

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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2004-CA-001419-WC

BOBBY ADAMS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-02-00576

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

APPELLEES

OPINION  
AFFIRMING  
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BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

KNOPF, JUDGE: Bobby Adams appeals from an opinion and order by the Workers' Compensation Board (Board) which affirmed an opinion and award by the Administrative Law Judge (ALJ). Adams argues that the ALJ erred in accepting a physician's impairment rating using the Diagnosis-Related Estimates (DRE) method over another physician's impairment rating using the Range-of-Motion (ROM)

model. Adams insists that the Fifth Edition of the American Medical Association's Guides to the Evaluation of Permanent Impairment (Guides) requires the use of the ROM model in his case. Adams also argues that the ALJ erred by allowing his employer credit for overpayment of temporary total disability (TTD) benefits which it paid while his claim was pending. We conclude that the Board properly analyzed both issues, and hence, we affirm.

While employed as a mine electrician for Coastal Coal, Adams sustained a work-related back injury on October 9, 2001. He did not return to work after that injury. On April 25, 2002, Adams filed claims for benefits based upon that injury, coal workers' pneumoconiosis, and hearing loss. The pneumoconiosis claim was bifurcated and eventually dismissed. The hearing loss and back-injury claims were consolidated and were later amended to include psychological overlay attributable to the injury. Coastal Coal conceded that Adams has a work-related injury and a permanent partial disability but disputed Adams's assertion that he is totally occupationally disabled.

Coastal paid temporary total disability (TTD) benefits to Adams at the rate of \$530.07 per week from October 9, 2001, through January 27, 2002. In an agreed order entered on March 11, 2003, the ALJ directed Adams to undergo a vocational

rehabilitation evaluation and reinstated TTD benefits until the evaluator's report was submitted.

In support of his back-injury claim, Adams primarily relied on the reports and depositions of his family physician, Dr. Ricky E. Collins, and Dr. James Templin, an occupational medicine and chronic pain specialist. Dr. Collins was of the opinion that Adams had degenerative disc disease which was aggravated into disabling reality by the work-related injury. Dr. Collins stated that Adams could no longer return to his previous work, and he doubted that Adams could perform any type of work due to his chronic pain. However, Dr. Collins admitted that he had very little to do with the treatment of the injury, and he did not assign a functional impairment rating.

In his report, Dr. Templin assigned Adams a 17% functional impairment rating to the body as a whole. This rating combined a 5% functional impairment for a DRE lumbar category II, a 5% functional impairment for a compression fraction of the L2 vertebra, a 5% functional impairment under the DRE cervical category II and a 3% functional impairment for moderate pain. Dr. Templin placed significant restrictions on Adams's physical activities, and agreed with Dr. Collins that Adams could not return to the type of work which he had performed prior to the injury. In his testimony, however, Dr. Templin stated that he would assign a 28% functional impairment rating for these

conditions based on the ROM model. When asked about the conflicting ratings, Dr. Templin stated that he did not find the ROM method appropriate when preparing his Form 107-I, but he felt that the ROM model was more accurate because Adams has multi-level disc involvement or has suffered multiple injuries to the same spinal region.

Dr. James R. Bean, a neurosurgeon, was assigned to treat Adams by Coastal's workers' compensation carrier. In evaluating Adams's back injury, Dr. Bean assigned a 5% functional impairment rating under the DRE model. Dr. Bean did not believe that the ROM method was an appropriate measure to determine functional impairment because he did not find any multi-level involvement in Adams's lumbar spine region. However, Dr. Bean admitted that an MRI had shown problems at multiple levels of Adams's spine. In addition, Dr. Bean testified that he did not use the ROM method because he questioned its accuracy. Coastal also relied on the report and testimony of Dr Russell Travis, who also assessed a 5% functional impairment rating using the DRE model.

After considering the evidence, the ALJ found that Drs. Bean and Travis properly assessed Adams using the DRE model, and that Adams has a 5% functional impairment rating to the body as a whole as a result of his lumbar spine condition. The ALJ found that Adams has an additional 10% functional impairment rating for

his psychological impairment, for a total functional impairment of 15%.<sup>1</sup> The ALJ further found that Adams is unable to return to his previous employment.

However, the ALJ expressed concerns about Adams's lack of effort in pursuing vocational rehabilitation. The vocational evaluators reported that Adams had the ability to obtain retraining at the community and technical college level. Adams did enroll in a class for a short time and was able to perform adequately. But Adams withdrew from the class, citing his back pain. While the ALJ did not believe that Adams was malingering, the ALJ concluded that Adams "is not as physically and academically incapable as he perceives himself and presents himself to be." Consequently, the ALJ denied his claim for vocational rehabilitation benefits.

