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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2004-CA-000921-WC

DONNIE KEVIN DAY — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-00-59819

HIGHLANDS MINING & PROCESSING;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE;
AND THE WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; GUIDUGLI AND KNOPF, JUDGES.

KNOPF, JUDGE: Donnie Day appeals from a decision of the Workers' Compensation Board, entered April 14, 2004, reducing his occupational disability rating from 25.3% to 13%. The Administrative Law Judge (ALJ) had initially arrived at the latter figure, but upon Day's motion for reconsideration had

determined that that finding was based on his (the ALJ's) improper reliance on certain medical records. Aside from those records, the ALJ believed, the evidence supported the higher figure. The Board determined that the ALJ's use of the disputed records had been proper and so reinstated the original award. Day contends that the Board has misconstrued rules governing the admission and use of medical opinion evidence. Although our reasoning differs somewhat from that of the Board, we affirm.

In December 2000, while working as a repairman for appellee Highlands, Day, about twenty-seven years old at the time, injured his lower back. After a period of rest, he attempted to return to work, but persistent pain forced him to cease working in February 2001. Back surgery in May 2001 failed to relieve his symptoms. Apparently he has not been able to return to work since then.

In March 2002, Highlands referred Day to Dr. Gregory Snider. Following his examination and his subsequent review of Day's medical records, Dr. Snider opined that Day had reached maximum medical improvement (MMI) in August 2002 and that the workplace injury had left Day with a 13% whole-person impairment. Relying on Dr. Snider's opinion that Day had improved as much as possible, Highlands discontinued Day's temporary total disability (TTD) benefits as of September 1, 2002. Day filed his compensation claim later that month and

sought both additional TTD benefits and benefits for permanent disability. Highlands attached Dr. Snider's report to its response to Day's petition as proof that its termination of Day's TTD benefits had been lawful.

In support of his claim, Day submitted reports by two doctors, both of whom opined that his workplace injury had left him impaired, and one of whom, Dr. Christa Muckenhausen, estimated that impairment as 22% of the whole person. Apparently that impairment rating translates to a 25.3% partial disability rating. Highlands submitted the report of Dr. Russell Travis, who assessed a 10% impairment. In addition to the two doctor reports permitted by KRS 342.033,[1] Day filed numerous treatment records, and "for statistical purposes" adopted Dr. Snider's report as evidence bearing on his TTD claim. In Day's brief to the ALJ, however, he also referred to Dr. Snider's assessment of his impairment as evidence tending to support his permanent disability claim.

The ALJ awarded Day permanent partial disability benefits based on a 13% whole-person impairment. He explained that Dr. Snider's impairment assessment seemed to him the soundest of all those in the record. Day sought reconsideration

[1] The statute provides in part that "[i]n a claim for benefits, no party may introduce direct testimony from more than two (2) physicians without prior consent from the administrative law judge."

of the award and argued that the ALJ ought not to have relied on Dr. Snider's opinion because neither party had submitted Dr. Snider's report for that purpose, but only as background evidence for the TTD issue. The ALJ agreed with Day, withdrew the first award, and issued a new award based on Dr. Muckenhausen's report.

Highlands appealed to the Board. It argued that the ALJ's initial reliance on Dr. Snider's opinion had not been improper, and thus that the ALJ had erred by modifying the award. In agreeing with Highlands, the Board noted that notwithstanding the statutory limit of two doctor reports, parties commonly file extensive treatment records pursuant to 803 KAR 25:010 § 14(2).[2] Although the rule makes clear that doctor reports included in such filings need not be considered, the ALJ's discretion under KRS 342.033 to allow additional reports authorized the ALJ, the Board believed, to rely on any reports that appeared in the record for any purpose. Parties thus, according to the Board, file additional doctor reports at their own risk. Day contends that the Board has too laxly construed the rule limiting the submission of doctor reports.

[2] "Any party may file as evidence before the administrative law judge pertinent material and relevant portions of hospital, educational, Office of Vital Statistics, Armed Forces, Social Security, and other public records. An opinion of a physician which is expressed in these records shall not be considered by an administrative law judge in violation of the limitation on the number of physician's opinions established in KRS 342.033."

We need not reach this question, however, because, as our Supreme Court has recently reiterated, in general a party waives its right to object to the admission of evidence by failing to raise the objection at the time the evidence is offered. In Copar, Inc. v. Rogers,[3] an employer challenged an ALJ's reliance on doctor opinions included, as in this case, in reports filed as treatment history under 803 KAR 25:010 § 14. The employer argued that the opinions did not satisfy foundational requirements imposed by other rules. Citing KRE 103, which requires contemporaneous objection to preserve alleged evidentiary errors, the Court declined to address this argument because the employer had acquiesced in the submission of the reports.

Here, too, not only did Day not object to the submission of Dr. Snider's report, but he adopted the report as his own evidence and urged the ALJ to consider it in support of his permanent disability claim. Only after the ALJ had entered the award did Day assert the alleged evidentiary error. Under Copar and KRE 103, Day's objection was untimely and thus did not provide a proper basis for modifying the award. The Board did not err, therefore, by reinstating the original award.

Day also contends that the Board abused its discretion by permitting Highlands to file a tardy brief. Apparently

[3] Ky., 127 S.W.3d 554 (2003).

Highlands filed its notice of appeal to the Board on time, but missed the briefing deadline. As Highlands correctly points out, 803 KAR 25:010 § 21(11)[4] vests the Board with broad discretion to sanction tardy briefs as it deems appropriate. Highlands explained its lapse as the result of an administrative error, promptly responded when the oversight had been pointed out, and the short delay in no way prejudiced Day. The Board did not abuse its discretion.

The Board having neither erred nor abused its discretion, we affirm its April 14, 2004, order.

ALL CONCUR.

BRIEF FOR APPELLANT:

Sherry Brashear
Harlan, Kentucky

BRIEF FOR APPELLEE:

J. Gregory Allen
Riley & Allen, P.S.C.
Prestonsburg, Kentucky

[4] "Sanctions. Failure of a party to file a brief conforming to the requirements of this administrative regulation or failure of a party to timely file a response may be grounds for the imposition of one (1) or more of the following sanctions: (a) Affirmation or reversal of the final order; (b) Rejection of a brief that does not conform as to organization or content, with leave to refile in proper for within ten (10) days of the date returned. If timely refiling occurs, the filing shall date back to the date of the original filing; (c) Striking of an untimely response; (d) A fine of not more than $500; or (e) Dismissal."