

RENDERED: JULY 18, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

**Commonwealth of Kentucky
Court of Appeals**

NO. 2007-CA-001413-WC

DONALD NEWSOME

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-00835

JET COAL COMPANY, INC.;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: STUMBO AND WINE, JUDGES; GUIDUGLI,¹ SENIOR JUDGE.

GUIDUGLI, SENIOR JUDGE: Donald Newsome petitions this Court for review of the Workers' Compensation Board opinion entered June 15, 2007, affirming the Administrative Law Judge's opinion dismissing his claim for Workers' Compensation benefits. We affirm.

¹ Judge Daniel T. Guidugli sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

On review, Newsome raises the same legal issues and makes the same arguments as he did before the Board. In that, the Board thoroughly addressed each of his arguments and we can neither add to nor improve on the well-reasoned opinion of the Board, we adopt it, in full, as that of this Court.

Donald Newsome (“Newsome”) appeals from a decision of Hon. R. Scott Borders, Administrative Law Judge (“ALJ”), dismissing his claim for indemnity benefits against Jet Coal Company, Inc. (“Jet Coal”). The ALJ determined Newsome’s current condition was not caused by a work-related incident. On appeal, Newsome argues the ALJ’s opinion is not supported by substantial evidence and he sustained a permanent injury at work as a matter of law.

Newsome filed an Application for Resolution of Injury Claim with the Office of Workers’ Claim on June 27, 2006. He alleged that on December 19, 2005 he injured his right shoulder in the course and scope of his employment with Jet Coal. Newsome, presently seventy years of age and a coal miner by occupation, testified he is a part owner and president of Jet Coal. He explained that he currently works outside the mine greasing end-loaders, fixing flat tires, shoveling beltline, and general labor and repair. Newsome further testified that on the date of his injury he already had a pain in his right shoulder and he “pulled something loose” while lifting a fifty pound flat tire to place it on a tire changer. He continued to work and did not seek medical treatment for his condition until mid-January 2006. Dr. Shockey referred Newsome to Dr. McClung, an orthopedic surgeon who specializes in shoulders.

Newsome first began having problems with his right shoulder in 1997, and Dr. Shockey performed right shoulder surgery in 1998. Additionally, Newsome stated he injured his right shoulder in 2001, while throwing rags into the back of his pickup truck. He did not seek medical attention at that time, but complained of his condition to Dr. Shockey in 2002. At the final hearing, Newsome testified he continues to experience pain in his right shoulder and is contemplating surgery.

The medical evidence in this claim was well summarized by the ALJ and comes by way of the reports of Drs. J. Steven Shockey, Ira B. Potter, Michael Best, and Bart Goldman. The medical evidence is uncontradicted that Newsome sustained a right rotator cuff tear that was surgically corrected in 1998 and all physicians believe Newsome has permanent impairment. Dr. Shockey believed that even though Newsome had symptomatology as late as 2002, it was not severe enough to warrant further evaluation or to significantly restrict his activities. It was Dr. Shockey's belief that the December 2005 injury rendered Newsome unable to actively abduct and use the right arm in a meaningful manner. Dr. Shockey did not assign an impairment rating; however, it was his opinion that any impairment rating should be apportioned 60% to Newsome's preexisting condition based on the previous surgery and the subsequent injury in 2001.

Dr. Potter believed all of Newsome's complaints were caused by the December 19, 2005 injury, and assigned a 9% whole person impairment rating based on pain and loss of range of motion. Dr. Best noted a 2002 report from Dr. Shockey recorded that Newsome felt something tear in his right shoulder fourteen months earlier and Dr. Shockey believed it was a relatively massive tear. Treatment, however, was delayed because of a scheduled gastric bypass surgery, but Newsome did not return to Dr. Shockey following the bypass. Dr. Best did not believe Newsome qualified for an impairment rating for loss of range of motion, but did assign a 2% impairment rating for pain due to the effects of the December 2005 injury.

Dr. Goldman believed Newsome would likely have an impairment rating for the shoulder, whether or not he underwent another repair of the rotator cuff. However, Dr. Goldman did not relate the impairment to the 2005 injury. Dr. Goldman refused to assign an impairment because Newsome was considering surgery and, for that reason, was not at maximum medical improvement. Dr. Goldman stated in his October 4, 2006 report that "[w]hatever impairment rating this gentleman ends up with, there is no way, within a reasonable degree of medical probability, to relate any of the impairment

rating to the alleged work injury.” He further stated any restrictions were related to Newsome’s preexisting condition.

The ALJ was more persuaded by the reports of Drs. Goldman and Best and concluded Newsome:

[s]uffered a preexisting, active condition to his right shoulder that relates back to 1998 or the incident that occurred in 2002 and is not causally related to the December 19, 2005 incident.

It appears to the Administrative Law Judge that the condition that the Plaintiff suffers from currently is in fact the exact same condition Dr. Shockey diagnosed in 2002 and therefore it could not have been caused by [the] December 2005, work incident.

