

RENDERED: JUNE 10, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2004-CA-001154-WC

MARK GARNETT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 02-WC-65168

CALVARY COAL COMPANY, INC.
HON. R. SCOTT BORDERS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: BUCKINGHAM, JOHNSON, AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Mark Garnett has petitioned this Court for review of an opinion of the Workers' Compensation Board vacating and remanding an opinion, order, and award by the Administrative Law Judge which determined that Garnett was totally disabled as a result of a work-related accident and awarded him corresponding workers' compensation benefits. The Board vacated and remanded the case because the ALJ's decision was based, in part, on his mistaken belief that Garnett's hand injury was to

his dominant hand, when, in fact, the injury was to his nondominant hand. Having concluded that the Board correctly determined that the ALJ's decision was based, at least in part, upon a misconception which could possibly affect the outcome of the award, we affirm.

On November 15, 2002, while in the employ of Calvary Coal Company, Inc., Garnett was operating a scoop to clean a coal feeder and push shuttle cars. An acetylene tank had been left in the scoop bucket, and when Garnett pushed the bucket into the feeder the tank was crushed and exploded. As a result, Garnett suffered burns to his face and right hand. Garnett also suffered psychological injuries as a result of the accident. Garnett has not returned to work since the accident.

On March 26, 2003, Garnett filed an Application for Resolution of Injury Claim with the Department of Workers' Claims. Following discovery and an evidentiary hearing, on November 25, 2003, the ALJ issued an opinion, order, and award wherein he determined Garnett to be permanently and totally occupationally disabled. The ALJ awarded corresponding total occupational disability benefits to Garnett.

Calvary Coal subsequently filed a motion for reconsideration. In its motion, among other things, Calvary Coal asserted that Dr. Talmage Hays's 15% impairment rating to the body as a whole based on Garnett's hand injury was the

result of the mistaken premise that Garnett's hand injury was to his dominant hand when, in fact, the injury was to his nondominant hand. In making his decision dated November 25, 2003, the ALJ relied upon this erroneous impairment rating. On December 30, 2004, the ALJ entered an order denying the motion for reconsideration.

Calvary Coal subsequently appealed the decision to the Board. On May 17, 2004, the Board entered an opinion vacating and remanding the case to the ALJ because the ALJ's decision was based, in part, upon the misconception that Garnett's injury was to his dominant hand, when the injury was actually to his nondominant hand. This petition for review followed.

In its May 17, 2004, opinion, the Board stated, in relevant part, as follows:

Calvary also argues the ALJ abused his discretion by relying on the 15% impairment rating assessed by Dr. Hays for injury to Garnett's right hand because Dr. Hays mistakenly thought Garnett's right hand was Garnett's dominate [sic] hand. Calvary notes that Garnett testified that he is left-handed. Calvary argues Table 13-22 of the AMA Guides does not allow for a 15% rating for a non-dominant hand. Calvary believes that because the 15% rating is erroneous, it cannot be relied upon by the ALJ to enter an award of permanent disability benefits. . . .

Since December 12, 1996, it has been axiomatic that before there is an award of permanent partial disability benefits or permanent total disability benefits, an

injured worker must first establish a permanent impairment rating as the foundation for a permanent disability rating. Ira A. Watson Department Stores v. Hamilton, [34 S.W.3d 48 (Ky. 2000)]. KRS 342.0011(36) defines permanent disability rating as the permanent impairment rating selected by an administrative law judge times the factor set forth in the table that appears at KRS 342.730(1)(b).

The record in Garnett's claim contains substantial evidence to support an impairment rating for a physical condition as well as a psychological condition. Testimony of Dr. Weitzel is sufficient to establish a 15% impairment for Garnett's psychological condition. With respect to the physical condition, Calvary correctly notes that the 15% functional impairment assessed for Garnett's right hand injury exceeds the range in Table 13-22 for a non-dominant extremity; however, Dr. Hays clearly stated he assessed a Class 2 impairment using Table 13-22 of the AMA Guides. Table 13-22 sets forth criteria for rating impairment related to chronic pain in one upper extremity. A Class 2 impairment is determined using the same criteria whether the impairment is for the dominant or nondominant extremity. Under the AMA Guides, a Class 2 impairment for a nondominant extremity qualifies for a 5%-14% impairment rating. Thus, evidence from Dr. Hays is sufficient to support a 5-14% rating for impairment of Garnett's nondominant hand.

