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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2006-CA-001048-WC

LARRY BROCK — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-84-25962

MANALAPAN MINING COMPANY;
SPECIAL FUND; HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND GUIDUGLI, JUDGES; BUCKINGHAM,[1] SENIOR JUDGE.

GUIDUGLI, JUDGE: Larry Brock appeals from an opinion and order of the Workers' Compensation Board affirming an opinion and order of the Administrative Law Judge ("ALJ"). The ALJ dismissed Brock's claim on reopening against Manalapan Mining Company. Brock argues that the Board incorrectly failed to rule that the ALJ erred when, after ruling on January 14, 2000, that

[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 KRS 21.580.

Brock's low back problems were work-related, she later found on November 11, 2005, that Brock's low back complaints were due to natural aging. Brock also argues that he was denied procedural due process when the ALJ failed to move the case along to a resolution in a timely manner. For the reasons stated below, we affirm the opinion and order of the Workers' Compensation Board.

We have closely examined the voluminous record in this case, which spans a period of several years. In the interest of judicial economy, and because no good purpose is served in rewriting the well-reasoned opinion of the Workers' Compensation Board, we adopt the Board's opinion as that of this Court. The Board stated in relevant part as follows:

> On appeal, Brock argues he was denied due process in the proceedings below and requests that the matter be remanded for assignment to a different administrative law judge for purposes of a fair and impartial hearing. Brock argues the ALJ pressured him to settle for an amount he believed insufficient and then dismissed his claim after he refused to do so. Brock submits that the ALJ's decision was vindictive and constituted an abuse of discretion.
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> Manalapan responds that Brock's characterization of the ALJ's conduct is fallacious and unsupported by the record of proceedings below. Manalapan points out that the litigation of Brock's claim on reopening spanned a period of roughly seven years, during which time Brock was represented by counsel, had an opportunity to testify by deposition and was provided multiple hearings, all of which amounts to more process than he was due. Manalapan

notes that Brock first raised the issue of due process after the ALJ's decision dismissing his claim, and also observes that Brock does not question the presence of substantial evidence to support the ALJ's decision.

Following Brock's submission of a brief, *pro se*, and Manalapan's submission of a response brief, an entry of appearance was made and a reply brief filed on Brock's behalf by Hon. Bennett Clark, attorney at law. In the reply brief, Brock argues that the ALJ on reopening improperly set aside a finding of fact rendered in the original litigation of this matter and also overlooked certain evidence in her summary of the record. While we appreciate counsel's zealous efforts on Brock's behalf, we do not believe the matters raised in the reply brief constitute reversible error on the part of the ALJ.

After an exhaustive review of the voluminous record of proceedings below, we agree with Manalapan that Brock received everything to which he was entitled under due process of law and more. While we appreciate that Brock disagrees with the ALJ's conclusion and is convinced that it must be the product of bias, his allegations failed to stand up under review. It is plain from the record that the procedural requirements of due process were met, and it is clear from the opinion that the ALJ's dismissal was the result of a reasonable exercise of discretion based on the reliable, probative and material evidence contained in the whole record. Accordingly, we affirm.

Brock was born February 15, 1953, and resides in East Bernstadt, Kentucky. He has a ninth grade education and no specialized vocational training. He was only 31 years old when he first injured his back while shoveling coal for Manalapan. His injury

occurred August 3, 1984, and he filed the original application for benefits on March 14, 1985, alleging permanent, total disability.

In the initial litigation, evidence was submitted from four physicians. Dr. Galen Smith diagnosed a herniated lumbosacral disc and assigned a 10% permanent impairment rating, with restrictions that would preclude Brock from returning to work in the coal mines. Dr. Robert Matheny offered a similar diagnosis and restrictions to that of Dr. Smith, but assigned a 20% impairment rating. Dr. O.M. Patrick found only degenerative changes on the radiopathic studies and assigned a 0% impairment rating, though he restricted Brock from performing heavy lifting and repetitive bending and stooping. Dr. T.R. Miller found narrowing of the lumbrosacral disc space and degenerative changes, for which he assigned a 5% impairment rating.

