

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002609-WC

CLARENCE HICKS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-78469

R & J WELL SERVICE; HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: KELLER AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

KELLER, JUDGE: Clarence Hicks (Hicks) appeals from an Opinion of the Workers' Compensation Board (the Board) affirming the Opinion of the Administrative Law Judge (ALJ) dismissing Hicks's claim. On appeal, Hicks asserts: (1) that the ALJ erred when he found that Hicks had not suffered a work

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.

injury; (2) that the ALJ misconstrued Dr. Bean's testimony regarding Hicks's pre-existing condition; (3) that the ALJ's failure to apportion any of Hicks's impairment was not supported by substantial evidence; and (4) that the ALJ's decision denying medical treatment is not supported by substantial evidence. For the reasons set forth below, we affirm.

FACTS

Hicks filed a claim with the Office of Workers' Claims, alleging that he suffered a work related injury to his back, shoulders, arms, head, and legs on August 18, 2006 (the injury). R & J Well Service, Inc. (R&J) timely filed a "Notice of Claim Acceptance" stating that Hicks's claim was being "accepted as compensable as a temporary exacerbation of a pre-existing condition" and admitting that Hicks's injury "occurred or became disabling on August 18, 2006." However, R&J stated that there was "a dispute concerning the amount of any additional compensation owed to the Plaintiff as any permanent impairment arising from the work incident is denied."

Following the taking of proof, the parties attended a final hearing. In a statement before the hearing, the ALJ noted that the claim was being bifurcated and that the parties "want[ed] to make sure that the issue is [sic] to include injury as defined by the Act." Counsel for both parties agreed with that statement.

After the final hearing, the ALJ rendered an opinion and order dismissing Hicks's claim. In his opinion, the ALJ noted Hicks's testimony that he had suffered from back pain prior to the injury. He also noted Hicks's testimony

that, despite those symptoms, he had been able to work more than sixty hours per week but had not been able “to do much” since the injury.

The ALJ noted Dr. Potter’s records and Dr. Potter’s opinion that “Hicks’s complaints were the result of years of cumulative trauma and repetitive strain associated with the physical demands of his employment.” The ALJ reviewed Dr. Bean’s records and testimony regarding the pre-existing nature of Hicks’s condition. The ALJ noted Dr. Templin’s opinion and the reports of Dr. Jenkinson and Dr. Best. We will summarize these medical opinions and Hicks’s testimony in more detail below. Because the primary issue herein is whether evidence of substance supported the ALJ’s finding that Hicks’s condition actively pre-existed the injury, our summary of the evidence will primarily focus on that issue.

A. Clarence Hicks

Hicks testified by way of deposition and at the final hearing. Hicks was born on June 23, 1965, has a ninth grade education, and has worked for a meat packing company and R&J. On August 18, 2006, Hicks lifted a valve and was turning when he experienced pain in his back and “went to [his] knees.” That evening, Hicks received treatment at Highlands Hospital in Prestonsburg. Three days later, Hicks began treating with Dr. Potter, who recommended physical therapy and medication. Ultimately, Dr. Potter referred Hicks to Dr. Bean, who recommended surgery. There is some dispute regarding the timing of this referral. From Dr. Bean’s testimony it appears that the referral was made before the injury.

However, based on the entirety of the evidence, whether the referral was made before or after the injury is of little consequence.

Hicks admitted that he had experienced intermittent low back and leg pain for approximately one year prior to the injury. Dr. Potter treated Hicks for these complaints with medication. Hicks could not remember the name or names of that medication but testified that Dr. Potter changed his medications after the injury. Hicks testified that Dr. Potter also had referred him for an MRI and nerve conduction study prior to the injury. In early August of 2006, Dr. Potter took Hicks off work for one or two days because of Hicks's back and leg pain.

Hicks noted that he had worked up to eighty hours per week preceding the alleged injury. However, after the injury, his pain increased to the point that he could not continue working.

