

RENDERED: NOVEMBER 5, 2004; 2:00 p.m.  
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2004-CA-000497-WC

KEITH M. CLOYD

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-75742

CMC/CLA; HON. DONALD G. SMITH,  
ADMINISTRATIVE LAW JUDGE; and  
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

\*\* \*\* \* \* \*

BEFORE: COMBS, CHIEF JUDGE; MINTON AND VANMETER, JUDGES.

VANMETER, JUDGE: This is a petition for review from an order entered by the Workers' Compensation Board (Board) vacating and remanding the opinion and award of an administrative law judge (ALJ) in favor of the claimant, appellant Keith M. Cloyd. For the reasons stated hereafter, we affirm the Board's decision.

Cloyd began working for CMC/CLA Company (CMC) as a machine operator in the company's Paris, Kentucky location in mid-1999. On April 15, 2002, while extracting a stuck aluminum

wheel from a casting machine, Cloyd developed a pain between his shoulder blades. He received emergency room treatment and was off work for three days following the incident. Cloyd then returned to light duty work and continued to be treated through the use of medication, a TENS unit, and physical therapy. Approximately one month later, Cloyd complained to a supervisor that he was in so much pain that he needed to be excused from work. Cloyd was told to lie down, but he left work after feeling no relief. The next day he was terminated for walking off the job. Cloyd continued to have pain and tenderness in the affected area, and his treating physicians restricted his activities. Since his termination he has performed part-time, light jobs for a body shop.

Cloyd filed a workers' compensation claim in January 2003. A hearing was conducted and the ALJ found Cloyd to have a 5% permanent impairment rating as a result of the April 2002 workplace injury. The ALJ stated:

The Plaintiff's testimony was credible regarding the circumstances of his injury at work on April 15, 2002. Dr. McEldowney specifically related the Plaintiff's current back problems to the work injury on April 15, 2002. Dr. Best indicated that the Plaintiff's back problems were related to causes other than his work injury. Dr. Menke failed to specifically address causation. In this instance, the Administrative Law Judge finds Dr. McEldowney to be persuasive. Therefore the Plaintiff's current back condition is

related to his work injury on April 15, 2002.

CMC requested reconsideration alleging that the benefit payment amount had been miscalculated and that the ALJ had erred by relying on the report of Dr. McEldowney because the physician had not been provided with Cloyd's complete medical history. In response, the ALJ corrected the benefit payment amount but declined to reconsider the impairment rating, stating:

As it regards the sufficiency of findings on pre-existing disability and/or causation, it is found that the Plaintiff is supported in his position that the described work injury is the cause of his medical impairment and thus the cause of his Occupational Disability. Plaintiff was engaged in full time work prior to the alleged onset date, and there is no credible evidence that he had a permanent impairment to his mid or upper back before that time. . . .

On appeal the Board found Cloyd's extensive medical history relevant to the April 2002 injury. That history shows that Cloyd has been treated for obesity since the age of five, and that he has suffered from a range of emotional and anxiety issues. In 1987 Cloyd was in a motor vehicle accident, which resulted in abrasions to his back below the right shoulder blade and to his upper extremities. In 1991 Cloyd received treatment for neck discomfort, and in 1992 he fell from a ladder at work, injuring his mid-back on the right side. In 1994 Cloyd slipped and fell at work, striking his back and head. According to the

Board, x-rays of the cervical area were interpreted as normal, but

[t]he thoracic films demonstrated mild lateral wedging of the T8 vertebral body on the right with mild irregularity of the end plates at T7-8 and T8-9 consistent with degenerative changes. Dr. A. Koriakin diagnosed Cloyd as suffering from mild to moderate degenerative disc disease of the thoracic spine from T7-9. He also diagnosed mild lateral wedging deformity of T8, which he thought could represent a remote injury to that area.

Cloyd received another diagnosis of thoracic strain in August 1994 and a work hardening program was prescribed. Despite a job change in May 1995, which eliminated heavy lifting and straining, Cloyd continued to have pain and found it necessary to cease that employment. Next, as stated by the Board,

[o]n December 10, 2001, Cloyd reported to the Bourbon County Hospital emergency room presenting with a history of severe back pain, which he described as excruciating. On December 12, 2001, it was recorded that three days earlier while sitting in a chair, Cloyd had a sudden onset of severe sharp mid back pain with radiation through his mid substernal chest anteriorally.

A few months later, on April 15, 2002, Cloyd incurred the injury that is at issue before us.

