

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-000143-WC

KENT SULLIVAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-00276

ALLIED SYSTEMS; HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; THOMPSON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

THOMPSON, JUDGE: Kent Sullivan appeals from an opinion of the Workers'
Compensation Board affirming the Administrative Law Judge's opinion and order
denying Sullivan indemnification and medical benefits for multiple work-related
injuries. The ALJ determined that Sullivan's alleged injuries were temporary in

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

duration resulting in no permanent harmful change in the human organism and declined to grant indemnity benefits. Sullivan's award of future medical expenses were limited to examinations and x-rays of his shoulders. Sullivan alleges the following errors: (1) the ALJ committed error when it denied his motion for a new hearing; (2) the ALJ committed reversible error by "globally" dismissing his multiple claim for benefits; and (3) the ALJ misinterpreted the lay and medical evidence. We affirm.

Sullivan alleged in his claim for benefits that he sustained five separate injuries while employed as a commercial truck driver for Allied Systems: (1) on July 14, 2005, he injured his right knee; (2) on May 31, 2006, he injured his neck, left elbow, back and hip; (3) on October 20, 2006, he injured his right hand; (4) on December 29, 2006, he injured his left knee, right shoulder and back; and (5) on February 1, 2007, he sustained injuries to his neck and shoulders. Prior to 2005, Sullivan sustained multiple injuries.

In 1987, he injured his neck and left elbow while working for Allied and received a settlement. The following year, he sustained an injury to his left knee and also received a workers' compensation settlement. In 1994, Sullivan sustained a work-related injury to his right knee and received a settlement for permanent benefits. In 2000, Sullivan sustained a work-related injury to his right shoulder and received a workers' compensation settlement. In 2002, he sustained a work-related injury to his lower back and received temporary total disability benefits and a settlement based on a 12.9 percent impairment rating.

Sullivan testified that he was able to return to his normal and customary work-related duties following his injuries. However, in 2005 and 2006, he missed three months of work due to pain, which he related to the effects of his 2002 injury and sought medical treatment from an orthopedic surgeon. Sullivan testified that until May 31, 2006, he had no further problems pertaining to his upper, mid, or lower back.

The succession of injuries for which Sullivan now seeks compensation began on July 14, 2005, when he fell from a truck tire and injured his right knee. He was treated by Dr. Craig Beard, an orthopedic surgeon, who prescribed physical therapy and a knee brace. He subsequently visited Dr. Fogerty, who recommended surgery; however, it was not performed. Sullivan testified he did not miss work as a result of his injury.

On May 31, 2006, Sullivan sustained injuries to his neck, left elbow, right hip and lower back. However, he did not seek treatment until five months later when he saw Dr. Singer but missed no time from work.

On October 20, 2006, Sullivan injured his right hand at work when he struck it against a pin on the side of his truck. He sought medical treatment and was released to return to work the same day. He testified that his right hand no longer causes him difficulty other than an occasional "popping."

Sullivan's December 29, 2006, injury occurred when he was ratcheting a chain and it broke, causing him to fall backwards onto the steel deck behind his truck. He initially sought treatment at the urgent care clinic and was

given a steroid injection to his left hip. He subsequently returned to Dr. Beard and, later, saw his family physician, Dr. Timothy Long. Again, he did not miss work as a result of his injury.

Sullivan's final work-related injury occurred on February 1, 2007, when he again ratcheted a chain that broke and experienced pain in his neck, shoulders, right bicep and left elbow. The following day, Sullivan sought treatment from Dr. Long, who prescribed steroid tablets and restricted Sullivan to light duty. On July 4, 2007, Allied informed Sullivan that it could no longer accommodate his light-duty restrictions. At approximately the same time, his treating orthopedic surgeon at that time, Dr. Huffnagle, restricted Sullivan from work.

Sullivan testified that he has not returned to work since July 4, 2007, and continues to experience pain in his neck, shoulders, elbows, right bicep, upper, mid and lower back, right hip, and both knees. He believes that he is permanently totally disabled.

