RENDERED: DECEMBER 7, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000905-WC

RICHARD A. SUTTON, JR. — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-86241

NATIONAL ENVIRONMENTAL CONTRACTORS;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART AND
REMANDING IN PART

** ** ** ** **

BEFORE: DIXON AND KELLER, JUDGES; GRAVES,[1] SENIOR JUDGE.

KELLER, JUDGE: Richard A. Sutton, Jr. (Sutton) petitions this Court for review of the Opinion of the Workers' Compensation Board (the Board) affirming the decision of the Administrative Law Judge (ALJ) awarding permanent partial disability benefits for Sutton's left arm and right foot injuries and denying benefits related to his cervical spine.

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

In support of his position, Sutton argues that the ALJ misconstrued his testimony regarding his work status and that the ALJ should have given greater weight to the opinion of his treating physician. For the reasons set forth below, we affirm in part and remand in part for additional findings.

FACTS

At the time of his April 28, 2005, injury, Sutton was 30 years old, had a high school education with several college credits, and training as a journeyman insulator. In addition to his work as a journeyman insulator, Sutton had worked for Stride Rite shoes unloading trucks and operating a fork lift, for a car dealer washing cars, and for a fast food restaurant. Sutton's job for National Environmental Contractors (NEC) required him to climb ladders, reach overhead, crawl, stoop, bend, stand for prolonged periods of time, and lift up to 100 pounds.

When he was in high school, Sutton underwent surgery to repair a cervical spine fracture he suffered while playing football. After he recovered from that surgery, Sutton did not receive any ongoing treatment or have any ongoing complaints of neck pain.

On April 28, 2005, Sutton fell from the roof of a building and suffered, in pertinent part, injuries to his left wrist and right ankle. Sutton also alleged that he suffered an injury to his cervical spine and developed depression as a result of his physical injuries. Following his injury, Sutton returned to work for NEC, working approximately 16 hours per week. He testified that he could not work longer hours

because of increased pain and that he only worked for two to three months. As of the date of the hearing, Sutton was no longer working.

During his testimony at the hearing, Sutton complained of right ankle pain, decreased left upper extremity range of motion and strength, an inability to straighten his left arm completely, an inability to lift a gallon of milk with his left hand, and neck pain. Sutton testified that he could not return to his job for NEC or for Stride Rite.

Although the parties filed numerous medical records and/or physicians' depositions, we will only summarize those that are pertinent to this appeal.

Sutton filed Dr. Changaris's March 27, 2006, report. Dr. Changaris stated that Sutton complained of neck, wrist, elbow, and right foot pain, "emotionality" with feelings of anger and frustration, and occasional bilateral arm numbness. Dr. Changaris's examination revealed evidence of depression, decreased cervical spine range of motion, normal upper extremity strength and reflexes, and decreased left upper extremity and right ankle range of motion. Dr. Changaris stated that Sutton's post-injury cervical spine MRI showed post-operative changes at C6-7 with mild lordotic straightening, loss of disc height, and midline focal disc protrusion. Sutton's post-injury cervical spine x-ray showed no acute abnormality, chronic disc degeneration, normal alignment, and post-surgical fusion at C6-7. Dr. Changaris made diagnoses of "[c]ervical pain increased with possible instability due to progressive disckopathy [sic][;] Elbow/arm fractures traumatic loss of range of motion[;] Wrist, traumatic loss of range of motion[; and] Ankle, ligamentous injury with loss of range of motion." Dr. Changaris assigned Sutton 3%

impairment for his right ankle, 13% impairment for his left wrist, 10% for his left elbow, 10% impairment for cervical discopathy due to loss of stability at C5-6, and 4% for depression. Dr. Changaris ultimately combined those impairment ratings for a total impairment rating of 35%.[2] Dr. Changaris stated that Sutton was not able to work and that he needed additional diagnostic testing with possible cervical spine surgery. Furthermore, Dr. Changaris stated that Sutton's "neck condition, namely, post-fusion of C67[sic] was dormant and non-disabling by any known standard."

Sutton also filed the deposition of Richard Holt, M.D. Dr. Holt began treating Sutton for complaints of neck pain with some symptoms of possible radiculopathy on referral from Dr. Changaris. Dr. Holt initially recommended traction and nerve root blocks. However, when those treatments did not provide any significant relief, Dr. Holt recommended an anterior fusion at C6-7. Dr. Holt noted that he had seen evidence of motion at that level on his November 2005 x-rays and he expected the surgery would stabilize Sutton's cervical spine at that level. However, on cross-examination, Dr. Holt admitted that Sutton's x-rays from May and August of 2005 did not show any evidence of motion at C6-7.

