

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000075-WC

JAMES KELLY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-92344

RADAC CORP.; HON. THOMAS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

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

THOMPSON, JUDGE: James Kelly appeals from a decision of the Workers'
Compensation Board affirming an Administrative Law Judge's (ALJ) decision.

For the reasons stated herein, we affirm.

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.

On March 4, 2005, Kelly, a plant laborer employed by the Radac Corporation, was dipping a steel radiator core into a dip pot when he began experiencing numbness in his left leg. After completing his shift and working for two more days, he presented himself at Urgent Care where he was prescribed medicine and advised not to return to work for one week.

Kelly then began receiving medical treatment from Drs. Duplechan and Stephen Bailey. Dr. Duplechan performed a series of injections which failed to provide Kelly relief. Assessing Kelly with a ten percent whole body impairment, Dr. Bailey advised Kelly that he needed surgical intervention if he desired to fully recover from his injury. Kelly declined to have the surgery because he feared the possible complications from the procedure.

On April 5, 2007, a hearing was conducted and evidence was submitted into the record. The evidence included depositions and medical reports of several doctors and Kelly's testimony. Kelly testified that he sustained a work-related back injury in 2002 which caused pain in his right leg. He testified that he was successfully treated by Dr. Hoblitzell, resulting in the pain in his right leg and, to a lesser degree, his left leg, completely subsiding.

He further testified that he began having bowel incontinence within two months of his March 2005 injury. When asked why he denied having bowel incontinence to Dr. Duplechan on April 26, 2005, Kelly testified that he misunderstood what was being asked. When questioned further, Kelly provided no response regarding his failure to inform his doctors about his bowel incontinence.

The medical report of Dr. Stephen Autry, a board certified orthopedic surgeon, noted that Kelly sustained an extension of a pre-existing disc herniation at L5-S1 as a consequence of his injury in March 2005. He noted that the injury created left-sided radiculopathy and that Kelly had right-sided lumbar radiculopathy as a result of his injury in 2002. He opined that Kelly's current symptoms were "more proximally caused" by his March 2005 injury. Dr. Autry assessed a ten percent whole person impairment and placed restrictions on Kelly's physical activities.

During his deposition, Dr. Autry agreed with Dr. Bailey's opinion that Kelly had a preexisting active five percent impairment at the time of his work-related injury in March 2005, resulting in only half of Kelly's ten percent impairment being work-related. Finally, on December 6, 2006, Dr. Autry completed a questionnaire wherein he opined that the development of bowel incontinence, a secondary condition of his back injury, was unlikely unless Kelly had concurrent bladder incontinence.

Dr. John Harpring, a university evaluator, performed a physical examination on Kelly and diagnosed him as having a herniated lumbar disc. He noted that Kelly's injury was the cause of his complaints. He assessed a thirteen percent whole person impairment. Further, Dr. Harpring testified that he did not see any lesions extreme enough to cause Kelly to sustain bowel incontinence.

He further testified that incontinence is usually caused by a very large herniated disc causing severe central stenosis. Although recognizing that the

medical reports demonstrated that Kelly had a herniated disc, he testified that Kelly's herniation was not severe enough to cause incontinence. When asked about Dr. Wayne Tuckson's opinion regarding Kelly's incontinence, Dr. Harpring testified that he, as a board certified neurosurgeon, not a general surgeon specializing in colorectal procedures like Dr. Wayne Tuckson, was in a better position to determine if a spinal cord injury caused Kelly's incontinence. However, Dr. Harpring testified that a colorectal specialist (proctologist) would be in a better position to determine the cause of Kelly's fecal incontinence.

Dr. Wayne Tuckson, a university evaluator, performed a physical examination on Kelly and noted that his findings were consistent with bowel incontinence as a consequence of pudendal neuropathy. He opined that the neuropathy could be related to Kelly's workplace injury. Further, Dr. Tuckson testified that Kelly's anal muscles did not have a normal tone and did not contract properly when prompted. When asked what could cause this condition, Dr. Tuckson named several possible causes, including diabetes, previous surgeries, or a congenital anomaly. However, he testified that he believed that Kelly's condition was the result of his work-related injury.

