

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002597-WC

DANNY WHALEN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-76231

H.K. SYSTEMS, INC. AND THE
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, NICKELL, AND TAYLOR JUDGES.

TAYLOR, JUDGE: Danny Whalen petitions this Court to review an opinion of the Workers' Compensation Board (Board) entered November 21, 2007, (after the Board's earlier opinion was vacated and remanded for further consideration in Appeal No. 2005-CA-002229-WC), dismissing Whalen's claim for benefits. We affirm.

Whalen filed a workers' compensation claim alleging a work-related cumulative trauma to his low back. Whalen was employed from December 1, 1975, through March 10, 2004, as a painter on a production line at H.K. Systems, Inc. In that job, Whalen maintained that he was frequently required to lift buckets of paint weighing ninety pounds and to maneuver fifty-five gallon drums of paint. According to Whalen, he was also required to bend, twist, turn, stoop and stand every day. He viewed his job duties as physically strenuous.

Following a hearing, the Administrative Law Judge (ALJ) concluded that Whalen's back condition was non-work related. Instead, the ALJ found that Whalen suffered from degenerative disk disease that was caused by the natural aging process. To support this finding, the ALJ referenced the medical opinion of H.K. Systems' expert, Dr. John Larkin.

The Board affirmed the ALJ's opinion, but the Court of Appeals vacated and remanded the ALJ's opinion in Appeal No. 2005-CA-002229-WC. In the first appeal, the Court of Appeals held:

On appeal to this Court, Whalen contends that both Dr. Larkin and the ALJ used an improper standard in addressing the issue of causation. Dr. Larkin conducted an independent medical issue of causation. Dr. Larkin conducted an independent medical evaluation with a history of 29 years as a painter of industrial equipment with a description of the physical job demands. Dr. Larkin also reviewed the MRI and EMG studies relied on by the treating physicians. Dr. Larkin did find objective evidence of "degenerative lumbosacral arthrosis." As to causation, Dr. Larkin said: "As to whether or not this represents a repetitive or cumulative trauma effect, findings are consistent for the normal aging process in a

patient of this age.” At this point, instead of asking Dr. Larkin if the natural aging process was the cause within the realm of reasonable medical probability, he was asked: “Is there any objective medical evidence to support the conclusions that Mr. Whalen’s work either caused or contributed to cause any permanent harmful change or injury to the low back?” Dr. Larkin’s negative response was relied on by the ALJ to conclude Whalen had not met his burden of proving a work-related injury.

....

Dr. Larkin was given the wrong test for determining medical causation, which corrupts his medical testimony. In Cepero v. Fabricated Metals Corp., 132 S.W.3d 839, 842 (Ky. 2004), our Supreme Court quoted with approval the Board’s opinion, that where “a physician’s history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence.” Likewise, we opine that when the physician is given the wrong standard to determine medical causation, the physician’s opinion is also flawed and it would be error for the ALJ to rely upon said opinion in making findings and conclusions of law.

Subsequently, in Appeal No. 2006-SC-000558-WC, the Supreme Court affirmed the Court of Appeals and also determined that the ALJ erred by relying upon the medical opinion of Dr. Larkin:

Summarizing the evidence, the ALJ noted that Dr. Larkin “concluded there was no objective medical evidence to support the conclusion that [the claimant’s] work caused or contributed to any permanent harmful change or injury. . . .

....

The court explained in Gibbs v. Premier Scale Co./Indiana Scale Co., 50 S.W.3d 754 (Ky. 2001), that

objective medical findings must support a diagnosis in order to establish the presence of a harmful change. In Staples, Inc. v. Konvelski, 56 S.W.3d 412 (Ky. 2001), the court rejected an argument that the cause of a harmful change must also be proved by objective medical findings. As stated in Brown-Forman Corp. v. Upchurch, 127 S.W.3d 615, 621 (Ky. 2004)(citations omitted), “Medical causation must be proved to a reasonable medical probability with expert medical testimony, but KRS 342.0011(1) does not require it to be proved with objective medical findings.”

