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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000374-WC

JAMES FLEMING — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-00399

COASTAL COAL, LLC;
HON. RICHARD M. JOINER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BUCKINGHAM AND TACKETT, JUDGES.

TACKETT, JUDGE: James Fleming ("Fleming") petitions this Court to review an opinion of the Workers' Compensation Board ("Board") entered on January 21, 2004. In the Board's opinion, it affirmed an opinion and award of the Hon. Richard M. Joiner, Administrative Law Judge ("ALJ") entered on September 8, 2003. The ALJ awarded Fleming permanent partial disability benefits

after he determined that Fleming had a 5.5% impairment rating for a work-related, cumulative trauma injury to his low back.

According to Fleming, he began working in the coal mining industry in 1968. He worked as a general laborer for several different coal mines over the years. In April of 2000, Fleming was hired by Coastal Coal, Inc. ("Coastal Coal"). According to Fleming, he performed hard manual labor for Coastal Coal at one of its underground mines. Fleming testified that he injured his back in either 2000 or 2001. After this initial injury, Coastal Coal placed Fleming on light outside duties for approximately two weeks but Fleming soon returned to his normal work duties underground. Later, in 2001, Fleming began to experience numbness and tingling in his arms and hands. Fleming notified Coastal Coal and told his supervisors that he had been diagnosed with carpal tunnel syndrome. Fleming testified that in April of 2002, he injured his back again. And Coastal Coal again placed him on light outside duties for one to two weeks. But Fleming soon returned to his normal duties. According to Fleming, he continued to work for Coastal Coal in his regular capacity until Coastal Coal closed the mine on June 7, 2002.

On February 24, 2003, Fleming filed a workers' compensation claim. He claimed that on June 7, 2002, when the mine closed, he was suffering from repetitive trauma injuries to his low back, wrists and arms.

MEDICAL EVIDENCE

On July 23, 2003, Fleming proceeded to hearing on his claim. At that hearing, he testified on his own behalf. In addition to Fleming's testimony, the ALJ considered medical records from Mountain Comprehensive Health Consultants ("Mountain Comp") and the reports and depositions of Dr. David E. Muffly ("Dr. Muffly"), Dr. Ronald S. Dubin ("Dr. Dubin"), and Daniel D. Primm, Jr. ("Dr. Primm").

According to Mountain Comp records, an x-ray of Fleming's lumbar spine from 1994 revealed that he had spondylosis. An x-ray of Fleming's cervical spine showed that he had a decrease in the C6-7 disc height with osteophytes from the C7 disc protruding into the right neural foramina. Also, in 2001, he was diagnosed with carpal tunnel syndrome in both wrists.

Dr. Muffly examined Fleming on January 9, 2003. During the examination, Fleming did not tell the doctor about any specific work-related injuries. But Fleming told the doctor that, during thirty-six years of working in coal mines, he was required constantly to bend down, to stoop, to lift, and to shovel. Dr. Muffly diagnosed Fleming with carpal tunnel syndrome, lumbar osteoarthritis, and degenerative disc disease. He opined that Fleming's problems were caused by repeated work-related mini-traumas. Dr. Muffly opined that Fleming was 10%

whole body impaired due to carpal tunnel syndrome and opined that Fleming was 10% impaired due to his back problems. Dr. Muffly restricted Fleming to lifting a maximum of 20 pounds, to infrequent bending and stooping, and to sitting and standing no more than three hours in an eight-hour period.

In May of 2003, Dr. Primm examined Fleming. The doctor also reviewed Mountain Comp's records and took x-rays of Fleming's neck, low back, and arms. Dr. Primm opined that Fleming had mild degenerative changes at C6-7 and had moderate disc space narrowing and osteophytes at L5-S1, T11-12, and L2-4. He opined that Fleming did not suffer from carpal tunnel syndrome. But he did diagnose Fleming with pre-existing degenerative changes in the thoracolumbar spine, with a history of superimposed injury and arousal. He further opined that Fleming could return to his previous type of work without any restrictions. He opined that Fleming fell between a DRE Category I and II which meant Fleming would be from 0-5% impaired. The doctor felt that any impairment would be due to the arousal of the pre-existing degenerative changes.

