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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000385-WC

PERRY COUNTY BOARD OF EDUCATION — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-90866

GARY COUCH; HON. ROBERT SWISHER, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Perry County Board of Education (hereinafter "Perry County") has petitioned this Court for review of the decision of the Workers' Compensation Board (hereinafter "Board"), which affirmed the decision of the

Administrative Law Judge (hereinafter "ALJ") which awarded Gary Couch permanent total disability benefits. After careful review, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Couch is a resident of Busy, Kentucky, and was born on June 9, 1960. He is high school graduate, and took some courses in marketing and management, without completing a degree, or receiving a certification. Couch's work history consists of serving in the Army, working as a construction laborer, and working as a school custodian.

Perry County hired Couch in 1995 as a janitor, and Couch had worked for Perry County about twelve years before the injury in question. During his employment with Perry County, Couch sustained several physical injuries including an injury to his right knee in 2002. After surgical repair for this injury, he returned to work without any job restriction. Couch also sustained multiple low back strains during his employment with Perry County. His last low back strain occurred on September 24, 2008, and resolved.

Thus, on April 12, 2010, Couch had recovered from his previous minor injuries, was not receiving treatment for cervical or lumbar conditions, and had no active back problem. On that day, while Couch was setting up tables for the school breakfast, a table fell and struck him in the leg causing him to fall onto his buttocks. Following the injury, Couch was taken off work and did not return until October 2010. On his return, he had been released for work with a temporary

restriction of no lifting over fifty pounds. Then, on November 15, 2010,[1] while Couch was at work, he was sitting at a table filling out paperwork and, upon standing, he experienced an increase in back pain. As he stood up, his right leg was numb, causing him to fall. Since that time, Couch has not returned to work.

Couch testified by deposition on November 29, 2010, and again at the July 6, 2011, hearing before the ALJ. Despite returning to light-duty work in October, Couch testified the job requirements actually increased. During his testimony, he added that since April 12, 2010, the low back, hip, upper back, and neck complaints had never gone away. In fact, according to Couch, these symptoms continued to worsen. He described the pain as a burning sensation in his left leg that occurs after sitting for more than fifteen to twenty minutes. Additionally, if he sits longer than that, his leg goes numb. Couch also said that he has difficulty with walking and climbing stairs.

Couch supported his claim with records from the Primary Care Center of Eastern Kentucky. The records from April 12, 2010, April 15, 2010, and April 30, 2010, reflect complaints and treatment for pain and radiculopathy in the neck and low back, along with burning and tingling in the left foot. The record from April 30, 2010, reflects a diagnosis of degenerative disk disease and disk bulges with spinal cord compression in the neck.

[1] Throughout the record, different dates are given for the second incident, which occurred on either November 15, 16, or 17, 2010. We will reference the date as reflected by the ALJ or the testimony of the various witnesses.

The Primary Care Center also referred Couch to Dr. Phillip Tibbs for a neurosurgical evaluation. Couch first saw Dr. Tibbs on June 11, 2010. In a letter of that date, Dr. Tibbs related the history of the injury, and noted that "[h]e is having low back pain radiating into the left foot and cervical pain and dysesthesia in both arms and numbness in the thumb and 1st and 2nd fingers." Dr. Tibbs wrote that the lumbar and cervical MRI's demonstrated degenerative disk disease. Then, on October 4, 2010, Dr. Tibbs indicated Couch needed no surgery, and could return to work with a fifty-pound lifting restriction. Finally, in a letter dated April 8, 2011, Dr. Tibbs explained that he found nothing amenable to surgery and opined that it was not safe for Couch to return to work.

Both Couch and Perry County filed reports from Kentucky Mountain Radiology. Lumbar and cervical MRI's taken April 26, 2010, reflected degenerative disk disease, with severe central canal stenosis and cord compression in the cervical spine. And, Couch filed records from both Dr. Merced, his family physician, and also from his physical therapy. Physical therapy records from September and October 2010 said that Couch's condition was improving and that he wanted to return to work, despite continued pain.

