RENDERED: JUNE 23, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002532-WC

JONATHAN GIBSON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-86973

BLACKHAWK MINING, INC.;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; McANULTY, JUDGE; POTTER, SENIOR JUDGE.[1]

POTTER, SENIOR JUDGE: Jonathan Gibson (Gibson) has petitioned for review of an opinion of the Workers' Compensation Board (Board) entered November 10, 2005, that affirmed an opinion, award and order of the administrative law judge (ALJ) rendered May 9, 2005, dismissing Gibson's claim against Blackhawk Mining Inc. (Blackhawk) for permanent disability benefits and future medical treatment.

[1] Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

In October, 2000, one month short of turning twenty-two years old, Gibson began work for Blackhawk as a roof bolter operator. On April 18, 2003, he was involved in a work-related accident while in Blackhawk's employ, when, while operating a roof bolter, his glove became caught in the machine between "the pot and a wrench," wrapping around his right hand and wrist, and suspending him for several minutes until he was removed from the machine. Thirty minutes later he informed his supervisor of the accident and was transported to the hospital where he was treated and released.

As a result of the above incident, Gibson filed his claim with the Office of Workers Claims on July 1, 2004, for injury to his right hand, right wrist, and right shoulder. Evidence was submitted that Gibson's physician had diagnosed the development of reflex sympathetic dystrophy (RSD)/chronic regional pain syndrome (CRPS). The claim was later amended to include carpal tunnel syndrome (CTS) and secondary psychological overlay.

Based on evidence outlined in the opinion, the ALJ concluded:

> Before deciding extent and duration of compensable disability, it must be determined what is included in compensable disability. The first question is whether [Gibson's] psychiatric complaint is work-related so as to be compensable. KRS 342.0011(1) in applicable part states that a

psychological, psychiatric or stress-related change in the human organism does not constitute an injury for the purposes of workers' compensation unless it is a direct result of a physical injury. In the present case, I am more persuaded by Dr. Ruth who gave [Gibson] a 0% impairment from a psychiatric standpoint. Objective medical findings, including the results on the Zung Depression Scale support his opinions. Further, Dr. Ruth said "There is no source including that of the injury that I can prove caused any purported depression." I am persuaded that it is not demonstrated that [Gibson's] psychological, psychiatric or stress complaints are a direct result of a physical injury of April 18, 2003. I find that these complaints are not compensable.

The next question is whether [Gibson] suffers from Reflex Sympathetic Dystrophy or Chronic Regional Pain Syndrome. I have reviewed and considered the conflicting evidence. I am more persuaded by Dr. Burgess' opinion that [Gibson] does not have Reflex Sympathetic Dystrophy. This opinion is supported by objective medical evidence. Dr. Burgess found no cyanosis or mottling. Skin color and temperature were normal. [Gibson's] hand was neither moist or dry compared with the other hands. Skin, nails and hair on the hand were all normal. Medical records and bone scan reports did not indicate Reflex Sympathetic Dystrophy. Numerous other findings support Dr. Burgess' opinion. Pursuant to the AMA Guidelines, [Gibson] does not meet sufficient criteria to be diagnosed as having Reflex Sympathetic Dystrophy or Chronic Regional Pain Syndrome. I find that [Gibson] does not suffer from Reflex Sympathetic Dystrophy or Chronic Regional Pain Syndrome.

The next question is whether [Gibson] has work-related carpal tunnel syndrome. Dr. Ahmed stated, following an NCV/EMG study that the test results were suggestive of mild to moderate right carpal tunnel syndrome. He recommended clinical

correlation. I have considered this evidence as well as the rest of the evidence. I find that [Gibson] has not met the burden of proving that he suffers from work-related carpal tunnel syndrome.

Having made the above determinations, I find that [Gibson] suffers no permanent impairment or disability as the result of his April 18, 2003 work injury. The issue of pre-existing active condition becomes moot.

I have also reviewed the medical and lay evidence with regard to temporary total disability benefits and I find that there was no underpayment regarding duration. He was paid $373.24 per week from April 19, 2003 through August 27, 2004. I don't find medical evidence that persuades me that he was totally disabled after August 27, 2004. I have reviewed the evidence with regard to weekly amount of temporary total disability benefits and find that there is an underpayment regarding rate. The rate of temporary total disability benefits is correct for an average weekly wage of $466.55. The evidence regarding average weekly wage was unavailable to defense counsel because the employer is out of business. However, I am persuaded by [Gibson's] statement on his Form 101 that he earned $14.00 per hour, working 43 to 44 hours per week. I find [Gibson's] average weekly wage to be $609.00. [Gibson] was entitled to $406.02 per week for temporary total disability benefits.

