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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001318-WC

HODGES TRUCKING COMPANY.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-86619

ROBERT W. WALDECK;
HON. EDWARD D. HAYS, ALJ
AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART, VACATING IN PART, AND
REMANDING

** ** * ** * ** *

BEFORE: ACREE, CHIEF JUDGE; JONES AND KRAMER,¹ JUDGES.

JONES, JUDGE: Hodges Trucking Company ("Hodges") appeals from the

Workers' Compensation Board's ("Board") decision affirming the Administrative

¹ Judge Joy A. Kramer, formerly Joy A. Moore.

Law Judge's ("ALJ") Opinion and Order awarding permanent total disability ("PTD") benefits to the Appellee, Robert W. Waldeck, on his KRS² 342.125 motion to reopen. On appeal, Hodges maintains that the Board erred as a matter of law in affirming the ALJ's award because while Waldeck proved that he has an increased impairment rating, the proof otherwise indicated that Waldeck's condition improved from a functional standpoint since the initial Opinion, Order & Award on his claim. Hodges also argues that the Board should have reversed the ALJ with respect to Waldeck's psychological claim because Waldeck failed to seek compensation for a psychological injury as part of his original claim. For the reasons more fully explained below, we AFFIRM IN PART, REVERSE IN PART, VACATE IN PART, and REMAND.

I. BACKGROUND

On or about June 2, 2008, Waldeck filed a Form 101 Application for Resolution of Injury Claim with the Department of Workers' Claims. In his Form 101, Waldeck alleged that on May 29, 2007, he injured his back, both legs and his hip when he fell while working for Hodges. Waldeck did not make a claim for a psychological injury as part of his original claim. Waldeck's claim was assigned to the Honorable Grant Roark ("ALJ Roark"). Following discovery, ALJ Roark conducted a combined Benefit Review Conference ("BRC") and final hearing on December 30, 2008.

² Kentucky Revised Statutes

As part of the BRC, the parties stipulated to: jurisdiction under the Act; an employment relationship between Waldeck and Hodges; the date of injury (May 29, 2007); notice; Waldeck's date of birth (August 22, 1968); Waldeck's educational level (completion of tenth grade); Waldeck's average weekly wage (\$532.27); the duration and rate of temporary total disability benefits Hodges paid Waldeck (total paid \$16,154.82); and the total amount of medical expenses Hodges paid on Waldeck's behalf (\$14,411.41). However, the parties were unable to agree on: Waldeck's entitlement to permanent disability benefits under KRS 342.730; whether Waldeck had obtained maximum medical improvement ("MMI"); and whether any of Waldeck's impairment was caused by a preexisting active condition.

Immediately following the BRC, ALJ Roark presided over an evidentiary hearing at which Waldeck and his wife, Paula, were the only witnesses. In addition to Waldecks' testimony, the parties relied on the evidence they had previously filed of record, which included Waldeck's deposition testimony and various treatment-related medical records and expert medical reports.

ALJ Roark rendered an Opinion & Order on March 2, 2009. Therein, ALJ Roark made the following findings of fact and conclusions of law: (1) Waldeck had "a pre-existing active lower back condition due to a 2004 injury for which he underwent surgery at L5-S1 in 2005 . . . [which] left [him] with a residual 10% impairment rating under the 5th Edition of the AMA Guides"; (2) based on the opinion of Dr. John Guarnaschelli, "Waldeck's current low back pain and need

for any additional treatment is attributable to his May 29, 2007, work incident [at Hodges]"; (3) based on Dr. Goldman's report that Waldeck did not carry "his burden of proving he has any permanent impairment rating associated with his claimed injury" precluding him from receiving any permanent income benefits; and (4) Waldeck reached MMI as of September 25, 2008.

Based on his findings and conclusions, ALJ Roark awarded Waldeck temporary total disability benefits ("TTD") from June 6, 2007, through September 24, 2008, at the rate of \$357.86 per week and all reasonable and necessary medical expenses for the cure or relief of the effects of his injury in accordance with KRS 342.020. Neither Waldeck nor Hodges appealed ALJ Roark's Opinion & Award.

