

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-000520-WC

GERALD SHANLEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-01568

MOUNTAIN AGGREGATES, INC.;
HON. CHRIS DAVIS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
REVERSING

** ** * * * * *

BEFORE: MOORE AND NICKELL, JUDGES; HARRIS,¹ SENIOR JUDGE.

HARRIS, SENIOR JUDGE: Gerald Shanley appeals from a Workers'

Compensation Board opinion remanding his claim to the Administrative Law

¹ Senior Judge William R. Harris 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) for additional findings of fact to support the award of total occupational disability. The sole issue before us is whether the ALJ's opinion was supported by sufficient evidence.

Gerald Shanley is 59 years old. After dropping out of high school in the eleventh grade, he obtained his GED. Shanley has no vocational or technical training. Although Shanley is physically fit, he suffers from a significant hearing impairment.

Shanley worked for Mountain Aggregates for nineteen years. For eighteen years he worked as a diesel mechanic, which required him to be exposed to loud noises while operating heavy equipment. Although Shanley was supplied with hearing protection in the form of earplugs and earmuffs, the nature of his job required him to remove the protection in order to listen to the machines. During his last year of employment, Shanley worked as a foreman, a position in which he supervised employees and was responsible for their safety. In June 2007, Shanley took a family medical leave. During that time, Shanley was terminated from Mountain Aggregates for his "inability to perform his job duties as management."

Shanley claims that he noticed a decline in his ability to hear during the 1990s. However, his hearing problem was not diagnosed until he performed unsatisfactorily on a company-required hearing examination. Following the examination, Shanley consulted Dr. Greg Hazelett. Dr. Hazelett diagnosed

Shanley with work-related hearing loss and recommended hearing aids. At this time, Shanley claimed that he mostly read lips. On November 29, 2007, Shanley filed a Form 103 Application for Adjustment of Hearing Loss claim.

In support of his claim, Shanley submitted the report of Dr. Charles Hieronymus. Dr. Hieronymus performed a hearing loss evaluation on Shanley and concluded that Shanley had a 12% whole person impairment. Dr. Hieronymus diagnosed Shanley with bilateral hearing loss, chronic tinnitus, and impaired speech discrimination.

Mountain Aggregates submitted a report compiled by Dr. Robert Woods. Dr. Woods concluded that Shanley had an 11% impairment. He also found that Shanley's hearing loss was not consistent with noise-induced hearing loss. Instead, Dr. Woods estimated that 75% of Shanley's problem was caused by "hereditary and from aging" and only 25% due to noise. Dr. Woods also recommended hearing aids and repeat testing.

Mountain Aggregates also filed the affidavit of J.L. Bowen, its safety director. Bowen stated that he was familiar with Shanley's job description and duties. He claimed that even a substantial hearing loss would not have prevented Shanley from performing his job duties, as they were mostly supervisory in nature.

An evaluation performed by a university evaluator, Dr. Richard Haydon, was also submitted. Although Dr. Haydon found that some of Shanley's sensorineural loss could be caused from smoking and degenerative disease, he opined that the majority of hearing loss was related to noise exposure. Dr. Haydon

assessed a 12% whole person impairment. Dr. Haydon recommended that Shanley be restricted to activities that do not require clear communication and in which hearing is not necessary for safety purposes.

The ALJ found that Shanley sustained a 12% impairment rating and that he cannot to return to the type of work done on the date of the injury. The ALJ also found that in light of Shanley's educational background, work history, and physician-mandated restrictions, Shanley was permanently and totally disabled. This finding was in accordance with KRS 342.7305 and *Webster County Coal Corp. v. Lee*, 125 S.W.3d 310 (Ky. App. 2003).

On review, the Board affirmed the ALJ's determination that Shanley has a work-related 12% impairment resulting from his hearing loss, but (in a split decision) concluded that the ALJ's findings of fact were inadequate to support his determination that Shanley is totally and permanently disabled. Based on this conclusion, the Board remanded the claim to the ALJ for findings of fact on the total disability issue. We disagree with the Board's conclusion and are persuaded that it erred in remanding the claim to the ALJ.

Since Shanley, the party with the burden of proof, prevailed on the total disability issue before the ALJ, it was the duty of the Board, as a reviewing tribunal, to determine whether there was some evidence of substance to support the ALJ's finding of total and permanent disability. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). The ALJ has the role of weighing the evidence, drawing inferences, and making determinations of credibility. *Magic Coal Co. v.*

Fox, 19 S.W.3d 88, 96 (Ky. 2000). If the ALJ's opinion is supported by substantive evidence in the record, the decision must be upheld. *Special Fund v. Francis*, *supra*. The presence of conflicting testimony does not give the Board grounds for reversal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999).

The Board's decision was premised on the fact that no physician found Shanley totally disabled. True, but other evidence combined with the physicians' opinions indicate an increased level of disability.

The Kentucky Supreme Court in *McNutt Construction/ First General Services v. Scott*, 40 S.W.3d 854, 859-60 (Ky. 2001), held that KRS 342.0011(11) requires an individualized determination of the worker's capabilities. Further, there is no requirement that a worker be unable to physically perform any job in order to be awarded total disability. "The definition of 'work' clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled." *Id.* at 860. The ALJ should consider factors such as education, emotional well being, and vocational status. *Id.*

We agree with the dissenting opinion of Board Members Gardner and Cowden. Certainly the ALJ could have been more analytical in stating his findings, but we find a sufficient basis in the record for the ALJ's opinion. With his hearing impairment, Shanley might be able to find employment in various fields. However, the lay, medical, and vocational proof provided evidence of substance supporting the ALJ's conclusion that employment is not probable in light of his educational background, work history, and disability. Accordingly, we

reverse the opinion of the Workers' Compensation Board and reinstate the ALJ's opinion, order and award.

ALL CONCUR.

BRIEF FOR APPELLANT:

John Earl Hunt
Stanville, Kentucky

BRIEF FOR APPELLEE,
MOUNTAIN AGGREGATES, INC.:

H. Brett Stonecipher
Lexington, Kentucky