

RENDERED: OCTOBER 15, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000757-WC

THOMAS E. WHITE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-70149

PEABODY COAL COMPANY;
HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

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

GUIDUGLI, JUDGE: Thomas A. White (hereinafter "White") has petitioned this Court for review of the Workers' Compensation Board's (hereinafter "the Board") opinion affirming the Opinion and Award of the Administrative Law Judge (hereinafter "the ALJ"). We affirm.

White is currently a sixty-one year old resident of Sturgis, Union County, Kentucky. He completed high school, and served in the United States Air Force from 1962 through 1966 when he was honorably discharged. In the Air Force, White received training as an aircraft mechanic, and has also received vocational training as a welder. Since 1970, White has worked in the mining industry, the majority of the time for Peabody Coal Company (hereinafter "Peabody"), the appellee herein. He worked as a utility man for Peabody from 1971 through 1996, when he was laid off. After briefly working for Andalex in 1996, he was called back to Peabody where he worked as a roof bolter. He has not worked since being laid off on November 18, 2002.

On October 21, 2001, White sustained a work injury to his low back while lifting a timber. He finished his shift that day, and then sought chiropractic treatment for pain down his right hip and leg before seeking treatment from orthopedic specialist Dr. Jacob O'Neill. By the time Dr. O'Neill released White to full duty work in January 2002, the mines were closed. Because of continued problems, White contacted the workers' compensation carrier for Peabody and was referred to Dr. Rick Lee, who in turn referred White to orthopedic surgeon Dr. James M. Donley (hereinafter "Dr. Donley"). By May, the mines had reopened, and White returned to his normal duties. Dr. Donley first saw White on April 29, 2002, for a complaint of tightness

in the right thigh. Dr. Donley ordered an MRI and diagnosed degenerative disc disease of the lumbar spine and a herniated disc at L2-3 on the right. White underwent surgery on June 27, 2002. He was off work until Dr. Donley released him to full duty work on September 23, 2002. White returned to his regular job as a roof bolter without missing work until being laid off on November 18, 2002. He drew unemployment benefits for six months following the lay off.

White filed an Application for Resolution of Injury Claim on March 3, 2003.¹ White filed the records of Dr. Donley in support of his claim. As did the Board, we shall rely upon the ALJ's accurate summary of Dr. Donley's records. In particular, we note that by January 3, 2003, White's back showed a full range of motion and that no treatment was performed. By letter dated February 5, 2003, Dr. Donley indicated that White retained an 8% whole body impairment secondary to his disk herniation and residual pain. Dr. Donley also indicated that White had returned to his regular job activities. White did not see Dr. Donley again until May 14, 2003, at which time the office note reported that he had been laid off the previous

¹ White also filed an Application for Resolution of Coal Workers' Pneumoconiosis Claim on December 13, 2002. The two claims were consolidated on his motion on June 23, 2003, and both claims were assigned to ALJ Overfield. However, again on White's motion, the two claims were bifurcated and the pneumoconiosis claim was held in abeyance pending the resolution of constitutional issues on October 2, 2003. Because this petition for review only concerns the injury claim, we shall confine our summary and review to that claim.

November and that there was essentially no change in his condition. Both his straight leg test and his neurological status were normal, although there was a slight reduction of mobility. Dr. Donley then completed a physical disability assessment on June 9, 2003, in which he imposed restrictions on standing, walking, bending and stooping and indicated that White could not be expected to complete even light duty work over an eight-hour day. White also relied upon the July 8, 2003, vocational evaluation of Dr. Tom L. Wagner, which was apparently filed in rebuttal over the objection of Peabody, as Peabody had not filed any proof. Dr. Wagner relied upon Dr. Donley's physical disability assessment in reaching his opinion that White was totally occupationally disabled.