The final issues regard disputed medical treatment. Having considered the evidence in its entirety, I am more persuaded by the opinions expressed by Dr. Burgess and find that a spinal cord stimulator is not reasonable or necessary treatment for [Gibson's] work injury and is therefore not compensable. KRS 342.020. Having found that [Gibson] does not suffer from work-related carpal tunnel syndrome, I find that [Blackhawk] is not liable for treatment of carpal tunnel syndrome.

In affirming the ALJ's opinion and order, the Board stated:

> It is well established that the claimant in a workers' compensation claim bears the burden of proving each of the essential elements of the cause of action. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Gibson was unsuccessful in his burden of proof before the ALJ, the question on appeal is whether the evidence is so overwhelming, upon consideration of the whole record, as to compel a finding in his favor. Wolf Creek Colleries v. Crum, 673 S.W.2d 735 (Ky.App. 1984).
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> Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky.App. 1985). As fact-finder, 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); Paramount Foods Inc. v. Burkhardt, supra. Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky.App. 1995). The ALJ, as 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky.App. 2000). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, supra. In order to reverse the decision of the ALJ, it must be shown there

was no evidence of substantial probative value to support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As to all of the issues raised by Gibson in this appeal, we find the ALJ's conclusions to be supported by substantial evidence. The medical evidence was conflicting with regard to each of those determinations and, as such, the ALJ was free to pick and choose that testimony she found to be most credible. Moreover, the ALJ was permitted to draw all reasonable inferences from the evidence. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979).

As to the ALJ's finding that Gibson does not have RSD/CRPS, Dr. Burgess plainly testified that Gibson does not meet the criteria necessary to qualify for that diagnosis pursuant to the AMA Guides. Dr. Burgess testified that the AMA Guides set out eleven factors, of which a patient must show signs and symptoms of at least eight to be diagnosed with the condition. According to Dr. Burgess, Gibson did not meet this requirement. Of those symptoms that Gibson did exhibit, Dr. Burgess felt they were associated with edema produced by the "Jobst" compression glove he was wearing at the time of the examination. Dr. Gibson attributed the symptoms to a condition called factitious lymphedema, which is produced by a tourniquet effect due to a tight band around the extremity. Once the band is removed, the swelling and other signs disappear within hours or days. Based on the correctness of this diagnosis, Dr. Burgess felt that Gibson would qualify for a 0% impairment rating according to the AMA Guides. Even Dr. Gutti, [Gibson's] treating physician, conceded at the time of his deposition that of the eleven criteria set out in the AMA Guides for diagnosing RSD/CRPS, Gibson at best only demonstrated six or seven. Dr. Gutti further testified that he diagnosed RSD/CRPS despite the AMA Guides stated requirements. The ALJ's

discretion to rely on the opinions expressed by Dr. Burgess was in no way compromised or diminished by his status as an evaluating rather than treating physician. An ALJ, as fact-finder, is not obligated to give more weight to evidence from an attending physician than to evidence of other physicians. Wells v. Morris, 698 S.W.2d 321 (Ky.App. 1979). What is more, the number of expert witnesses that express a diagnosis or opinion upon which the ALJ relies is of no importance. As long as the ALJ's determination is supported by any evidence of substance contained within the record, her decision may not be disturbed on appeal. Special Fund v. Francis, supra.

Similarly, we must affirm the decision of the ALJ pertaining to dismissal of Gibson's claim for alleged secondary psychological overlay. Dr. Ruth plainly stated, "Gibson does not have a psychiatric impairment as defined by the AMA *Guides to the Evaluation of Permanent Impairment*." Dr. Ruth's report in our opinion is thorough and was based upon direct observation and objective testing. It therefore rises to the level of substantial evidence sufficient to support the findings and conclusions of the ALJ.

