

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000317-WC

MARCUS NAPIER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-99332

JAMES RIVER COAL; HON. R.
SCOTT BORDERS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON AND VANMETER, JUDGES; KNOPF,¹ SENIOR
JUDGE.

VANMETER, JUDGE: Marcus Napier petitions for the review of a Workers'
Compensation Board (Board) opinion affirming the opinion and order of an

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

Administrative Law Judge dismissing Napier's claim on reopening. For the following reasons, we affirm.

While Napier worked for James River Coal, he suffered three separate injuries involving his lower back in December 1999, May 2000, and August 2001. Following the second injury, Napier underwent a laminectomy/discectomy at L5-S1; following the third injury, he underwent a microendoscopic discectomy at the same disc level. Napier sought workers' compensation benefits relating to these three injuries, and he was awarded permanent partial disability benefits in August 2003 based upon a 22% impairment rating.

In February 2006, Napier filed a motion to reopen his claim, alleging a worsening of his physical condition and a claim for psychological overlay secondary to his physical condition. On reopening, the parties submitted testimony from Napier as well as the medical evidence which we summarize below, quoting from the ALJ's opinion and order.

Dr. Christa Muckenhausen performed a physical examination of Napier and diagnosed him as being

status post back injury with lumbosacral radiculopathy bilaterally right, occasionally radiating to the left with disk herniation's [sic] at two levels, L4-5 and L5-S1 maximally to the right with two subsequent surgeries performed, progressive degenerative changes of the spine with increased scar tissue formation in the weight-bearing joint and radicular component, and anxiety, depression and sleep disturbance as well as concentration and memory problems in context with pain syndrome.

Dr. Muckenhausen opined that Napier had incurred a worsening of his condition since his original award and was entitled to “a 33% functional impairment rating, 23% for the lumbar spine, 10% for the psychiatric condition, and 3% for pain.”

Dr. William Lester treated Napier monthly from August 2005 to May 2006 “for back pain and nerves” and prescribed medications.

Dr. P.D. Patel diagnosed Napier “as having suffered from mood disorder, secondary to chronic low back pain with depressive and generalized anxiety features[.]” Dr. Patel felt this was causally related to Napier’s work-related low back injuries and assessed a 15% functional impairment rating to the body as a whole.

Dr. James Templin evaluated Napier both pre- and post-award. Pre-award, Dr. Templin diagnosed Napier “as suffering from chronic low back pain syndrome, history of lumbar disk herniation at L5-S1, a recurrent disk herniation at L5-S1, status post micro endoscopic discectomy at L5-S1, status post laminectomy/discectomy at L5-S1, herniated disc at L4-L5, and right leg radicular symptoms.” Dr. Templin opined that Napier’s pre-award conditions were work-related and assessed a 22% functional impairment rating to the body as a whole. Post-award, Dr. Templin issued the same diagnosis with an additional diagnosis for depression. While Dr. Templin assessed the same functional impairment rating, he stated that Napier subjectively had a worsening of his condition, as objectively evidenced by Napier’s increased use of medication.

Dr. Christopher Stephens diagnosed Napier “as suffering from back and leg pain secondary to disc disease at L4-5 and L5-S1.” Dr. Stephens assessed Napier’s impairment rating as 13%—the same impairment rating he assigned for Napier pre-award—and further opined that there were no objective measures for a worsening of Napier’s back. Dr. Stephens opined that to take more medications over time was “the natural progression for someone who takes chronic narcotic medications for pain.”

Dr. David Shraberg diagnosed Napier as having “an adjustment disorder of adult life associated with his back injuries and two surgeries, as well as, substance induced dysphoria, reversible (Fetnanyl and Percocet).” Dr. Shraberg ultimately opined that Napier had a 0% permanent psychiatric impairment.

From this evidence, the ALJ found that any depression and/or anxiety suffered by Napier resulted from substance-induced dysphoria, and that Napier did not meet his burden of proving a psychological condition related to his low back injuries. The ALJ also held that Napier did not meet his burden of proving a worsening of his physical condition. Finally, the ALJ held that James River Coal was not responsible for paying for the medication Napier took for certain stomach problems. The Board affirmed, and this petition for review followed.