A hearing was held before a referee on June 27, 1985, and the "old" Board rendered a decision on September 15, 1986. Taking into consideration the factors set out in Osborne v. Johnson, 432 S.W.2d 800 (1968), the old Board concluded that Brock was not permanently and totally disabled, though he did lack the capacity to return to work in the coal mines. The old Board determined Brock could perform less strenuous work with appropriate vocational guidance and training. Brock was awarded permanent income benefits based on a 70% occupational disability, which was apportioned equally between Manalapan and the Special Fund.

Brock never returned to gainful employment after his injury with Manalapan. He later applied for and was awarded social security disability benefits. On April 27, 1998, he filed a motion to reopen his award, alleging a worsening of condition due to his work-related back injury. He attached to

his motion to reopen the reports of treating neurosurgeon Dr. John Gilbert, who assessed more stringent medical restrictions than were in evidence in Brock's original claim, and treating pain management specialist Dr. James Templin, who opined that Brock did not appreciate significant reduction in his pain despite participation in a four-week pain management program, and remained unable to work. Brock also attached to his motion to reopen the report of psychologist Dr. Elmer Maggard, who concluded that Brock had developed a psychiatric impairment as a result of his work-related injury.

Over Manalapan's objection, the claim was reopened and assigned to an arbitrator for the taking of proof and a decision on the merits. Brock testified by deposition in the proceedings before the arbitrator on September 11, 1998. For his case-in-chief, Brock relied on the expert reports from Drs. Templin, Gilbert and Maggard attached to his motion to reopen. Following a Benefit Review Conference on October 2, 1998, the arbitrator rendered a Benefit Review Determination on March 10, 1999, favorable to Brock. Manalapan requested a *de novo* hearing by an administrative law judge.

By order issued April 23, 1999, the matter was assigned to the ALJ for the taking of proof and a final hearing. The ALJ held a pre-hearing conference on August 3, 1999, and a final hearing on August 16, 1999. At the final hearing, Brock was questioned by his counsel and counsel for Manalapan. The ALJ engaged in extensive questioning, as well, in an apparent effort to inform herself on whether the surgery requested by Brock and contested by Manalapan was reasonable, necessary and related to his original work injury. The claim was placed in abeyance at the final hearing to allow Brock to undergo additional treatment. In an order issued January 14, 2000, the ALJ granted Brock's motion to

compel Manalapan to pay for treatment for Brock's work-related low back condition, including the surgery proposed by Dr. El-Naggar.

Brock's attorney withdrew from representation at that point and the matter languished in abeyance until an entry of appearance on Brock's behalf was made by new counsel, who requested that the claim be removed from abeyance and scheduled once more for a final hearing. The ALJ granted the motion in an order issued May 9, 2002, which also set the matter for a formal hearing on June 26, 2002. In an order issued June 28, 2002, the hearing was continued to September 23, 2002, upon a joint request by the parties after settlement discussions failed and the need for time to file additional evidence arose. Brock testified once more by deposition on May 29, 2002. He filed the testimony of his then treating surgeon, Dr. Lockstadt, who had actually performed the fusion procedure recommended by Dr. El-Naggar.

At the hearing on September 23, 2002, the ALJ again placed the claim in abeyance for 60 days when Brock advised he might undergo another surgical procedure. Following a telephonic status conference, the ALJ scheduled the matter once more for a final hearing on July 1, 2003. At this third hearing, the claim was placed in abeyance for 60 days more while the parties attempted to negotiate a settlement. The record is then void of activity for nearly two years, when the ALJ issued an order for a telephonic status conference to take place May 5, 2005. The parties apparently reached a tentative settlement after that, but the agreement was never finalized. Brock moved the ALJ to set a final hearing, which was held September 14, 2005.