On or about May 2, 2012, Waldeck filed a motion to reopen pursuant to KRS 342.125. Waldeck alleged in his motion that subsequent to ALJ Roark's March 2, 2009, Opinion & Award, he came under the care of Dr. Christopher B. Shields, a neurosurgeon. Waldeck indicated that Dr. Shields diagnosed him with lower back pain with components of L5 and S1 radiculopathy bilaterally for which he recommended that Waldeck be treated with a laminectomy, foraminotomy, and facetectomy with fusion at the L4-5 interspace, and the L5-S1 interspace. Waldeck indicated that he elected to go forward with the recommended surgery, which Dr. Shields performed on September 23, 2009. Hodges paid for the surgery and related expenses pursuant to KRS 342.020.

Waldeck filed an affidavit in support of his motion to reopen in which he further averred that following his surgery he "continued to experience low back

pain" and "began to experience depression due to [his] chronic pain." Waldeck also attached a report from Dr. Warren Bilkey to his motion to reopen. Dr. Warren Bilkey opined that Waldeck's impairment had increased to 29% from the presurgical levels. Dr. Bilkey further opined that 10% of that impairment was attributable to a preexisting active condition that predated the May 29, 2007, work injury.

Waldeck also included an evaluation by Dr. Steven J. Simon, a licensed clinical psychologist. Dr. Simon's opinion is that Waldeck developed a mood disorder with major depression secondary to his back injury and chronic pain for which he assigned a 20% psychiatric impairment as a consequence of the work-related injury.

The Chief ALJ sustained Waldeck's motion to reopen to the extent that he directed the Department of Workers' Claims to reopen the claim and assign the matter to an ALJ for adjudication on the merits. The reopening was assigned to the Honorable Edward Hays ("ALJ Hays") for final adjudication. After additional discovery and a hearing, ALJ Hays sustained Waldeck's motion to reopen and awarded him permanent total disability ("PTD") benefits under the Act. In so doing, ALJ Hays found as follows:

[I]t is clear that plaintiff's condition has substantially worsened and in support of this finding, the ALJ finds that plaintiff now has a 29% permanent impairment to the body as a whole based on the AMA Guides, Fifth Edition, 10% of which was preexisting active, and 19% of which is the result of the injury. In addition thereto, the ALJ finds plaintiff has a 5% impairment for work-

related depression. Thus, the plaintiff's permanent impairment has substantially worsened since the Opinion of Judge Roark.

After balancing Waldeck's limited work experience, physical restrictions, "borderline intelligence," depression, and residual chronic pain with his relatively young age (44 years old at the time), ALJ Hays concluded that Waldeck was totally occupationally disabled. ALJ Hays then awarded Waldeck PTD benefits of \$354.85 per week commencing May 2, 2012, the date upon which Waldeck filed his motion to reopen.

Hodges petitioned ALJ Hays to reconsider asserting that he erred in considering the psychological impairment and in finding Waldeck permanently totally disabled because no evidence was presented to demonstrate that Waldeck's symptoms had worsened. By Order rendered February 8, 2013, ALJ Hays denied Hodge's petition for reconsideration.

Hodges then appealed to the Board. The Board determined that ALJ Hays' conclusions with respect to a worsening of condition and inclusion of the psychological impairment were supported by substantial evidence, and therefore, affirmed those findings. The Board, however, vacated the award and remanded the claim to the ALJ to determine whether Waldeck's 2004 lumbar low back injury resulted in any occupational disability, and, if so, to deduct that percentage from the award of PTD benefits.

This appeal followed.

II. STANDARD OF REVIEW

Pursuant to KRS 342.285, the ALJ is the sole finder of fact in workers' compensation claims. Our courts have construed this authority to mean that the ALJ has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974).

Moreover, an ALJ has sole discretion to decide whom and what to believe, and may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

On review, neither the Board nor the appellate court can substitute its judgment for that of the ALJ as to the weight of evidence on questions of fact.

Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440, 441 (Ky. App. 1982). In short, the reviewing body cannot second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion.

Medley v. Board of Education, Shelby County, 168 S.W.3d 398, 406 (Ky. App. 2004).

Discretion is abused only when an ALJ's decision is arbitrary,

unreasonable, unfair, or unsupported by sound legal principles. *Downing v.*

Downing, 45 S.W.3d 449, 454 (Ky. App. 2001). To demonstrate an abuse of

discretion, "[a] party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that the

finding was unreasonable under the evidence." *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 754 (Ky. 2011).