We likewise find no error as to the ALJ's determination that Gibson failed to meet his burden of proving permanent disability or entitlement to an award due to CTS. The nerve conduction studies performed by Dr. Ahmed were only suggestive of mild CTS. While Dr. Gutti was willing to make a diagnosis of CTS, he assigned no impairment rating pursuant to the AMA Guides relative to that diagnosis sufficient to allow for a disability rating pursuant to KRS 342.730(1)(b). Although Dr. Templin acknowledged the results of the nerve conduction studies in the history portion of his medical report, he did not diagnose Gibson as having CTS, nor did he assign any portion of his 59% impairment rating to the effects of that condition. Similarly, Drs.

Freimark, Shockey and Burgess make no diagnosis with regard to CTS. Hence, we find no error.

As to the question of compensability of the spinal cord stimulator, we also affirm. Dr. Burgess clearly testified that Gibson would not benefit from the stimulator or continuing stellate blocks.

We now turn to the remaining issue involving the legal propriety of the duration of the award of TTD benefits. Pursuant to KRS 342.0011(11)(a), TTD is defined as the condition of an employee who has not reached maximum medical improvement ("MMI") from an injury and has not reached a level of improvement that would permit a return to employment. TTD is a factual finding in which the ALJ is called upon to analyze the evidence presented and to determine the date the injured employee either first: (1) reaches MMI; or (2) attains a level of improvement such that he is capable of returning to active gainful employment. KRS 342.0011(11)(a); W.L. Harper Construction Co. v. Barker, 658 S.W.2d 202 (Ky.App. 1993); Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000). Generally, the duration of an award of TTD may be ordered only through the earlier of those two dates. In this instance, the ALJ determined that Gibson was entitled to $406.02 per week in TTD benefits from April 19, 2003 through August 27, 2004. The ALJ stated only that she found no medical evidence sufficient to persuade her that Gibson "was totally disabled after August 27, 2004." Blackhawk apparently terminated voluntary payments on August 27, 2004, after receiving a copy of Dr. Templin's July 28, 2004 report. None of the medical experts of record directly addressed the issue of when Gibson reached MMI. However, given the totality of the evidence, the only reasonable inference is that Gibson was at MMI by the date of Dr. Templin's examination. Although Dr. Templin does not directly discuss MMI in his report, he

> obviously felt it was appropriate to assess an AMA impairment rating at that time. Pursuant to the express requirements of the AMA Guides, a patient's functional impairment rating may only be measured if the patient being examined has reached MMI.
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> While technically the ALJ's finding with regard to the duration of Gibson's TTD award does not satisfy the standard set out above, we nevertheless affirm. Blackhawk in its brief before this Board argues in favor of the TTD award granted by the ALJ. Certainly, given the evidence found most credible by the ALJ, we cannot say the ALJ's determination that Gibson was not temporarily totally disabled after August 27, 2004 is unreasonable or unsupported by the record. Hence, we find no error.

Before us, Gibson argues that the Board erred in affirming the ALJ's opinion, award and order, asserting that the ALJ's findings 1) denying Gibson permanent disability benefits, 2) determining that Gibson's psychiatric condition was non-compensable, 3) determining that Gibson did not suffer from RSD, and 4) denying payment for CTS and a spinal cord stimulator were error in the face of overwhelming evidence to the contrary, and 5) determining that Gibson was not underpaid in duration temporary total disability (TTD) benefits was error due to misapplication of the proper standard and procedure. We affirm.

Our standard of review of a decision of the Board "is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so

flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). Having reviewed the Board's application of the law to the evidence, we conclude that the Board committed no error.

As to Gibson's argument that the ALJ's determination that his psychiatric condition was non-compensable because it was not a direct result of his work related injury was contrary to the weight of the evidence as a whole, the evidence presented to the ALJ on this issue was as follows. Dr. Robert Granacher's initial psychiatric examination, which included a mental evaluation and psychological testing, resulted in a diagnosis of possible mood disorder due to work related injury, probably contributed to by sleep apnea due to morbid obesity. This diagnosis was confirmed following a sleep study. Dr. Douglas Ruth performed a psychiatric examination, including psychological testing. While he could conclude that Gibson had evidence of a depressive disorder (but not a clinical depression), he could not conclude that Gibson's work related injury directly caused this condition, and he certainly did not have a psychiatric impairment according to the AMA Guides. And, despite Gibson's argument that Dr. Ruth relied upon Dr. Granacher's report indicating that he had a pre-existing psychiatric condition, Dr. Ruth's testimony indicated that he was actually unsure from a statement in Dr. Granacher's report

as to whether Gibson had related a prior history of depression. Based on the above evidence, therefore, the ALJ's reliance on Dr. Ruth's findings do not appear to rise to "an error in assessing the evidence so flagrant as to cause gross injustice," pursuant to Western Baptist Hospital, supra.