Accordingly, the ALJ ordered Coastal to pay TTD benefits to Adams at the rate of \$530.07 per week from October 10, 2001, through January 14, 2002, and thereafter based on a 15% permanent partial disability multiplied by 3.2,<sup>2</sup> at the rate of \$190.82 per week for a maximum of 425 weeks. The ALJ allowed

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<sup>1</sup> The ALJ further found that Adams's functional impairment for occupational hearing loss is less than 5%, and under KRS 342.7305(2), he was not entitled to benefits for his hearing loss claim. Adams has not appealed this finding.

<sup>2</sup> KRS 342.730(1)(b).

Coastal to take credit for all compensation which it paid to Adams prior to the award.

Adams then appealed to the Board, arguing that: (1) the ALJ erred in relying on Dr. Bean's assessment of an impairment rating for Adams's lumbar spine using the DRE method rather than the ROM method; and (2) Coastal is not entitled to credit for overpayment of TTD benefits because it made those payments voluntarily. In an opinion entered July 6, 2004, the Board rejected both of these arguments. Adams raises these same two issues on appeal to this Court. After thoroughly considering the record, the briefs and the authorities cited therein, we adopt the following portion of the Board's opinion with Board Member Young writing:

[The Guides] instructs that, in assessing a spinal impairment rating, "[t]he DRE method is the principal methodology used to evaluate an individual who has had a distinct injury." Guides, p. 397; see also, Guides, p. 374. The Guides also instructs, however, that "[t]he ROM method is used in several situations," including "[w]hen there is multilevel involvement in the same spinal region (e[.]g[.], fractures at multiple levels, disk herniations, or stenosis with radiculopathy at multiple levels orbilaterally)." Guides, pp. 379, 380; see also, Guides, p. 374.

Adams points out that when Dr. James Templin was questioned concerning the foregoing language from the Guides, Dr. Templin agreed a fracture and a herniation at the same level qualified Adams' case for exception from use of the DRE method. Adams

also correctly points out that Dr. Templin, who assessed an impairment rating for Adams' lumbar spine injury at 5% pursuant to the DRE method in his written Form 107-I, agreed in his deposition that impairment should be assessed pursuant to the ROM method. Adams argues the ALJ was required by the Guides to accept Dr. Templin's deposition testimony, assessing a 28% impairment rating for the lumbar spine injury, over other impairment ratings in evidence because the only impairment rating of record for the lumbar spine injury which was assessed pursuant to the ROM method was that assessed by Dr. Templin in his deposition.

Adams' argument overlooks pertinent deposition testimony from Dr. James R. Bean. Included in Dr. Bean's deposition testimony regarding his evaluation of impairment under the DRE method is the following testimony addressing the appropriateness of evaluation under the ROM method:

Q. And, Doctor, are you familiar with the range of motion model -

A. Yes.

Q. -- for lumbar spine impairments?

A. Yes.

Q. Now, did you find any multi-level involvement in the lumbar spine region with this patient, as in multiple fractures, herniations, bulges, et cetera?

A. No.

The foregoing testimony constitutes substantial medical evidence supporting the finding made at page 14 of the ALJ's opinion "that Dr. Bean was justified in using the DRE model and explained that justification." Since Dr. Bean did not find any multi-level involvement in the lumbar spine region, he used the DRE method.

Admittedly, as Adams points out on appeal, Dr. Bean agreed, in response to questioning at his deposition, that an MRI

showed "problems at multiple levels." Adams points to nothing in the medical evidence, however, which requires a fact finder to equate a general concession that there are "problems at multiple levels" with an admission that there is "multi-level involvement in the lumbar spine region" of a type and degree requiring use of the ROM method under the Guides.

Adams also correctly notes Dr. Bean testified he could not recall using the ROM method "in the past ten years" because he believed that method to be inaccurate and unreliable. In light of the other medical evidence of record in this case, however, we simply cannot say as a matter of law that Dr. Bean's impairment rating assessment does not constitute substantial evidence. In addition to impairment ratings assessed by Dr. Bean and Dr. Templin, the record also contains an impairment rating assessed by Dr. Russell L. Travis. Although Dr. Templin testified in his deposition that the ROM method was the appropriate method to use in assessing impairment in Adams' case, we agree with the respondent it is not insignificant that the written impairment ratings from Dr. Templin, Dr. Bean and Dr. Travis were all assessed using the DRE method.

"[T]he proper interpretation of the Guides and the proper assessment of an impairment rating are medical questions." Kentucky River Enterprises, Inc. v. Elkins, Ky., 107 S.W.3d 206, 210 (2003). [. . .] Although Adams disagrees with the ALJ's acceptance of the impairment rating assessed by Dr. Bean, the ALJ, as fact finder, is the sole judge of the weight to be afforded the evidence and credibility of the witnesses. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). When the medical evidence is conflicting, as here, the ALJ has the discretion to choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from



the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). So long as the ALJ's decision is supported by any evidence of substance, as it is in this case, we may not reverse. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Adams also contends on appeal that Coastal is not entitled to any credit for overpayment of temporary total disability ("TTD") benefits because, Adams alleges, those TTD benefits were voluntary payments. Adams cites Triangle Insulation and Sheet Metal Company v. Stratemeyer, Ky., 782 S.W.2d 628 (1990). That case does not support Adams' all-or-nothing position.