III. ANALYSIS

A. Psychological Claim

Hodges asserts that the Board should not have affirmed the ALJ's decision allowing Waldeck to recover for his psychological injury claim on reopening because the record shows that Waldeck was treated for work-related depression prior to ALJ Roark's award.

The purpose of a reopening is to address specific situations that arise after the entry of an award. *Brooks v. University of Louisville Hospital*, 33 S.W.3d 526, 530 (Ky. 2000). A condition that arises after the initial award and was not known or should not have been reasonably known to the employee at that time may be the subject of a reopening. *Fischer Packing Co. v. Lanham*, 804 S.W.2d 4 (Ky.1991). In *Slone v. Jason Coal Co.*, 902 S.W.2d 820 (Ky.1995), the Kentucky Supreme Court held that "a motion to reopen pursuant to KRS 342.125 may not be based on a condition known to the claimant during the pendency of his original claim, but which he did not present." *Id.* at 822. Subsequently, the holding in *Slone* was codified in KRS 342.270(1) which states in part:

When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be known, to him. Failure to join all accrued causes of action shall result in such claims being barred under this chapter as waived by the employee.

In this case, ALJ Hays based his determination to allow the psychological claim on the fact that no physician had assessed a permanent impairment rating for any psychological injury at the time ALJ Roark rendered his decision. As the above-cases demonstrate, this is not the determinative question. The issue is whether, based on the facts, Waldeck knew or reasonably should have known that he potentially had a claim for a psychological injury as related to the November 2007 injury during the pendency of his original claim.

The Board concluded that the ALJ did not err because the evidence of record does not indicate that Waldeck had been diagnosed with depression prior to ALJ Roark's opinion even though he was being treated with antipsychotic medications in 2007. The Board explained:

[T]he ALJ's determination Waldeck sustained a psychological impairment due to the work-related injury is supported by the opinions of Drs. Simon and Allen, neither of whom evaluated him prior to March 2009. Although Waldeck treated with anti-depressant/anxiety medication beginning in June 2007, there is no evidence he was diagnosed with a psychological condition until he saw Dr. Simon in August 2011. The evidence supports the ALJ's determination of a work-related psychological condition, which was not diagnosed prior to March 2009.

The record does not support the Board's conclusion in this regard.

Much to the contrary, the record indicates that on August 2, 2007, Waldeck treated with the Family Care Center, a division of the Hardin Memorial Hospital, where he was examined by Dr. Susanne Brown. Although somewhat difficult to decipher, her notes indicate that she diagnosed Waldeck with depression and anxiety for

which she prescribed two medications. (R. at 87-89). Additional records indicate that Waldeck continued with these medications until well after the time ALJ Roark rendered his award with respect to Waldeck's initial claim.

What is less clear is whether Waldeck knew or reasonably should have known that his depression was causally related to his work injury such that he should have pursued a claim for a psychological injury at that time. The evidence could potentially support either outcome and ALJ Hays did not make any factual determination in this regard.

Accordingly, given the ALJ's failure to apply the correct standard in assessing whether Waldeck's psychological claim should have been permitted to proceed on reopening and the ambiguity of the evidence, the Board should have remanded this matter to the ALJ to determine whether Waldeck's psychological injury claim had "accrued" and was "known, or should reasonably be known, to him" prior to ALJ Roark's 2009 award. On remand, if the ALJ determines that Waldeck knew or reasonably should have known that he had a work-related psychiatric claim during the pendency of his original action, but failed to pursue to the claim at that time, then Waldeck cannot include the claim as part of this reopening. Accordingly, we must vacate the Board's decision to the extent it affirmed ALJ Hays' decision on the psychological claim and remand the psychological claim for additional findings of fact.

B. Evidence of Increased Impairment for Back Injury

Hodges next argues that the Board erred in affirming the ALJ's PTD award because Waldeck did not present any objective medical evidence that he suffered a functional change in condition. We do not find this argument convincing.

