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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-001968-WC

WEBSTER COUNTY COAL, LLC
(DOTIKI MINE)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-99663

MARSHALL D. PARKER, SR.

APPELLEE

AND

NO. 2013-CA-001978-WC

MARSHALL PARKER

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-99663

WEBSTER COUNTY COAL CO., LLC
(DOTIKI MINE); HON. STEVEN G. BOLTON,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, STUMBO AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Webster County Coal, LLC (Dotiki Mine) appeals and Marshall Parker cross-appeals from an opinion and order of the Workers' Compensation Board affirming a decision of the Administrative Law Judge (ALJ), awarding medical benefits to Parker¹ but denying him permanent partial disability benefits. Webster County Coal argues the evidence compelled a finding that Parker's low back disability was not caused by a work-related accident. Parker argues KRS 342.730(4) is unconstitutional by mandating he is ineligible for permanent benefits because he was entitled to collect social security benefits.

Parker began working for Webster County Coal as an underground miner in 1974. On September 8, 2008, Parker, age sixty-eight, suffered a work-related injury when he slipped and fell on mud after crossing over a belt he repaired. He reported the incident and injury to his back and right knee.

Parker continued to work without restriction until November 30, 2008. He ceased work to have knee surgery to repair a torn right lateral meniscus on December 2, 2008, and Webster County Coal paid temporary total disability benefits through December 21, 2010.

¹ This decision included awarding payment for prior treatment to his medical providers Multicare Madisonville, Dr. Richard Hozknecht, Coop Health Services, Deaconess Hospital, David D. Eggers, M.D., Neurological Consultants, James M. Donley, M.D., Center for Orthopedics, Wayne C. Cole, D.O. and Kelly L. Cole, D.O.

Webster County Coal agreed Parker's knee injury was compensable, but disagreed that his back injury was compensable. Webster County Coal refused to pay for Parker's spinal fusion surgery and other medical expenses relating to his back problems. It argued Parker could not establish causation because Parker's back problems were the result of the normal aging process as shown by his history of low back pain and his impairment was caused by an active, preexisting condition.

Parker filed a workers' compensation claim seeking medical benefits and permanent disability benefits for his knee and back conditions. The ALJ considered testimonial and written evidence from Parker, Dr. Wayne C. Cole, Dr. Russell L. Travis, Dr. Bart J. Goldman, Tri-State Orthopaedic Surgeons, Inc., Dr. William M. Gavigan and Dr. David Eggers in determining Parker suffered a work injury that caused his back condition by activating a dormant preexisting condition.

Parker testified he was working seventy to eighty hours a week, was not experiencing any low back pain immediately prior to the accident and had no plans to retire prior to being injured. Parker testified he had minor previous back problems including straining his back "a little bit" and pain that was "just sore and kind of hurt like a muscle." He went to company doctors for these and other injuries and never missed any time for any back injuries. One time he received an epidural due to pain, but was never placed on light duty or given any restrictions due to his back. While he had some ongoing back strain due to his age, he had not

seen a doctor about his back in the two years before the injury and was not on prescription medicine for pain.

Parker testified that when he fell, he experienced a jerk to his low back, right hip and right leg. He experienced severe pain in his back which became worse, radiating from the lower part of his back and right hip down the side of his leg to his ankle and toes.

The medical evidence showed Parker had a history of back injuries and a degenerative back condition for which he had previously sought treatment as early as 2001. He had a work-related back injury on March 3, 2003, and received treatment from Tri-State Orthopaedic Surgeons, but he was pain free in June 2005. Parker returned complaining of low back pain commencing on April 1, 2006, due to a work injury, but returned to work without restrictions on June 26, 2006.

The medical records from Tri-State Orthopaedic Surgeons showed Parker was asymptomatic for back problems after June 26, 2006. There were no subsequent records from any providers for low back problems over the next two years, until the work-related incident of September 8, 2008.

Based on this history and the current status of Parker's back, either when they treated him or reviewed his medical records, Drs. Gavigan, Eggers and Travis agreed Parker suffered a work injury to his back on September 8, 2008, but disagreed as to whether the work injury itself caused Parker's disabling back condition. Dr. Gavigan diagnosed Parker with a severe degenerative disease of the lumbar spine, which he opined preexisted and was active prior to the work injury,

and a lumbar strain on September 8, 2008. Dr. Eggers opined Parker's work injury was the cause of Parker's back condition but did not further explain the causal relationship. Dr. Travis initially opined Parker's back condition was work-related, but upon further review determined the degenerative changes he saw in Parker's back preexisted the work injury.