In Triangle Insulation and Sheet Metal Company v. Stratemeyer, the Court did provide some guidance with regard to an employer's right to a credit for TTD payments voluntarily made before a workers' compensation claim is filed. In that case, an overpayment of TTD benefits resulted because the claimant ultimately was found to have reached maximum medical improvement ("MMI") at a date earlier than the date on which the employer had ceased paying TTD benefits. The specific issue addressed in the case was "whether an employer gets credit on a dollar for dollar basis or on a week by week basis when the employer makes voluntary payments which are higher than the eventual actual award." Id., at p. 629. Triangle Insulation argued "that a dollar for dollar credit should be permitted because only past due, not future, benefits were affected." Id., at 629. The Court held "that when a claimant's future benefits are not affected, the employer shall be allowed a full dollar for dollar credit on past benefits." Id., at 630.

Clearly, the holding in Triangle Insulation and Sheet Metal Company v. Stratemeyer recognized an employer's right to a credit against past benefits for voluntary TTD overpayments made before the filing of a claim. Moreover, the case did not hold that

an employer may not receive a credit against future benefit payments.

The Stratemeyer case discussed General Electric Company v. Morris, Ky., 670 S.W.2d 854 (1984) and W.T. Sistrunk & Company v. Kells, Ky. App., 706 S.W.2d 417 (1986), cases in which dollar for dollar credits were disallowed in favor of week for week credits. Neither Morris nor Kells prohibited credits against future benefit payments.

The Stratemeyer case also embraced the rationale of Western Casualty & Surety Company v. Adkins, Ky. App., 619 S.W.2d 502 (1981), and validated the holding in Adkins:

The rationale in Western Casualty and Surety v. Adkins, Ky.App., 619 S.W.2d 502 (1981) recognized that it would be counter productive to penalize an employer who voluntarily paid weekly benefits to an injured employee in excess of the ultimate liability and could result in discouraging such voluntary payments which would be detrimental to the injured employee in the long run. In Adkins, the employer was entitled to credit against the final award for the entire amount of the voluntary payments. The fact that in Adkins, *supra*, the award was an open ended total disability does not contradict this situation which involves future periodic benefits. Id., at 629-630.

The Stratemeyer case further explained, with respect to an employer credit for overpayment:

The two methods of computing credit [dollar for dollar and week by week] are not mutually exclusive. It is important to encourage employers to make voluntary payments to injured employees.

Employers are not obligated to pay benefits until a claim has been litigated and an award entered. Such payments are voluntary. The circumstances involved in each specific case must be carefully evaluated so that the employee is not unduly harmed and the employer is encouraged to make voluntary payments.

Id., at 630.

In Adams' case, the ALJ awarded "credit for any amounts of compensation heretofore paid." The TTD overpayment in Adams' case was made pursuant to an agreed order which was signed as a result of the ALJ's request that Coastal resume payment of TTD benefits while Adams pursued a vocational rehabilitation evaluation. The agreed order acknowledged that Adams was to be referred for a comprehensive evaluation, and that Coastal would resume TTD payments.

The ALJ found in his opinion that vocational rehabilitation was a contested issue reserved by Coastal. The finding is supported by a benefit review conference order and memorandum dated February 11, 2003. The subsequent agreed order resuming TTD payments did not withdraw vocational rehabilitation as a contested issue.

The ALJ further found, based on Adams' performance in the vocational rehabilitation process, that Adams had no interest in vocational rehabilitation. Adams does not argue on appeal that there is no substantial evidence in the record to support this finding. Our review of the record convinces us that the finding, while perhaps not compelled, is supported by substantial evidence in the record.

Finally, in support of his argument that Coastal should receive no credit for TTD overpayment, Adams contends (1) that Coastal did not raise TTD as a contested issue at the benefit review conference, and (2) that Coastal waived TTD payments as a contested

issue in the agreed order reinstating those benefits. The benefit review conference order and memorandum dated February 11, 2003 reflects that extent and duration were preserved as contested issues. This would encompass the extent and duration of TTD. The agreed order reinstating TTD benefits merely acknowledged TTD benefits were being reinstated. It did not waive extent and duration as contested issues. We reject Adams' invitation to order permanent partial disability benefits to run from the last date TTD payments were made rather than from the date Adams reached MMI.

Accordingly, the July 6, 2004, opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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