At the final hearing, the ALJ noted that proof filed on Brock's behalf consisted of his own testimony and the testimony of Drs. El-Naggar, Lockstadt, Templin, Gilbert and Maggard. Brock was questioned once more by his counsel and counsel for Manalapan. The ALJ frequently interjected questions of her own over the course of Brock's examination, in an apparent effort to clarify matters relating to his medical state and the amount of workers' compensation benefits he could draw without seeing a reduction in his social security disability benefits. There was a disagreement between Brock and his counsel regarding the amount he could receive in workers' compensation benefits without experiencing an offset in his social security disability benefits. When Brock attempted to explain what he had learned from the Social Security Administration ("SSA"), the ALJ understood Brock to be questioning the veracity of his attorney and suggested that he attorney might be inclined to withdraw from representation of Brock.

It should be noted that the foregoing exchange occurred after Brock's counsel had passed the witness, when Brock expressed a desire to say something on his own behalf and the ALJ directed him to "go right ahead." At the close of the exchange between Brock and the ALJ, he requested leave to obtain documentation from the SSA verifying the information he had been provided and file it with the ALJ. Though proof time was long expired, the ALJ permitted Brock to submit this additional information. The record contains a letter written to the ALJ from E. Jeff Howson, Field Office Manager for the SSA, confirming that Brock could receive the maximum award of $294.87 per week in workers' compensation benefits without it affecting the amount payable on his social security record. This letter appears to have been faxed to the ALJ

by Brock on September 15, 2005, the day after the final hearing.

There was another point, too, in the final hearing when the ALJ allowed Brock the opportunity to testify without the constraints of the usual question and answer format. At the close of questioning by counsel, near the end of the hearing, the ALJ stated, "All right. Anything else you want to tell us here today, Mr. Brock, since this, I think, will be our last go around?"

Following the final hearing, the parties were given an opportunity to supplement the briefs they had previously filed, when the matter had first gone to hearing on August 16, 1999. Only at that point was Brock's claim on reopening submitted for decision. As previously noted, the ALJ issued an opinion and dismissal of Brock's claim on November 11, 2005. The thrust of the ALJ's decision was that Brock had experienced no worsening of his physical condition due to his work-related back injury or increase in occupational disability since the time of his original award. Her particular findings and conclusions were as follows:

> Based upon the record herein, it is the opinion of this ALJ that Plaintiff's motion to reopen his award for an increase in benefits must fail. In reviewing the medical records, I am not persuaded that Plaintiff even had a herniated disc as a result of the injury in 1984, but rather that the myelographic studies performed by Dr. Bean, had only shown this as being an incidental finding. Dr. Bean had never recommended surgery and had never found a positive SLR. The disc defect at L5-S1 had been observed to be located on the right, but Plaintiff has persistently complained of pain in basically the entire left side of his

body. Degenerative changes were noted at the time and the more persuasive evidence indicated that Plaintiff had suffered from arousal of these, but basically on a strain/sprain. Dr. O.M. Patrick did not even think that Plaintiff warranted an impairment rating and the remaining ratings ranged from 5-20%. Plaintiff appears to have immediately settled into a disability role in spite of being only 31 years of age at the time, which correlates very much with the psychological profile assessed by Dr. Shraberg. Be that as it may, the old Board gave Plaintiff a 70% award and Plaintiff had already filed for Social Security benefits. Plaintiff has undertaken a most inactive lifestyle and has sought treatment from myriads of physicians, most of whom do not indicate that surgery was at all appropriate. We are now 22 years out from the original injury and as was pointed out, Plaintiff's inactivity has caused hastening of his natural old [aging] processes. Plaintiff has graduated to large amounts of narcotic and other medications and now Dr. El-Naggar is considering implanting a nerve stimulator, as these medications are no longer seemingly working. Although the physicians with a more conservative approach did not recommend surgery, as there was no instability, nerve root impingement or neurological deficits, in their opinion, Plaintiff proceeded to have fusion surgery by Dr. Lockstadt, of which he now claims did not help him at all, in the long run, even though the procedure was performed successfully and the fusion is solid. None of the treatments or procedures have been of any help and Plaintiff has been cautioned against any further surgery. Based upon these findings and the fact that Plaintiff never attempted

to return to work in any of the 22 years since the injury herein, I cannot state that he is any more occupationally disabled now that he was then, nor am I persuaded that his physical condition has changed as a result of his earlier injury, but rather believe that the change in his medical condition is due to age related change and inactivity.