The ALJ found Parker suffered a work-related injury to his low back on September 8, 2008, based on the medical records and opinions of Drs. Gavigan, Eggers and Travis, and Parker's testimony. The ALJ found Parker had a preexisting degenerative disease condition to his back at the time of his work-related injury, based upon the medical opinions of Dr. Travis and Dr. Gavigan, but that it was not active or symptomatic for at least two years prior to the date of the injury based upon the Tri-State Orthopaedic Surgeons' records and Parker's testimony.

The ALJ reasoned as follows:

Dr. Eggers[']s opinion is that the back injury is work-related to the 9/8/2008 traumatic event, but he failed to properly analyze his opinion as to causation[.]

While the physicians of record in this proceeding are eminently qualified to opine on the etiology of a given medical condition, they are not qualified to opine on the legal effect. Here, the evidence is uncontested that [Parker] worked for a little more than two (2) years immediately prior to the date of the injury unhindered by the condition of his lumbar spine. It was only after the work-related accident of September 8, 2008 that his complaints of back pain and related symptoms led to the spinal fusion surgery[.]

...

Here, [Webster County Coal] does not dispute [Parker's] attendance record up to and including the date of the accident. A worker with an active disability does not work 70-80 hour weeks doing the type of work performed by [Parker]. Thus, while [Parker's] back condition may have been impairment ratable just prior to the date of injury, it was not actively symptomatic by both his own testimony and [Webster County Coal's] records.

The ALJ determined Parker had received the maximum temporary total disability benefits he was entitled to under KRS 342.730(4). The ALJ determined the outstanding medical bills associated with Parker's low back injury were directly related to its cure and relief, reasonable and necessary, and should be paid by Webster County Coal. The ALJ determined Parker was entitled to future medical benefits for the cure and relief of the injury to his low back.

Webster County Coal filed a petition for reconsideration on the causation of Parker's low back condition. The ALJ denied the petition.

Webster County Coal appealed, arguing the ALJ improperly determined causation solely based on Parker's lay opinion where the ALJ had determined Dr. Eggers's opinion lacked supporting analysis or explanation. Parker filed a cross-appeal, arguing KRS 342.730(4) is unconstitutional for violating his rights to equal protection and due process.

The Board affirmed the ALJ's decision,² determining it was supported by substantial evidence. It explained that although the ALJ pointed out

² The Board also *sua sponte* vacated an order issued after the appeal was filed and remanded for a determination of outstanding medical disputes, including whether treatment for Parker's cervical spine was compensable, and whether additional parties should be joined.

deficiencies in Dr. Eggers's report, the ALJ relied on his opinion on causation.

While the Board noted the ALJ could have more clearly explained the basis for his determination that Parker's low back condition was caused by the work injury, it determined the ALJ's findings were sufficient on this matter. The Board also determined it was without authority to review the constitutionality of a statute and previous Kentucky Supreme Court opinions established KRS 342.730(4) was constitutional. We affirm on both issues.

The ALJ, as the exclusive finder of fact pursuant to KRS 342.285(1), has the "sole discretion to determine the quality, character, and substance of evidence." *James T. English Trucking v. Beeler*, 375 S.W.3d 67, 69-70 (Ky. 2012). This discretion includes "decid[ing] whom and what to believe" and gives the ALJ the freedom to "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." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009). The ALJ may believe some evidence and disbelieve other evidence and may adopt any reasonable inference from the evidence even if a contrary inference could also be made. *Carnes v. Parton Bros. Contracting, Inc.*, 171 S.W.3d 60, 66 (Ky.App. 2005).

Where a workers' compensation claimant is successful before the ALJ, the Board must affirm if there is substantial evidence to support the ALJ's conclusions. *Id.* at 68. On appeal, our standard of review of a decision of the Board "is limited to determining whether the decision was erroneous as a matter of law." *Ira A.*

Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000). We must affirm an ALJ’s factual findings so long as they are supported by substantial evidence. *Id.* “The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.” *Id.* We will only correct the Board if it overlooked or misconstrued controlling statutes or precedent, committed a flagrant error in assessing the evidence which caused gross injustice or substituted its judgment for that of the ALJ concerning factual findings. *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky.App. 2008); *AK Steel Corp. v. Childers*, 167 S.W.3d 672, 675 (Ky.App. 2005).

Webster County Coal argues the ALJ erred as a matter of law in finding Parker’s low back condition to be compensable because (1) there was no competent medical proof of causation where the ALJ discredited Dr. Eggers and (2) Dr. Eggers’s opinion was deficient where he had no prior knowledge of Parker’s previous history of low back pain.

Eligibility for workers’ compensation benefits requires the establishment of a compensable “injury” defined as follows:

[A]ny work-related traumatic event or series of 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 evinced by objective medical findings. “Injury” does not include the effects of the natural aging process[.]

