

RENDERED: DECEMBER 3, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000486-WC

BARRY BORDERS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-95838

BUSH AND BURCHETT;
HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND STUMBO, JUDGES; LAMBERT,¹ SENIOR JUDGE.

¹ Senior Judge Joseph E. Lambert 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.

LAMBERT, SENIOR JUDGE: Barry Borders petitions for review of a decision of the Workers' Compensation Board. The Board affirmed an Administrative Law Judge's decision in favor of Bush and Burchett as to Appellant's reopened workers' compensation claim. Appellant argued that he had incurred a worsening of his impairment sufficient to warrant a finding of permanent total disability, but the ALJ concluded that Appellant was only entitled to an increase in the amount of his previously awarded permanent partial disability benefits. For reasons that will be explained, we affirm the decision of the Workers' Compensation Board.

Facts and Procedural History

Appellant is a 55-year-old resident of River, Kentucky who worked for Bush and Burchett² from 1995 to 2003 as a mechanic and welder. He also performed other tasks, including electrical and machine-operation work, and was often required to engage in heavy manual labor. Appellant filed a workers' compensation claim on March 8, 2004 after sustaining work-related injuries in two separate incidents. On June 1, 2003, Appellant injured his cervical spine when he inadvertently drove his truck over a ditch or depression in the roadway and was thrown against the top of the truck's cab. Appellant did not miss work as a result of this injury, but on June 19, 2003, he injured his lumbar spine while lifting a steel sling weighing approximately 250 pounds. Following the second injury, Appellant took five days off and then returned to work, but he required co-workers to assist

² Bush and Burchett is a construction company that specializes in the construction of bridges.

with any heavy lifting. He has not worked for Bush and Burchett or any other employer since July 3, 2003.

In February 2005, an ALJ reviewed the medical evidence relating to Appellant's injuries and awarded Appellant permanent partial disability benefits based on findings that Appellant suffered an 8% impairment as a result of his lumbar spine injury and a 5% impairment as a result of his cervical spine injury. The ALJ also found that Appellant's lumbar injury prevented him from returning to his former employment³ and that he was entitled to temporary total disability benefits for the period from June 20, 2003 through June 7, 2004 as a result of that injury. A corresponding psychiatric impairment claim filed by Appellant was dismissed.

In February 2009, Appellant was allowed to reopen his workers' compensation claim pursuant to KRS 342.125(1)(d)⁴ due to an alleged worsening of his cervical and lumbar injuries since the original award. Appellant specifically alleged that since the original award he had experienced worsening pain in his neck, shoulders, and lower back, along with a radiation of pain and numbness down his arms and legs. He attempted to address these ailments with physical therapy, medication, and injections but ultimately underwent an anterior cervical

³ The "3x" multiplier set forth in KRS 342.730(1)(c)1 was consequently applied to this injury.

⁴ KRS 342.125(1)(d) provides: "Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds: . . . Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order."

C6-7 microdiskectomy and fusion in February 2009 to address a herniated disc.

Because of his worsening condition, Appellant contended that he was now entitled to a finding of permanent total disability and a corresponding increase in his occupational disability benefits.⁵ Appellant supported his claim with records and reports from his physicians, along with his own testimony at a hearing and by deposition. He also filed a fully favorable decision from the Social Security Administration awarding him Social Security disability benefits.

Dr. Ira Potter, one of Appellant's primary care physicians, assigned a 25% whole person impairment rating to Appellant based on Appellant's cervical spine surgery and noted that this impairment might stand at 28% depending on how much pain Appellant experienced and its impact on his daily living. Dr. Potter's records indicate that prior to Appellant's surgery, he was referred for nerve conduction studies that revealed a right medial neuropathy at the right wrist with mild ulnar neuropathy at the left elbow. Dr. Potter placed restrictions on Appellant's physical activity and indicated that Appellant's condition had deteriorated since the original award, resulting in a greater occupational disability. Dr. Loey Koussa, another of Appellant's primary care physicians, similarly reported that Appellant had reached maximum medical improvement and remained unable to perform gainful employment.

⁵ KRS 342.0011(11)(c) defines "permanent total disability" as "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury[.]"

Appellant also submitted records from Dr. Henry Bell, a pain management physician. Dr. Bell noted that Appellant's primary complaint was constant and activity-dependant neck and shoulder pain radiating into both arms and that he also complained of lower-back pain that radiated into both legs. Appellant also complained of numbness and tingling in his upper extremities. Appellant received both cervical and lumbar epidural steroid injections in October 2007 and noted that his pain levels improved afterwards. He received additional injections in January 2008.

Appellant was eventually referred to Dr. Leon Ravvin, a neurosurgeon. Dr. Ravvin also believed that Appellant had reached maximum medical improvement and was unable to perform gainful employment. In January 2009, Appellant complained of worsening pain radiating down his right upper extremity. Dr. Ravvin subsequently performed the aforementioned cervical surgery to address these complaints.

Appellant testified that the cervical surgery eliminated the "excruciating pain" running down his right arm but noted that he still occasionally suffered from some pain, numbness, and tingling in that arm. Appellant also indicated that he still suffered from constant pain in his neck and shoulder area but that it was "nothing like it was before." Appellant further testified that following surgery, his level of pain was "about the same" as it was prior to the original award. However, he noted that his pain was beginning to increase again because his injections were wearing off. Appellant also indicated that his neck bothered

him more than his lower back. Appellant further stated his belief that he was unable to return to any type of employment, including light duty work such as working the counter at an auto parts store; however, he acknowledged that he had made no efforts to seek employment of any kind since the original award. The remainder of Appellant's testimony relating to his injuries is well-summarized in the ALJ's Opinion, Award and Order.