As it concerns the issues of whether Plaintiff's thorasic [sic] and neck problems are related to the initial injury, I am again finding in favor of the Defendant, as per my earlier ruling in this matter. I found no evidence that there was any injury to anything other than the low back in 1984. The medical evidence does not bear it out, nor does the old Board's opinion. The Plaintiff, by way of history to his various treating physicians have [sic] indicated that his thorasic [sic] and neck problems were basically part of the injury herein and as a consequence, those doctors have erroneously related these problem areas to the 1984 injury. [sic]

Likewise, in regards to the psychological complaints, I am persuaded by Dr. Shraberg's assessment that Plaintiff has non work related issues of long standing. In reviewing his evidence, he pretty well predicted that any surgical procedure would be considered as not being successful and, unfortunately, it appears that he was correct.

Thus, based upon the record herein,

IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff's motion to reopen his award for an increase in benefits shall

> be and it is hereby DISMISSED. Plaintiff's thorasic [sic] and neck problems are found not to be work related, as is his psychological claim.

Brock filed a petition for reconsideration on November 28, 2005, citing to testimony by Dr. Goodman in which the physician conceded that Brock's work-related injury had deteriorated over time and asserting that the medical evidence establishing a worsening of condition was uncontroverted. The ALJ issued an order on December 13, 2005, denying Brock's petition for reconsideration.

At that point, Brock's attorney terminated his representation and Brock proceeded to prosecute his claim *pro se*. On December 19, 2005, Brock filed a pleading titled "Motion/Request for Another Hearing/Rehearing in Reopening Case Because Judge in First Hearing Did Not Conduct Hearing Fairly." The essence of Brock's plea was that the ALJ denied him due process by refusing to allow him to present all evidence relevant to disposition of his claim on reopening and by prejudging the merits of his claim. Brock asserted that the ALJ exerted pressure on him to settle his claim for an amount he believed to be inadequate and became angry with him when he refused to settle his claim. Brock further asserted that the ALJ overstepped the bounds of her role as fact-finder by cross-examining him at his final hearing and abused her discretion by dismissing his claim out of vindictiveness. He requested that his claim be assigned to a different administrative law judge for a new hearing and an impartial determination on the merits.

Manalapan responded to Brock's motion, taking exception to his characterization of ALJ Steen's conduct in the matter and noting that there was no legal authority for the

relief requested, in any event. Brock's pleading came before the Chief Administrative Law Judge on the Frankfort motion docket. In an order entered February 10, 2006, the Chief ALJ, noting that there is no provision in Kentucky's Workers' Compensation Act or the accompanying Administrative Regulations for a hearing as requested by Brock, denied the motion.

In the meantime, on January 3, 2006, Brock filed a notice of appeal to the Board. In his brief, Brock reiterates the assertions made in his motion for rehearing. He argues that he was denied due process in the proceedings below and requests that the matter be remanded for assignment to a different administrative law judge for purposes of a fair and impartial hearing. Brock argues that the ALJ's consideration of his claim was tainted by her anger with him for refusing to settle his claim. He believes she had essentially already made up her mind to dismiss his claim and that her prejudgment of his claim precluded him from receiving a fair hearing and an impartial decision.

The 14th Amendment to the United States Constitution prohibits any state from depriving a person of his property without "due process of law." Section 2 of the Kentucky Constitution provides, "Absolute and arbitrary power over the lives, liberty and property of freemen exists nowhere in a republic, not even in the largest majority." The Kentucky Supreme Court has interpreted the state constitutional provision to encompass the same due process and equal protection interests reflected in the federal document, to wit:

> Section 2 of the Kentucky Constitution provides the Commonwealth shall be free of arbitrary action. With respect to adjudications, whether judicial or

> administrative, this guarantee is generally understood as a due process provision whereby Kentucky citizens may be assured of fundamentally fair and unbiased procedures. Smith v. O'Dea, 939 S.W.2d 353 (Ky.App. 1997). As noted in Pritchett v. Marshall, 375 S.W.2d 253 (Ky. 1963), the state is enjoined against arbitrariness by Section 2 of the Kentucky Constitution which, we have held is 'a concept we consider broad enough to embrace both due process and equal protection of the laws, both fundamental fairness and impartiality.' Id. at p. 253.