Dr. Robert Johnson performed an evaluation at Couch's request on November 10, 2010. Dr. Johnson noted Couch had continued to complain of low back and neck pain since the accident and that he been taken off work for at least three months. Dr. Johnson diagnosed specific trauma to the neck with asymmetric findings and guarding, a major degree of chronic strain in the low back without

conclusive evidence of radiculopathy. Dr. Johnson opined the April 12, 2010, injury caused Couch's complaints and observed that Couch's condition continued to worsen. He recommended restrictions of no lifting, pushing, pulling, or carrying in excess of five to ten pounds, no climbing, no hazardous surfaces, no shoveling and no associated activities that could exacerbate his condition. Later, in a supplemental report dated May 27, 2011, Dr. Johnson stated that his original opinion remained unchanged.

On August 2, 2010, at the request of Perry County, Dr. David Jenkinson, an orthopedic surgeon, performed an independent medical evaluation of Couch. Dr. Jenkinson stated Couch demonstrated no objective evidence of cervical or lumbar radiculopathy. In his opinion, Couch had sustained a sprain or strain of the cervical and lumbar spine which had resolved. Further, he did not believe any restrictions were necessary. Dr. Jenkinson prepared supplemental reports on February 15, 2011, and July 25, 2011. In the reports, he did not change his opinion.

After the November 15th incident, on November 16, 2010, Dr. Merced's records reflect that Couch sustained a back injury at work the preceding day with pain radiating into the buttocks and both legs. On December 1, 2010, Dr. Merced noted Couch had persistent low back pain, and his neck pain had somewhat improved. Finally, on July 18, 2011, Dr. Merced's office note showed that Couch continued to complain of low back pain, and his neck pain had increased over the preceding few days.

Couch also provided information regarding additional cervical and lumbar MRIs that were performed following the November 15th incident. The lumbar MRI dated November 22, 2010, demonstrated minimal bulging at L4-5. The cervical MRI dated February 24, 2011, demonstrated a disk herniation at C3-4 with multilevel osteophyte and disk complexes.

On August 26, 2011, the ALJ entered an opinion in which he determined that Couch sustained cervical and lumbar injuries due to being struck by a table while performing janitorial duties for Perry County on April 12, 2010. It was further decided by the ALJ that these injuries rendered Couch permanently totally disabled and entitled him to an award of permanent total disability benefits. Following the ALJ's opinion, on September 8, 2011, Perry County submitted a petition for reconsideration, which was denied by the ALJ on October 3, 2011.

Thereafter, Perry County appealed the decision to the Board. On January 24, 2012, the Board affirmed the ALJ's decision. In its decision, the Board noted that Perry County had not preserved whether a "second" injury rather than an exacerbation of the original injury occurred in November 2010 and held that the ALJ's decision was supported by substantial evidence. It is from this decision that Perry County now appeals.

STANDARD OF REVIEW

As stated in *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992), our role in reviewing the decision of the Board in workers' compensation cases is only to correct a decision of the Board when we perceive that "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." *Id*. at 687–88. The Board, through the hearing officer, is the trier of fact and is entitled to choose what evidence to believe. *Bowling v. Natural Res. and Envtl. Prot. Cabinet*, 891 S.W.2d 406, 410 (Ky. App. 1994). Thus, a decision of the Board's findings of fact is reversed only upon a showing that the Board acted arbitrarily. *Id*. at 409. As long as the Board's decision is supported by evidence that "has sufficient probative value to induce conviction in the minds of reasonable persons[,]" and is not arbitrary, we cannot disturb it on appeal. *Hughes v. Kentucky Horse Racing Auth.*, 179 S.W.3d 865, 871 (Ky. App. 2004)(footnote omitted). Additionally, statutory guidance is found in Kentucky Revised Statutes (KRS) 342.285(2), which provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. Keeping this standard of review in mind, we turn to the issues in this case.

ISSUES

Initially, Perry County argues that, contrary to the Board's legal analysis, it was not necessary for them to preserve the issue of whether Couch had failed to join a second work-related accident in the quest for benefits. Next, Perry County maintains that the ALJ did not properly weigh the evidence in determining whether Couch had sustained a partial or total disability. Rather than making this assessment, Perry County proposes that the ALJ relied on inferences from facts and testimony, which were not on the record. Therefore, it maintains that Couch

did not satisfy his burden of proof as far as his ability to find suitable employment following his injury. Finally, Perry County claims that the ALJ's award of permanent total disability benefits was erroneous as a matter of law because the evidence did not support it.