The medical testimony consisted of Sullivan's past and current treating physicians and Dr. Martin Schiller, an orthopedic surgeon, who performed an independent medical evaluation of Sullivan on June 7, 2007.

Dr. Fogerty confirmed his treatment of Sullivan from January 1988 through December 2005. On January 21, 1988, he performed arthroscopic surgery to repair a torn medial meniscus of Sullivan's left knee and, in October 1994,

performed a similar procedure on Sullivan's right knee. He continued to treat him for knee complaints until 1995.

In September 2001, Sullivan returned to Dr. Fogerty's care and surgery was performed on Sullivan's right shoulder. Dr. Fogerty diagnosed impingement syndrome of the right shoulder, which he continued to treat throughout 2001. On March 27, 2001, Sullivan underwent an MRI of the right shoulder which revealed: (1) pertendinitis, tendonitis and tendinosis along the subscapular tendon; (2) thickening and chronic tenosynovitis involving the superior, middle and inferior glenohumeral ligaments; (3) internal impingement syndrome of the glenohumeral joint with surrounding scar tissue; (4) possible restrictive capsulitis of the anterior compartment of the glenohumeral joint; (5) corrugation and thickening of the coracohumeral ligaments consistent with rotator interval capsulitis and anterior internal impingement syndrome of the glenohumeral joint; (6) thickening of the coracoacromial joint; (7) mild hypertrophic changes at the AC joint and the greater tuberosity; (8) degenerative joint disease with a small effusion of the glenohumeral joint; and (9) post surgical, mild articular and subarticular, degenerative and pseudocystic changes with mild osteonecrosis of the articular margin of the glenoid process.

On June 21, 2001, Dr. Fogerty noted that Sullivan complained of neck pain, which Dr. Fogerty attributed to tightness in his right shoulder. On August 7, 2001, he diagnosed Sullivan as suffering from cervical muscle strain.

An MRI of the cervical spine performed on October 12, 2001, revealed: (1) right paracentral posteriorly protruded discs at C3-4 and C4-5 with right-sided foraminal stenosis; (2) a right paracentral posteriorly spondylotic protruded disc and mild cord indentation with right-sided foraminal stenosis at C5-6; (3) a right paracentral posteriorly herniated disc and mild cord indentation with right paracentral spinal and foraminal stenosis at C6-7; and (4) shallow posterocentral bulging at C7-T1.

Following an automobile accident on July 30, 2003, Sullivan returned to Dr. Fogerty with complaints of pain in his wrists and left shoulder and continued treatment for those injuries until March 2004.

On December 22, 2005, Sullivan informed Dr. Fogerty that he had been injured on July 14, 2005, and was experiencing right knee pain. Dr. Fogerty diagnosed a contusion of the knee and chondromalacia of the patella. Dr. Fogerty recommended treatment with anti-inflammatories and strengthening exercises.

A medical report prepared by Dr. Huffnagle was introduced. He noted a history of Sullivan's injuries sustained in 2005, 2006, and 2007, but did not record a history of injuries or treatment concerning Sullivan's injuries prior to the July 14, 2005, incident. He diagnosed Sullivan as having right sciatic pain, chondromalacia of the patella, headaches and possible cervical disc disease. Pursuant to the AMA Guides, he assessed seventeen percent impairment to the body as a whole. He recommended physical restrictions and opined that it was unlikely that Sullivan could return to his occupation as a truck driver.

Dr. Wheelhouse is an orthopedic surgeon who performed an independent medical evaluation of Sullivan on June 11, 2007. Similar to Dr. Huffnagle, his recorded history of Sullivan's prior medical treatment did not include any record of injuries or treatment prior to July 14, 2005. Sullivan denied having experienced significant pain prior to sustaining his injury in July 2005 and, as a result, Dr. Wheelhouse characterized Sullivan's past medical history as "unremarkable."