The record includes the reports of three physicians who examined Cloyd. On April 18, 2003, a medical evaluation was conducted by Dr. McEldowney, who diagnosed Cloyd as suffering

from chronic mid to upper thoracic strain/sprain, which he attributed directly to the April 2002 work injury. Dr. McEldowney found that Cloyd had reached maximum medical improvement and assessed a 5% impairment to the whole person based on the most recent AMA Guides. As noted by the Board, Dr. McEldowney's report contained nothing pertaining to Cloyd's extensive medical history.

Dr. Menke examined Cloyd three times over the summer of 2002. He reported that a thoracic MRI showed no specific abnormalities of the thoracic spine. He opined that Cloyd was not eligible for a permanent partial impairment rating above 0%. Dr. Menke did not indicate that he had been privy to Cloyd's past medical history.

Dr. Best's evaluation took place on May 28, 2003. His report specifically mentioned Cloyd's previous medical history and included a chronological listing of his back injuries. Like Dr. Menke, Dr. Best reported that no objective abnormality existed. He opined that Cloyd's chronic obesity, which previously had been described as resulting in a severe postural abnormality, was the source of his continuing pain. In line with Dr. McEldowney's findings Dr. Best also found that Cloyd suffered a 5-8% impairment to the whole person according to the AMA Guides. Unlike Dr. McEldowney, Dr. Best specifically stated the issue of causation as follows:

While Mr. Cloyd meets criteria for DRE Thoracic Category II, this is not related to the work injury of April 15, 2002. Clearly, the medical records review demonstrates degenerative changes with thoracic spine lipping and compression deformity. These changes were noted back to 1994. X-ray of the thoracic spine of May 16, 1994, noted:

- Mild lateral wedge deformity of T8.
- Degenerative disc disease of the thoracic spine, T7 through T9, mild to moderate with irregularities of endplates of T7-8 and T8-9

Indeed, the MRI of the thoracic spine dated June 13, 1994, noted:

- Hypertrophic lipping involving the anterior aspect of the lower thoracic vertebral bodies

Therefore, the patient in 1994 met criteria for Thoracic DRE Category II. He continues to meet only criteria for Thoracic DRE Category II and, therefore, has no additional impairment and certainly no impairment that objectively can be related to the work injury of April 15, 2002.

The Board vacated and remanded the ALJ's opinion stating that the ALJ's findings of fact were insufficient in light of the fact that "the evidence establishing a pre-existing active impairment appears to be uncontradicted." The Board found that the ALJ did not provide adequate reasons for rejecting such uncontradicted evidence. This petition for review followed.

Cloyd contends that the Board erred in vacating the ALJ's decision because KRS Chapter 342 establishes the ALJ as the sole fact-finder and the ALJ's decision was supported by

substantial evidence. After a review of the evidence we disagree.

An ALJ's finding in favor of a claimant must be based on substantial evidence. *Special Fund v. Francis, Ky.*, 708 S.W.2d 641 (1986). As stated in *Smyzer v. B.F. Goodrich Chemical Company, Ky.*, 474 S.W.2d 367, 369 (1971), "[s]ubstantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."

Here, the record indicates that Cloyd had an extensive medical history predating the April 2002 injury. Neither Dr. McEldowney, Dr. Menke, nor the ALJ specifically addressed the essential issue of whether Cloyd had a pre-existing active impairment test contributed to the permanent impairment rating which followed the April 2002 injury. See KRS 342.0011(35). As this finding must be made by the fact finder, the Board correctly concluded that the ALJ's decision must be vacated and remanded for additional findings of fact. Only then may there be meaningful review of the ALJ's decision. *Shields v. Pittsburg & Midway Coal Mining Company, Ky. App.*, 634 S.W.2d 440 (1982).

Finally, Cloyd contends that the Board misconstrued the AMA Guides by concluding that he was impaired prior to the April 2002 injury. However, the Board in fact did not reach

this conclusion, but instead vacated and remanded the claim to the ALJ for additional findings relating to this matter. There is no merit to this claim on appeal.

For the reasons stated above, we affirm the Board's decision.

MINTON, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, CONCURS AND FILES SEPARATE  
OPINION.

COMBS, CHIEF JUDGE, CONCURRING: In relying on the report of Dr. McEldowney, the ALJ acted within the scope of his prerogative to accept or select testimony/evidence which he found credible or persuasive. It appears that Dr. McEldowney had an incomplete medical history before him -- a fact that detracted from the soundness of his diagnosis. Therefore, the ALJ erred because of the underlying error in the medical opinion. While we are affirming the Board's conclusion that the findings of the ALJ lacked substantial evidence, I would note that we are correcting an error based on an incomplete record rather than upon faulty reasoning of the ALJ.

BRIEF FOR APPELLANT:

John W. Hardin  
Versailles, Kentucky

BRIEF FOR APPELLEE:

No brief filed.