Additionally, during his deposition, Dr. Tuckson testified that Kelly's declarations to him, regarding his medical history, were very important in the formation of his medical opinion of the origin of Kelly's incontinence. He testified that Kelly informed him that the onset of his bowel incontinence occurred soon

after his workplace injury and that Kelly failed to inform him that he had diabetes, a potential cause of his incontinence.

After reviewing Kelly's early medical records, Dr. Tuckson testified that Kelly's statements to him were inconsistent with Kelly's early medical records, indicating that Kelly did not complain about his bowel incontinence until July 2006. Dr. Tuckson testified that these pieces of information would have been a significant factor in determining the cause of Kelly's incontinence. Finally, Dr. Tuckson testified that he had relied almost entirely on Kelly's declarations regarding his medical history in reaching his medical conclusion.

Following the hearing, the ALJ awarded Kelly permanent partial disability benefits based on a five percent whole person impairment. The ALJ concluded that Kelly "would not be permanently occupationally disabled from the effects of his work related back injury alone" The ALJ stated that Drs. Bailey and Autry, who Kelly had expressed confidence in, assessed Kelly with a ten percent whole person impairment, and each doctor assigned half of this percentage to a pre-existing condition. Following the denial of Kelly's petition for reconsideration and the affirmation of the ALJ's opinion and order by the Board, this appeal followed.

Kelly contends that the ALJ failed to provide presumptive weight to Dr. Harpring's medical report concluding that Kelly suffered a thirteen percent whole person impairment. Citing Kentucky Revised Statutes (KRS) 342.315(2), Kelly contends that the ALJ was required to afford presumptive weight to the

findings of Dr. Harpring, a university evaluator, unless the findings were rebutted. Thus, Kelly contends that this case should be remanded to the ALJ with directions to afford presumptive weight to Dr. Harpring's findings. We disagree.

When reviewing a decision of the Workers' Compensation Board, we must decide, in light of the record, whether the evidence is so overwhelming as to compel a favorable finding for the appellant. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). Our function, in reviewing such a decision, is to correct the Board when it "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).

Furthermore, the ALJ, as the finder of fact, has broad discretion to decide the quality, character, and import of the evidence and to draw reasonable inferences from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). The ALJ is free "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).

Additionally, Kentucky Revised Statutes (KRS) 342.315(2) provides that "[t]he physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the executive director." The clinical findings of the evaluator must

be afforded presumptive weight by the ALJ and the burden to overcome these findings shall be on the opponent of the evidence. *Id.* “When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.” *Id.*

Although KRS 342.315(2) provides that presumptive weight should be afforded to a university evaluator's clinical findings and opinions, the statute does not deprive an ALJ of the discretion to draw a different inference from the evaluator's clinical findings in light of the other medical evidence in the record.

Further, in *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 97 (Ky. 2000), the court wrote:

Pursuant to KRS 342.315(2), the clinical findings and opinions of the university evaluator constitute substantial evidence of the worker's medical condition which may not be disregarded by the fact-finder unless it is rebutted. Where the clinical findings and opinions of the university evaluator are rebutted, KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence. In instances where a fact-finder chooses to disregard the testimony of the university evaluator, a reasonable basis for doing so must be specifically stated.”

While Kelly contends that Dr. Harpring’s thirteen percent impairment rating should have been adopted by the ALJ, Drs. Autry and Bailey opined that Kelly suffered a ten percent impairment. Both doctors also opined that only half of Kelly’s ten percent impairment, five percent, was attributable to Kelly’s workplace injury because there was a pre-existing five percent impairment. Based on this conflicting evidence, we conclude that the ALJ’s decision to disregard Dr.

Harpring's thirteen percent impairment rating was based on a reasonable basis as required by *Magic Coal Co. Id.* at 97.

Furthermore, the ALJ's successive orders, one on October 23, 2006, precluding Dr. Harpring from issuing an impairment rating, and one on October 24, 2006, permitting Dr. Harpring to issue an impairment rating, were clearly an oversight by the ALJ. The ALJ's opinion and order makes clear that he did not intend to issue an order permitting Dr. Harpring to determine Kelly's impairment rating because there were already two impairment ratings in the record.