B. Dr. Ira Potter

Hicks filed medical records and a Form 107 from Dr. Ira Potter. On August 21, 2006, Dr. Potter stated that Hicks felt sudden pain in his back while bending to pick up a piece of equipment. Following his examination, Dr. Potter made a diagnosis of acute lumbosacral pain with right leg radiation, took Hicks off work, and recommended medication and physical therapy. At some point, Dr. Potter referred Hicks to Dr. Bean for a neurosurgical evaluation. As previously noted, the timing of this referral is not clear.

In his Form 107, Dr. Potter noted that Hicks had a two to three year history of intermittent lower back pain and dysfunction prior to the injury. Dr.

Potter treated Hicks for these complaints in February, May, July, and August 2006. He noted that Hicks had undergone an MRI in July 2006 and a nerve conduction study in August 2006. The MRI revealed a right L5-S1 disc extrusion, but the nerve conduction study was normal. Dr. Potter stated that Hicks's

complaints were caused by years of cumulative trauma and repetitive strain associated with the physical job demands encountered through his employment . . . [his] lower back symptoms gradually manifested at work in early 2006 and grew progressively worse . . . [The] 08-18-06 injury was superimposed upon a pre-existing work-related L5-S1 disc herniation . . . [that] was severely exacerbated by the 08-18-06 work injury.

Dr. Potter assigned Hicks a 13% impairment rating, stating that none of that impairment actively pre-existed the injury. In an addendum to his Form 107, Dr. Potter stated that Hicks had not reached maximum medical improvement and that the impairment rating might be subject to change in the future.

C. Dr. James Bean

Hicks filed medical records and the transcript of the deposition of Dr. James Bean. In pertinent part, Dr. Bean testified that he began treating Hicks on September 25, 2006. He initially treated Hicks conservatively with physical therapy and medication. However, when Hicks did not improve, Dr. Bean recommended surgery to repair a herniated disc at L5-S1. With regard to whether Hicks had a pre-existing condition, Dr. Bean testified on direct examination as follows

I think it [the injury] aroused a pre-existing condition, and it was pre-existing because the MRI scan was done before the injury and showed it, but he didn't have that type of pain. He now has pain that corresponds to that finding.

The injury, in my view, caused further protrusion of the disc enough to make the nerve tight or compressed enough to cause the pain. So it was there beforehand. The pain wasn't there. The injury occurred and now it causes pain and he should have surgery on it.

On cross-examination, Dr. Bean stated that Hicks's condition

was active because he had been getting studies since 2001 on his back for back pain. It was a non-disabling condition because he was working. And it was also dormant in the sense that it wasn't a constant right leg pain. [T]hat's not asymptomatic because he's been seeing a doctor and getting studies done and getting treatment for it.

As to the extent that Hicks's impairment rating actively pre-existed the alleged injury, Dr. Bean stated that:

if he had radiculopathy that was symptomatic, even if he was still able to work but having the problem and you wanted to be reserved, he'd end up with a 10 percent impairment rating, same old impairment rating. Can't escape it. If he had just back pain, it'd be 5 percent because it'd be a Category II.

According to Dr. Bean, the difference between the 5% and 10% ratings is the extent and duration of leg pain. If the leg pain was present and then subsided, the impairment rating would be 5%. However, if the leg pain lasted three to six months, then the impairment rating would be 10%.

On re-direct examination, Dr. Bean testified that, if Hicks's back and leg pain was intermittent before the alleged injury but constant thereafter, the impairment rating would be evenly divided.

