

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-000484-WC

PINE MOUNTAIN LUMBER COMPANY, LLC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-03-74856

CARLOS J. ADAMS; HON. HOWARD
E. FRASIER, JR., ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: COMBS, CHIEF JUDGE; TAYLOR, JUDGE; BUCKINGHAM,¹ SENIOR
JUDGE.

TAYLOR, JUDGE: Pine Mountain Lumber Company, LLC (Pine
Mountain) petitions this Court to review an opinion of the
Workers' Compensation Board (the Board) rendered February 3,
2006, affirming the Administrative Law Judge's (ALJ's) award of

¹ Senior Judge David C. Buckingham 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.

total occupational disability benefits to Carlos J. Adams. We affirm.

The record indicates that Adams was employed by Pine Mountain and sustained a work-related injury on August 25, 2003. Adams was allegedly injured when he and two other employees were lifting a "cant" which weighed some 200 pounds. Adams testified that he felt a pulling sensation in his back when lifting the cant. He filed a claim for workers' compensation benefits based upon a physical back injury and psychological injury.

The ALJ determined that Adams suffered a 5% permanent impairment rating due to his physical back injury and suffered a 35% psychological impairment rating as a result of the physical injury. The ALJ further concluded there was no possibility that Adams could return to work based upon his current psychological and mental instability. As such, the ALJ awarded total occupational disability benefits. Being unsatisfied with the award, Pine Mountain sought review with the Board. By opinion entered February 3, 2006, the Board affirmed the ALJ's opinion. This review follows.

Pine Mountain contends the ALJ's finding that Adams suffered a 5% permanent impairment rating to his lumbar spine was clearly erroneous. Pine Mountain alleges that there existed no credible evidence in the record to support a 5% impairment rating to the lumbar spine. Specifically, Pine Mountain points

out that Dr. Joseph Zerga initially assessed a 5% impairment rating to Adams' lumbar spine; however, Dr. Zerga filed an amended report into the record. In this amended report, Dr. Zerga revised his opinion concerning the impairment rating and opined that Adams suffered no permanent impairment. Dr. Zerga stated that the revised opinion was based upon a review of the reports from Dr. Eric Johnson and Dr. David Shraberg. Dr. Zerga specifically opined that he concurred with Dr. Shraberg's opinion that Adams was malingering. As such, Pine Mountain contends there was no competent medical evidence in the record to support the ALJ's finding that Adams suffered a 5% permanent impairment rating to his lumbar spine. We disagree.

The ALJ's findings of fact will not be set aside if supported by substantial evidence of a probative value. Louisville Cooperage v. Knoppe, 695 S.W.2d 440 (Ky.App. 985). Moreover, it is well-established that it is within the province of the fact-finder to believe parts of the evidence and to disbelieve other parts of the same evidence. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977).

In the case at hand, we believe the ALJ was well within his discretion in accepting the initial opinion of Dr. Zerga that Adams suffered from a 5% permanent impairment rating to the lumbar spine. Indeed, the ALJ specifically addressed his reasoning for disregarding the revised opinion of Dr. Zerga:

The undersigned finds that the reports of Dr. Johnson and Dr. Ludgate are more credible than the report of Dr. Shraberg and the amended report of Dr. Zerga. Apparently, Dr. Zerga and Dr. Kennedy were unable to complete a range of motion analysis of the Plaintiff's lumbar spine, and this event caused Dr. Zerga to initially opine a 5% whole body impairment based on lumbar DRE category II. In his amended report, Dr. Zerga accepted the diagnosis of Dr. Shraberg of "malingering," and revised his opinion to 0% lumbar impairment.

On cross-examination, Dr. Shraberg admitted that his opinion of conscious malingering was just a "possibility," and such opinion is insufficient in terms of the reasonable probability required by Kentucky courts. See, e.g., Seaton v. Rosenberg, 573 S.W.2d 333, 338 (Ky. 1978). Alternatively, Dr. Shraberg has opined that the physical injury has resolved, and any psychological symptoms, conscious or subconscious, did not arise until some later point in time and therefore are not related to the injury of August 25, 2003. Such opinion is simply not consistent with the facts for a number of reasons. (Footnote omitted.)

It was within the discretion of the ALJ to accept Dr. Zerga's initial opinion and reject the revised opinion regarding permanent impairment. See Caudill, 560 S.W.2d 15. Thus, we are of the opinion that substantial evidence of a probative value existed supporting the ALJ's decision that Adams suffered a 5% permanent impairment rating.

Pine Mountain next contends that "the record completely lacks substantial evidence having the fitness to induce conviction in the minds of reasonable men, to support a

finding that Adams has suffered a psychological/psychiatric injury approximately caused by work-related injury or traumatic event." Appellant's Brief at 18. Again, we disagree.

We believe the medical opinion of Dr. John W. Ludgate constitutes substantial evidence of a probative value to support the ALJ's findings that Adams suffered a psychological permanent impairment rating of 35% and the psychological illness was caused by his work-related injury. Upon this issue, the ALJ specifically found:

Dr. Ludgate noted that "Mr. Adams presented in a rather unusual manner. He was tremulous and agitated with poor eye contact. . . . He also appeared to be depressed with very little animation facially. He never smiled and showed some psychomotor retardation consistent with depression." (Id.) Dr. Ludgate administered the following tests: Structured Clinical Interview for Diagnosis ("SCID"), Beck Depression Inventory ("BDI"), Beck Anxiety Inventory ("BAI"), and Personality Assessment Inventory ("PAI"). Results from all of these tests supported the following diagnosis:

AXIS I: Major Depression Single
Episode: Moderate without
Psychotic Features
Generalized Anxiety Disorder
AXIS II: Borderline Intellectual
Functioning by previous
testing
AXIS III: Lumbar Back Pain
AXIS IV: Moderate (finances, changes
in life style)
AXIS V: Current GAF 55.

(Id. at 3-4).

In an attached Form 107 report, Dr. Ludgate opined within reasonable/psychological probability that the[sic] Mr. Adams' complaints are caused by his work-related injury. "Patient had no significant mental health problems prior to his accident. In my view his depression & anxiety are secondary to pain, restrictions in life activities & financial stress." (Id., Form 107, 2/15/05, p. 2). He opined permanent psychological impairment of 30-35% based on Class 3 (moderate).

The ALJ succinctly outlined the medical opinion of Dr. Ludgate upon permanent psychological impairment and causation. We view Dr. Ludgate's opinion alone as sufficient to support the ALJ's decision. As such, we reject Pine Mountain's contention that the ALJ's finding that Adams suffered a work-related psychological injury was not supported by substantial evidence of probative value.

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

ALL CONCUR.

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