Commonwealth Natural Resources and Environmental Protection Cabinet v. Kentec Coal Co., Inc., 177 S.W.3d 718 (Ky. 2005).

The Supreme Court has offered the following guidance with respect to the specific elements required of "due process":

> We have held that 'due process of law' and the 'law of the land' are synonymous and mean that no citizen shall be deprived of his life, liberty or property without reasonable notice and opportunity to be heard according to regular and established rules of procedure. Board of Levee Commissioners of Fulton County v. Johnson, 178 Ky. 287, 199 S.W. 8, L.R.A. 1918E, 202; Fleenor v. Hammons, 6 Cir., 116 F.2d 982, 132 A.L.R. 1241. In Milner v. Gibson, 249 Ky. 594, 61 S.W.273, 277, it was said:
>
> 'It is an established rule that an enactment accords due process of law, if it affords a method of

> procedure, with notice, and operates on all alike. A statute is consistent with due process where it gives the power of preliminary procedure to a board or commission, and the final hearing and determination to the courts.'
>
> Pacific Live Stock Co. v. Lewis, 241 U.S. 440, 36 S.Ct. 637, 60 L.Ed. 1084.

Parrish v. Claxon Truck Lines, 13 P.U.R.3d 363, 286 S.W.2d 508 (Ky. 1956).

Addressing the elements of due process in a worker's compensation claim, the Court of Appeals of Kentucky in Bently v. Aero Energy, Inc., 903 S.W.2d 912 (Ky.App. 1995), held as follows:

> The components of procedural due process in the context of administrative proceedings are well settled and, in this Commonwealth, are outlined by the following language in Kentucky Alcohol Beverage Control Board v. Jacobs, Ky., 269 S.W.2d 189, 192 (1954):
>
> > In order that the requirements of due process of law be satisfied, the litigant must be afforded procedural due process as well as substantive due process. This includes a hearing, the taking and weighing of evidence, if such is offered, a finding of fact based upon consideration of the evidence, the making of an order supported by substantial evidence, and, where the party's constitutional rights are involved, a judicial review of the

> administrative action. (Citations omitted).

Each of these elements was more than satisfied in the proceedings below. Brock testified by deposition in the proceedings before the arbitrator on September 11, 1998, and testified by deposition in the *de novo* proceedings before the ALJ on May 29, 2002. He presented expert reports and testimony from Drs. Templin, Gilbert, El-Naggar, Lockstadt, and Maggard. The ALJ held a pre-hearing conference on August 3, 1999, and no less than four hearings, on August 16, 1999; September 23, 2002; July 1, 2003; and September 14, 2005. Brock was permitted after the final hearing to file the letter from the SSA confirming his eligibility to receive maximum workers' compensation benefits, and he points to no other evidence he intended to file that was disallowed by the ALJ. We believe it is beyond debate that, procedurally speaking, Brock received all the process that is due under the law and more.

Of course, the thrust of Brock's argument is that the ALJ's decision was not based upon reasoned and impartial consideration of the evidence, but upon bias and vindictiveness for Brock's refusal to settle his claim. Brock's allegations against the ALJ are neither borne out by the record, nor by the ALJ's decision.

Although the ALJ expressed displeasure at Brock's failure to file documentation from the SSA prior to the final hearing, she nonetheless granted him leave to do so. This was a matter within the ALJ's discretion. Typically, a motion for extension of proof time must be filed no later than five days before the deadline sought to be extended and must be supported by facts establishing that timely production was not possible. *See* 803 KAR 25:010, Section 15. The regulations allow the ALJ

to order additional discovery or proof between the time of the benefit review conference and the final hearing upon motion "with good cause shown." 803 KAR 25:010, Section 13(15). Thus, the ALJ's grant of leave to Brock to file the SSA documentation *after* a final hearing that took place more than seven years after the date on which his claim was reopened seems to us an extraordinary exercise of discretion in Brock's favor.

