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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2003-CA-001244-WC

COMMONWEALTH ALUMINUM CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-90-31276

THOMAS SCOTT ROBERTS; HON. JOHN B.
COLEMAN, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, JOHNSON, AND KNOPF, JUDGES.

JOHNSON, JUDGE: Commonwealth Aluminum Corporation has petitioned for review of an opinion of the Workers' Compensation Board entered on May 14, 2003, which affirmed an opinion and award of the Administrative Law Judge entered on December 16, 2002. The Board determined that the ALJ's finding that Thomas Scott Roberts¹ had suffered an increase in occupational

¹ Roberts, one of the appellees herein, did not file a brief with this Court.

disability from 40% to 100% was supported by substantial evidence in the record. The Board further determined that in arriving at Roberts's 100% occupational disability rating, the ALJ did not err by considering evidence related to Roberts's ocular² condition. Having concluded that the Board did not err by affirming the ALJ's award which considered Roberts's ocular condition in determining that Robert's occupational disability had increased to a total disability, we affirm.

Roberts was born on January 14, 1957, and has a ninth grade education with no specialized or vocational training. In approximately 1976, Roberts began his employment as a furnace operator with Commonwealth Aluminum in Lewisport, Hancock County, Kentucky. In August 1990 Roberts was driving a forklift in between melters when a pipe burst resulted in his being exposed to chlorine gas. As a result of this exposure, Roberts began to experience various lung problems. Roberts attempted to return to work at Commonwealth Aluminum in a janitorial position, but was unable to continue with his employment at the plant because of the hot temperatures and the various chemicals used inside the building. Roberts filed a claim with the Department of Workers' Claims shortly after the chlorine gas exposure.

² Ocular conditions refer to problems associated with the eye or eyes.

In an opinion and award entered on December 31, 1991, Roberts was assigned a 40% occupational disability rating, with 80% of that attributed to his chlorine gas exposure, and the remaining 20% attributed to the arousal of a pre-existing condition. Medical evidence presented before the ALJ suggested that Roberts suffered from asthmatic bronchitis as a result of the chlorine gas exposure. The ALJ ordered that Commonwealth Aluminum and/or its insurer pay Roberts permanent partial disability benefits, vocational rehabilitation benefits, and that Roberts be compensated for his medical expenses.

In January 1996 Roberts filed a motion to reopen,³ alleging that his pulmonary condition had worsened, and that he had developed osteoporosis due to the steroid medication he was taking as a result of his breathing problems. Roberts's motion to reopen was granted, and both Roberts and Commonwealth Aluminum introduced medical evidence in support of their respective positions. On October 11, 1996, after considering all of the lay and medical evidence presented, the ALJ found that Roberts had failed to show an increase in occupational disability and denied his request for increased benefits. The Board affirmed the ALJ's findings in an opinion entered on

³ See Kentucky Revised Statutes (KRS) 342.125.

February 14, 1997, and this Court affirmed the Board's opinion in an unpublished decision rendered on June 18, 1998.⁴

On December 11, 2000, Roberts filed a second motion to reopen, once again alleging that he had experienced an increase in occupational disability since the entry of his original award. Roberts's motion to reopen was granted in an order entered on April 12, 2001, and both Roberts and Commonwealth Aluminum introduced evidence in support of their respective positions. In addition to alleging that his pulmonary condition and osteoporosis had worsened, Roberts for the first time asserted that his long-term use of steroid medication had resulted in vision problems. Roberts introduced the medical opinion of Dr. Garry Binigar, an ophthalmologist who had treated Roberts since 1977. Dr. Binigar diagnosed Roberts as having glaucoma and subscapular cataracts in both eyes and a central retinal vein occlusion in his left eye, all of which he attributed to Roberts's long-term use of steroid medication.

