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Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-002367-WC

JERRY WELLS — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-67464

HAZARD APPALACHIAN REGIONAL HOSPITAL;
HON. MARCEL SMITH, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION FUNDS, SUCCESSOR
TO SPECIAL FUND; AND WORKERS' COMPENSATION
BOARD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

TACKETT, JUDGE: Jerry Wells appeals from the decision of the Workers Compensation Board affirming the denial of his claim for reopening due to a worsening of a work-related injury. The Administrative Law Judge (ALJ) held that Wells had not demonstrated by comparative evidence that his condition had actually worsened. Wells appeals, arguing that the ALJ's conclusion was unreasonable in light of the evidence. We disagree, and affirm.

Wells injured his back three times while working for appellee Hazard Appalachian Regional Hospital (ARH), once in August 1997 and twice in August 1998, the last of which required medical treatment which caused him to be off work until February 1999. Wells filed a claim in which he was ultimately found to have a 15% permanent impairment rating, which translated to an 18.75% permanent disability rating. The initial award was increased by a 1.5 multiplier based on his inability to return to the same type of work, but reduced by a .5 multiplier based on his return to work at modified duty earning equal or greater than his pre-injury wage.

Wells first requested a reopening in December 2001, alleging a worsening of his condition. The claim was assigned to an ALJ for further adjudication in January 2002. Based on the medical records and reports submitted, the ALJ found no evidence of a greater level of occupational disability. The Board affirmed this decision, and a second motion to reopen was filed in December 2003. The matter was again assigned to an ALJ for further proceedings, and again the ALJ found that there was no evidence of a worsening. The Board affirmed that decision, holding that it could not substitute its judgment for that of the ALJ in weighing the evidence, and that Wells had not shown that the evidence was so overwhelming that it compelled a contrary result. Wells presents the same argument to this Court

as he did to the Board, namely that the ALJ was obligated to award increased benefits in light of the uncontradicted testimony of Drs. Templin and Chaney. We disagree that the evidence compels the result urged by Wells.

On a reopening, the burden of proof and the risk of non-persuasion falls on the party seeking reopening. Stambaugh v. Cedar Creek Mining Co., 488 S.W.2d 681 (Ky. 1972), Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968). Where the decision of the fact-finder is adverse to the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence compelled a contrary result. Mosely v. Ford Motor Co., 968 S.W.2d 675 (Ky. App. 1998). A reviewing court may not substitute its judgment for that of the finder of fact as to the weight of the evidence. The ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The fact finder may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000). The ALJ is even permitted to reject uncontroverted evidence, as long as a reasonable basis for doing so is stated. Osborne v. Pepsi-Cola, 816 S.W.2d 643 (Ky. 1991).

The essence of the Board's holding is that while two doctors assigned a numerically higher impairment rating, 17%, to Wells in 2003 assessments, the process is not so mechanical that the ALJ must therefore award additional benefits. The rejection of Wells' claim was based on a lack of comparative evidence which details how the condition worsened. After a review of the evidence, we agree with the Board's conclusion that the ALJ, who clearly stated her reasons for rejecting the contention that the 2% increase documented in the reports of Templin and Chaney represented a true worsening of his condition demonstrated by objective medical evidence. We adopt the following portion of the Board's opinion as our summary of the reasons that the evidence does not compel a contrary result:

> Dr. Templin did not see Wells prior to the original award issued in June 2000. Moreover, Dr. Templin did not address the issue of permanent impairment in his original evaluation of Wells in 2001. His 2003 report, produced in conjunction with the current reopening, provides no expert opinion with respect to a worsening of Wells' condition from the date of the original award. While the 17% rating assessed by Dr. Templin is numerically higher than the 15% rating found in the original claim, there is nothing within the report of Dr. Templin to suggest that this difference represents a true worsening of Wells' condition, as opposed to a change in the AMA Guides between the 4th and 5th editions or variability in the methods of assessment utilized by the examiners. It is noted that 3% of the rating assessed by Dr. Templin was based on Chapter 18 of the 5th Edition, which addresses pain-related impairment, a value not available to examiners under the 4th Edition. Of course, it was the 4th Edition of the AMA Guides used by Dr. Chaney to assess the 15% impairment rating

upon which benefits were awarded in Wells' original claim.

