

RENDERED: SEPTEMBER 3, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-000435-WC

SIDNEY COAL COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-83194

PAUL DAVID OWENS; HON. JOHN B.
COLEMAN, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
FUNDS (SUCCESSOR TO THE SPECIAL FUND);
AND WORKERS' COMPENSATION BOARD

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BARBER, DYCHE, AND McANULTY, JUDGES.

McANULTY, JUDGE: Sidney Coal Company, Inc. (Sidney Coal)

petitions for review from an opinion of the Workers'

Compensation Board (Board) affirming the opinion and award of

the Administrative Law Judge (ALJ) granting appellee Paul David

Owens' motion to reopen his claim for workers' compensation

benefits and awarding Owens additional benefits. Sidney Coal

argues that Owens failed to demonstrate either a worsening of

his condition since the original award of benefits, or,

alternatively, that he failed to demonstrate that he suffered from a permanent impairment as a result of the psychological conditions upon which the ALJ based the additional award. For the reasons stated below we affirm.

In August 1996, Owens was working as a miner for Sidney Coal Company. On August 13, 1996, in a coal mine roof accident, a piece of coal fell and struck Owens on the back of the neck and lower back. The blow shoved him forward, causing injuries to his neck, back, right leg and right knee. Sidney Coal does not dispute that Owens sustained these work-related injuries in the accident.

On October 30, 1998, Owens filed an Application for Resolution of Injury Claim against Sidney Coal Company and the Special Fund. On August 24, 1999, ALJ Donald G. Smith rendered an opinion and award determining that Owens incurred an occupational disability of 40% as a result of the August 13, 1996 accident. The disability rating was based upon a 30% occupational disability for Owens' back injury, while 10% was due to the injuries relating to his right leg.

In the meantime, in March 1997, Owens returned to employment with Sidney Coal. In March 1998 an attempt was made to remove the steel rod in his right femur. The surgeons were able to remove the screws, but not the rod. Following the surgery, Owens returned to work in May 1998. He moved to the

position of continuous miner operator in January, 1999. Owens stayed in that position until July, 1999.

After leaving Sidney Coal, Owens obtained employment with Pike County Fiscal Court in the Solid Waste Department as a member of its garbage pickup crew. He initially worked as a loader, but then moved to truck driver after receiving his CDL license.

In February 2001, Owens began experiencing muscle spasms and was hospitalized for depression and suicidal tendencies the following month. Owens received temporary total disability benefits from February 11, 2001, through July 22, 2001.

In August 2001, Owens returned to work for Sidney Coal. Owens worked up until March 18, 2002, when he experienced increased back pain while manually reeling up some cable wire. He has not worked since March 18, 2002. Temporary total benefits were again instituted from March 19, 2002, through October 28, 2002.

On November 21, 2002, Owens filed a motion to reopen his claim for workers' compensation benefits on the basis that his occupational disability had worsened since the original award. The Chief Administrative Law Judge determined that Owens had made out a prima facie case for reopening, and the case was

assigned to ALJ John B. Coleman. A hearing on the reopening was held on May 28, 2003, at which time Owens testified.

On August 8, 2003, the ALJ entered an opinion and award determining that Owens had experienced a worsening of his condition since the original opinion and award. As determined by the ALJ, the worsening was related to the onset of depression and post-traumatic stress disorder brought about by the original work-related physical injuries. The ALJ determined that as a result of his worsened condition, Owens had sustained a 75% occupational disability. The ALJ awarded benefits corresponding to the increased occupational disability.

On January 28, 2004, the Board entered an opinion affirming the ALJ's decision. This petition for review followed.

The ALJ determined that Owens had experienced a worsening of his condition since the original opinion and award because of the onset of depression and post-traumatic stress disorder brought about by the original work-related physical injuries. Sidney argues that the ALJ's decision was erroneous because there was no evidence of permanent impairment from a psychological standpoint.

Certain basic principles exist in a reopening of a workers' compensation claim. First, the burden of proof falls upon the party seeking reopening. Griffith v. Blair, Ky., 430

S.W.2d 337, 339 (1968). Here, that party is Owens. Consequently, pursuant to KRS 342.125, it was Owens' burden to prove that the effects of the August 13, 1996 accident had worsened since ALJ Smith's opinion of August 24, 1999, so as to cause an increase in vocational disability. In ascertaining whether there has been a change, it was the ALJ's obligation to analyze not only the evidence presented at the time of reopening, but also the evidence presented previously. W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453, 455 (1946). Here, the comparison is to Owens' condition at the time of the August 1999 decision with his condition at the time of reopening.