After the bulk of the parties' evidence had been submitted, Commonwealth Aluminum filed a brief before the ALJ arguing that Roberts had failed to show an increase in his occupational disability. In addition to arguing that Roberts's evidence did not support a finding that he had suffered an increase in occupational disability, Commonwealth Aluminum

⁴ 97-CA-000641-WC.

contended that Roberts was precluded from presenting evidence related to his ocular condition. Specifically, Commonwealth Aluminum claimed that Roberts knew his ocular condition was work-related when his first motion to reopen was litigated, but that he nevertheless failed to raise that issue before the ALJ at that time. Hence, Commonwealth Aluminum argued that Roberts's ocular condition could not be considered as a basis for finding that Roberts had suffered an increase in occupational disability.

On December 16, 2002, the ALJ entered an opinion and award on Roberts's motion to reopen. The ALJ stated that since Roberts's vision was "correctable to 20/20" during the proceedings related to his first motion to reopen, and that since Roberts's retinal visual occlusion, glaucoma, and cataracts were not diagnosed until after Roberts's first request for increased benefits was denied on October 11, 1996, Roberts was not sufficiently aware of his ocular condition during the litigation of his first motion for increased benefits to have been required to have raised the issue at that time. Thus, the ALJ ruled that Roberts's ocular condition could be considered when determining his total occupational disability rating.

The ALJ further found that "the combined effects of [Roberts's] breathing and visionary problems now cause a total and permanent inability for [Roberts] to be employed on a

regular and sustained basis." Consequently, the ALJ determined that Roberts had met his burden of proving an increase in occupational disability, and assigned him a 100% occupational disability rating. The ALJ ordered that Commonwealth Aluminum and/or its insurer would be responsible for paying Roberts \$282.67 per week beginning on December 11, 2000, and continuing for so long as Roberts remained permanently disabled. In addition, the ALJ ordered that Commonwealth Aluminum was liable for "all reasonable and necessary medical expenses for the cure and relief of [Roberts's] work-related lung condition[.]"

On May 14, 2003, the Board entered an opinion affirming the ALJ's order. The Board held that there was substantial evidence before the ALJ to support a finding that Roberts had suffered an increase in occupational disability from 40% to 100%, and that the ALJ did not err by considering evidence related to Roberts's ocular condition. This petition for review followed.

Commonwealth Aluminum raises two primary arguments in its petition. First, it claims that when determining whether Roberts had suffered an increase in occupational disability, the ALJ erred by considering evidence related to Roberts's ocular condition. In particular, Commonwealth Aluminum argues that the

ALJ incorrectly determined that Slone v. Jason Coal Co.,⁵ was not controlling, and that Roberts's ocular condition could be considered when determining Roberts's occupational disability rating. We disagree.

In Slone, our Supreme Court held that where an injured worker knows that an injurious condition is work-related at the time an action is pending before the ALJ, the failure of the worker to raise that condition during those proceedings precludes the worker from subsequently raising that condition in a motion to reopen:

The testimony in the record from the physician expert used by the claimant indicates that the mental condition was sufficiently known [to the claimant such that he raised that condition during] a proceeding [to collect] Federal social security benefits. For some unknown reason, the claimant did not choose to pursue a similar complaint in the State workers' compensation proceeding. Accordingly, the present appeal which attempts to raise these issues by means of the reopening procedure cannot really be distinguished from the prohibition against piecemeal litigation. . . . The failure of the claimant to present any evidence regarding his mental condition in the original workers' compensation claim cannot be cured by a motion to reopen more than two years later.

KRS 342.125 provides that an award may be reopened upon a showing of "change of occupational disability, mistake or fraud or newly discovered evidence." A motion to reopen cannot be based on a condition known

⁵ Ky., 902 S.W.2d 820 (1995).

to the claimant during the pendency of his original action, but which for some reason, he did not choose to litigate.⁶

In his order addressing Roberts's ocular condition, the ALJ stated:

[Commonwealth Aluminum] further argued that [Roberts's] visionary problems should not be considered as that condition was present at the time of the decision in his first motion to reopen. . . . [Commonwealth Aluminum] relies upon the letter to [Roberts's] counsel dated August 1996 in making this assumption. However, Dr. Binengar's testimony clearly indicates that [Roberts's] vision was correctable to 20/20 at the time of that letter and further indicates that the retinal visionary occlusion was not diagnosed until November 1996 which is after the [ALJ's final order in Roberts's first motion to reopen]. It is further noted that the glaucoma and cataracts were not diagnosed until even later and these are noted to be reasons for [Roberts's] decreasing vision. As such, I do not find Slone[] to be controlling.