D. Dr. James Templin

Hicks filed the Form 107 of Dr. James Templin. Dr. Templin noted a history of the injury and Dr. Potter's medical records, which showed complaints of low back and right leg pain dating to March of 2001. Dr. Templin also noted a five year gap in treatment, with no complaints of low back pain again until February 13, 2006. Following his examination, Dr. Templin made diagnoses of chronic low back pain, lumbar disc herniation at L5-S1, lumbar disc desiccation at L4-5, and right leg radicular symptoms. He assigned Hicks an 8% impairment rating and stated that Hicks's pre-existing lumbar disc herniation was exacerbated by the work injury. As to whether Hicks had any pre-existing impairment, Dr. Templin stated that Hicks's

disc herniation was present prior to his injury of 08-18-06. Even with this finding, Mr. Hicks was able to work and perform his functional job duties productively for some two to three weeks. I believe the lifting injury on 08-18-06 exacerbated his underlying pre-existing lumbar disc herniation with radicular symptoms.

Dr. Templin apportioned all of his impairment “to an active and symptomatic preexisting lumbar disc herniation.”

E. Dr. David Jenkinson

R&J filed the report of Dr. David Jenkinson. Hicks complained to Dr. Jenkinson of constant back pain with some radiation into the right leg. Dr. Jenkinson noted that Hicks’s MRI was performed prior to the injury and agreed with Dr. Bean that the MRI showed an abnormality at L5-S1. However, he stated that he saw only degenerative changes and did not see a “significant disc herniation.” Dr. Jenkinson assigned Hicks a 0% impairment rating and stated that Hicks could return to work with no restrictions. Finally, Dr. Jenkinson indicated that Hicks was engaged in symptom magnification.

F. Dr. Michael Best

R&J filed the report of Michael Best, M.D. In his review of the medical records, Dr. Best noted Hicks’s complaints of back pain to Dr. Potter in March and June of 2001 with renewed complaints beginning in February of 2006. Following his review of the records and examination, Dr. Best concluded that Hicks’s condition actively pre-existed the injury. Finally, Dr. Best assigned Hicks

a 5% impairment rating but indicated that all of that impairment rating, like Hicks's condition, actively pre-existed the injury.

THE ALJ'S OPINION

Having reviewed Hicks's testimony and the medical evidence, the ALJ stated that the primary question was whether the alleged injury caused Hicks's condition and precipitated the need for surgery. In reviewing the evidence, the ALJ noted that there had been no objective change in Hicks's condition following the alleged injury. Furthermore, the ALJ noted that the evidence indicated that Dr. Potter had referred Hicks to Dr. Bean prior to the alleged injury and that Dr. Bean's testimony regarding causation was less than clear. Relying on Dr. Jenkinson's opinion and Dr. Bean's testimony that Hicks's condition actively pre-existed the injury, the ALJ found that the injury resulted in a "temporary exacerbation" but not in any "permanent impairment or need for permanent medical treatment." The ALJ then awarded Hicks temporary total disability benefits from August 19, 2006 through November 22, 2006. Finally, the ALJ awarded Hicks medical expense benefits during his period of temporary disability but specifically excluded any entitlement to medical expense benefits related to the surgery recommended by Dr. Bean. Hicks appealed to the Board and, after a lengthy recital of the evidence, the Board affirmed the ALJ.

STANDARD OF REVIEW

When reviewing a decision of the Board, this Court will only reverse when the Board has overlooked or misconstrued controlling law or so flagrantly

erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In order to review the Board's decision, we must review the ALJ's decision because the ALJ as fact finder has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). In reaching his decision, the ALJ is free to choose to believe or disbelieve parts of the evidence from the total proof, no matter which party offered it. *Brockway v. Rockwell International*, 907 S.W.2d 166, 169 (Ky. App.1995). The determinative question to be answered is whether the ALJ's finding “is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.” KRS 342.285; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). If the party with the burden of proof fails to convince the ALJ, that party must establish on appeal that the favorable evidence was so overwhelming as to compel a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). With these standards in mind, we will address the issues raised by Hicks. We note that, although Hicks listed four issues, the second and third issues are essentially the same. Therefore, we will address those two issues as one.