KRS 342.0011(1). “[O]nly those harmful changes which are proximately caused by work-related trauma are compensable[.]” *McNutt Constr./First Gen. Servs. v.*

Scott, 40 S.W.3d 854, 859 (Ky. 2001). Therefore, if the harmful change is caused by an active disabling preexisting condition, it is not compensable. *Id.*

Parker, as the claimant, bears the burden of proving every element of his workers' compensation claim, including causation. *Williams v. White Castle Sys., Inc.*, 173 S.W.3d 231, 235 (Ky. 2005). Although there are situations in which lay testimony is sufficient to establish causation, typically, "the causal connection between an accident and an injury must be shown by medical testimony[.]" *Jarboe v. Harting*, 397 S.W.2d 775, 778 (Ky. 1965). See *Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc.*, 618 S.W.2d 184, 186-187 (Ky.App. 1981). Medical causation can be proven through expert medical testimony establishing reasonable medical probability for causation. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004). "Where there is conflicting medical testimony concerning the cause of a harmful change, it is for the ALJ to weigh the evidence and decide which opinion is the most credible and reliable." *Id.* In establishing whether Parker has satisfied his burden as to causation, his own testimony is competent and of some probative value, especially when used in conjunction with consistent medical evidence. See *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 209-210 (Ky. 2003); *Caudill v. Maloney's Disc. Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

The weight to be given to an expert's medical opinion is within the discretion of the ALJ. *GSI Commerce v. Thompson*, 409 S.W.3d 361, 365 (Ky.App. 2012). A physician's opinion on causation is not rendered unreliable on

the basis that other experts disagree. *City of Owensboro v. Adams*, 136 S.W.3d 446, 452 (Ky. 2004). An ALJ can properly rely on a physician's opinion as to causation, even where that opinion may be based on an incomplete history where there is nothing to indicate that a complainant attempted to conceal similar past injuries from any medical experts, and the physician's opinion is supported by other credible evidence. *GSI Commerce*, 409 S.W.3d at 365. We must affirm ALJ's finding on causation if supported by a physician's opinion as so long as the countervailing evidence was not so overwhelming as to render the decision unreasonable. *Brown-Forman Corp.*, 127 S.W.3d at 622.

We agree with the Board that the ALJ's finding, that Parker's work injury was the proximate cause of a harmful change to Parker's back, was supported by substantial evidence. Drs. Travis, Gavigan and Eggers opined Parker suffered a work-related injury. However, they disagreed on whether this injury, or preexisting active injury, caused his back problems. Drs. Travis and Gavigan opined an active preexisting injury caused Parker's back impairment and Dr. Eggers opined it was caused by the work injury.

Parker provided uncontested testimony about the circumstances of his fall at work, the resolution of previous injuries and that the work injury caused a different and more intense pain, and resulted in impairment that his previous injuries had not. His testimony that he did not have prior impairment was supported by the Tri-State Orthopaedic Surgeons' records showing two years without any back complaints. While Dr. Eggers's report did not provide an

exhaustive review of Parker's medical history, there is no basis to conclude he did not know about Parker's prior history of low back pain, that Parker misrepresented his history or Dr. Eggers's opinion as to medical causation was unreliable. When Dr. Eggers's opinion was combined with Parker's testimony as to causation and the relevant medical records, it was sufficient to support the ALJ's finding that Parker's work injury caused his back condition. Accordingly, we affirm on the issue of causation.

In his cross-appeal, Parker challenges the failure of the ALJ and Board to award him permanent partial disability benefits arguing KRS 342.730(4) violates his right to due process and equal protection as a member of the class of elderly workers.

KRS 342.730(4) provides as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee qualifies for normal old-age Social Security retirement benefits under the United States Social Security Act, 42 U.S.C. secs. 301 to 1397f, or two (2) years after the employee's injury or last exposure, whichever last occurs.

In interpreting the constitutionality of this provision, the Kentucky Supreme Court has previously upheld it, reasoning as follows:

Although KRS 342.730(4) discriminates against workers who are eligible for both workers' compensation disability benefits and normal social security retirement benefits, it advances a legitimate state interest in coordinating forms of income replacement benefits and avoiding a duplication of benefits. Although it discriminates against partially disabled workers who are eligible for social security retirement benefits, it

advances a legitimate state interest in preventing workers who are eligible for old-age social security benefits and only partially disabled from ultimately receiving greater workers' compensation benefits than similarly-situated workers who are totally disabled. We conclude, therefore, that KRS 342.730(4) is rationally related to a legitimate state interest and that it is constitutional when applied to either total or partial disability awards.

Keith v. Hopple Plastics, 178 S.W.3d 463, 468 (Ky. 2005). We are bound to follow Kentucky Supreme Court precedents and must affirm. SCR 1.030(8)(a).

Accordingly, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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