RENDERED: DECEMBER 22, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

# Commonwealth of Kentucky

# Court of Appeals

NO. 2011-CA-000148-WC

DEREK FARMER. APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-86461

ICG HAZARD, LLC; HON. JOSPEH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE; and WORKERS'
COMPENSATION BOARD APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS AND LAMBERT, JUDGES; SHAKE,[1] SENIOR JUDGE.

COMBS, JUDGE: Derek Farmer appeals an adverse ruling of the Workers' Compensation Board (Board). The Board had affirmed a judgment of Administrative Law Judge Joseph W. Justice (ALJ), who dismissed Farmer's claim

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

for workers' compensation benefits. After our review of the record and the pertinent law, we vacate and remand.

Farmer filed three claims for workers' compensation benefits based on cumulative trauma, hernia injury, and hearing loss. His claims were consolidated into one action. On June 28, 2010, the ALJ issued an opinion, award, and order dismissing all of Farmer's claims. Farmer filed a petition for reconsideration. On August 10, 2010, the ALJ issued an order clarifying that while Farmer had indeed sustained a work-related hearing loss, the loss did not meet the threshold impairment rating for benefits pursuant to Kentucky Revised Statute[s] (KRS) 342.7305. The remaining arguments were denied. Farmer then appealed to the Board. In an opinion entered on December 16, 2010, the Board affirmed the June 28, 2010, decision of the ALJ. Farmer then filed this appeal.

An ALJ's decision is "conclusive and binding as to all questions of fact" and the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.285. KRS 342.290 defines the scope of review by the Court of Appeals as to the Board and as to errors of law arising before the Board. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). Our review is narrowly circumscribed by statute "to correct the Board only where the . . . 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

On appeal, Farmer first challenges the ALJ's dismissal of his cervical and lumbar spinal injury claim in its entirety, arguing that the ALJ misapplied the law. Farmer contends that the ALJ relied upon a series of "mini-traumas" that he suffered during his career in order to dismiss his claim and ignored the fact that his medical history instead supports a compensable claim of cumulative trauma injuries. Farmer claims that the dismissal was not in conformity with the provisions of the Act; that it was clearly erroneous based on the evidence of the record; and that it was arbitrary, capricious, or characterized by abuse of discretion (or clearly unwarranted exercise of discretion). He submits that the dismissal was so unreasonable as to require a reversal.

Farmer has documented work-related accidents each of which resulted in injuries to his neck and back as well as in hearing loss: pulling cable, a rock fall, and lifting heavy metal. He has suffered bulging discs and stenosis, which have produced low back and bilateral leg pain. Neck and back injuries have been documented by medical reports assigning ranges of impairment of 18% (by Dr. McAlister) to 19-24% body impairment (by Dr. Muckenhausen). Dr. Johnson noted repeat injuries (*i.e.;* cumulative trauma) resulting in "progressive degenerative changes," observing that Farmer is "incapable of substantial gainful activity." (Appellant's brief at p. 11).

Only Dr. Best found "0% impairment," an evaluation which the ALJ chose (as was his prerogative) to believe in rejecting this claim. And the Board affirmed. But *the only substantial evidence* in the record supports the very real *existence* of the injuries alleged – at least to the neck and lower back.

We are compelled to vacate the judgment of the Board in this case as we are persuaded that Farmer's injuries amply establish his entitlement to compensation. Mindful of the mandate of *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992), we conclude that the Board has indeed "committed an error in assessing the evidence so flagrant as to cause gross injustice." The decisions of the ALJ and the Board in this case fail to conform both to the spirit and the letter of the Workers' Compensation Act. Farmer correctly argues that the outcome is "so unreasonable under the evidence that it must be reversed as a matter of law." (Appellant's brief before the Board at ii.)

Therefore, we vacate the judgment in this case and remand the matter for further administrative deliberation and action.

LAMBERT, JUDGE, CONCURS.

SHAKE, SENIOR JUDGE, DISSENTS AND FILES SEPARATE OPINION.

SHAKE, SENIOR JUDGE, DISSENTING: Respectfully, I dissent with the majority opinion. Most significantly, the arguments made to this Court by Farmer are broad accusations of ALJ error without any legal or evidentiary support. In his 3-page brief, he fails to cite to the record or offer any evidence,

whatsoever, that would support a finding of either ALJ or Board error. It is incumbent upon the Appellant to file a brief that contains "ample supportive references to the record and citations of authority pertinent to each issue of law." CR 76.12(4)(c)(v). Appellant's brief offers none. It is not the duty of this Court to scour the record in order to plead Farmer's argument for him. *See Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 53 (Ky. 2003). Accordingly, he has failed to offer *any* evidence demonstrating error in the Board or the ALJ's opinions.

Moreover, the record fully supports the conclusions of Dr. Michael Best, upon which the ALJ relied. Review of the record indicates that Farmer filed a previous workers' compensation claim against Cyprus Mountain and the Special Fund in 1994. The 1994 claim alleged cumulative work-related trauma of his neck and back that became manifest on September 22, 1992. The impairments assigned by Dr. Christa U. Muckenhausen and Dr. Gary K. McAllister were given in response to physical examinations performed as part of Farmer's 1994 claim. Those ratings were 19% to 24% whole body impairment and 18% whole body impairment, respectively. Farmer's 1994 claim was settled for a lump sum amount on January 16, 1995, in an agreement approved by ALJ Richard H. Campbell.

Five years later, and as part of the claim currently under review, Dr. Robert K. Johnson evaluated Farmer and assessed him with a 10% whole body impairment rating. In addition, Dr. Michael Best assessed Farmer with a 0% impairment and opined that there was no objective evidence produced which would demonstrate that Farmer had experienced further harmful change since the

2002 manifestation of his neck and back trauma, for which he had already been compensated. A complete view of Farmer's medical history indicates that he was unsuccessful in showing that he sustained "a *harmful* change in the human organism evidenced by objective medical findings." KRS 342.0011(1). Instead, the evidence shows that Farmer in fact experienced an improvement, or a *beneficial* change, in the human organism since his 1994 workers' compensation claim, and while in the employ of Appellee. Of further note is the evidentiary suggestion that Farmer's 2009 retirement was premeditated and unrelated to any neck or back pain.

The majority opinion acknowledges that the ALJ has the discretion to believe or disbelieve certain evidence, but nonetheless chooses to discredit that discretion. "[T]he fact that we may have decided differently does not mean that the decision of the Board was completely unreasonable or that a different decision was compelled." *Special Fund v. Francis*, 708 S.W.2d 641, 644 (Ky. 1986). In order to effectuate a reversal, it must be shown that the record contained no evidence of substantial probative value to support the ALJ's decision. *Id.* Such a lack of evidence has not been demonstrated by Farmer or established by the majority opinion. Accordingly, I would affirm.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
|---|---|
| McKinnley Morgan<br>London, Kentucky | Jeffrey D. Damron<br>Pikeville, Kentucky |