Next, as to Gibson's argument that the ALJ's determination that he did not suffer from RSD or CRPS was contrary to the overwhelming evidence, the evidence was as follows. Dr. Shelley Freimark's evaluation resulted in clinical findings supporting a diagnosis of RSD caused by the work related injury, and Dr. Sai P. Gutti's examination and treatment resulted in a diagnosis of RSD resulting from the work related injury. Contrary to this testimony, hand surgeon Dr. Ronald Burgess's independent medical examination (IME) resulted in clinical findings not consistent with a diagnosis of RSD in that Gibson did not have eight out of eleven criteria needed under the AMA Guides for the RSD diagnosis, and that Gibson's wearing of a compression glove may have contributed to one symptom of RSD. Although Dr. Gutti diagnosed RSD, he agreed that he could not find eight or more objective criteria, either. Similar to the issue above, the ALJ's reliance on Dr. Burgess' findings do not appear to rise to "an error in assessing the evidence so flagrant as to cause gross injustice," pursuant to Western Baptist Hospital, supra.

Next, Gibson complains of ALJ error in denying payment for CTS and a spinal cord stimulator. The only evidence on this issue in support of CTS is found in Dr. Naveed Ahmed's diagnosis of mild to moderate right CTS following his EMG/NCV studies, and in Dr. Gutti's diagnosis, although even with this finding Dr. Gutti did not assign an impairment rating. In contrast, neither Dr. James Templin, Dr. J. Steven Shockey, Dr. Freimark or Dr. Burgess made a CTS diagnosis. As to the spinal cord stimulator, neither doctor who diagnosed CTS recommended this treatment. The stimulator was only recommended by Dr. Freimark, and only on a trial basis. And, Dr. Burgess specifically indicated that Gibson would not benefit from this treatment. Again, there was no error in the ALJ's reliance on the evidence as a whole that did not support either the CTS diagnosis or the stimulator treatment.

Gibson also contends ALJ error in failing to find that he was permanently disabled due to his work related injury. The evidence was indicative of fractures that apparently had healed, and conflicting evidence of RSD and CTS that developed out of the injury. The ALJ premised its conclusion of no permanent impairment on the inability of any physician to find eight of eleven objective criteria for a finding of RSD, and on the failure of any physician to note that even with the dual diagnoses of mild to moderate CTS that it rose to the level of

an impairment rating. Pursuant to Kentucky Revised Statutes (KRS) 342.0011(11)(c), "permanent total disability" is defined as the "condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury." "Permanent disability rating" is defined in KRS 342.0011(36) 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 evidence was substantial and sufficient that Gibson had no permanent impairment and thus no permanent disability rating. There was no error.

Lastly, Gibson complains of ALJ error in determining the end date for payment of his TTD benefits. The ALJ determined that Gibson was underpaid as to the rate of the payment, and ordered adjustments accordingly. The ALJ also determined that payments were made from April 19, 2003, through August 27, 2004, finding no persuasive medical evidence that Gibson was totally disabled after August 27, 2004. It is this August 27, 2004, date with which Gibson takes issue. The duration of TTD is defined as the date the injured employee either first (1) reached maximum medical improvement (MMI) or (2) attained a level of improvement such that he is capable of returning to employment. KRS 342.0011(11)(a). The ALJ concluded that no medical evidence was presented to show total

disability after August 27, 2004. Evidence indicated that Dr. Templin rendered a report on July 28, 2004. In that report, Dr. Templin assessed an AMA impairment rating, which pursuant to the AMA Guides can only be assessed if the patient has reached MMI. Blackhawk terminated voluntary payments on August 27, 2004, after receiving a copy of Dr. Templin's July 28, 2004 report. While concluding that the ALJ's finding did not satisfy the standard, the Board found no error: "given the evidence most credible by the ALJ, we cannot say the ALJ's determination that Gibson was not temporarily totally disabled after August 27, 2004 is unreasonable or unsupported by the record." Pursuant to Western Baptist Hospital, there is no error.

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

ALL CONCUR.

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