Brock points to the ALJ's questioning of him at the September 14, 2005, final hearing as evidence of bias. He argues, "[S]he took over as if she was the lawyer representing my employer." We disagree with Brock's characterization of the ALJ's conduct. Brock would do well to recall that the ALJ also questioned him extensively at his first hearing on August 16, 1999, in an apparent effort to inform herself on whether the surgery requested by Brock and contested by Manalapan was reasonable, necessary and related to his original work injury. Following the hearing, the ALJ issued an order directing Manalapan to pay for the contested surgery on Brock's low back.

We read the ALJ's questioning of Brock at the September 14, 2005, hearing as an effort by the ALJ to parse out the truth with respect to Brock's social security offset figure. It should be noted that we believe such issue to be irrelevant to the ALJ's consideration of the merits of Brock's claim on reopening. That being said, we also believe that, had the ALJ already made up her mind to dismiss Brock's claim, as he asserts, she would have had no concern for how much he could draw in workers' compensation benefits without experiencing an offset in social security benefits. The ALJ's granting of Brock's request to make a statement after his counsel had finished direct examination is another example of

discretion exercised in Brock's favor that perhaps has not been appreciated by him.

While it is true that an administrative law judge is well-advised to exercise restraint in questioning a claimant directly, lest she be seen as assuming the role of advocate for one party or the other, it is also the case that the ALJ has broad discretion in her role as fact-finder. The ALJ is charged with conducting hearings, supervising the presentation of evidence and, in receiving evidence, making rulings affecting the competency, relevancy and materiality thereof. *See* KRS 342.230(3). As trier of fact, the ALJ is the gatekeeper and arbiter of the evidence both procedurally and substantively. Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283 (Ky. 2005). In reviewing the record of proceedings below, it is plain that over the course of the seven years Brock's claim on reopening was in litigation, the ALJ exercised an abundance of discretion in his favor.

We appreciate Brock's assertion that not everything that transpired between the parties and the ALJ is of record. However, it is worth emphasizing here that no such objection was raised until after the ALJ rendered a decision unfavorable to Brock. More importantly, however, we find nothing in the ALJ's decision to suggest that it was based on anything other than reasoned consideration of the evidence. It is for this reason that Brock's appeal ultimately must fail.

Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *See* Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (Ky. 1945). We believe the

evidence as set out by the ALJ in her opinion and dismissal is evidence of substance that supports her finding that Brock failed to show he suffered a worsening of condition and increase in occupational disability. There is nothing in the record of proceedings or the decision itself to suggest the ALJ dismissed Brock's claim for any reason other than those set out in her findings of fact and conclusions of law.

It is well-established that Brock, as the claimant in a workers' compensation claim, bore the burden of proving each of the essential elements of his claim before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky.App. 1979). Since Brock was unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different conclusion. Wolf Creek Collieries v. Crum, 673 S.W.2d 725 (Ky.App. 1984). Compelling evidence is defined as evidence that is so overwhelming that 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 authority to determine the quality, character and substance of the evidence. Squade D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). 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). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 125 (Ky. 1977). The ALJ may believe part of the evidence and disbelieve other parts, even when it comes from the same witness or the same 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 Hardware Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky.App. 2000). Furthermore, it is well-established that the ALJ, as fact-finder and ultimate arbiter of all issues in controversy, has broad authority to draw all reasonable inference from the record. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979).

Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, supra, at 482. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support her decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Although it is obvious from Brock's brief that he feels he has been dealt with unfairly, we nonetheless find ample evidence of substantial probative value to support the ALJ's ultimate determination, in the reports of Drs. Goodman and Primm and in the testimony of Brock himself regarding his physical condition and occupational status over the years since his original award.