On November 4, 2009, the ALJ found that Appellant's cervical impairment had increased to 26% as a result of his microdiskectomy and fusion surgery and that he no longer retained the physical capacity to return to his former work. Thus, Appellant was entitled to an increase in his permanent partial disability benefits as a result of this impairment.⁶ The ALJ also awarded benefits for a period of temporary total disability running from February 13, 2009 to May 13, 2009 but concluded that the evidence did not support a finding of permanent total disability.

In reaching this latter conclusion, the ALJ noted that the restrictions placed on Appellant's physical activity by Dr. Potter in 2009 differed only slightly from those imposed by Dr. Potter in 2004 prior to the original award. With respect to Appellant's lower-back injuries, the ALJ found that Appellant's own testimony reflected that his limitations there were no more severe than what they were in 2004.⁷ The ALJ further found that with respect to Appellant's cervical injuries,

⁶ The "3x" multiplier set forth in KRS 342.730(1)(c)1 was consequently applied to this injury, as well.

⁷ The original award relating to Appellant's lumbar injury was undisturbed.

Appellant had admitted that his surgery had alleviated a substantial amount of his pain and that his pain levels were at a level similar to those he described at the time of the original award. The fact that Appellant had surgery, standing alone, was not enough to render him totally disabled.

Thus, while the ALJ believed that Appellant was unable to return to his former employment, he did not deem Appellant to be totally disabled. Appellant subsequently filed a petition for reconsideration on this issue, asking the ALJ to reconsider his Opinion, Award and Order or, in the alternative, to make “specific findings as to what if any jobs [Appellant] could possibly do given his age, education and current restrictions.” The ALJ denied the petition and Borders appealed to the Workers’ Compensation Board. The Board determined that substantial evidence supported the ALJ’s determination that Appellant was not totally disabled and consequently affirmed.⁸ This appeal followed.

Analysis

On appeal, Appellant argues that the medical evidence compels a finding of permanent total disability and asks this Court to remand this case for an entry of an award to this effect. He further contends that because the ALJ failed to make additional factual findings at his request, the Opinion, Award and Order lacks sufficient factual findings to justify the decision therein.

⁸ The case was remanded to the ALJ for resolution of a medical fee dispute, but that issue is not before us.

A workers' compensation claimant bears the burden of proof and risk of non-persuasion before the ALJ with regard to every element of his claim.

Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 928 (Ky. 2002). This standard also applies to a claimant attempting to increase his original award. *Griffith v. Blair*, 430 S.W.2d 337, 339 (Ky. 1968). Because Appellant had the burden of proof before the ALJ and was unsuccessful, the issue on appeal is whether the evidence compels a different result, *i.e.*, “the evidence in that party’s favor is so compelling that no reasonable person could have failed to be persuaded by it.”

Carnes v. Tremco Mfg. Co., 30 S.W.3d 172, 176 (Ky. 2000); *see also Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). In conducting our review, we must abide by the rule that “the ALJ, as the fact finder, has sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence.” *Morrison v. Home Depot*, 279 S.W.3d 172, 175 (Ky. App. 2009); *see also Paramount Foods, Inc., v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); KRS 342.285. This particularly holds true where medical testimony is concerned. *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421, 422-23 (Ky. App. 1997). Moreover, we can reverse a decision of the Workers’ Compensation Board affirming an ALJ’s decision only where 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Applying these standards, we find no basis for reversing the decision of the ALJ or the Board. The ALJ cited to Appellant's medical records and testimony extensively in support of his conclusion that Appellant's condition had not worsened to the point that he was permanently and totally disabled. Appellant argues that his testimony and that of his physicians support his contention that his injuries preclude any gainful employment. However, "[a]lthough 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." *Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000); *see also McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). This holds particularly true where a claimant must establish that the evidence compels a different result. Thus, while Appellant presented evidence that supports his claim of permanent disability, this Court is not in a position to second-guess the ALJ and the Board given the stringent standards under which we must operate on appeal.

Appellant also contends that reversal is merited because the ALJ failed to comply with his request for additional factual findings. In a petition for reconsideration, Appellant asked the ALJ to "come forth with some positive evidence that there are really some jobs out there" that he could do. The ALJ declined to do so, and Appellant now argues that the Opinion, Award and Order consequently lacks sufficient factual findings. In support of this argument Appellant cites to *Shields v. Pittsburg and Midway Coal Min. Co.*, 634 S.W.2d 440 (Ky. App. 1982). However, his reliance upon this decision is unavailing. While

Shields does require that an ALJ identify those specific factual findings on which he relies in support of his ultimate conclusions, *id.* at 444, it does not require an ALJ to *produce* evidence to support his findings beyond that which exists in the record. This burden rests with the claimant. Thus, Appellant's argument is rejected.

Conclusion

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas W. Moak
Prestonsburg, Kentucky

BRIEF FOR APPELLEE:

F. Allon Bailey
Patrick J. Murphy, II
Lexington, Kentucky