Following an unsuccessful petition for reconsideration, Newsome has appealed. On appeal, pointing to the favorable evidence from Drs. Shockey and Best, Newsome argues he established a work-related traumatic event that caused a harmful change in the human organism. He contends that although he underwent surgery in 1998 and had complaints of shoulder pain in 2002, there is no basis to determine he did not suffer an injury as a result of the December 19, 2005 incident. He specifically points to Dr. Shockey’s opinion that the 2002 complaints did not warrant further investigation. Newsome submits the ALJ did not properly evaluate Dr. Shockey’s or Dr. Best’s opinions and the decision is clearly erroneous. Newsome further contends Dr. Goldman’s report does not constitute substantial evidence because he did not review the “x-ray films and other diagnostic films performed by Dr. Shockey.”

While we understand Newsome’s dissatisfaction with the opinion of the ALJ, Newsome has impermissible requested this Board to substitute its judgment for that of the ALJ as to the weight and credibility accorded by the fact finder to the evidence. As we so frequently

admonish, this is not the Board's function. See KRS 342.285 (2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

It is well settled that the claimant in a workers' compensation claim bears the burden of proving each essential element of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). One of those essential elements is work-related causation. Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since Newsome was unsuccessful in his burden of proof before the ALJ, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in his favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Thus, for Newsome to be successful on appeal he must establish that the opinion of Dr. Goldman is so lacking in probative value it must be disregarded as a matter of law. Only then would the ALJ's decision be unsupported by substantial evidence, requiring a reversal.

Newsome's singular attack on Dr. Goldman's opinion is that he did not review x-rays taken at the direction of Dr. Shockey. We note, however, Dr. Goldman's report reveals that he reviewed 1991 right shoulder films, and 1998 and 2006 arthrograms of the right shoulder. Dr. Goldman also reviewed all of Dr. Shockey's operative notes, as well as his other notes contained in the record. Newsome has not directed our attention to any particular x-rays or films that Dr. Goldman did not review, nor does he allege what, if anything, those films reveal that would disqualify Dr. Goldman's opinion as being substantial evidence. In fact, Dr. Goldman's discussion includes an accurate and unchallenged summary of Dr. Shockey's opinions as follows:

This gentleman had a previous rotator cuff tear on the right it was repaired in 1998. He states that in 2001 his shoulder began to hurt him again after throwing some clothes into a truck. He did not seek medical care at that time but over a year later, when seeing his orthopedist for another problem, he stated that he 'mentioned' his right shoulder to Dr. Shockey. The history given to Dr. Shockey

at that time was that 14 months prior he had thrown something into the back of a truck and felt something tear. At that time he only had pain for 2 or 3 days but since that incident he had loss of function in his arm. Therefore it is safe to assume that he was still having a problem with that right shoulder. On examination by Dr. Shockey on 12/2/2002 he was noted to have significant weakness in external rotation and a positive drop arm test. He had no neurologic deficits. At that time Dr. Shockey felt he had a 'relatively massive tear, of his rotator cuff.' Treatment was delayed on his right shoulder apparently at Mr. Newsome's request because he was undergoing evaluation for gastric bypass surgery. When he returned to see Dr. Shockey on 1/12/2006 x-rays showed 'early evidence of rotator cuff atrophy.' They also showed 'priding of the humeral head.' Both of these are evidence of a chronic rotator cuff tear. These x-rays were taken only for 24 days out from the injury in question.

Therefore, based on Dr. Shockey's examination in 2002 and the reading of the x-rays by Dr. Shockey on January 12, 2006, within a reasonable degree of medical probability, this gentleman had a chronic rotator cuff tear prior to the injury in question. His function, as far as I can tell, is actually better now than it was when he was seen in 2002 by Dr. Shockey since, at that time, he had a positive drop arm test. Therefore while this gentleman may indeed benefit from repair of his massive tear of his right rotator cuff, this is a pre-existing condition which may have been temporarily exacerbated by the injury of 12/19/2005. His function now appears to be better than it was documented by Dr. Shockey 4 years ago. Repair of this rotator cuff tear, within a

reasonable degree of medical probability, is not [the] responsibility of his current Workers' Compensation carrier.

Though it is true the opinions of Dr. Shockey would have supported an award had the ALJ been so inclined, it is not the type of evidence that compels an award. It has been long settled that an ALJ is not required to give greater weight to the testimony of a treating physician than that of an examining physician. Morris v. Wells, 698 S.W.2d 321 (Ky. App. 1985). The ALJ's decision that Newsome's condition is the result of a preexisting condition and not the 2005 work incident is supported by substantial evidence of record and, as such, may not be disturbed on appeal. See Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986); Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d 181 (Ky. 2003).

Accordingly, the opinion and order of the Administrative Law Judge is hereby AFFIRMED.
ALL CONCUR.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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