Conversely, Couch's position is that the ALJ's decision was based upon evidence, as well as law, and that the Board properly affirmed it. First, notwithstanding the Board's holding that the issue of joinder was not preserved, Couch also argues that the joinder issue is a mischaracterization by Perry County. The issue is not preservation of joinder since joinder of the claims was unnecessary. Couch has always maintained that the second incident, on November 15, 2010, was not a separate incident but an exacerbation of the original injury incurred in April 2010. Couch also contends that sufficient evidence existed on the record to support the ALJ's determination that Couch is totally disabled and unable to work in another position, particularly in light of the fact that the workers' compensation statutes do not require the testimony of a vocational expert. Finally, Couch states that Perry County failed to establish that the ALJ and the Board's decisions were not based on substantial evidence. Because of this failure, the Board's decision is not clearly erroneous as a matter of law. We address each issue separately.

ANALYSIS

1. Joinder

In the ALJ's decision, and again in the order on reconsideration, he addressed whether two injuries occurred and concluded that one injury happened on April 12, 2010, and that the second incident in November 2010 was an exacerbation of the original injury. Whereas the Board decided that because Perry County in the Benefit Review Conference ("BRC") order and memorandum executed June 28, 2011, did not suggest that a "second" injury occurred in November 2010, the issue was not preserved. On appeal, Perry County states that the Board was incorrect about the preservation of the issue and that the November 15th incident was a second injury that Couch did not include in his petition.

As the ALJ noted in his order responding to the employer's petition for reconsideration, Couch never claimed a second injury and, therefore, was not required to amend his original complaint. Further, the ALJ pointed out that Perry County in its original brief did not take the position that Couch needed to amend his complaint but instead maintained that Couch had not been injured on either date. The ALJ went on to reason that merely standing up and a leg giving out is not a second injury but directly attributable to the original injury. And, the ALJ goes on to state that while Perry County emphasizes the fact that Dr. Tibbs had released Couch to full-duty work the day before the November 17, 2010, incident, Couch testified that upon his return to work in October with restricted lifting duties, he worked in pain and never returned to full regular duty. It was the ALJ's conclusion that Couch did not sustain a second injury as defined by the Workers'

Compensation Act but that his incident in November 2010 was directly attributable to the April 2010 injury.

The Board in its opinion confirmed the ALJ's conclusions that Perry County initially did not contest whether two separate injuries were incurred but insisted that Couch had not been injured. The Board noted that the issue was not preserved in the BRC order and also concluded that Perry County's arguments regarding joinder were not proffered until after the ALJ rendered his decision. With regard to benefit review conferences, as provided in 803 Kentucky Administrative Regulations (KAR) 25:010, Section 13(14): "[o]nly contested issues shall be the subject of further proceedings." Since our role in reviewing the decision of the Board is only to correct a decision of the Board when we determine that it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice, in the issue at hand, we do not believe that in the instant situation the Board misapplied the law or assessed the evidence incorrectly. Hence, we concur with the Board. In sum, the issue was not preserved and sufficient evidence exists to support the ALJ's findings.

2. Inferences from evidence

Perry County maintains that the ALJ did not properly weigh the evidence in determining whether Couch had sustained a partial or total disability. Relying primarily on *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky.

2000), Perry County states that the ALJ drew inferences from factors not in evidence in determining Couch's ability to obtain further employment.

Worker Compensation statutory guidelines regarding a determination of partial or permanent disability are found in KRS 342.0011. In pertinent part, it provides:

> (1) "Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process[.]
>
> ....
>
> (11)(b) "Permanent partial disability" means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work; and
>
> (11)(c) "Permanent total disability" means 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[.]
>
> ....
>
> (34) "Work" means providing services to another in return for remuneration on a regular and sustained basis in a competitive economy[.]

With these statutory guidelines in mind, we turn to *Hamilton* for the relevant inquiry necessary to determine that an employee is permanently disabled:

> [D]etermining whether a particular worker has sustained a partial or total occupational disability as defined by

> KRS 342.0011(11) clearly requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy. . . .
>
> An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. . . . [I]t necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. 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.
>
> . . . It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability.

Hamilton, 34 S.W.3d at 51-52 (internal citations omitted).