Looking beyond the numbers to the substance of Dr. Templin's report, it may be seen that his physical findings from one examination to the next are virtually identical. Indeed, it would be easy enough to conclude that Dr. Templin simply plugged in different values for the results of strength and range of motion testing. Notably, range of motion testing in 2003 revealed improvement over Wells' range of motion in 2001. Strength testing revealed no change in the average on the left and a modest decrease in strength on the right. Overall, it may not be said that the objective medical evidence reflected in Dr. Templin's reports of 2001 and 2003 compel a finding that Wells' condition worsened during that interval.

We have acknowledged, however, that Dr. Templin's first report came after the original award, and it was Wells' position in his previous claim on reopening that his condition had in fact worsened in the interval between the 2000 award and Dr. Templin's 2001 evaluation. Thus, we turn to the records of Dr. Chaney, who has treated Wells since 1998. Unlike Dr. Templin, Dr. Chaney did in fact address the issue of permanent impairment during both the original litigation and on reopening. Moreover, the rating offered by Dr. Chaney in 2004 was 2% higher than the rating assessed by him in 1999.

As Hazard ARH has pointed out in its briefing, however, the impairment rating espoused by Dr. Chaney in 2004 appears to be simply a carbon copy of the report of Dr. Templin. One might reasonably conjecture that the 17% rating is not the product of an independent comparative analysis by Dr. Chaney at all. On the other hand, it is not necessarily inappropriate for Dr. Chaney to adopt the rating assessed by Dr. Templin, if he believes it to be an accurate appraisal under the AMA Guides. However, without some further explanation or elaboration on the difference between his opinion in 1999 and 2004, we cannot conclude that Dr. Chaney's report compels the outcome urged by Wells.

In both 1999 and 2004, Dr. Chaney assessed a 5% rating under category II of the [Diagnosis Related Estimate (DRE)] Model for Wells' lumbar spine impairment. In 1999, he added to this a 10% rating for personal neuropathy in the right lower extremity,

to arrive at a 15% permanent impairment rating. In 2004, Dr. Chaney, like Dr. Templin, added to the 5% lumbar spine impairment an additional 9% for gait disorder and 3% for pain. Dr. Chaney offered no explanation as to why he utilized a different method of assessment of impairment for the lower extremity. We note, however, that the AMA Guides direct the examiner to evaluate impairment in an extremity caused by [Reflex Sympathetic Dystrophy (RSD)] according to the method described in Chapter 13, from which the 9% rating for gait disorder was derived. Thus, one might reasonably infer that Dr. Chaney, like Dr. Templin, believed it appropriate to rate Wells' lower extremity impairment under that chapter of the AMA Guides in light of the RSD diagnosis that had been made subsequent to his 1999 report. However, a review of Dr. Chaney's records just prior to issuance of the original award reveals that he suspected RSD in early 2000, being at a loss to explain otherwise Wells' right lower extremity symptoms. In other words, the fact that Dr. Chaney had not definitively diagnosed RSD at the time of the original award does not mean the criteria for impairment resulting from that condition were not present.

Notably, in his office record dated February 7, 2000, Dr. Chaney observed, "He walks with an antalgic gait and drags his right leg" Straight leg raising on the right was positive at 30 degrees. Wells reported that his right leg felt cold at times and that he experienced numbness, tingling and pain in the extremity continuously. He continued to complain of back pain and tenderness over the lower lumbar spine. These are the same findings upon which the 17% rating was assessed by Dr. Chaney and Dr. Templin in the reopening now before us.

In his brief before this Board, Wells suggests that the evidence of a 17% impairment rating alone was sufficient to compel an increase in the award of permanent income benefits. While we acknowledge the integral role of AMA impairment ratings in permanent partial disability claims after 1996, we do not believe the matter is so mechanical as Wells suggests. That is, the ALJ nevertheless retains the discretion to weigh the evidence and judge the credibility of the witnesses. In the case *sub judice* the ALJ clearly stated the basis for her rejection of the higher impairment rating that had been assessed.

> In looking at the record as a whole, the ALJ was not persuaded the 2% increase represented a worsening of Wells' condition that had been shown by objective medical evidence. Because this conclusion is based upon substantial evidence in the record and reflects an accurate application of the reopening provisions of KRS 342.125(1), it may not be disturbed on appeal. Special Fund v. Francis, supra.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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