition to the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence was so overwhelming it compelled a finding in his favor and that no reasonable person could have failed to be persuaded by it. Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 678 (1998). In such cases, the issue on appeal is whether the evidence compels a finding in his favor. Paramount Foods at 419; Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 800 (1995). To be compelling, evidence must be so overwhelming that no

reasonable person could reach the same conclusion as the ALJ.

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

After reviewing the evidence in this case, we are not persuaded that the record compels a result opposite from the decision reached by the ALJ. Huff has done little more than point out the evidence favorable to his case and argue that the ALJ should have given more weight to this evidence. However, there was conflicting evidence and testimony concerning whether Huff suffered a permanent total occupational disability as a result of the accident, and in such cases it is the function of the ALJ to resolve the conflict in the opinions. Pruitt v. Bugg Brothers, supra. Moreover, we agree with the Board's summary of Huff's arguments concerning the ALJ's decision:

Huff raises a number of arguments as to the weight to be given to the evidence. Huff recites at great length the medical evidence contained in the record that would support a finding in his favor. Huff believes the ALJ erred in giving more weight to Dr. Cooley's expert opinion since he evaluated Huff on only one occasion and did not review the neuropsychological evaluation report of the UK Epilepsy Monitoring Center. Huff questions Dr. Bean's opinion since he viewed only the February 11, 1998 MRI that was of poor quality. Huff believes more weight should be given to the reports of Dr. Tikhtman. He believes the ALJ erred in not finding him permanently totally disabled as a result of his injuries. He believes the evidence is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. Huff believes he has proven he suffered chronic low back pain,

neck pain, headaches, seizures, a psychological disorder and post-concussion syndrome. He therefore seeks remand for entry of a finding that he has sustained a permanent total disability.

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Since December 12, 1996, it is axiomatic that whether there be an award of permanent partial disability benefits or permanent total disability benefits, an injured worker must first establish a permanent impairment rating as the foundation for a permanent disability rating. Ira A. Watson Dept. Stores v. Hamilton, Ky., 34 S.W.3d 48 (2000). Since there were no ratings assessed for Huff's cervical, low back or eye injury, the question becomes one of whether Dr. Cooley's opinion or that of Dr. Allen was more credible. As noted by the ALJ, Dr. Cooley assessed a 0% impairment and stated Huff had no evidence of psychosis or mood disorder and should be able to return to work from a psychiatric standpoint. He found no neuropsychiatric deficits. The ALJ, as was his prerogative, found Dr. Cooley's opinion to be the more persuasive. Having accepted Dr. Cooley's opinion and having rejected Dr. Allen's opinion and, thus, the only impairment rating of record, the ALJ, as a matter of law, could not award either a permanent total or permanent partial disability. Huff is understandably disappointed in the ALJ's determination. However, the record clearly contains substantial evidence supporting the ALJ's conclusion. There being substantial evidence of record supporting the ALJ's conclusion, we may not reverse. [Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986)]. For the most part, Huff simply asks this Board to substitute its judgment for that of the ALJ as to the weight to be accorded the evidence. The Board may not properly do so. KRS 342.285(2).

For the forgoing reasons the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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