RENDERED: NOVEMBER 7, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002052-WC

DAVID WEBB — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-00287

TOYOTA MOTOR MANUFACTURING OF KENTUCKY, INC.; HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON AND DIXON, JUDGES; GRAVES,[1] SENIOR JUDGE.

CLAYTON, JUDGE: David Webb appeals from an opinion of the Workers' Compensation Board ("Board") affirming an order of an Administrative Law

[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 Kentucky Revised Statutes (KRS) 21.580.

Judge ("ALJ") in favor of his employer, Toyota Manufacturing of Kentucky, Inc. ("Toyota"). We will affirm the decision of the Board.

FACTUAL SUMMARY

Mr. Webb began working for Toyota as a body welder in May of 1992. As a body welder, he was required to perform repetitive lifting and pulling each day. Mr. Webb began having problems with his neck in 1994 and, after notifying Toyota of the problem, was sent to physical therapy for treatment.

In December of 1997, Mr. Webb injured his neck playing basketball. Dr. James Bean testified that Mr. Webb also experienced neck pain and numbness in his hands after playing golf in March of 2002. All of these events, however, were manageable for Mr. Webb until an incident at Toyota in February of 2002. This event occurred after he began working on the V6 inner line at Toyota. On March 20, 2003, Mr. Webb was taken off work after he experienced severe pain. He testified that he experienced constant headaches and pain in his neck after loading hundreds of piston rings onto pistons.

As a result of his symptoms, Mr. Webb did not return to work until May of 2003. In October of that same year, his symptoms returned and in December of 2003, he underwent surgery. Dr. Bean performed the surgery and after, noted that Mr. Webb had a good result with marked relief of pain. Mr. Webb returned to Toyota in 2004 upon the release of Dr. Bean.

In October of 2005, Dr. Bean completed a Form 107 in which he assessed Mr. Webb as having a 20% whole person impairment. He diagnosed it as

being a degenerative disc which was pre-existing, but also indicated that the conditions at Toyota aggravated Mr. Webb's condition.

In April of 2005, Dr. Robert Nickerson diagnosed Mr. Webb as having post C5-C6 anterior cervical disectomy and fusion, and set forth his opinion that there was a 25% whole person impairment. As Dr. Bean found, Dr. Nickerson concluded that there was a pre-existing condition which was exacerbated by Mr. Webb's work at Toyota.

Dr. Ray Wechman began treating Mr. Webb in January of 1997. As a result of sports, Dr. Wechman diagnosed Mr. Webb as having exacerbation of chronic neck pain. In March of 2002, Mr. Webb once again went to Dr. Wechman after his golfing incident noted above. In March of 2003, Mr. Webb underwent a series of steroid shots with Dr. Wechman and in October of that same year, saw his associate, Kelly Burgess, who referred him to Dr. Bean.

On June 14, 2005, Dr. Michael Best performed an independent medical evaluation ("IME") of Mr. Webb's condition. Dr. Best performed a physical examination of Mr. Webb and reviewed his medical history as documented by the other doctors Mr. Webb had seen throughout the years. In his report, Dr. Best noted that Mr. Webb had been examined by Dr. David Bosomworth just two days before the injury he had alleged at work. Dr. Best's conclusion was that Mr. Webb had a non-work related condition which pre-existed the work injury at Toyota. Dr. Best assessed a 28% whole person impairment which he attributed to the surgery Mr. Webb had undergone.

STANDARD OF REVIEW

In reviewing a decision of the Board, our function "is to correct the Board only where [we] perceive[] the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

"[T]he claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). We recognize that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15-16 (Ky. 1977).

PROCEDURAL HISTORY

This case was originally brought before the ALJ for hearing and he concluded that Mr. Webb's case should be dismissed for failure to meet his burden in establishing that his injury was work-related. The ALJ opined that the injury which Mr. Webb alleged he had on March 20, 2003, was inconsequential and that his condition was, instead, based on his basketball injury in 1995.

Mr. Webb appealed the decision to the Board and, in an October 6, 2006, decision, the Board vacated the ALJ's decision. It found that the grounds upon which the ALJ had based his decision were unsound in that he had

overlooked the testimony of both Dr. Bean and Dr. Nicholson. The Board found that the opinion of these two doctors was that at least part of Mr. Webb's injury was work-related.

The ALJ, on remand, reconsidered the record, including the testimony of Dr. Bean and Dr. Nicholson and made additional findings of fact. The ALJ again dismissed Mr. Webb's case, however, finding that the opinions of Dr. Best on both the issue of whether the injury was work-related and whether Mr. Webb had a cumulative injury that merely manifested itself on March 20, 2003, were more persuasive than those of the other physicians.

Mr. Webb then appealed his decision to the Board once again. The Board found that, given the evidence in the record regarding Mr. Webb's medical history and the dates of events which led to his March 20, 2003, injury, the outcome of the ALJ was reasonable and affirmed his decision.

