

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002393-WC

RANDALL STUMP

APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-89345

MOUNTAIN EDGE MINING, INC.,
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE, and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: HENRY AND SCHRODER, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: Randall Stump appeals from an opinion of the Workers' Compensation Board affirming a decision rendered by an Administrative Law Judge denying future knee replacement surgery and an increase in income benefits against Mountain Edge Mining, Inc. Finding no error, we affirm.

On May 9, 2000, Stump suffered a work related injury to his left knee. He continued to work until April 19, 2001, at

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

which time he had knee surgery and missed one work shift. When he returned to work he was assigned to light duty but eventually returned to his position as a maintenance foreman for Mountain Edge. On April 27, 2002, Stump left his employment with Mountain Edge because his knee had allegedly deteriorated and he could no longer perform his work duties.

Stump settled his workers' compensation claim based on a 3% impairment rating for a lump sum payment of \$2,290.37 and reserved his right to receive future medical treatment for his work related condition. The agreement was approved by the ALJ on May 15, 2002.

In July 2004, Stump filed a motion to reopen pursuant to KRS 342.125 alleging a worsening of his physical condition and an increase in occupational disability. The claim was subsequently assigned to an ALJ for further adjudication.

Stump testified that his knee condition had grown progressively worse stating that it "catches" and "locks up", and he now experiences lower back pain. Since 2002, Stump has gained approximately 55 pounds and now weighs 315 pounds.

Dr. Nadar, Stump's treating orthopedic surgeon, first treated Stump for his work-related injury on November 13, 2000. He originally diagnosed a sprained medial collateral ligament in the left knee. After Stump continued to have difficulty, he performed an arthroscopy and partial medial meniscectomy of the

left knee on April 19, 2001, and released Stump to return to full duty on July 9, 2001. In August 2001, Dr. Nadar assessed a 3% impairment rating. He did not see Stump again until April 22, 2003. Stump complained of increased problems with persistent pain, popping, and catching of the knee. Dr. Nadar continued to treat Stump with analgesics and anti-inflammatory medication. Dr. Nadar testified that within a reasonable degree of medical probability, since August 2001, Stump's condition has progressed and worsened and that he now has at least a ten percent impairment to the body as a whole. Fifty percent of that impairment, he opined, is due to pre-existing conditions and the remainder to the 2000 injury. His treatment plan included Synvisc injections. If that treatment did not have positive results, however, Dr. Nadar recommended knee replacement surgery. Although he found Stump's condition had worsened, Dr. Nadar did not place additional restrictions on Stump's activities.

Dr. Wagner performed an independent medical evaluation on October 28, 2004. He found Stump to have a 1% impairment to the body as a whole which he attributed to pre-existing degenerative changes to the knee. As treatment, he did not believe knee replacement was necessary and recommended anti-inflammatory medication and a dramatic weight reduction.

Dr. Lowe, an orthopedic surgeon, performed an independent medical examination on October 8, 2004. He testified that Stump's impairment now exceeded 3% to the body as a whole. Because of his objective findings and with Stump's reliance on a cane, he would rate his impairment as high as 20%. Even without factoring in Stump's use of the cane, which Dr. Lowe admitted could be exaggerated by the patient, he would still assess a 13% impairment. As the first option of treatment he recommended Synvisc injections to the left knee and, if unsuccessful in relieving Stump's symptoms, knee replacement surgery. He further stated that Stump no longer had the physical capacity to return to work.

The ALJ relied on Dr. Wagner's opinion and found that Stump failed to demonstrate that he suffered a worsening of his condition or increase in his disability. Additional income benefits were denied. As to medical benefits sought for knee replacement surgery, the ALJ again relied on Dr. Wagner and the request was denied. The ALJ did approve the benefits payable for anti-inflammatory medication finding Dr. Lowe's and Dr. Nadar's testimony persuasive.

It is not the function of the Board or of this appellate court to replace our judgment with that of the ALJ. As the fact-finder, the ALJ can reject testimony and believe or

disbelieve any part of the evidence.² Simply because there is evidence to support a finding in the appellant's favor, the decision will not be reversed unless there is no substantial evidence of probative value to support the decision.³

Although Stump submitted evidence to support his claim and it would not have been unreasonable for the ALJ to render an award in his favor, the evidence did not compel such a result.⁴

We agree with the following analysis provided by the Board:

In this instance, we find that the ALJ's determination on reopening was supported by sufficient evidence of probative value. In order to have been successful, Stump was charged with proving to the ALJ's satisfaction as fact-finder that he had suffered a "[c]hange of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order." See KRS 342.125(1)(d). Stump failed in that burden. Instead, the ALJ was more persuaded by the expert opinions expressed by Dr. Wagner. In 2001, at the time of the original settlement Dr. Nadar assessed a 3% whole body impairment pursuant to the AMA Guides. Hence, it was reasonable for the ALJ to conclude there has been no worsening of impairment. It does not matter that Drs. Lowe and Nadar expressed contrary opinions that Stump's impairment rating had increased or worsened over the past four years.

² Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000).

³ Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

⁴ Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984).

As to Stump's claim for medical benefits for knee replacement surgery, the ALJ relied on the testimony of Drs. Wagner that Stump could be treated with anti-inflammatory medications. Even the testimony of Drs. Nadar and Lowe does not establish that the surgery is presently necessary or, without reduction in Stump's weight, that this is even a reasonable treatment. The evidence is more than sufficient to establish that the knee surgery is not necessary or reasonable.⁵

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Glenn M. Hammond
Glenn M. Hammond Law Office
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Jeffery D. Damron
Baird & Baird, P.S.C.
Pikeville, Kentucky

⁵ KRS 342.020.