As to causation, Dr. Holt testified that the work injury was "a significant exacerbating event." However, Dr. Holt also stated that "[t]his non-union did not occur at the time of his fall, did not occur months later. This was a result of the 1992 surgery."[3]

[2] We note that in his initial report, Dr. Changaris stated that the combined impairment rating equaled 57%. In a subsequent report, he corrected the combined rating to 35%.

[3] The 1992 surgery was to repair a cervical spine fracture Sutton suffered while playing football in high school.

NEC filed the reports and the transcript of the deposition of Henry Garretson, M.D. Dr. Garretson evaluated Sutton on December 13, 2005, for complaints of right foot pain, left upper extremity pain, improving left upper extremity numbness, decreased left wrist and elbow motion, decreased left grip strength, and neck pain. Dr. Garretson's examination revealed decreased cervical spine range of motion but no evidence of instability, decreased left wrist and left elbow range of motion, diffuse left upper extremity weakness, mild disuse atrophy of the left upper extremity muscle groups, normal reflexes, and decreased sensation in the left hand and fingers. Following his examination and review of Sutton's medical records, Dr. Garretson made diagnoses of status post left arm fracture, right foot injury of uncertain nature, left median nerve injury, partially resolved with continued improvement, and status post C6-7 fusion. Dr. Garretson assigned Sutton a 15% impairment rating for his decreased upper extremity range of motion and stated that he saw no indication for cervical spine surgery. Finally, Dr. Garretson stated that Sutton would not have any increased impairment related to his cervical spine.

In follow-up reports, Dr. Garretson stated that Sutton had reached maximum medical improvement for his elbow but had not reached maximum medical improvement related to his left median nerve injury. Furthermore, Dr. Garretson stated that Sutton would be limited in terms of heavy lifting and pulling with his left upper extremity; however, during his deposition, Dr. Garretson stated that Sutton would not require any permanent restrictions "from returning to any type of work."

In his deposition, Dr. Garretson also testified that Sutton had suffered a neck injury in the early 1990's and underwent surgery. However, based on his examination, Dr. Garretson stated that he found no evidence that Sutton suffered a new neck injury in 2005.

NEC filed the report of Peter Kirsch, M.D. After performing a records' review, Dr. Kirsch stated that he did not believe that Sutton's cervical spine symptoms were related to the work injury. Any soft tissue injuries he would have suffered in that injury would have healed within three months of the injury. Finally, Dr. Kirsch stated that he saw no evidence that any pre-existing dormant condition had been aroused into disabling reality.

STANDARD OF REVIEW

If the ALJ's decision is supported by substantial evidence of probative value, we may not reverse it on appeal. *Wolf Creek Collieries v. Crum,* 673 S.W.2d 735, 736 (Ky.App. 1984). *See also, Newberg v. Armour Food Co.*, 834 S.W.2d 172 (Ky. 1992); *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). As fact-finder, the ALJ has the sole authority "to determine the quality, character and substance of the evidence." *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). The ALJ may choose whom and what to believe and may believe part of the evidence and disbelieve other parts whether the evidence came from the same witness or the same total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977); *Pruitt v. Bugg*

Brothers, 547 S.W.2d 123, 124 (Ky. 1977). With this standard in mind, we shall address each of the issues raised by Sutton in turn.

ANALYSIS

A. Weight to be Afforded to the Opinion of a Treating Physician

Sutton argues that the ALJ should have given greater weight to the opinion of Dr. Holt regarding his cervical spine condition than to the opinions of Drs. Garretson or Kirsch because of Dr. Holt's status as a treating physician. In support of his argument, Sutton states that "it was reversible error for the Workers' Compensation Board to cite as authority Yocum [sic] v. Bratcher . . . and Wells v. Morris" for the proposition that the Court of Appeals had "officially ruled on the question of the weight to be given the treating physician." We disagree.

Sutton correctly notes that *Yocom v. Bratcher*, 578 S.W.2d 44 (Ky. 1979) does not directly address whether an ALJ is required to give greater evidentiary weight to the opinion of a treating physician. *Yocom* simply states that an earlier published opinion by the Court of Appeals, *Shedd Bartusch Foods v. Bratcher*, 568 S.W.2d 54 (Ky.App. 1979), which implied that a treating physician's opinion should be given greater evidentiary weight, was incorrectly published and should not be cited as authority. However, in *Yocom* the Supreme Court of Kentucky referred to *Codell Construction Co., v. Dixon*, 478 S.W.2d 703 (Ky. 1972) which stated that the fact finder "is not obliged either to accept or to disregard the testimony of one expert as against another."