While Kelly disagrees, the ALJ has discretion to decide evidentiary issues. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d at 16. Our review of this decision is limited to determining whether the decision constituted an error resulting in gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d at 687-88. Here, the ALJ mistakenly issued a second evidentiary order and decided to limit this second order subsequent to its issuance. The effect of this decision did not create a gross injustice in light of the other medical evidence in the record.

Kelly next contends that the ALJ improperly rejected Dr. Tuckson's medical opinion in favor of Dr. Harpring's. Kelly contends that Dr. Tuckson, a proctologist, was in a superior position to determine whether Kelly's herniation caused his incontinence. Thus, Kelly contends that the ALJ's decision, deferring to Dr. Harpring's conclusion regarding whether Kelly's herniation caused his incontinence, was erroneous. We disagree.

During his deposition, Dr. Harpring testified that he, as a board certified neurosurgeon, was in a better position to determine if Kelly's herniation caused his incontinence. However, Dr. Harpring further testified that Dr. Tuckson, as a proctologist, was in a better position to determine the cause of Kelly's bowel incontinence. While these two statements may appear to conflict, the ALJ's conclusion that Dr. Harpring's testimony was more probative regarding the causal relationship of the herniation to the incontinence was supported by the evidence. Dr. Harpring specifically testified that he was in a better position to determine if the herniation caused Kelly's incontinence.

Moreover, Dr. Tuckson's testimony revealed that Kelly's statements to Dr. Tuckson were inconsistent with his uncontradicted early medical history. Dr. Tuckson testified that his medical opinion was almost entirely based on Kelly's declarations regarding his medical history. Because Dr. Tuckson did not have a complete and accurate medical history of Kelly, the ALJ had an additional basis to rely on Dr. Harpring's opinion rather than Dr. Tuckson's.

Kelly next contends that the ALJ erred when it failed to make an assessment regarding his ability to earn an income by maintaining regular employment. He contends that the ALJ did not consider his physical limitations when he made his determination that Kelly suffered only a permanent partial disability. Thus, based on his physical limitations, he contends that the ALJ was required to find that he was permanently disabled. We disagree.

When a party fails to request further findings of an ALJ in its petition for reconsideration, our review on appeal is limited to whether the ALJ's conclusion regarding the issue is so unreasonable in light of the evidence that it must be reversed. *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366, 370 (Ky.App. 2008). The evidence must be so overwhelming as to compel a finding in favor of the appellant. *Wolf Creek Collieries*, 673 S.W.2d at 736.

KRS 342.0011(11)(c) states that a finding of permanent total disability must be established by demonstrating an employee's "complete and permanent inability to perform any type of work as a result of an injury." KRS 342.730(1)(a) precludes a non-work-related impairment to be considered in determining work-related disability. Further, the ALJ is required to consider factors such as the employee's post-injury physical, emotional, intellectual, and vocational status. There is also a consideration of the likelihood that the employee will be able to find work consistently under normal employment conditions. *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000).

Based on the evidence in the record, there is no overwhelming evidence that requires reversal of the ALJ's finding of partial disability. The ALJ's order and opinion listed Kelly's age, education level, and work experience. Kelly's impairment rating was ten percent but only five percent of this impairment was attributable to his workplace injury. While Kelly appears to have physical limitations, the decision to find Kelly partially disabled, not permanently disabled, was reasonable.

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

GRAVES, SENIOR JUDGE, CONCURS.

KELLER, JUDGE, CONCURS AND FILES SEPARATE OPINION.

KELLER, JUDGE, CONCURRING: I concur with the majority's opinion. However, I write separately to clarify what I believe to be a misstatement in the Board's opinion and an implication in the majority's opinion that Kelly failed to request further findings regarding the extent of his disability on reconsideration. Based on my review of Kelly's motion for reconsideration, I believe that he adequately requested further findings from the ALJ. However, I agree the record supports the ALJ's opinion and the ALJ adequately addressed the extent of Kelly's disability.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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