On June 17, 2003, after Dr. Primm's examination, Dr. Dubin examined Fleming as well. Dr. Dubin diagnosed Fleming with carpal tunnel syndrome and with lumbar spondylosis with moderate to severe radiculopathy. Dr. Dubin opined that Fleming's problems were caused by repetitive use of his back and

hands. The doctor opined that Fleming suffered from a 10% permanent partial impairment due to carpal tunnel syndrome and that Fleming suffered from an 11% impairment due to his low back condition. Dr. Dubin restricted Fleming from repetitive bending, stooping, lifting, or crawling. Dr. Dubin opined that Fleming was no longer physically capable of working in the coal mining industry.

ALJ'S OPINION AND AWARD

In the ALJ's opinion and award, the ALJ relied on the opinions of Dr. Muffly and Dr. Dubin and determined that Fleming had suffered a work-related, cumulative trauma injury to his low back. The ALJ relied on Dubin's opinion and found that Fleming had a DRE Category III, 11% impairment. But the ALJ determined that only half of the 11% impairment, 5.5%, was compensable since Fleming had a history of prior back complaints. Relying on Fleming's own testimony that he continued to do his regular job duties until the mine closed, the ALJ determined that Fleming retained the physical capacity to return to the same type of work that he did at the time of the injury. Since Fleming could return to the same type of work, the ALJ determined that the three-multiplier found in Kentucky Revised Statute (KRS) 342.730(1)(c)1 was inapplicable. And the ALJ did not apply the four-multiplier found in KRS 342.730(1)(c)3 for

employees with less than eight years of education. But the ALJ did apply the two-multiplier found in KRS 342.730(1)(c) since Fleming was earning less than his average wage at the time of the injury and awarded Fleming $45.43 per week. Although the ALJ found that Fleming had suffered a work-related injury to his back, the ALJ determined that Fleming did not suffer from carpal tunnel syndrome based on Dr. Primm's opinion.

Being unsatisfied with the ALJ's opinion and award, Fleming appealed to the Workers' Compensation Board, but the Board affirmed the ALJ's decision. Now, Fleming petitions this Court for review.

FLEMING'S ARGUMENTS

In Fleming's petition for review, he argues that the Board erred when it affirmed the ALJ's decision that he retained the physical capacity to return to the same type of work that he performed at the time of his injury. Fleming also argues that the Board erred when it affirmed the ALJ's determination that Fleming had an eighth grade education.

To support Fleming's argument that he could not return to the same type of work, Fleming points to the reports and depositions of both Dr. Muffly and Dr. Dubin. Fleming relies on the fact that both doctors had placed work restrictions upon him, which Fleming argues prohibited him from returning to his

prior work. In addition, Fleming points out that the ALJ relied on and found to be credible Dr. Muffly's and Dr. Dubin's opinions when the ALJ determined that Fleming had suffered a work-related, cumulative trauma injury. Yet despite this, the ALJ did not rely upon nor did the ALJ find credible the doctors' opinions when the ALJ determined that Fleming retained the physical capacity to return to the same type of work. Fleming insists that if the doctors' opinions were credible for one of the ALJ's determinations then their opinions should have been credible for all of the ALJ's determinations.

According to Fleming, the Board also applied the wrong standard of appellate review. Fleming cites Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986), and argues that the Board should have applied the clearly erroneous standard. He insists that the ALJ's decision was unreasonable and clearly erroneous since the restrictions that the doctors had placed upon him prevented him from ever returning to work in the coal mining industry. In addition, Fleming argues that the ALJ should have applied the four-multiplier found in KRS 342.730(1)(c)3 since Fleming testified that he never completed the eighth grade.

