

RENDERED: AUGUST 1, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000148-WC

CANTEEN SERVICE COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-91364

ROBERT ALLEN;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, MOORE, AND WINE, JUDGES.

MOORE, JUDGE: Canteen Service Company petitions this Court to review an opinion of the Workers' Compensation Board, affirming an opinion and order of the Hon. R. Scott Borders, Administrative Law Judge (ALJ). After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

Robert Allen brought his claim for workers' compensation benefits alleging that his lower back was injured in February 2001, during the course of his employment with Canteen, when he was "filling up a cart with chips and [C]okes and felt a burning sensation in his low back." Later that evening, his leg began hurting, as well. Shortly after the injury, Allen stopped working at Canteen. However, approximately three weeks after the injury at Canteen, Allen went to work at a bakery. He worked at the bakery for four days, then he quit claiming his back and legs hurt too much.

Dr. John Harpring, a neurosurgeon, examined Allen and opined that Allen had a lumbar disk herniation. Dr. Harpring believed this was a result of the work-related injury. Dr. Harpring performed surgery, *i.e.*, a lumbar discectomy. Dr. Harpring reported that after surgery and despite medication and undergoing therapy, Allen continued to experience pain in his lower back and left leg. Dr. Harpring and Dr. John Dimar, a doctor at the Spine Institute, then recommended that Allen undergo a lumbar fusion.

Dr. Russell Lee Travis, a neurosurgeon, testified in his deposition that his examination of Allen revealed "elements of symptom magnification." Additionally, Dr. Travis testified that his examination did not reveal objective findings to support Allen's claims of low back and leg pain.

Jennifer C. Jackson, M.D., examined Allen and reported that his back pain "appeared to be a direct result of the [work-related] accident sustained on

February 16, 2001.” Dr. Jackson opined that Allen’s functional impairment rating was 12% of the whole person, and that Allen “would have permanent restrictions which would include no repetitive bending or twisting and lifting limited to 20 pounds on an occasional basis.” Dr. Jackson also reported that Allen would “require ongoing treatment [for] his chronic pain.”

An initial hearing was held, and the ALJ entered an opinion and award of interlocutory relief that held Allen’s claim in abeyance until he underwent the surgery recommended by Dr. Harpring and Dr. Dimar and reached maximum medical improvement from the surgery. In this opinion, the ALJ also awarded Allen temporary total disability benefits amounting to \$248.28 per week beginning the date the surgery was performed and continuing until Allen reached maximum medical improvement. The ALJ also entered an order suspending payment of further temporary total disability benefits.

The surgery was performed in October 2005. In September 2006, Dr. Dimar reported that Allen’s back pain was better, but that he continued to suffer from leg pain, which Dr. Dimar opined was “likely caused by chronic nerve injury from both the scarring and having had compression on the nerve.” Dr. Dimar reported that it was his opinion that Allen would not reach maximum medical improvement until one year after his fusion surgery, *i.e.*, in October 2006. Dr. Dimar opined that Allen should limit lifting to “no more than 20-25 pounds and avoid repetitive bending, lifting, and twisting.”

Following the fusion surgery, Allen went back for a postoperative visit with Dr. Harpring, who reported that Allen's pain in his left leg was greatly improved, but that he had begun experiencing right leg pain, which Dr. Harpring opined may have been due to inflammation. Subsequently, Allen returned to Dr. Harpring for another postoperative visit. Following that visit, Dr. Harpring reported that Allen continued to have relief from his left leg pain after surgery, but that he had "significant right leg pain." Dr. Harpring found no nerve root impingement after reviewing a CT scan and a lumbar myelogram, and he opined that the right leg pain was consistent with scarring. Dr. Harpring reported that he would help Allen get some pain management and that further surgery was unnecessary.

Canteen moved to terminate temporary total disability benefits and to remove the claim from abeyance. The ALJ granted those motions.

In 2006, Dr. Henry Tutt, a neurosurgeon, conducted an independent medical evaluation ("IME") of Allen. Dr. Tutt reported that Allen's "complaint of right foot pain is not understood," and opined that the foot problem was "not due to nerve root compression." Additionally, Dr. Tutt reported that "[i]n the face of a solid fusion, one is unable to explain [Allen's] continuing low back pain." Dr. Tutt opined that Allen was "capable of resuming his previous work duties, his restriction being that he utilize[s] appropriate body mechanics when performing any heavy lifting."