We acknowledge Brock's argument that, in summarizing Dr. Goodman's testimony, the ALJ overlooked Dr. Templin's September 9, 1996, correspondence confirming that his earlier reference to a motor vehicle accident ("MVA") was incorrect. Dr. Goodman had cited to Dr. Templin's reference to an MVA as the cause of Brock's cervical condition and worsening low back condition. We agree that, in light of Dr. Templin's subsequent correction of the erroneous reference in his earlier report to a motor vehicle accident, it would have been error for the ALJ to have dismissed Brock's claim based on the occurrence of the alleged MVA. However, there is nothing in her decision to indicate that the ALJ attributed any portion of Brock's condition to an intervening accident. The portion of her decision cited

in Brock's reply brief is no more than an accurate summary of Dr. Goodman's testimony paraphrasing an inaccurate medical history recorded by Dr. Templin. The ALJ also noted that Dr. Goodman attributed Brock's cervical and thoracic complaints and his worsening lumbar condition to the natural aging process combined with total inactivity.

More importantly, the ALJ herself did not attribute any portion of Brock's condition to an intervening MVA. Rather, she dismissed his claim for impairment to the cervical and thoracic spines based on the lack of evidence "that there was any injury to anything other than the low back in 1984." Nowhere in her "Findings of Fact and Conclusions of Law" does the ALJ suggest that she was persuaded to dismiss Brock's cervical and thoracic claims by Dr. Templin's erroneous reference to an MVA. While it would have been better, perhaps, for the ALJ to have referenced specifically the letter from Dr. Templin correcting his earlier mistake, such mention would have been gratuitous. The ALJ did consider that "Dr. Templin causally related the entirety of Plaintiff's problems and impairment to the injury in 1984." As the fact-finder, it was within the ALJ's discretion to reject Dr. Templin's opinion. Magic Coal Co. v. Fox, supra; Pruitt v. Bugg Brothers, supra.

Brock is correct, of course, that the ALJ does not have the discretion to set aside findings of fact made by the "old" Board in the original litigation of Brock's claim and issue a *nunc pro tunc* judgment on reopening. However, we disagree with that characterization of the ALJ's decision. In his reply brief, Brock asserts, "At page 12 of her decision, under the ALJ Findings of Fact and Conclusions of Law Judge Steen found that the 'old Board' had made an error in its factual finding when it found that the 1984 work injury had resulted in a herniated lumbar disc." We read no such

allegation of error on the part of the "old" Board in the ALJ's decision on reopening. Rather, the ALJ sets out her opinion that Brock's work-related injury was basically a lumbar strain arousing pre-existing degenerative changes and then notes, "Be that as it may, the old Board gave Plaintiff a 70% award and Plaintiff had already filed for Social Security benefits." This statement is entirely accurate, of course.

Contrary to the suggestion in Brock's reply brief, the "old" Board did not make a finding of fact that he had suffered a herniated disc as a result of the original work injury. The "old" Board merely summarized the evidence of record, which included medical opinions ranging from 0% impairment for a low back strain to 20% for a herniated disc, and then found that Brock had a 70% occupational disability. In 1984, occupational disability rather than permanent impairment was the standard by which an award of permanent partial disability benefits was measured at that time. In other words, the findings of the ALJ on reopening in no way contradict the findings of the "old" Board in the original litigation.

On reopening, the ALJ is obligated to make a comparison of the claimant's condition at the time of the original award and his condition at the time of reopening. The claimant is required to show a change in his physical condition attributable to his work-related injury since the date of the original award. Newberg v. Davis, 841 S.W.2d 164 (Ky. 1992); Continental Air Filter Co. v. Blair, 681 S.W.2d 427 (Ky. 1984). We read the ALJ's findings of fact as reasonable explication of the rationale underlying her conclusion that Brock had not made such a showing. One might infer from the ALJ's verbiage that she believes the "old" Board's award of 70% occupational disability benefits was excessive in light

of the medical evidence. However, even if the ALJ intended such an inference, it does not constitute reversible error.

Having adopted the Board's analysis, and for the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bennett Clark
Lexington, Kentucky

BRIEF FOR APPELLEE, MANALAPAN MINING COMPANY:

Gayle G. Huff
Harlan, Kentucky