ANALYSIS

A. Finding that Hicks Did Not Suffer a Work Injury

Hicks first argues that “the ALJ’s finding of no work injury is reversible error.” In support of his argument, Hicks states that R&J stipulated to a

work injury and that Drs. Potter, Bean, Templin, and Jenkinson all stated that he had suffered a work injury.

We note that Hicks's argument that R&J stipulated to a work injury is incorrect. The Benefit Review Conference Memorandum and Order indicates that the parties stipulated to an "alleged" injury. Furthermore, at the final hearing, the ALJ confirmed that the parties wanted him to consider whether Hicks suffered an injury as defined by KRS Chapter 342 as an issue. Therefore, it is clear that R&J preserved the issue of whether Hicks suffered a work injury and that this issue was properly before the ALJ.

As to whether Hicks suffered an injury, we turn to KRS 342.0011(1), which defines injury as:

any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

Dr. Potter stated that Hicks's complaints were the result of work related cumulative trauma exacerbated by the August 16, 2006 injury. However, he noted that Hicks's herniated disc pre-existed the injury. Dr. Bean also noted that Hicks had an active pre-existing condition that was aggravated by the August 2006 injury. Dr. Templin agreed with Drs. Potter and Bean that Hicks had a pre-existing herniated disc that was aggravated by the work injury. Dr. Jenkinson stated that Hicks had degenerative changes only and that Hicks did not have a herniated disc. Dr. Best stated that Hicks's condition actively pre-existed the

injury. Hicks underwent an MRI before the injury, which revealed a herniated disc. Furthermore, Hicks admitted, and Dr. Potter's records confirmed, that he had symptoms that pre-dated the injury. Although we might have come to a different conclusion than the ALJ, there was substantial evidence to support the ALJ's finding that Hicks did not suffer an injury as defined by Kentucky Revised Statute (KRS) 342.0011(1), and we are powerless to hold otherwise.

We do agree with Hicks that the ALJ's finding of no work injury and his award of TTD and medical expense benefits is somewhat inconsistent. However, neither Hicks nor R&J appealed from that portion of the ALJ's award; therefore, we will not address this apparent inconsistency.

B. Failure to Apportion

Hicks next argues that, based on Dr. Bean's testimony, the ALJ was compelled to apportion some of Hicks's condition to the injury. This argument fails for two reasons. First, Dr. Bean was not the only physician who addressed the issue. As noted above, Dr. Jenkinson, on whom the ALJ specifically relied, stated that all of Hicks's condition was due to pre-existing degeneration. Furthermore, Dr. Templin attributed 100% of Hicks's impairment rating to an active, pre-existing disc herniation. The ALJ is charged with weighing the evidence and drawing inferences from that evidence, and can pick and choose what evidence to believe. *See Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985), and *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). The reports of Dr. Jenkinson and Dr. Templin support the ALJ's inference that Hicks's condition is not related to the injury, and we cannot disturb that finding on appeal. *See* KRS 342.285.

Second, Dr. Bean's testimony is not as clear cut as Hicks would like. Hicks argues that the ALJ could not have relied on Dr. Bean and come to the conclusion that Hicks's condition was not related, at least in part, to the injury. However, we note that the ALJ stated that he was relying on Dr. Bean's testimony only in so far as Dr. Bean stated that Hicks's condition was pre-existing and active. As noted above, Dr. Bean stated that Hicks's herniated disc actively pre-existed the injury. Furthermore, Dr. Bean stated that, depending on the length of time Hicks suffered leg symptoms, any impairment Hicks might have would also have actively

pre-existed the injury. Therefore, the ALJ's partial reliance on Dr. Bean's testimony is not inconsistent with a finding that Hicks did not suffer a work related injury. Furthermore, the ALJ's partial reliance on Dr. Bean's testimony is not inconsistent with the ALJ's failure to apportion any of Hicks's condition to the injury.