Dr. Wheelhouse diagnosed: (1) cervicalgia; (2) thoracic spine injury; (3) lumbosacral spine injury with right sacroiliitis; (4) trochanteric bursitis of the right hip; (5) bilateral shoulder impingement syndrome and tendonitis; (6) bilateral elbow injuries; and (7) bilateral knee contusions with post traumatic chondromalacia of the patella. Pursuant to the AMA Guidelines, he assessed Sullivan as having a thirty percent whole person impairment due to the reported work-related injuries involving the neck, shoulders, low back, and knees. He also imposed restrictions on Sullivan's physical activities and opined that Sullivan could not return to work as a truck driver.

Dr. Martin Schiller, an orthopedic surgeon, performed an independent medical evaluation on June 7, 2007. He recorded a detailed history of Sullivan's medical history, including his injuries prior to July 2005. He diagnosed Sullivan as having a lengthy history of degenerative changes of the cervical and lumbar spine. He opined that Sullivan's 2002 injury produced a seven percent impairment to the low back and that Sullivan would also qualify under the AMA Guides for an

additional six percent due to arthritic changes in the cervical spine. However, he did not attribute any impairment to Sullivan's most recent work-related injuries and stated:

I would not agree that any of the symptoms that he is currently experiencing have anything to do with the May 31, 2006, the December 29, 2006, or the February 1, 2007, incidents. These would have been soft tissue injuries and there is no evidence that they caused any permanency in this patient.

Dr. Schiller concluded that on physical examination, Sullivan's right elbow, shoulders, and knees were normal and MRI scans of the knees revealed degenerative changes unrelated to his work injuries.

Concerning future medical care, Dr. Schiller opined that:

In my opinion this patient should be seen by an orthopedic surgeon and have x-rays at least taken of the left shoulder. An MRI scan might also be necessary if the right shoulder is also found to be at issue. X-rays and possibly an MRI scan might be necessary for the right shoulder. Clinically, there is no evidence of any injury to either shoulder, but he is complaining of pain and has some voluntary limited range of motion of both shoulders.

ALJ Marcel Smith relied on Dr. Schiller's opinion and dismissed Sullivan's claim in its entirety except for the award of future medical treatment based on Dr. Schiller's recommendation. In doing so, the ALJ reasoned:

The actual occurrence of the events described by plaintiff have not been disputed [by] either defendant. The first issue presented is extent and duration of disability. With regard to the right hand injury, plaintiff's testimony indicated that he didn't expect a permanent problem. Dr. Huffnagle assessed 17%

permanent impairment to the body as [a] whole. Dr. Huffnagle is the treating physician. He became plaintiff's treating physician about a month before plaintiff's deposition, according to plaintiff. Dr. Wheelhouse assessed a 30% impairment to the body as a whole. Neither of these physicians had plaintiff's history of prior problems. Dr. Schiller said the injuries were soft tissue injuries that did not leave permanent damage. I have considered the evidence in its entirety, including the medical and lay evidence. I find plaintiff to be a [sic] credible with regard to occurrence of the injuries. I am most persuaded by Dr. Schiller that the injuries that plaintiff suffered were temporary exacerbations of pre-existing active condition. Although Dr. Huffnagle is the treating physician and [had] the opportunity to examine plaintiff several times, I am more persuaded by Dr. Schiller's impairment assessment because it is better supported by the findings on examination and on diagnostic films. The findings on exams were mostly normal or subjective. The MRI films supported the opinion that plaintiff suffered only temporary exacerbations. Dr. Schiller additionally had the opportunity to review all of plaintiff's medical records over the years, including his history of prior injuries, surgeries, and workers' compensation claims. I find that plaintiff has not suffered any permanent functional impairment as a result of any of these work injuries and therefore is not entitled to an award of permanent disability benefits. Although plaintiff considers himself totally disabled, I find that the medical evidence demonstrates that his [sic] is not totally disabled.

With regard to future medical expenses, I find that he is entitled to future treatment as described by Dr. Schiller. This would include examination of shoulders by an orthopedist and the x-ray of the shoulders.

Between the time the opinion and order was rendered and the filing of a petition for reconsideration, ALJ Smith resigned. Therefore, Sullivan filed a motion for a new hearing and final adjudication alleging that it was impossible for

a new ALJ to properly consider his petition for reconsideration. ALJ Manno summarily denied Sullivan's petition for reconsideration and motion for new hearing.