Dr. Tutt issued an addendum to his IME of Allen regarding his review of various imaging studies. Dr. Tutt opined that there were “no objective medical findings which support [Allen’s] subjective complaints.” Dr. Tutt further reported that Allen had a 20% impairment to the body as a whole, and that Allen had reached maximum medical improvement approximately three to four months after his first surgery in April 2002.

A clinical psychologist, Robert W. Adams, Psy.D., examined Allen in 2006. Dr. Adams opined that Allen suffered from the following: “severe depression social withdrawal, severe anxiety, paranoid and bizarre ideas, irritability, and anhedonia. In addition he has a severe reading disorder and is functioning in the borderline range of intelligence.” Dr. Adams also opined that Allen suffered from “major depression severe single episode continuous with psychotic features.” Dr. Adams reported that it was his opinion that Allen’s “depression [was] directly linked to the fact that he can no longer do manual labor, and that he knows of no other type of work that he might do, considering his cognitive and academic limitations.” Dr. Adams opined that Allen was not able to work due to his inability to tolerate the pressures of work. In a report dated November 17, 2006, Dr. Adams opined that Allen would have a Class III moderate impairment.

Dr. John J. Griffin, a psychiatrist, evaluated Allen in 2004, and again in 2006. In 2006, Dr. Griffin opined that Allen suffered from: (1) dysthymic disorder; (2) personality disorder, unspecified; and (3) learning disabilities. Dr.

Griffin further opined that Allen did “not have a psychiatric disorder as a result of the February 16, 2001 work incident. His Dysthymic Disorder is related to his basic underlying and ongoing personality disorder.” Dr. Griffin reported that Allen was capable of working and that there was “no need for any restriction on his activities from a psychological standpoint.” However, Dr. Griffin opined that, based on the combination of his three psychiatric diagnoses listed above, Allen was entitled to a 15% functional impairment rating. Contrary to Dr. Adams’s opinion that Allen suffered from “major depression severe single episode continuous with psychotic features,” Dr. Griffin found “no evidence of psychosis.”

Following Allen’s fusion surgery, Dr. Jackson reported that Allen “should remain under care for pain management,” and that he should “walk as much as he can tolerate.” Dr. Jackson further opined that Allen was entitled to “an impairment rating of 23% Impairment of the Whole Person,” and that he “would have permanent restrictions including no lifting over 20 pounds, no repetitive bending or twisting, and he would need to be allowed to move about and change position as needed for comfort.”

Another hearing was held before the ALJ, in which Allen testified that he obtained some relief from the fusion surgery, including relief from the shooting pain down his left leg. However, Allen attested that following the surgery, he had problems with his right leg, involving pain shooting down that leg and into his right foot. Allen stated that he no longer had pain in his left leg, but he continued to have constant pain in his back, even though the back pain improved “a little bit.”

His wife stopped sleeping in the same bed with him in 2000 because he was kicking, tossing, and turning too much. Allen attested that he can only sit continuously for an hour or an hour and a half, and that he can only stand continuously for forty-five minutes to an hour.

Allen's wife, Kathleen Allen, also testified at the hearing. Kathleen attested that Allen has "crying spells" at least twice a week, that he no longer shops with her, and that he is unable to go camping and do other activities that they used to do.

The ALJ entered an opinion, order, and award after reviewing the aforementioned evidence. Regarding the issue of the "work-relatedness/causation of [Allen's] psychiatric condition," the ALJ reported that

[a]fter careful review of the prior testimony of both Dr. Griffin and Dr. Adams, as well as [Allen], the [ALJ] remains persuaded [Allen] has met his burden of proving he suffered a work-related psychological injury as a direct result of the February 16, 2001 work-related back injury and therefore this issue . . . is resolved in favor of [Allen].