We acknowledge that objective medical findings may lead a physician to conclude that one cause of a condition is more medically probable than another, but the legal standard for proving causation is reasonable medical probability. Therefore, a medical opinion that addresses a different standard of causation is flawed and does not constitute substantial evidence. Dr. Larkin’s response to the employer’s questionnaire is such an opinion. Because the ALJ relied on Dr. Larkin’s opinions, including his response to the questionnaire, and because it is unclear that the ALJ applied the correct standard for decision, the matter must be reconsidered using the correct standard.

Upon remand, the ALJ found, once again, that Whalen’s back condition was non-work related. To support this finding, the ALJ relied upon the medical opinion of Dr. Larkin as found in a December 13, 2004, report. In that report, the ALJ pointed out that Dr. Larkin stated that Whalen’s back condition was “consistent with the normal aging process.” The ALJ also cited to other physicians who diagnosed Whalen as suffering from degenerative disc disease. The Board subsequently affirmed the ALJ’s opinion dismissing Whalen’s claim. Our review follows.

Whalen raises several issues of error for our review. Whalen contends that the ALJ erroneously relied upon the medical opinion of Dr. Larkin as to causation, the ALJ's opinion was arbitrary and capricious, the ALJ ignored the uncontroverted medical testimony of Dr. John Kelly upon causation, and the ALJ's opinion was not supported by substantial evidence. In fact, Whalen asserts that the medical testimony of Dr. Kelly "supports a finding that [Whalen's] degenerative arthritis is due to the repetitive work activities."

It is well-established that the weight and credibility of evidence is within the sole province of the ALJ, as fact-finder. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). As Whalen did not prevail before the ALJ, our review is limited to whether the evidence compels a finding in favor of Whalen. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). Of course, we review issues of law *de novo*. *Finley v. DBM Techs.*, 217 S.W.3d 261 (Ky.App. 2007).

The ALJ found that Whalen's back condition was non-work related and was directly caused by the "normal aging process." In support of this finding, the ALJ specifically cited to the medical opinion of Dr. Larkin as found in a December 13, 2004, report, which read in part:

[A]t this point the patient has evidence of degenerative lumbosacral arthrosis. There is no evidence of a herniated disc. In addition, he has no evidence of any radiculopathy or peripheral neuropathy based upon EMG/NCV studies. As to whether or not this represents a repetitive or cumulative trauma effect, findings are consistent for the normal aging process in a patient of this age.

Upon review of the above, we conclude that Dr. Larkin's opinion, as expressed in the December 13, 2004, report, constituted substantial evidence of a probative value upon the issue of causation. *See Blair Fork Coal Co. v. Blankenship*, 416 S.W.2d 716 (Ky. 1967); *Young v. L.A. Davidson, Inc.*, 463 S.W.2d 924 (Ky. 1971); *Turner v. Com.*, 5 S.W.3d 119 (Ky. 1999). From the text of the report, it is clear that Dr. Larkin rendered an opinion upon whether Whalen's back condition represented a "repetitive cumulative trauma" or resulted from the "normal aging process." He believed the later caused Whalen's back condition. While there was certainly medical evidence to the contrary (most notably Dr. Kelly's medical opinion), we believe the ALJ simply viewed Dr. Larkin's medical opinion upon causation more persuasive. Moreover, the ALJ was certainly acting within his discretion by rejecting the medical opinions of Dr. Kelly. *See Square D Co.*, 862 S.W.2d 308.

We view any remaining contention of error by Whalen to be without merit.

Viewing the evidence as a whole, we hold that the evidence does not compel a finding in favor of Whalen. Accordingly, we are of the opinion that the Board properly affirmed the ALJ's opinion dismissing Whalen's claim.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Gregory N. Schabell
Covington, Kentucky

BRIEF FOR APPELLEE
H.K. SYSTEMS, INC.:

Ronald J. Pohl
Lexington, Kentucky