In support of his opinion and award the ALJ made the following relevant findings of fact and conclusions of law:

The final decision to be made by the Administrative Law Judge is the issue of whether the plaintiff has an increase in occupational disability attributable to his work related injury as shown by objective medical evidence. In this case, the plaintiff complains that his symptoms from his low back and leg have increased. However, a review of the medical evidence does not really show anything more than a change in the plaintiff's complaints in regards to his level of pain from these physical injuries. Although Dr. Rapier and Dr. Craig have offered their opinions that the plaintiff is now totally disabled, I am more convinced by the opinions of Dr. Primm and Dr. Wagner that there is no objective evidence of a physical change. However, I am firmly convinced that the plaintiff had

indeed developed major depression and post-traumatic stress disorder since his opinion and award in 1999. A review of Dr. Cowell's testimony is very convincing that the symptoms probably began in the summer or fall of 1999 and manifested their disabling reality in the episode of February and March of 2001. In fact, the post-traumatic stress disorder was undiagnosed until February 14, 2002. As for the plaintiff's physical injuries, he was able to return to employment in the coal mining industry, but Dr. Cowell has clearly set forth that the plaintiff's post-traumatic stress disorder will not allow him to return to that work environment. As such, the plaintiff has shown an increase in his occupational disability in that his manifested psychological condition will no longer allow him to perform work which he was able to perform at the time of his opinion and award. The Administrative Law Judge further finds that there is objective evidence that the plaintiff has developed this condition. In Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001), the Court noted that where a psychiatrist recorded events and observations and rendered a diagnosis and further testified that he had not performed standardized testing as such tests were only used in cases which were absolutely bewildering, objective evidence existed to award disability benefits. This is similar to the testimony of Dr. Cowell who indicated that he did perform standardized testing on the plaintiff which revealed depression, but that he did not need the standardized testing to know that he was examining a patient who was dejected, depressed, demoralized and hopeless. Dr. Cowell went on to note that through his direct observations during his treatment of the plaintiff that he eventually came to realize that the plaintiff's anxiousness was due to post traumatic stress disorder by direct observation. As such, I find that the plaintiff's increase in occupational

disability attributable to his onset of psychiatric symptoms is indeed shown by objective medical evidence. . . . Considering the plaintiff's age, education, and past work experience along with his physical and psychological restrictions and impairment, I am convinced that he has sustained a 75% occupational disability under the principles set forth in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) and KRS 342.0011(11). The Administrative Law Judge further notes that this increase in occupational disability is a direct result of his inability to return to the work he was performing at the time of his injury as well as at the time of his opinion and award and is due to his psychiatric state, which is directly attributable to the injury sustained in the work related accident of August 13, 1996.

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 rests with the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977).

Where the party with the burden of proof is successful before the ALJ, the issue on appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence is 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 relevant provision of the reopening statute, KRS 342.125,¹ allows a reopening upon a showing of:

Change of disability as 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.

KRS 342.125(1)(d).

¹ KRS 342.0015 provides that the procedural provisions of the 1996 changes to the Workers' Compensation Act shall apply to all claims irrespective of the date of injury or last exposure.

The findings of the ALJ in connection with whether there had been a worsening of Owens' condition as a result of his August 1996 work-related injury was supported by substantial evidence. The evidence presented by Dr. Cowell squarely addressed this issue. Dr. Cowell diagnosed Owens with major depressive disorder, single episode in partial remission, as well as post-traumatic stress disorder. Dr. Cowell's testimony further reflects that, sequentially, Owens' psychological problems did not become a disabling reality until February or March 2001, and that the condition was not diagnosed until February 14, 2002 - all subsequent to the original August, 1999 opinion and award. Dr. Cowell further attributed Owens' psychological condition to the original injuries he incurred in August, 1996.

The medical records and testimony of Dr. Cowell comprise substantial evidence supporting the decision of the ALJ that there has been a worsening of Owens' condition since the original award as a result of his work-related injury.