As for "the reasonableness and necessity of the referral to pain management recommended by Dr. Dimar," the ALJ noted that Allen's treating surgeon, Dr. Harpring, likewise referred Allen to pain management, but that Canteen denied the request for pain management treatment "based upon the evaluation of Dr. Tutt, who stated he was unable to find the need for further treatment." The ALJ also noted that Dr. Jackson reported that Allen required

treatment for his chronic pain. The ALJ stated that he was “persuaded by the opinions of Dr. Harpring [and] Dr. Jackson and finds [Allen] is in need of pain management treatment and [Canteen] is ordered to precertify payment for the same.”

Regarding the issue of the extent and duration of Allen’s disability, the ALJ noted that Dr. Jackson assessed Allen with a 23% functional impairment rating; that Dr. Adams assessed Allen in the Class III moderate impairment category, which the ALJ stated “translates to a 25 to 50% functional impairment rating psychiatrically”; that Dr. Tutt assessed Allen a 20% functional impairment rating for his back problems; and that Dr. Griffin assessed a 15% functional impairment rating for Allen’s “psychiatric condition but opined the same was not work-related.” Concerning Allen’s lumbar spine condition, the ALJ was “persuaded by the testimony of Dr. Jackson and [found Allen] suffered a 23% functional impairment rating to the body as a whole as a result of his lumbar spine condition.” As for Allen’s psychiatric condition, the ALJ stated that he was “persuaded by the testimony of Dr. Adams and [found Allen] suffered a 25% functional impairment rating as a result of his psychiatric condition.”

Regarding Allen’s allegation that he was “permanently and totally occupationally disabled” based on “the combination of his physical and psychological injuries,” the ALJ noted that “Dr. Jackson, Dr. Tutt, and Dr. Adams [had] all assessed functional impairment ratings that translate to permanent disability.” Additionally, the ALJ reiterated Dr. Jackson’s determination that Allen

had permanent lifting restrictions of 20 pounds with no repetitive bending or twisting, as well as the finding that Allen had “a [tenth] grade education and according to his vocational testing ha[d] a third-grade reading capacity and a full-scale IQ of 79.”

The ALJ found that Allen “presented very credible testimony” and concluded that Allen was “totally permanently occupationally disabled.” Allen was awarded temporary total disability benefits of \$248.28 per week for specified weeks. He was also awarded “permanent total occupational disability benefits payable at the rate of \$248.28 per week, commencing May 2, 2006 and continuing thereafter for so long as [Allen was] permanently and totally disabled subject to limitations contained in KRS 342.730(4), plus 12% per annum for all due and unpaid installments” of compensation. The ALJ further awarded Allen to recover from Canteen

and/or its insurance carrier, for the cure and relief from the effects of his low back including referral to pain management as recommended by Dr. Harpring, as well as for [Allen’s] psychiatric condition, such medical, . . . surgical and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may be reasonably required at the time of the injury and thereafter during disability.

Canteen filed a petition for reconsideration, claiming that the ALJ’s opinion failed “to include findings regarding the inconsistencies in [Allen’s] testimony and the medical records from treating physicians.” Allen responded to the petition for reconsideration, and the ALJ entered an order overruling Canteen’s

petition “as a re-argument of the claim,” holding that the ALJ “did properly consider what [Canteen] described as inconsistencies in [Allen’s] testimony, and the medical proof of Dr. Dimar and Dr. Griffin, and did not find them persuading.”

Canteen appealed to the Board. The Board reviewed the evidence of record, as well as the ALJ’s various opinions, and held that it was

clear from a reading of the ALJ’s order on petition for reconsideration that the ALJ considered the alleged inconsistencies contained in Allen’s testimony and the medical proof and did not find them persuasive. This is clearly the ALJ’s prerogative. This Board is prohibited from substituting its judgment for that of the ALJ as to [the] weight of [the] evidence on questions of fact.

The Board then noted that, after reading the ALJ’s opinion, it was clear “that the ALJ properly applied the standard for assessing occupational disability and the definition of permanent total disability as set forth in KRS 342.0011(11)(c) with the medical and lay evidence taken in this case.” Finally, the Board found that substantial evidence supported the ALJ’s determination that Allen was permanently and totally disabled.