Here, the ALJ weighed the same factors, beginning with the nature of Couch's injury and its effect upon his ability to return to his former employment. In this regard, the ALJ relied upon Couch's testimony that his neck and lower back pain severely limited his day-to-day life. The Board cited in the ALJ's opinion to show that the appropriate legal standard was used, and we will also:

> The threshold determination to be made when permanent total disability is alleged is whether the claimant has a permanent disability rating. In the present case, Dr. Johnson assigned a 14% impairment rating (8% lumbar

DRE category II, 6% cervical DRE category II) while Dr. Jenkinson assigned a 0% impairment rating. The physical examinations of the evaluating physicians, predictably, differed in findings. Dr. Johnson found restrictive range of motion in the cervical and lumbar spine along with paraspinal muscles that "do not relax." Dr. Jenkinson, examining the plaintiff approximately three months prior to the examination of Dr. Johnson, found full range of motion of the neck although there were complaints of pain with full forward flexion and with cervical rotation. According to Dr. Jenkinson, plaintiff did not complain of any significant pain with range of motion testing of his back and there was no tenderness to palpation of his lumbar spine. He exhibited a normal gait pattern and was able to walk on his heels and toes without difficulty. Dr. Johnson had noted an abnormal gait pattern, by contrast. When the plaintiff last saw Dr. Tibbs, he was found to have degenerative disc disease as demonstrated by MRI and was complaining of neck pain and weakness in the left hand and right shoulder pain as well as low back pain and left leg pain. It does not appear that Dr. Tibbs tested plaintiff's range of motion, and his physical examination findings are somewhat cursory. He noted that the plaintiff did not have any clinical radiculopathy or myelopathy and found nothing "truly amenable to surgical intervention." Importantly, however, Dr. Tibbs indicated "we believe it is not safe for him to return to work." Having carefully reviewed the evidence in this matter, the undersigned is persuaded that Dr. Johnson's 14% impairment rating more accurately reflects the level of plaintiff's impairment than Dr. Jenkinson's 0% impairment rating. It is undisputed that the plaintiff has had diagnostic studies which demonstrate degenerative changes of the lumbar and cervical spine of varying degrees. According to Dr. Johnson, radiographic findings and the specific injury event are consistent with the DRE category II impairment ratings he assigned. I find and conclude, therefore, that the plaintiff has a permanent impairment rating of 14% as a result of the work injury of April 12, 2010 and, therefore, a permanent disability rating of 14%.

Having determined that the plaintiff has a permanent disability rating, it is incumbent on the Administrative Law Judge to conduct an analysis of those factors set forth in *Hamilton* in determining whether the plaintiff is permanently and totally disabled. Initially, I note that the plaintiff is 51 years old, a factor which is somewhat "neutral" with respect to the plaintiff's access to further employment although at that age he presumably will have fewer opportunities available for employment than a much younger worker. The negative impact of plaintiff's age is increased considering that the number of jobs available generally in the area where plaintiff resides is smaller than would be the area if plaintiff lived in or near a larger city.

With respect to the plaintiff's post-injury "intellectual" status, it is noted that the plaintiff is a high school graduate and apparently attended some college courses while he was in Florida although he did not complete any certificate program. While plaintiff is a high school graduate, he would have graduated over 30 years ago and his work history includes only physical manual labor. In other words, throughout the course of his work life, the plaintiff has relied almost exclusively on his physical abilities and less, if at all, on his intellectual abilities. It does not appear that the plaintiff has any transferable job skills of a non-physical laboring nature. There is certainly nothing in the plaintiff's prior work history or life experiences to suggest that he would readily succeed in employment which emphasized academic abilities over physical ability.

While the *Hamilton* analysis requires the Administrative Law Judge to consider a claimant's post-injury emotional status, there is little evidence with respect to that issue in the record. Plaintiff testified that he has been diagnosed with post-traumatic stress disorder and treats for that condition presumably as a result of his experiences in being wounded in the armed forces as well as being shot at by his neighbor. There is no specific evidence, however, that the plaintiff has any occupational disability attributable to his post-traumatic stress disorder or any other emotional condition although it is conceivable that

such difficulties may arise were the plaintiff to be placed in a stressful employment position. Fortunately for the plaintiff, however, he has been able to work basically by himself during the night shift as a school janitor for the past 15 years, a position which would appear to be relatively low stress. There is no specific evidence, therefore, that the plaintiff's current employment access is significantly impaired or precluded by virtue of his post-injury emotional status.