In the alternative, Sidney Coal argues that the ALJ's decision was erroneous because none of the medical witnesses, including Dr. Cowell, quantified Owens' psychological diagnoses as a percentage of impairment pursuant to the AMA Guidelines. Sidney Coal argues that without an impairment rating for the

psychological condition under the AMA Guidelines, there could be no award.

In a reopening case, the substantive rights and obligations of the parties are governed by the law in effect on the date of the injury. Woodland Hills Mining, Inc. v. McCoy, Ky., 105 S.W.3d 446, 448 (2003). The version of KRS 342.730(1)(c) in effect on the date of Owens' injury provided as follows:

For permanent partial disability, except all cases described in subsection (1)(b), sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage but not more than seventy-five percent (75%) of the state average weekly wage as determined by his percentage of disability caused by the injury or occupational disease as determined by the "Guides to the Evaluation of Permanent Impairment," American Medical Association, latest edition available, or under KRS 342.0011(11), whichever is greater. . . . (Emphasis added).

As noted by the emphasized portion of the statute, the version of KRS 342.730(1)(c) in effect on the date of the original injury expressly provided for an alternative calculation of income benefits under KRS 342.0011(11). In turn, the version of KRS 342.0011(11) on the date of the original injury provided as follows:

"Disability" means a decrease of wage earning capacity due to injury or loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives, taking into

consideration his age, occupation, education, effect upon employee's general health in continuing in the kind of work he is customarily able to do, and impairment or disfigurement.

Clearly, in combination, the relevant versions of KRS 342.730(1)(c) and KRS 342.0011(11) provided a means for an awarding of workers' compensation benefits without the assignment of an AMA disability rating under the guidelines. In fact, KRS 342.730(1)(c) specifically provided that the award should be based upon whichever calculation produced the greater result, and so Sidney Coal could not have been prejudiced by the failure of the medical witnesses to assign an AMA Guidelines disability rating to Owens. In addition, we adopt the Board's discussion regarding this issue:

The record contains substantial evidence upon which the ALJ could conclude Owens had a decrease of wage earning capacity due to the injury. As noted by Dr. Cowell, Owens could not return to jobs in the mining industry. Owens' testimony indicated he earned a much higher wage in the mining industry than he earned in his employment with the Fiscal Court. As noted in KRS 342.0011(11) as set out above, a decrease of wage earning capacity due to an injury is one of the definitions of disability. The other portion of the definition of disability is a loss of ability to compete to obtain the kind of work the employee is customarily able to do, in the area where he lives, taking into consideration his age, occupation, education, effect upon employee's general health of continuing in the kind of work he is customarily able to do, and impairment or disfigurement. Mining

work was the type of work Owens was customarily able to do. Clearly, Dr. Cowell's testimony indicates there would be a negative effect upon Owens' general health if he continued in that kind of work. Contrary to Sidney's assertion, the definition in KRS 342.0011(11) does not require a showing of an impairment rating, but rather it allows for impairment or disfigurement as a consideration in determining if there is a disability.

The facts in the present claim are strikingly similar to those in Woodland Hills Mining, Inc. v. McCoy [Ky., 105 S.W.3d 446 (2003)]. In that case, the Supreme Court applied the pre-December 12, 1996 substantive proof requirement of KRS 342.730, and upheld a finding of an increase in occupational disability to a total disability even though the claimant only produced evidence of increased levels of pain and depression and produced no evidence of increased impairment ratings.

Finally, we believe the record would actually support a finding that Owens had an impairment rating from the psychological condition. While Dr. Grancher indicated that he did not believe Owens had any percentage of impairment as a result of the work injury, he did indicate that Owens was entitled to an impairment rating of about 10% due to residual depressive symptoms. Dr. Cowell believed Owens continued to have depressive symptoms as well. The ALJ, had he felt it necessary, could certainly have accepted Dr. Granacher's opinion regarding impairment rating and rejected Dr. Granacher's opinion as to causation. Caudill v. Maloney's Discount Store [Ky., 560 S.W.2d 15 (1977)].

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 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). This did not occur in the present case.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

A. Stuart Bennett
Jackson Kelly PLLC
Lexington, Kentucky

BRIEF FOR APPELLEE PAUL DAVID
OWENS:

Randy G. Clark
Clark & Johnson
Pikeville, Kentucky

BRIEF FOR APPELLEE WORKERS'
COMPENSATION FUNDS:

David W. Barr
Frankfort, Kentucky