Canteen now petitions this Court for review of the Board’s decision. Specifically, Canteen contends that the ALJ’s opinion is flawed “because it does not include [an] explanation of the characterization of Allen’s testimony as ‘very credible’ given [the] testimony (through records, reports and deposition testimony) of Drs. Dimar, Tutt and Griffin . . . indicating Allen’s continuing complaints were inexplicable.” Canteen asserts that the ALJ failed to review “all the evidence of record” and, thus, the Board’s decision “should be reversed and remanded for

further consideration regarding review of all evidence and appropriate review of Allen's inconsistent testimony.”

II. STANDARD OF REVIEW

“When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did.” *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). “Substantial evidence is defined as evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.” *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 518 (Ky. 2003) (internal quotation marks omitted). “As fact-finder, the ALJ has the authority to determine the quality, character, and substance of all the evidence.” *Id.* “The ALJ is the sole judge of the weight and inferences to be drawn from the evidence.” *Id.* “He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party’s total proof.” *Id.* “Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal.” *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999).

III. ANALYSIS

Canteen contends that the ALJ failed to review all of the evidence of record. He also maintains that the ALJ’s opinion is flawed because he failed to

explain his characterization of Allen’s testimony as “very credible,” in light of the evidence provided by Drs. Dimar, Tutt, and Griffin, which indicated that there was no explanation for Allen’s continuing complaints.

We first note that in its petition for review, Canteen cites *Bullock v. Goodwill Coal Co.*, 214 S.W.3d 890, 893 (Ky. 2007), for the proposition that the ALJ was required to “offer explanation and findings regarding inconsistent testimony.” However, Canteen’s reliance on *Bullock* is misplaced. *Bullock* involved the interpretation and application of KRS¹ 342.315(2), which requires an ALJ “to afford the clinical findings and opinions of a designated university evaluator presumptive weight; requires the opponent of such evidence to overcome it; and requires an ALJ to state specific reasons when rejecting a university evaluator’s clinical findings and opinions.” *Bullock*, 214 S.W.3d at 890-91. Yet, KRS 342.315(2) “pertains only to occupational disease claims,” *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 109 (Ky. App. 2007), and the present case does not involve an occupational disease claim, but a work-related injury claim. Therefore, KRS 342.315(2) is inapplicable to the present case and, by extension, *Bullock* is inapplicable to this case because it concerned the application of KRS 342.315(2). Consequently, Canteen’s reliance on *Bullock* is misplaced.

As for Canteen’s claim that the ALJ failed to explain why he found Allen’s testimony to be “very credible,” in light of evidence provided by Drs.

¹ Kentucky Revised Statute.

Dimar, Tutt, and Griffin, we again note that credibility determinations are solely the responsibility of the ALJ. *See Garrett Mining Co.*, 122 S.W.3d at 518.

Additionally, Canteen contends that the ALJ failed to review all of the evidence of record, because the opinions of Drs. Dimar, Tutt, and Griffin indicated that there was no explanation for Allen's continuing complaints. However, Canteen's argument is again misplaced because, in his opinion, the ALJ discussed the evidence provided by Drs. Dimar, Tutt, and Griffin at length. In fact, the ALJ provided a detailed summary of all of the evidence presented in the record and at the hearings. Based upon the evidence, the ALJ noted that Drs. Jackson, Tutt, and Adams had "all assessed functional impairment ratings that translate to permanent disability." Significantly, Canteen does not challenge this finding by the ALJ that Allen was permanently disabled, based upon the functional impairment ratings assigned by Drs. Jackson, Tutt, and Adams. Therefore, substantial evidence supports the ALJ's decision.

Furthermore, in his order on the petition for reconsideration, the ALJ explained that he had considered the alleged inconsistencies cited by Canteen, but found the medical proof of Drs. Dimar and Griffin to be unpersuasive. As previously noted, credibility determinations are solely for the ALJ to make. *See Garrett Mining Co.*, 122 S.W.3d at 518. Moreover, contrary to Canteen's assertion, the ALJ actually relied upon the medical proof of Dr. Tutt in determining Allen's functional impairment rating. Therefore, Canteen's claims lack merit, and we affirm on all grounds.

ALL CONCUR.

BRIEF FOR APPELLANT:

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