Hence, the ALJ determined that since Roberts's vision was "correctable" at the time of the proceedings related to his first motion to reopen, and since his glaucoma and cataracts were not diagnosed until after those initial proceedings had concluded, Roberts's ocular condition could be considered in his second motion to reopen. The Board affirmed the ALJ on similar grounds, stating that "there may have been evidence that Roberts was becoming aware of his ocular condition at about the same

⁶ Id. at 821-22.

time his first motion to reopen was being litigated, but there is nothing to indicate the condition was occupationally disabling at that time."

We agree with the Board because we likewise conclude that Slone, is distinguishable from this case. The claimant in Slone was not only aware of his mental condition at the time of his original claim, but he also had filed a claim for social security benefits based on that condition at the same time he had filed his original workers' compensation claim. Our Supreme Court concluded that the claimant's attempt to raise the condition in a motion to reopen violated the prohibition against piecemeal litigation.⁷

In contrast, Roberts's ocular impairment did not arise directly from his work-related injury, but occurred as a side-effect of the steroid medications which he was taking due to his breathing problems. At the time of the first motion to reopen, Dr. Brinegar was aware that Roberts was suffering from increased intraocular pressure due to his use of steroid medication. However, he added that any vision impairment was fully correctable to 20/20 at that time. Moreover, Dr. Brinegar did not observe any permanent or disabling effects from this condition until after the first motion to reopen was denied. Indeed, Dr. Brinegar did not diagnose the ocular occlusion until

⁷ Id. at 822.

November, 1996, and the glaucoma and cataracts were not diagnosed until 1998.

KRS 342.125 provides that an award may be reopened upon a showing of "change in occupational disability, mistake or fraud or newly discovered evidence". Even if Roberts had been aware of his ocular condition in time to raise it in his first motion to reopen, there is no indication that the condition caused any change in his occupational disability at that time. Thus, the ocular condition could not have been the subject of a motion to reopen in 1996. Unlike the claimant in Slone, Roberts could not have pursued a claim for his ocular condition at the time of his first motion to reopen. Therefore, he should not be barred from raising the claim once it has become permanent and occupationally disabling.

Commonwealth Aluminum's only remaining argument is that the Board erred by determining that there was substantial evidence before the ALJ to support a finding that Roberts suffered from a 100% occupational disability. The burden of proof was with Roberts to show that his occupational disability had increased.⁸ The ALJ's function is to weigh the conflicting evidence and to decide which is more persuasive.⁹ As fact-

⁸ Beale v. Rolley, Ky., 777 S.W.2d 921 (1989).

⁹ Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985)(holding that the fact-finder "has the authority to determine the quality, character and substance of the evidence presented").

finder, the ALJ "has the sole authority to judge the weight to be afforded the testimony of a particular witness,"¹⁰ and "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."¹¹

When an ALJ's decision is appealed to the Board, KRS 342.285(2) mandates that "[t]he board shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact. . . ." Where the ALJ has made a factual finding, the Board is limited to determining whether there is substantial evidence in the record supporting the ALJ's finding.¹² Substantial evidence has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."¹³

It is well-established that 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

¹⁰ Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000)(citing McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974)).

¹¹ Id. (citing Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977)).

¹² Addington Resources, Inc. v. Perkins, Ky.App., 947 S.W.2d 421, 423 (1997).

¹³ Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971).

injustice."¹⁴ We find no error in the Board's assessment of the evidence and accept its summary of the evidence which supports the ALJ's award, as follows:

Clearly, Dr. Pope testified concerning Roberts' deteriorating condition and believed he was no longer capable of any employment. The claimant's treating physician explained in detail how Roberts' condition was worse than indicated by his pulmonary function studies. Further, though Dr. Binegar did not state specific restrictions due to Roberts' ocular condition, the claimant's own testimony supports a finding of decrease in occupational ability. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979).

Based on the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Morton
Samuel J. Bach
Henderson, Kentucky

BRIEF FOR APPELLEES:

No brief filed.

¹⁴ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).