Pursuant to KRS 342.125(1)(d), an ALJ may reopen and review a workers’ compensation award or order on the ground that there has been 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.” A claimant bears the burden of proving his claim on reopening. *See Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 219 (Ky. 2006). Since Napier failed to meet his burden here, the issue on appeal is “whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor[,]” *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984), in that no reasonable person could have reached the same conclusion as the ALJ. *Neace v. Adena Processing*, 7 S.W.3d 382, 385 (Ky.App. 1999).

Psychological Claim

First, Napier argues that the Board erred by affirming the ALJ’s dismissal of his psychological claim. We disagree.

The record, of course, contains medical evidence to support Napier’s claim for a psychological condition. For instance, Dr. Muckenhausen assessed Napier with a 10% impairment for his psychological condition, and Dr. Patel assessed Napier with a 15% impairment for the same. Further, while Dr. Templin did not diagnose Napier with any psychological condition prior to his workers’ compensation award, Dr. Templin diagnosed Napier with depression subsequent to the award. However, contrary to these opinions is Dr. Shraberg’s assessment that Napier has a 0% permanent psychiatric impairment and “an adjustment disorder of adult life associated with his back injuries and two surgeries, as well as, substance induced dysphoria, reversible (Fetnanyl and Percocet).”

When “medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ.” *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 109 (Ky.App. 2007) (quoting *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993)). Accordingly, the ALJ did not err by choosing to rely upon Dr. Shraberg’s opinion, and the Board did not err by affirming the ALJ’s decision. To the extent Napier’s argument that Dr. Shraberg’s medical report was “based on inaccuracies and misstated opinions of other doctors” goes toward the weight of the evidence, which the ALJ has the sole authority to determine, *Square D*, 862 S.W.2d at 309 (ALJ has sole authority to determine the “quality, character, and substance of the evidence”).

Claim for Worsening of Physical Condition

Next, Napier argues that the Board erred by affirming the ALJ’s dismissal of his claim seeking benefits based on a worsening of his physical condition. We disagree.

The Kentucky Supreme Court held in *Colwell*, 217 S.W.3d at 218, that one way a claimant may show a worsening of impairment, as required by KRS 342.125(1)(d), is through objective medical findings that demonstrate “a greater loss, loss of use, or derangement of a body part, organ system, or organ function due to a condition caused by the injury[.]” Napier argues that the evidence compels a finding in his favor on this issue. More specifically, he argues that his post-award MRI provides objective medical findings of “greater loss” or increased

changes in his back condition. However, as the Board set forth in its opinion affirming the ALJ's decision:

The findings set out in the January 22, 2004 [post-award] MRI report are identical to findings from an MRI conducted May 6, 2002 [pre-award], as described in the October 24, 2002 report of Dr. Sheridan. Both MRI's were interpreted as showing a moderate herniated nucleus pulposus on the right at L4-5 with obliteration of the anterior dural fat.

Contrary to Napier's claim, it is not clear that the MRI evidence supports his argument.

However, assuming *arguendo* that the MRI evidence does support Napier's argument, it does not compel a finding in his favor on this issue. Again, compelling evidence is that which is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. *Neace*, 7 S.W.3d at 385. And an ALJ has the sole authority to determine the "quality, character, and substance of the evidence." *Square D*, 862 S.W.2d at 309. Here, the ALJ's conclusion was supported by, *inter alia*, Dr. Stephens' opinion that there were no objective measures showing a worsening of Napier's back condition. Accordingly, the Board did not err by affirming the ALJ's opinion in this regard.

Medication Costs

Finally, Napier argues that the Board erred by affirming the ALJ's decision that James River Coal was not responsible for paying for the medication Napier took for his stomach problems. We disagree.

Napier states that he has developed stomach problems from taking medication for the pain which he suffers as a result of his work injury. Napier argues that James River Coal should pay for the other prescribed medication, stool softeners, and Metamucil he takes to treat these stomach problems, since they constitute reasonable and necessary treatment for his work injury. However, both the ALJ and the Board held that James River Coal was not required to pay for these medications since Napier failed to offer proof, other than his own testimony, that his stomach problems were related to his work injury. In his brief on appeal, Napier argues simply that the doctors agree that he “continues to have pain and requires continued treatment for said pain as a result [of] his work related injury.” While this may be the case, Napier still has not offered any medical evidence which connects his stomach problems with the pain which he suffers due to his work injury. As such, we cannot hold that the Board erred by affirming the ALJ’s decision that these medications were not compensable.

The Board’s opinion affirming the ALJ’s opinion and order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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