The most important aspect of the *Hamilton* analysis in the present claim, however, is the plaintiff's post-injury physical status. In this regard, Dr. Jenkinson was of the opinion that the plaintiff needs no work restrictions and could return to his normal occupation. Dr. Johnson was doubtful that the plaintiff would be able to continue working as a school custodian without significant help as to the more physical aspects of that employment. Both Drs. Jenkinson and Johnson evaluated the plaintiff before his November 17, 2010 exacerbation, however. Dr. Jenkinson, in fact, evaluated the plaintiff before he even attempted to return to work, and Dr. Johnson evaluated the plaintiff after he returned to work but shortly prior to the November exacerbation from which he has not returned to work. The only physician to have examined, evaluated and/or treated the plaintiff after his failed attempt to return to work is Dr. Tibbs. As set forth above, Dr. Tibbs specifically indicated that it is not safe for the plaintiff to return to work. Dr. Tibbs was the same doctor who treated the plaintiff initially and allowed him to return to work at first on restricted duty but then with a release for full duty. Dr. Tibbs would be in a better position than either Drs. Jenkinson or Johnson to evaluate and determine the plaintiff's ability to work and his ultimate restrictions. Further, Dr. Tibbs, as a treating physician, obtains a higher level of credence with respect to his opinions than either of the evaluating physicians. In short, Dr. Tibbs was well familiar with the plaintiff's work activities and determined that it is not safe for him to return to work. This pronouncement takes on even more significance in light of the plaintiff's demonstrated pursuit of returning to his job with the defendant. It is undisputed that the plaintiff has sustained

> various work injuries over the course of his work life and that he has always returned to work at full duty. Even after he was injured on April 12, 2010, he expressed a desire to Drs. Tibbs, Johnson and Jenkinson to return to work as he appeared to enjoy what he did. Contrary to the defendant's assertion, the undersigned does not view the plaintiff as someone looking for a way to return on workers' compensation. In fact, I found the plaintiff to be a very credible witness at the Formal Hearing and I place significant weight on his own assessment of his residual physical capacity. In that vein, plaintiff testified that if he sits more than 15 to 20 minutes, he has a burning sensation in his left leg and his leg ultimately goes numb. He has difficulty walking, cannot walk for even so far as a city block without having to stop and rest, and has difficulty climbing stairs. I accept the plaintiff's assessment of his physical capacity as accurate and credible. *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979). Having, therefore, considered the factors required pursuant to the *Hamilton* decision, and in reliance upon the opinions of Drs. Tibbs and Johnson and the plaintiff's own credible testimony, I find and conclude that the plaintiff is permanently and totally disabled as a result of the work injury of April 12, 2010.

Board opinion entered January 24, 2012, at 11-16. Hence, upon consideration of the decision of the ALJ, we are persuaded, as was the Board, that the ALJ clearly weighed the evidence concerning whether Couch is able to be employed. Further, the ALJ did so by analyzing the appropriate factors set forth in KRS 342.0011 concerning what a worker is and is not able to do after recovering from the work injury. It necessarily included a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. The ALJ also considered the likelihood that Couch would be able to find work consistently under normal employment conditions and whether his physical

restrictions would interfere with employment capabilities. Given that one function of the ALJ is to translate the lay and medical evidence into a finding of occupational disability, we conclude that he did so here. Substantial evidence of record exists to support the conclusions, and for that reason, we cannot say the ALJ's decision is so unreasonable that it must be reversed as a matter of law.

3. Clearly erroneous as a matter of law

Perry County's final argument is that regardless of the efficacy of its other arguments, the ALJ erred in awarding permanent total disability benefits to Couch. They vigorously contend that the decision was not supported by evidence of a probative value. Yet, the employer here cannot overcome the fact that "the decision of the fact-finder must be affirmed if there is any evidence of probative value to support it." *Blue Diamond Coal Co. v. Whitaker*, 303 Ky. 715, 198 S.W.2d 792 (Ky. 1946). Neither the Board nor we are persuaded that the ALJ's decision was not supported by substantial evidence.

CONCLUSION

For the foregoing reasons, the January 24, 2012, opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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