Id. at 708. Furthermore, in *Wells v. Morris,* 698 S.W.2d 321, 322 (Ky.App. 1985), this Court reversed a determination by the circuit court that the Board was required to give greater weight to the treating physician, stating "this is clearly not the law . . . ." Finally, we note that *Yocom v. Emerson Elec. Co.*, 584 S.W.2d 744 (Ky.App. 1979), *Yocom v. Harvey*, 578 S.W.2d 52 (Ky. 1979), and *Hardman v. Owensboro Forging Co.*, 309 S.W.2d 339 (Ky. 1958), all stand for the proposition that the fact finder is not required to give greater credence to any one expert's opinion over another's. Therefore, we can identify no error with regard to the Board's opinion that the ALJ was not required to give greater evidentiary weight to the opinion of Dr. Holt based on his status as a treating physician.

B. Cervical Spine Surgery

Sutton argues that the ALJ erred in finding that his cervical spine condition is not related to the work injury. In support of his position, Sutton states that the ALJ committed numerous errors, which we outline as follows: (1) the ALJ should have given greater weight to the opinion of Dr. Holt because of his status as treating physician; (2) the ALJ could not rely on the opinion of Dr. Garretson because Dr. Garretson did not have the November 2005 x-rays to review; (3) Dr. Holt's opinion was uncontradicted because only he had reviewed the November 2005 x-rays; (4) the ALJ did not sufficiently explain why she rejected Dr. Holt's "uncontradicted" opinion; and (5) the ALJ misconstrued the opinion of Dr. Changaris. We shall address each of these arguments in turn.

As we noted above, the overwhelming weight of authority indicates that the ALJ is not required to give greater evidentiary weight to the opinion of any expert, including that of a treating physician. Furthermore, while Sutton correctly notes that a treating physician's opinion is granted greater evidentiary weight in a social security proceeding, we are not persuaded that such should be the case in a Kentucky workers' compensation claim. In so holding, we again note the numerous opinions granting the fact finder the authority to choose how to weigh the evidence presented, a clear indication that what is good for social security is not necessarily good for Kentucky workers' compensation.

Sutton correctly points out that Dr. Garretson apparently did not review the November 2005 x-rays. Because of this failure on Dr. Garretson's part, Sutton argues that Dr. Garretson's opinion must be discarded as lacking substance. In support of his argument, Sutton cites *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004). However, *Cepero* is distinguishable from this case. In *Cepero*, the primary issue was whether Cepero's condition was related to the work injury or to an earlier non-work-related injury. The ALJ, relying on the opinion of Cepero's evaluating physician, found that Cepero's condition was related to the work injury. The Supreme Court of Kentucky found that the physician's opinion regarding causation did not constitute substantial evidence of probative value because the physician did not have any history of Cepero's non-work-related injury.

Unlike the physician in *Cepero*, Dr. Garretson was aware that Sutton had undergone a cervical fusion prior to the work injury, and, even though Dr. Garretson did not have the November 2005 x-ray to review, he did review the two earlier x-rays, neither of which showed any evidence of motion. Furthermore, Dr. Kirsch noted the November 2005 x-rays and the notation of lack of motion, and he concluded that Sutton's cervical spine symptoms were not related to the work injury. Finally, even Dr. Holt testified that "[t]his non-union did not occur at the time of his fall, did not occur months later. This was a result of the 1992 surgery." Therefore, the ALJ's finding that Sutton's cervical spine condition is not related to the work injury is supported by evidence of substance and cannot be disturbed on appeal. *Wolf Creek Collieries v. Crum,* 673 S.W.2d 735, 736 (Ky.App. 1984).

Because we have determined that Dr. Garretson's opinion was not fatally flawed and that there was evidence of substance contradicting Dr. Holt's opinion, the issues raised by Sutton regarding uncontradicted evidence are moot. As to whether the ALJ misconstrued Dr. Changaris's opinion, we note that the ALJ correctly noted Dr. Changaris's statement that Sutton's pain and possible instability were due to "progressive disckopathy" [sic]. While this statement by Dr. Changaris may not have been in keeping with Dr. Changaris's ultimate opinion on causation, the ALJ is free to believe part of Dr. Changaris's report and to disbelieve the rest. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Therefore, we discern no error in the ALJ's statement regarding Dr. Changaris's opinion.

