

RENDERED: FEBRUARY 10, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001844-WC

JOHN RONNIE OSBORNE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-73105

EAGLE COAL COMPANY #10; DR. BALLARD WRIGHT;
HON. JOHN W. THACKER, ADMINISTRATIVE
LAW JUDGE; AND KENTUCKY WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: TACKETT, TAYLOR, AND VANMETER, JUDGES.

TAYLOR, JUDGE: John Ronnie Osborne seeks review from an opinion of the Workers' Compensation Board (the Board) entered August 5, 2005, affirming a decision of the Administrative Law Judge (ALJ) entered April 25, 2005, denying appellant's motion to reopen for an increase in permanent disability and disallowing medical expenses incurred after July 1, 2004. We affirm.

Appellant was a coal miner for approximately nineteen years and was employed by appellee when he was injured at work on July 13, 1998. Appellant filed a claim for workers' compensation benefits for the alleged work-related injury to his back. By order entered in August 2000, the ALJ found that appellant had suffered a work-related injury and assessed a 15% total impairment rating. The ALJ found that 7.5% was attributable to the work-related injury and 7.5% was attributable to a nonwork-related automobile accident that occurred in 1988. Thereafter, Eagle Coal Company #10 (Eagle Coal) filed a motion to reopen to contest medical services. A few months thereafter, appellant filed a motion to reopen alleging increased occupational disability. By opinion and order entered April 25, 2005, the ALJ denied appellant's motion to reopen by concluding that the injury suffered in 1998 was not the cause of appellant's current complaints, and thus, he suffered no increased disability. The ALJ sustained Eagle Coal's motion by concluding that medical expenses incurred after July 1, 2004, were noncompensable. Being unsatisfied with the opinion, appellant sought review by the Workers' Compensation Board. By opinion entered August 5, 2005, the Board affirmed the ALJ's decision, thus precipitating our review.

Initially, we note that our review of the Board's opinion is limited to correcting the Board if we perceive the

Board has overlooked or misconstrued applicable law, or committed error in assessing the evidence that resulted in gross injustice. Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky.App. 1992).

Appellant initially contends the ALJ erred by concluding that medical expenses incurred after July 1, 2004, were noncompensable. Specifically, appellant believes the ALJ erroneously relied upon the opinion of Dr. Martyn Goldman. Appellant asserts the ALJ could not rely upon Dr. Goldman's opinion that appellant suffered no permanent impairment from the work-related injury. Appellant argues the ALJ's opinion was clearly contrary to the original opinion and award issued on August 4, 2000; wherein, appellant was found to suffer a 15% permanent impairment. As Dr. Goldman's opinion is contrary to the opinion and award of August 2000, appellant contends her opinion cannot constitute substantial evidence and that "*res adjudicata* and/or law of the case" doctrine precludes reliance upon her opinion. We disagree.

As pointed out by the Board:

The reasonableness, necessity and work-relatedness of the contested treatment recommended by Dr. Wright was not at issue in the original claim decided by ALJ Coleman. Indeed, such treatment had not even been recommended at the time the claim was originally decided. Thus, neither *res judicata* nor collateral estoppel would apply to the ALJ's determination of the

compensability of the treatment that is the subject of Eagle Coal's medical fee dispute.

As the precise issue of the compensability of Dr. Peter D. Wright's treatment was not decided in the original claim, appellant's argument that the doctrines of *res judicata* or collateral estoppel would apply is clearly without merit. Moreover, we observe that it is within the province of the factfinder to believe or disbelieve parts of evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). In the case at hand, it was within the province of the ALJ to accept certain parts of Dr. Goldman's testimony and to reject others. Indeed, the ALJ found that appellant suffered a 15% permanent impairment; hence, rejecting Dr. Goldman's opinion that appellant suffered no permanent impairment. However, the ALJ found credible Dr. Goldman's testimony that any further medical treatment was inappropriate and that appellant's current symptoms were not related to his injury sustained at work in 1998. Upon the whole, we are of the opinion the ALJ properly relied upon Dr. Goldman's testimony and that such testimony constituted substantial evidence to support the ALJ's finding that medical treatment after July 1, 2004, was noncompensable.

Appellant also contends the ALJ committed reversible error by denying his motion to reopen the claim for a worsening of condition. In particular, appellant argues that his "current

level of pain would be sufficient to prevent a return to any substantial gainful employment and award of 100% occupational disability benefits should have been granted herein."

Appellant argues the ALJ erred by believing that an increase in a permanent impairment rating was necessary to sustain a motion to reopen. However, as found by the Board:

Thus, it is true that the ALJ below had the discretion to award PTD benefits on reopening in the absence of evidence of an increase in Osborne's permanent impairment rating from the date of the original award to the date of reopening. However, notwithstanding the implications of Osborne's argument on appeal, there is nothing in the ALJ's decision on reopening to indicate that he thought himself constrained by the lack of such evidence. The ALJ did not dismiss Osborne's claim on reopening based on his failure to prove an increase in functional impairment. Rather, the ALJ expressly found that Osborne "has no increase in disability as no objective medical evidence of worsening of condition has been shown and the testimony of the plaintiff as to his assessment of the severity of his condition is essentially the same."

Based upon this sound reasoning by the Board, we, likewise, reject appellant's argument.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Leonard Stayton
Inez, Kentucky

BRIEF FOR APPELLEE:

Denise Kirk Ash
Lexington, Kentucky