KRS 342.125(1)(d) provides that a workers' compensation award may be reopened where there has been a "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." "Evidence of a post-award increase in the permanent impairment rating resulting from a work-related condition provides the objective medical evidence of a worsening of impairment that KRS 342.125(1)(d) requires for reopening." *James T. English Trucking v. Beeler*, 375 S.W.3d 67, 70 (Ky. 2012) (citing *Colwell v. Dresser Instrument Division*, 217 S.W.3d 213 (Ky. 2006)).

ALJ Roark's prior opinion concluded that while Waldeck sustained a work-related injury in 2007, it did not cause him to suffer a permanent impairment rating. As such, Waldeck was ineligible for either partial or total permanent disability benefits at that time and ALJ Roark made no findings in that regard. On reopening, as noted by the Board, substantial evidence supported ALJ Hays' conclusion that Waldeck's permanent impairment rating, as related to the 2007 work injury, had increased since ALJ Roark's prior opinion.

Thereafter, it was incumbent on ALJ Hays to determine whether Waldeck was entitled to additional benefits under the Act. The factors that an ALJ

must consider in determining whether an individual claimant is permanently and totally occupationally disabled are set forth in *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). They include: the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact; a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions; whether the individual will be able to work dependably; and whether the worker's physical restrictions will interfere with vocational capabilities. *Id.* "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." *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001).

While an ALJ must rely on medical proof to find that the worker sustained a permanent impairment rating, the ALJ is not required to base his conclusion that the claimant cannot perform any work on expert opinions. *Commonwealth Transp. Cabinet v. Guffey*, 42 S.W.3d 618, 621 (Ky. 2001). In certain cases, lay testimony, even if just that of the claimant, may be sufficient to support an award of PTD. *Id.* On reopening, as noted by the Board, ALJ Hays was permitted to and did balance the correct factors in arriving at his ultimate conclusion. Thus, we affirm the Board's decision regarding whether ALJ Hays properly consider and assessed the evidence in permitting Hays to reopen his claim and in awarding him PTD benefits.

The Board also *sua sponte* addressed in its opinion whether ALJ Hays should have deducted the prior pre-existing active impairment from Waldeck's PTD award. An active impairment does not require a finding of an active disability:

Impairment and disability are not synonymous . . . an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

Roberts Bros. Coal Co. v. Robinson, 113 S.W.3d 181, 183 (Ky.2003).

In order for there to be an exclusion from a total disability award under *Robert Bros.*, it must be established that the pre-existing condition was symptomatic and restrictive, and affected the employee's ability to work at his job immediately prior the second work injury. "If an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a)." *Id.*

ALJ Roark previously determined that after having surgery for the 2004 injury, Waldeck "returned to his roofing job without restrictions." ALJ Roark further found, based on Dr. Guarnaschelli's opinion, that Waldeck's "current low back pain and need for any additional treatment [were] attributable to his May 29, 2007 work incident." Moreover, on page fifteen of ALJ Hays' opinion, he found

that Waldeck's permanent disability was the product of the May 29, 2007, work injury alone. In so finding, ALJ Hays relied on Dr. Bilkey. Dr. Bilkey imposed restrictions of light duty work with twenty pound maximum lifting, no repetitive, bending, and no climbing, which he indicated were "due to the May 29, 2007, work injury."

The Board has the responsibility of insuring that the ALJ has acted according to law. KRS 342.285(2)(a). The ALJ has the duty to include findings of fact with respect to awards and decisions. KRS 342.275(2); *Arnold v. Toyota Motor Manufacturing*, 375 S.W.3d 56, 61 (Ky.2012). Our Supreme Court has expressly held that the Board has the authority, *sua sponte*, to correct awards that are erroneous as a matter of law. *Whittaker v. Reeder*, 30 S.W.3d 138, 143 (Ky.2000).

In this instance, however, we believe that the Board erred in remanding the claim to the ALJ as the ALJ made a factual finding that Waldeck's current occupational disability is entirely attributable to the 2007 injury. Substantial evidence of record coupled with ALJ Roark's prior, binding factual determinations support this finding. Accordingly, ALJ Hays' award was not erroneous as a matter of law. Therefore, we must reverse this portion of the Board's opinion.

IV. Conclusion

For the reasons set forth above, we affirm in part, reverse in part,
vacate in part, and remand this claim to the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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