Mr. Webb now brings his appeal from the decision of the Board to us.

DISCUSSION

Mr. Webb sets forth the issue before us as being whether the opinion of a non-practicing IME physician that his work activity was not sufficient to cause loading of the cervical spine and, thus, cumulative trauma injury, constituted substantial evidence, where the physician acknowledged that he did not know the nature of Mr. Webb's activity at work.

Dr. Best testified as follows regarding his knowledge of Mr. Webb's activity during his work day at Toyota:

Q. During this time between 1995 and 2002, or even 2003, was he actively working at Toyota?

A. I believe so, yes.

Q. Was he performing repetitive work?

A. I would assume so.

Q. All right. Doctor, he was engaged, I assume, in regular work activity over that seven-year period, is that right?

A. You know, again, I can't comment specifically on that. I don't have those records as to what his attendance was at all. I think that is a better question that goes to either he or the people at Toyota.

Q. All right. Well, what I'm interested in, Doctor, is between 1995 and the recommendation of surgery in 2000, and the surgery in 2003, he engaged in activity which we assume included repetitive work activity for seven to eight years for Toyota; is that correct?

A. Yes.

Q. All right. And are you familiar with repetitive trauma and cumulative trauma and things of that nature?

A. I certainly am.

Q. All right. Could that also cause an individual to have cervical problems and degenerative problems of the cervical area?

A. Well, first you have to have a repetitive strain to the area. There is no indication that I have that there was any loading of the cervical spine in any of his jobs.

Q. All right. And what were his jobs?

A. Well, let's see. He worked in body weld in 1994 and 1995. He drove a forklift in conveyance. He worked the inner V-6 line, subsequently worked the V-6 turntable and four cylinder upper lines.

Q Do you know what he did in those jobs?

A I do not.

Mr. Webb uses this dialogue as proof that there was not substantial evidence upon which the ALJ could base his decision. He cites *Cepero v. Fabricated Metals Corp.,* 132 S.W.3d 839 842-43 (Ky. 2004). In *Cepero*, the Court found that:

> [W]here it is irrefutable that 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. Medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable. Furthermore, to permit a ruling of law to stand based upon such evidence that is not reliable, probative and material would be fundamentally unjust. We therefore conclude the opinions of [the physicians] do not measure up as substantial evidence, and it was error for the ALJ to blindly elect to adopt their flawed conclusions to support any ruling of law.

Mr. Webb contends that Dr. Best's medical opinion is predicated upon erroneous or deficient information which does not, under *Cepero,* rise to the level of substantial evidence.

When a decision of an ALJ is based on substantial evidence of probative value, it may not be disturbed on appeal. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986); *Newberg v. Armour Food Co.*, 834 S.W.2d 172 (Ky. 1992). "Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chem. Co*., 474 S.W.2d 367, 369 (Ky. 1971).

In *Cepero*, the physicians involved did not receive accurate information from the claimant regarding his injuries. The claimant did not inform them of a non work-related injury which preceded the alleged work-related injury. Consequently, the Supreme Court of Kentucky found that the Board had properly held the medical opinions the ALJ had based his decision upon were flawed. In the present case, Dr. Best knew of Mr. Webb's prior injuries. Mr. Webb asserts that it is the fact that Dr. Best did not know the nature of his work at Toyota that makes his opinion inaccurate.

As set forth above "[t]he function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital,* 827 S.W.2d 687-88. Currently, there is no such gross injustice in the Board's decision to uphold the ALJ's determination.

The Board held that:

> While Dr. Best may have conceded he lacked clear-cut detailed knowledge of the particular physical requirements of Webb's job duties from 1992 through 2003, such evidence merely goes to the weight to be accorded Dr. Best's testimony and does not render his opinions less than substantive. Dr. Best testified there was nothing in the information he garnered and reviewed indicative of "loading of the cervical spine" sufficient to produce a cumulative harmful change to that body part. Other than general statements to the contrary by Drs. Nickerson and Bean, the question was not specifically addressed by Webb in his case-in-chief before the ALJ. The burden of proof relating to that issue rested with Webb. The absence of proof concerning the subject, which ultimately influenced the ALJ's decision, does not compel a finding in Webb's favor - nor somehow render Dr. Best's conclusions as lacking in substantive and probative value. While, had the ALJ been so inclined, he could have rejected Dr. Best's testimony in favor of the opinions expressed by Dr. Bean and Dr. Nickerson, as a matter of law he was not required to do so.

Board Opinion at pp. 14-15. Citations omitted.

We agree with the Board. The ALJ's decision was based on substantial evidence and Mr. Webb did not meet his burden of persuasion regarding the affect his work had on his prior existing condition. Thus, we will affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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