In a related argument, Hicks states that "Dr. Jenkinson's testimony cannot form the basis of substantial evidence supporting a finding that all of Mr. Hicks' [sic] impairment was pre-existing active." In support of this argument, Hicks notes that Dr. Jenkinson opined that Hicks had degenerative changes only and no impairment. That opinion, according to Hicks, is not sufficient to support a finding of an active impairment. However, this argument ignores the fact that the ALJ did not rely solely on Dr. Jenkinson to make the finding that Hicks's condition was pre-existing and active. He also relied on Dr. Bean, who testified that Hicks had a pre-existing active condition. Furthermore, even if the opinions of Dr. Jenkinson and Dr. Bean failed to fully support the ALJ's findings, there is more than ample other evidence to do so. As noted above, Dr. Templin stated that all of Hicks's impairment was pre-existing and active, as did Dr. Best. Dr. Potter's records reflected ongoing treatment for complaints of low back and leg symptoms prior to the injury. Hicks's MRI, which was performed prior to the injury, revealed a herniated disc, and Hicks testified that he was symptomatic before the injury. This evidence clearly supports the ALJ's finding that Hicks's condition actively pre-existed the injury.

Hicks further argues that the ALJ was required to make a finding regarding his percentage of impairment and cites to *Young v. Fulkerson*, 463 S.W.2d 118 (Ky. 1971) as supportive of his position. However, *Fulkerson* is distinguishable. In *Fulkerson*, the claimant had suffered several injuries. The issue was what portion of his disability was attributable to the last injury. In such a case, the Supreme Court of Kentucky held that the Board was required to determine the amount of disability that existed at the time of the last injury. Once that determination was made, the Board could then apportion the disability appropriately among the several injuries.

In the case herein, Hicks alleged only one injury. The ALJ found that Hicks's condition entirely pre-existed the injury and that Hicks had not suffered an injury as defined by KRS 342.0011(1). The only time an ALJ is required to make a determination regarding percentage of impairment is when the ALJ is making an award of permanent disability, either partial or total. *See* KRS 342.0011(11)(b) and (c). The ALJ made no such award to Hicks; therefore, the ALJ was not required to make a finding regarding what impairment, if any, Hicks has.

C. Compensability of Surgery

Hicks argues that the ALJ erred when he failed to find R&J liable for the surgery recommended by Dr. Bean. We disagree. KRS 342.020(1) provides that an employer is only liable for medical expenses related to an injury. Since the ALJ found that Hicks did not suffer an injury as defined by KRS 342.0011(1), R & J had no liability for medical expenses.

Although Hicks argues that the opinions of Drs. Bean, Templin, and Potter support his claim that his pre-existing condition was aggravated by the injury, the opinions of Drs. Best and Jenkinson do not. The ALJ specifically stated that he was relying on the opinion of Dr. Jenkinson along with that portion of Dr. Bean's opinion that Hicks's condition actively pre-existed the injury. That evidence supports the ALJ's opinion and the evidence to the contrary is not so overwhelming as to compel a contrary finding.

As to the cases cited by Hicks, his reliance on *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky. 2001), is misplaced. In *McNutt*, the issue was whether, after the 1996 Amendments to KRS Chapter 342, that portion of disability attributable to the arousal of a pre-existing dormant condition was compensable. In the case before us, the medical evidence overwhelming indicates that Hicks had a pre-existing active condition, not a pre-existing dormant condition. Therefore, *McNutt* is not instructive. Furthermore, *Wells v. Bunch*, 692 S.W.2d 806 (Ky. 1985), *Griffin v. Booth Memorial Hospital*, 467 S.W.2d 789 (Ky. 1071), and *Young v. Fulkerson*, 463 S.W.2d 118 (Ky. 1971), do not provide Hicks with any support because those cases involved the question of pre-existing active disability when the determination of disability was based on vocational factors, not solely on impairment.

Again, we note that we might have come to a different conclusion than the ALJ. However, the ALJ's finding that Hicks is not entitled to surgery is supported by substantial evidence, and we cannot overturn that opinion on appeal.

