

**Commonwealth Of Kentucky**

**Court of Appeals**

NO. 2005-CA-002024-WC

JOSEPH THOMAS STEVENS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-03-86264

VISION MINING COMPANY; HON. DONNA  
H. TERRY, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: McANULTY, SCHRODER, AND VANMETER, JUDGES.

McANULTY, JUDGE: This is a petition for review of an opinion of the Workers' Compensation Board which affirmed an opinion and award of the administrative law judge (ALJ). Appellant Joseph Thomas Stevens sustained a work-related crush injury to his right calf while working for appellee Vision Mining Company. The ALJ awarded Stevens permanent partial disability payments based on a 10% impairment rating. However, the ALJ concluded that Stevens retained the ability to return to unrestricted work

and so denied him the enhanced benefits of KRS 342.730(1)(c)(1). Because he had not returned to work, the ALJ also denied enhanced benefits under KRS 342.730(1)(c)(2).

Stevens argues that the ALJ's conclusions were erroneous because the ALJ ignored or overlooked significant evidence regarding Stevens' ability to return to work. He filed a petition for reconsideration of this evidence, which the ALJ overruled. On review, the Workers' Compensation Board affirmed the ALJ. The Board declared that the ALJ, as finder of fact, has sole authority and discretion to determine whether the evidence of impairment and work restrictions substantiate a finding of total occupational disability. The Board further found that the ALJ's conclusions were supported by substantial evidence in the record, and the evidence cited by Stevens did not compel a different result. Stevens petitions for review of this determination.

Our review of this case adheres to the standard of review in Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992). The function of further review by this Court of an opinion of the Workers' Compensation Board is to correct the Board only where we perceive it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. Id. at 687-688.

Stevens argues that the evidence in this case was erroneously assessed. He argues that the Board and ALJ ignored a May 25, 2004 letter from his orthopedist, Dr. Johnson, which stated that Stevens could no longer work. Stevens also points out that he was terminated from his employment as a result of this letter, which explains why he did not return to work.

Dr. Johnson's opinion in a Form 107-I dated December 2, 2004, stated that Stevens did not retain the physical capacity to return to the type of work performed at the time of injury. It further stated that he should have restrictions placed on his work activities due to the injury. These included limits on the amount of weight Stevens should lift, and having the ability to sit and elevate his leg as needed for pain. However, below these restrictions was a handwritten note which stated that Stevens called the doctor's office on January 20, 2004, and asked to return to work with no restrictions, and that Dr. Johnson complied by removing all restrictions.

In his deposition, Stevens related that the doctor did that at his urging because he called "in a panic" regarding losing his job at the mines. However, very soon thereafter Stevens realized that if he could not stand for more than fifteen minutes at a time and had to stop to elevate his leg, the coal industry would not accept that. He testified that he therefore asked the doctor to restore the restrictions. Later,

on May 21, 2004, Dr. Johnson wrote a letter in which he stated that Stevens' injury at work prevented him from performing his normal job duties. As a result, Vision Mining terminated Stevens from work.

Given this history, Stevens regards it as inaccurate to rely on the lifting of restrictions as being Dr. Johnson's opinion. He emphasizes the doctor's opinion from the May letter and restrictions in the December Form 107-I as being the true reflection of Stevens' inability to work at his former employment.

The ALJ stated in her order denying reconsideration that she considered the conflicting nature of Dr. Johnson's statements before arriving at her opinion and award. The ALJ was furthermore alerted in the motion for reconsideration to the letter Stevens now highlights, but she did not alter her assessment. The ALJ stated that she was aware that Stevens had been terminated from his employment in 2004. The Board, on review, was also aware of the range of opinions by Dr. Johnson and the circumstances surrounding Stevens' dismissal from employment with Vision Mining, yet still affirmed the ALJ's decision.

Even considering the letter from Dr. Johnson, which does contradict his January 2004 note saying that Stevens could work without restrictions, other evidence supported the ALJ's

ruling. The ALJ also relied on the evaluation of the orthopedic surgeon, Dr. Yelton, who performed an independent medical evaluation. Dr. Yelton opined that Stevens could return to work without restrictions. The ALJ relied on this opinion as well as Dr. Johnson's willingness to remove restrictions in finding Stevens did not meet his burden of establishing total disability from his injury.

From the foregoing, we do not agree that the ALJ's or Board's conclusions were a result of a lack of awareness or understanding of any portion of the evidence. We do not find an error in the assessment of the evidence in this case leading to flagrant error. Thus, we affirm the Board's opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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