Sullivan appealed to the Board, which affirmed the opinion and order of ALJ Smith and ALJ Manno's orders. This appeal followed.

Sullivan argues that an ALJ different from the ALJ who heard the evidence could not consider the petition for reconsideration absent a new hearing. We disagree.

Similar arguments have been previously rejected. In *Tuttle v. O' Neal Steel, Inc.*, 884 S.W.2d 661, 663 (Ky. 1994), the Court held that due process did not require the same ALJ who heard and ruled on the initial claim to rule on a motion to reopen. Agreeing with the Board's conclusion, the Court stated:

[N]othing in the statutes or regulations requires each claim to be decided by one ALJ throughout the life of the claim. As noted by the board, it has previously held that there was not a due-process violation in cases which were decided by ALJs after the evidence and claim had been heard by the former board.

Id. The procedural due process afforded in an administrative proceeding was further discussed in *Bentley v. Aero Energy, Inc.*, 903 S.W.2d 912 (Ky.App. 1995), where the Court explained that the ALJ may make findings and predicate an order upon the written record, and a decision by an ALJ other than the one who personally received the evidence is not invalid.

There is no logical basis to distinguish the precedent cited. The scope of review on a petition for reconsideration is to examine the opinion or order for patent errors and the ALJ may not reweigh the evidence on a factual issue decided in the initial opinion. *Wells v. Ford*, 714 S.W.2d 481 (Ky. 1986). Because the role of the ALJ is limited to the record on a petition for reconsideration, there is no requirement that an ALJ different from that who decided the merits of the case conduct a new hearing.

The remaining issues presented require that we review the ALJ's findings of fact and conclusions of law. Our scope of review is limited to whether the evidence compels a finding in his favor. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). As a fact finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. *Square D. Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Moreover, the ALJ has the sole authority to weigh the evidence and determine the inferences to be drawn. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997). 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. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974); *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002).

We agree with the Board that there was ample evidence to support the ALJ's determination that the injuries on July 14, 2005; May 31, 2006; October 20, 2006; December 29, 2006; and February 1, 2007, did not result in permanent

impairment and were only temporary exacerbations of pre-existing active conditions. Although there was evidence to the contrary, the ALJ found that Dr. Schiller's opinion based on the entirety of Sullivan's injury history was persuasive. Dr. Schiller assessed impairment ratings attributable to Sullivan's prior injuries, which he opined were pre-existing active conditions. He expressly stated that the injuries subject to the present claim produced only soft tissue injuries which were temporary and resulted in no permanent harmful change. It was within the authority of the ALJ to rely on Dr. Schiller's opinion and, therefore, we will not disturb the ALJ's decision.

Sullivan contends that he was entitled to indemnification and medical benefits even if his injuries were merely temporary and caused by pre-existing active conditions. In *Robertson v. United Parcel Service*, 64 S.W.3d 284 (Ky. 2001), the Court recognized that it is possible for a claimant to have a temporary injury for which temporary income and medical benefits may be awarded, yet fail to meet the burden of proof required to demonstrate a permanent harmful change in the human organism for an award of permanent benefits. Thus, Sullivan mistakenly asserts that his work-related injuries automatically entitled him to benefits. We agree with the Board's resolution of the issue:

There is no evidence of record of unpaid medical bills or receipts of medical charges paid out of pocket by Sullivan relative to his injuries, nor is there evidence Sullivan missed seven days consecutively following any of his injuries. See KRS 342.040(1). In accordance with Sullivan's own testimony, he continued to work regularly following each event until July 4, 2007, at which time he

was released by Allied. By that time Dr. Schiller, who evaluated Sullivan on June 7, 2007, had rendered the opinion ultimately relied on by ALJ Smith that the temporary harmful effects of the claimed injuries had resolved, and Sullivan had reverted to his pre-injury physical state of health.

Based on the foregoing, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEFS FOR APPELLEE:

James G. Fogle
Denis S. Kline
Louisville, Kentucky

David M. Andrew
Ft. Mitchell, Kentucky