The parties attended both a benefit review conference and then a final hearing on August 18, 2003, after which they discussed White's upcoming office visit with Dr. Donley and the possibility that White might have to undergo another surgery based upon results from a recent MRI. The hearing ended with the indication that counsel for White would notify the ALJ if surgery was required so that the claim could be placed into abeyance. No such notification took place. The parties filed briefs on the contested issue of the extent and duration of White's disability. On October 7, 2003, the ALJ issued an Opinion and Award, in which White was awarded temporary total

disability benefits as well as permanent partial occupational disability benefits. The ALJ ruled that White had an 8% whole body impairment, and that he was not totally occupationally disabled:

4. I find that Plaintiff is not totally occupationally disabled and in fact retains the physical capacity to return to the type of work he was performing at the time of his injury. In making this finding, I have relied on Plaintiff's testimony and the opinions of Dr. Donley in his office records through May 14, 2003. Dr. Donley released Plaintiff to return to work with no restrictions. Through May 14, 2003, he was of the opinion that Plaintiff was in essentially the same condition as he was in when he released him to return to unrestricted work. Plaintiff returned to work and worked for two months doing his regular job, working overtime and missing no time from work. He was laid off November 18, 2002. I find Dr. Donley's physical disability assessment to lack credibility. The restrictions he places on Plaintiff in that document are simply not consistent with his opinions set forth in his office records through May 14, 2003.

The ALJ awarded benefits accordingly.

On October 15, 2003, White filed a Petition for Reconsideration, asserting that the ALJ failed to give any explanation for disregarding uncontradicted medical evidence that he was entitled to an award of total disability benefits. Furthermore, White pointed out that the ALJ had omitted any mention of Dr. Wagner's vocational evaluation. In the order denying the Petition for Reconsideration entered October 31,

2003, the ALJ addressed the issue regarding "uncontradicted" medical evidence as follows:

First of all, the undersigned disagrees that Dr. Donley's June 8, 2003 report, which is the basis for Plaintiff's claim of total occupational disability, is uncontradicted. The report itself states that Dr. Donley had last seen Plaintiff on May 14, 2003. The report of May 14, 2003 stated Plaintiff was in essentially the same condition he was in when he returned to his regular duties working for Defendant Employer. Even if Dr. Donley's latest report is considered to be "uncontradicted medical evidence," the undersigned believes he has stated his reasons for not accepting that opinion.

Just prior to the entry of the order denying the Petition for Reconsideration, White filed a motion to supplement the record with two new reports from Dr. Donley dated August 20 and September 29, 2003. Peabody objected to the motion, and the ALJ denied the motion on November 14, 2003, indicating that the motion to supplement should have been filed before the opinion was rendered. White appealed the rulings to the Board, which affirmed the decision of the ALJ. This Petition for Review followed.

On appeal, White continues to argue that the ALJ improperly ignored uncontradicted medical, lay and vocational evidence without any explanation and erred in failing to admit additional medical records from Dr. Donley. On the other hand, Peabody asserts that the ALJ's decision was based upon

substantial evidence of probative value and properly rejected White's attempt to introduce the medical reports once the opinion and award was rendered.

Our standard of review in workers' compensation cases is well settled. In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court of Kentucky addressed its role and this Court's role in reviewing these decisions: "The function of further review of the WCB in the Court of Appeals 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." Id., at 687-88. With this standard in mind, we shall review the matter before us.

In Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979), this Court held, "[t]he claimant in a workman's compensation case has the burden of proof and the risk of persuading the [ALJ] in his favor." Furthermore, "[i]f the [ALJ] finds against the claimant who had the burden of proof and the risk of persuasion, the court upon review is confined to determining whether or not the total evidence was so strong as to compel a finding in claimant's favor." Id., at 280. Later, in Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986), the Supreme Court of Kentucky discussed "compelling evidence":

If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id., at 643.

White contends that the ALJ erred in ignoring uncontradicted evidence and for failing to explain the reason for ignoring this evidence. In Collins v. Castleton Farms, Ky.App., 560 S.W.2d 830 (1977), this Court, in reliance upon Larson, stated:

The Commission may even refuse to follow the uncontradicted evidence in the record, but when it does so, its reasons for rejecting the only evidence in the record should appear e.g., that the testimony was inherently improbable, or so inconsistent as to be incredible, that the witness was interested, or that his testimony on the point at issue was impeached by falsity in his statements on other matters. Unless some explanation is furnished for the disregard of all uncontradicted testimony in

the record, the Commission may find its award reversed as arbitrary and unsupported.

Id., at 831 (citing 3 A. Larson, Workmen's Compensation Law § 80.20 (9th ed. 1976)). See also Commonwealth v. Workers' Comp. Bd. of Ky., Ky.App., 697 S.W.2d 540 (1985). In Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., Ky.App., 618 S.W.2d 184, 187 (1981), this Court further held that, "when the question is one properly within the province of medical experts, the board is not justified in disregarding the medical evidence." On the other hand, when the evidence is conflicting, the ALJ has the sole authority to judge the weight, credibility, substance, and inference to be drawn from it. See Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The ALJ may also choose to believe part of the evidence and disbelieve other parts of the evidence, even if the evidence came from the same witness. See Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Brockway v. Rockwell Internat'l, Ky.App., 907 S.W.2d 166 (1995).