CONCLUSION

The ALJ's finding that Hicks did not suffer a work-related injury is supported by substantial evidence. In light of that finding, the ALJ was not required to apportion any of Hicks's condition to the injury or to find that the recommended surgery was compensable. The evidence does not compel any contrary findings; therefore, we affirm.

GRAVES, SENIOR JUDGE, CONCURS AND FILES SEPARATE OPINION.

THOMPSON, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

GRAVES, SENIOR JUDGE, CONCURRING: I concur with the majority solely because my oath requires that I follow the law, regardless of how unfairly it treats the working wounded who continue to serve their employer.

The existing Kentucky Workers' Compensation Act has been applied in accordance with the statute; however, I write separately because the result reached by the ALJ is inconsistent not only with the humanitarian purpose of Workers' Compensation law but also with moral principles. In an employment relationship there is an underlying element of natural justice. When an injured worker is forced to forego necessary curative medical treatment for an on the job injury, he is submitting to a forced wrong, against which justice cries out in protest.

Many fact finders would decide this case differently because they would be able to articulate the infinite variations in gradation of physical injury to the back. That is, the indirect effects of injury have various degrees of gravity

depending on an individual's recuperative powers. Clarence Hicks is being penalized because he has continued to labor even though he had an active disability.

King Draco, with his vast array of multitudinous machinations, could not have devised a more cruel or more harsh result. He would be proud of the result in this case.

Had the Kentucky Workers' Compensation Act existed in earlier times, Richard the Lionhearted would never have dared risk having a heavy male knight injure his back at the expense of a royal treasury, nor would Columbus or Pizarro have dared the slippery footing of the Santa Maria or the slopes of Mexico. It would not have been worth it.

When soldiers are injured in the line of duty they are given a medal, usually a Purple Heart. Were Clarence Hicks given an award, it would be a Dunces' cap with the inscription, "Denied a remedy because I am an expendable American worker."

THOMPSON, JUDGE, DISSENTING: I must respectfully dissent. I agree with Judge Graves' eloquent expression of the injustice of a denial of benefits in this case but differ with the majority's conclusion that Kentucky's Workers' Compensation law requires such a result.

Mr. Hicks withstood the rigors of heavy manual labor while working for R & J from 1994 thru 2006. In 2001, he began to experience physical symptoms of a gradual wear and tear type injury to his back and eventually an MRI

revealed a bulging disc. Despite his condition, Hicks continued to work for his employer well in excess of forty hours per week until August 18, 2006, the date of the injury. The ALJ has ruled that Mr. Hicks was temporarily totally disabled with an inconsistent finding of no disability. Now, Mr. Hicks has no health insurance to pay for his surgery because he was injured at work.

The ALJ relied heavily on the testimony of Dr. Jenkinson who performed an independent medical examination at R & J's request. His opinion was that Hicks had only degenerative changes and, contrary to the opinions of Drs. Potter, Bean, Templin, and Best, opined that Hicks had a 0% impairment rating. In view of the medical opinions in disagreement with Dr. Jenkinson's opinion, the result of the MRI, and the recommendation by Dr. Bean that Hicks undergo surgery to treat his herniated disc, it defies common sense to rely exclusively on Dr. Jenkinson's opinion.

I believe this case is an example of the "substantial evidence" test taken to the extreme. The majority's unbending adherence to the deference owed the ALJ in fact finding matters reduce the test to a mere "scintilla of evidence" test. The MRI revealed that Hicks has a bulging disc and will undergo surgery. He has engaged in heavy labor for the past fourteen years yet Dr. Jenkinson rendered the subjective diagnosis that Hicks is a malingerer. The objective facts simply do not support Dr. Jenkinson's subjective diagnosis. It is not mere coincidence that the only physician who gave a 0% impairment rating was the employer's independent medical evaluator.

I would reverse and remand this case to the ALJ for an award of benefits.

BRIEF AND ORAL ARGUMENT
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