C. Total and Permanent Disability

Sutton argues that the ALJ erred when she found him to be only partially disabled. In support of this argument, Sutton states that the ALJ "summarily concluded that [he] was not totally disabled because he was 'working,'" and that the ALJ did not "set forth substantial findings of fact" to support her finding of partial disability. Again, we disagree.

Initially, we note that, in rendering an opinion, an ALJ is required to set out the basic facts she relied on to support her ultimate conclusion. *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440 (Ky.App. 1982). With regard to an award of permanent total disability, KRS 342.0011(11)(c) states that "'[p]ermanent total disability' means 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." KRS 342.0011(34) defines work as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." Interpreting these two statutory provisions, the Supreme Court of Kentucky held that:

> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with *Osborne v. Johnson, supra,* it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be dependable and whether his physiological restrictions

> prohibit him from using the skills which are within his individual vocational capabilities.

McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 860 (Ky. 2001).

The ALJ, albeit briefly, summarized the evidence filed by the parties, noting Sutton's age, education, and work experience, as well as the restrictions imposed by the various physicians. Furthermore, the ALJ stated that she found the opinion of Dr. Garretson that Sutton had no restrictions to be the most persuasive. Therefore, while we might prefer a more thorough analysis, the ALJ set forth sufficient facts to support her conclusion that Sutton is not totally disabled.

D. Application of the Three Times Multiplier

Sutton argues that the ALJ misinterpreted the testimony of Dr. Garretson when she failed to award enhanced benefits under KRS 342.730(1)(c)1. In support of his argument, Sutton points to that portion of Dr. Garretson's report indicating that Sutton has permanent limitations with regard to heavy lifting and pulling with his left upper extremity. While we might have found otherwise, we note that Dr. Garretson's testimony that Sutton would not require any type of restrictions from returning to any type of work is sufficient to support the ALJ's opinion that Sutton is not entitled to enhanced benefits under KRS 342.730(1)(c)1.

E. Depression

Finally, Sutton argues that the ALJ erred when she failed to award him any disability benefits based on his allegations of injury related depression. The Board, in addressing this issue, found that "the ALJ was not compelled to accept Dr. Changaris's

assessment of a 4% impairment" then noted reasons why the ALJ could have rejected Dr. Changaris's opinion regarding psychological impairment. We have reviewed the ALJ's opinion and do not see any mention of the depression that Sutton alleged, nor any mention of Dr. Changaris's assignment of impairment related to that depression. Therefore, we cannot determine what the Board relied on in analyzing the ALJ's opinion in this regard and we must remand this matter back to the ALJ so that she can address this issue. In doing so, we note that we are not stating that the ALJ must make a finding that Sutton suffers from compensable work-related depression. However, we are stating that the ALJ must address the issue.

CONCLUSION

We hold that the ALJ did not err in her assessment of Sutton's permanent partial disability related to his physical conditions nor in her assessment that Sutton's cervical spine condition is not work-related. However, the ALJ did err by failing to even address Sutton's allegation that he suffered from work-related depression. Therefore, the opinions of the ALJ and the Board are affirmed in part and remanded in part, and the ALJ is directed to make findings regarding Sutton's alleged work-related depression.

DIXON, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, CONCURS IN RESULT AND FILES SEPARATE OPINION.

GRAVES, SENIOR JUDGE, CONCURRING IN RESULT: SCR 1.030(8)(a) compels a concurrence in result. In the Kentucky Workers' Compensation Act “cure and relief” are the stated objectives of providing medical treatment to injured

workers; consequently I find it illogical for the ALJ to fail to give due deference to the testimony of those doctors who have achieved "cure and relief" through therapy over a period of time. A mere "warm body" examining doctor neither seeks nor provides "cure and relief" but only adversely supports the litigation, not the injured worker.

The time is long overdue for Kentucky courts to adopt the well reasoned opinions of the United States Court of Appeals for the Sixth Circuit concerning the relative weight to be given to testimony of treating and examining physicians respectively. In *Walker v. Sec'y of Health and Human Services,* 980 F.2d 1066, 1070 (6th Cir. 1002), the court held:

> The medical opinion of the treating physician is to be given substantial deference – and, if that opinion is not contradicted, complete deference must be given. The reason for such a rule is clear. The treating physician has had a greater opportunity to examine and observe the patient. Further, as a result of his duty to cure the patient, the treating physician is generally more familiar with the patient's condition than are other physicians. It is true, however, that the ultimate decision of disability rests with the administrative law judge.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Robert L. Catlett, Jr. Louisville, Kentucky	Lyn Douglas Powers Louisville, Kentucky