In the present case, it appears that the medical evidence from Dr. Donley is actually conflicting, and there is substantial evidence in the record to support this finding of the ALJ as it appeared in the order denying the Petition for Reconsideration. The office notes up to and including the May 14, 2003, visit indicate that although he had continued to have

some problems with his right leg and hip, White's condition had essentially stayed the same from the time he was released to work. It is clear in the record that White was able to work his regular job duties and that the only reason he stopped working was because he was laid off and the mines had been closed. Additionally, in February 2003, Dr. Donley stated that White had resumed his regular work duties. As late as the May 14, 2003, visit, Dr. Donley noted that there was no essential change in his condition and no treatment was recommended. Therefore, the credibility of the physical disability assessment dated June 9, 2003, which included heavy restrictions, is suspect. White's own testimony reveals that he was able to actually perform his normal job duties, and that he only left the industry when the mines closed. Because it appears that the medical evidence of record, even though it is from the same physician, is contradictory, the ALJ was free to pick and choose what portions of the testimony to rely upon.

Even if Dr. Donley's records were to be considered uncontraverted, we agree with the Board that the ALJ sufficiently explained why he chose to ignore the portion of the evidence imposing severe work restrictions in light of the prior records.

As to Dr. Wagner's vocational evaluation, we agree with the Board that the ALJ should have at least mentioned its

presence in the record. However, in Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334, 337 (1985), the Supreme Court of Kentucky stated:

Uncontradicted opinions by vocational experts is not such evidence as *compels* any specific findings by the [ALJ], which body is the fact finder, with the right to "believe part of the evidence and disbelieve other parts of the evidence." *Caudill, supra*, p. 16. The opinions of the vocational expert do not supplant medical and other evidence but are merely a part of the total evidence which is before the Board. To hold otherwise would reduce workers' compensation hearings to a swearing contest between vocational experts. (Emphasis in original).

Accordingly, the ALJ was not required to place any weight upon Dr. Wagner's vocational evaluation. This is especially true, as the ALJ had already rejected Dr. Donley's physical disability assessment as not credible, which assessment Dr. Wagner apparently relied upon in forming his opinion as to White's ability to work.

White next argues that the ALJ improperly denied his motion to supplement the record with two reports from Dr. Donley following the rendition of the Opinion and Award. He argues that these reports from August 20 and September 29, 2003, office visits could not have been filed prior to the final hearing, which took place on August 19, 2003, and that it was an abuse of discretion to disallow the introduction of newly discovered

evidence that could not have been discovered with the exercise of due diligence. In support of this argument, White relies upon the decision of Durham v. Copley, Ky., 818 S.W.2d 610 (1991). In Durham, the Supreme Court of Kentucky addressed a situation in which the claimant's counsel did not receive a prior medical report regarding a torn rotator cuff until seven weeks after the rendition of the opinion. In that case, the Supreme Court held that the ALJ's refusal to allow the filing of that report was in error and constituted a manifest injustice.

Herein, we note that although the reports were not included in the brief to the Board, White attached copies of the reports in question to his Petition for Review. Although it appears that the reports were transcribed on August 22 and October 1, 2003, respectively, counsel has provided no explanation as to why the reports could not have been obtained prior to the rendition of the Opinion and Award on October 7, 2003. Indeed, the parties discussed the upcoming office visit scheduled for the next day at the August 19, 2003, final hearing. Furthermore, counsel was to notify the ALJ if the case needed to be held in abeyance due to a possible need for further surgery. The record does not reveal that counsel filed any type of appropriate motion until after he filed a Petition for Reconsideration. The ALJ was justified in denying the motion to supplement as the Opinion and Award had already been rendered.

Furthermore, it does not appear that the reports, if allowed in the record, would have changed the outcome based upon the other evidence of record, including White's own testimony.

Because the Board did not misconstrue or overlook any controlling precedent or commit any flagrant error in assessing the evidence, we affirm the Board's Opinion. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992).

ALL CONCUR.

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