When reviewing one of the Board's decisions, this Court will only reverse the Board's decision when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross

injustice. Daniel v. Armco Steel Company, Ky. App., 913 S.W.2d 797, 798 (1995). To properly review the Board's decision, this Court must ultimately review the ALJ's underlying decision. If the ALJ finds against the claimant who has the burden of proof and if the claimant appeals, then this Court must determine whether the evidence compelled a finding in the claimant's favor. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986); see also Wolf Creek Collieries v. Crum, Ky., 673 S.W.2d 735, 736 (1984). This Court has defined compelling evidence as evidence that is so overwhelming that no reasonable person could reach the same conclusion as the fact-finder. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985). But as the fact-finder, the ALJ, not this Court and not the Board, has sole discretion to determine the quality, character, and substance of the evidence. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999), quoting Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); see also Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Not only does the ALJ weigh the evidence but the ALJ may also choose to believe or disbelieve any part of the evidence, regardless of its source. Whittaker v. Rowland, supra at 481, quoting Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). In addition, whether an injured employee has retained the physical capacity to return to the same type of work that was performed at the time of the injury is a question

of fact for the ALJ to determine based on the evidence. Carte v. Loretto Motherhouse Infirmary, Ky. App., 19 S.W.3d 122, 126 (2000).

While the restrictions placed on Fleming by Dr. Muffly and Dr. Dubin may constitute evidence of substance that supports Fleming's contentions, this evidence does not compel a finding in Fleming's favor. According to the record, Dr. Primm opined that Fleming could return to the same type of work that he previously did without any restrictions. But more importantly, Fleming himself testified that he continued to perform hard manual labor for Coastal Coal until the company closed the mine. Given this evidence, any reasonable person could have reached the same conclusion as the ALJ that Fleming retained the physical capacity to return to the same type of work he performed at the time of his injury. And any reasonable person could have reached the same conclusion as the ALJ that the three-multiplier found in KRS 342.730(1)(c)1 was not applicable since Fleming did retain the capacity to return to the same type of work.

Since Fleming could return to the same type of work, the ALJ could not, as a matter of law, apply the four-multiplier found in KRS 342.730(1)(c)3. But even if the four-multiplier were applicable, any reasonable person could have reached the same conclusion as the ALJ that the four-multiplier was

inapplicable since Fleming himself stated not only in his application for resolution of injury claim but stated also in his deposition that he had, in fact, an eighth grade education.

CONCLUSION

Since the evidence did not compel a result in Fleming's favor, this Court concludes that the Workers' Compensation Board did not overlook or misconstrue any controlling law nor did the Board err in evaluating the evidence. Therefore, this Court affirms the Board's opinion.

BUCKINGHAM, JUDGE, CONCURS.

COMBS, CHIEF JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, CHIEF JUDGE, DISSENTING: I dissent as I am wholly persuaded that the Board flagrantly erred in affirming internally contradictory determinations of the ALJ that were refuted by the evidence of record. Mr. Fleming argues correctly that the opinions of the two doctors upon whom the ALJ relied contained restrictions which made it factually and physically impossible for him to return to work in the mining industry. There is no other interpretation of which the evidence is reasonably susceptible. Therefore, the three-multiplier of KRS 342.730(1)(c)1 should have been implicated. Additionally, he

testified that he had fewer than eight years of education, thus activating the four multiplier of KRS 342.730(1)(c)3.

While our standard of review of both the Board and an ALJ is necessarily deferential, nonetheless we cannot disregard such clear contradictions in the evidence. We are not only justified but compelled to correct the errors in this case. Accordingly, I would reverse and remand for entry of an opinion and award reflecting a consistent and comprehensive analysis of the evidence in this case.

BRIEF FOR APPELLANT:

Shawn C. Conley
Harlan, Kentucky

NO BRIEF FOR APPELLEE