An ALJ may select a rating from within an appropriate range established by the medical evidence. . . . [W]e note that the ALJ on remand may select an impairment rating within the 5-14% range for the injury to Garnett's hand.

Since December 12, 1996, once an ALJ has determined an individual has a

disability rating, the factors in Osborne v. Johnson, [432 S.W.2d 800 (Ky. 1968)], as modified by Ira Watson, supra, are applied to determine whether the claimant has a total occupational disability. It remains within the province of the ALJ to translate the medical impairment rating and non-medical factors and determine occupational disability utilizing the factors in Osborne v. Johnson. See, Ira A. Watson Department Stores v. Hamilton, supra, and McNutt Construction Company v. Scott, [40 S.W.3d 854, 858 (Ky. 2001)]. The ALJ may rely on the medical testimony as well as the worker's own self-assessment of his ability to work. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). Here, the ALJ reviewed the medical restrictions as well as Garnett's own testimony concerning his hand and his psychological condition. There was evidence to support a finding of total occupational disability.

Garnett had a limited education and had worked primarily in the mining industry. There was substantial evidence that Garnett could not return to his work in the mines. Although Garnett had worked for Smith Trucking as a mobile home escort, Garnett testified he could no longer drive as a result of his psychological condition. As noted by the ALJ, Garnett is functionally illiterate. Given his limited vocational skills and intellectual skills, as well as the physical and psychological conditions, the ALJ could reasonably conclude that Garnett was permanently totally disabled.

All of the foregoing notwithstanding, we agree with Calvary the permanent total disability award may be predicated in part on a mistaken belief that Garnett's right hand was Garnett's dominate [sic] hand. In summarizing the evidence, the ALJ expressly noted Dr. Hays assessed a 15 % impairment for "a Class II injury involving a dominant extremity." . . . The ALJ accepted the 15%

impairment rating, and the total disability award was based, at least in part, on the physical injury to Garnett's hand. We cannot glean from the opinion below whether the ALJ was aware Garnett's injury actually was to Garnett's nondominant hand; how or whether the ALJ's acceptance of Dr. Hays' impairment assessment may have been affected; or how or whether the ALJ's determination of occupational disability may have been affected. The difference between an injury to a claimant's dominant hand and an injury to a claimant's nondominant hand is not without significance to an ALJ in determining the physical and psychological impact of an injury on a claimant's occupational abilities [emphasis original].

The function of the Court of Appeals in reviewing a decision of the Board is to correct the Board only where the Court perceives that the Board has "overlooked or misconstrued controlling statutes or precedent" or where it has flagrantly erred in its assessment of the evidence so as to result in a gross injustice.¹

Having reviewed the record, we are persuaded that the Board has not overlooked or misconstrued controlling statutes or precedent or erred in its assessment of the evidence. To the contrary, the Board has identified a misconception by the ALJ which was applied in his decision in this case, and has properly remanded the matter for a reevaluation by the ALJ exclusive of the misconception.

¹ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Dr. Hays based his physical impairment rating of 15% upon the incorrect premise that the injured hand was Garnett's dominant hand. Garnett's own testimony establishes that the injury was to his nondominant hand. As a result of this mistake, Dr. Hays assigned an impairment greater than permitted under the guidelines for an injury to a nondominant hand. The ALJ appears to have relied upon this misconception. Thus, the Board did not err in its assessment that this error may have not been noticed by the ALJ, and that if he had known of the error, the outcome may have been different. It follows that the Board properly vacated and remanded the case for additional review by the ALJ in light of Dr. Hays's error.

Garnett argues that remand is not necessary because the error was brought to the ALJ's attention in Calvary Coal's petition for rehearing. However, the ALJ's order denying rehearing did not address the issue on the merits and leaves the record silent on the ramifications, if any, of the erroneous impairment rating. Hence, the ALJ's denial of Calvary Coal's motion for reconsideration is not a basis to disturb the Board's decision.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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