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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000798-WC

JEFF PACE AND
HONORABLE JOHNNIE L. TURNER — APPELLANTS

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-69052

KENTUCKY DARBY COAL CO., INC.;
HONORABLE GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Jeff Pace appeals from the April 17, 2014 opinion of the Workers' Compensation Board ("Board") affirming the January 6, 2014 Order on Petition for Reconsideration rendered by the Administrative Law Judge ("ALJ").

The sole issue on appeal is whether the Board erred in affirming the ALJ's finding that Pace reached maximum medical improvement ("MMI") by January 2006. After careful consideration, we affirm.

Pace was injured on November 9, 2001, while operating a continuous miner machine when a rock fell on him. He suffered multiple fractures of his pelvis and back, as well as other internal injuries. His employer, Kentucky Darby Coal Co., Inc., paid temporary total disability ("TTD") benefits from November 15, 2001, through May 9, 2011.

Initially, Kentucky Darby Coal Co., Inc. (hereinafter "Darby Coal") filed an application for an adjustment of injury claim on August 10, 2011. Darby Coal did not dispute that Pace was injured while working for them. However, it maintained that Pace was not totally disabled during the entire time period that it had been providing TTD benefits. In fact, he had been working off and on from 2006 through 2011, during which time Darby Coal was paying TTD benefits.

The ALJ entered an opinion and order on June 24, 2013, holding that Pace was entitled to TTD benefits from November 10, 2001, up to January 1, 2006. However, the ALJ found that Darby Coal had overpaid him TTD benefits after that date because he had achieved MMI by January 2006. In making this determination, the ALJ relied on the medical report of Dr. Martin Fritzhand, who filed his report at the behest of Pace. Further, the ALJ stated in the order that he was "also persuaded by an application [Pace] submitted to Black Mountain Coal in

which [he] indicated he had returned to work from 2006 through 2010, which is consistent with Dr. Fritzhand's determination of MMI."

Besides determining that Pace had reached MMI by January 2006, and consequently been overpaid TTD benefits, the ALJ, based on Pace's inability to return to his former job duties, awarded him partial permanent disability (PPD) benefits to run 520 weeks from January 1, 2006. Further, the ALJ stated in the order that Darby Coal was entitled to take a credit against the past-due PPD benefits from the overpayment of TTD benefits.

Pace filed a petition for reconsideration challenging the ALJ's finding that he had reached MMI as of January 2006. He suggested that the earliest he could have reached MMI is 2009 when he returned to work. Pace also sought to introduce records from the Social Security Administration indicating he had no earnings from 2002 through 2008.

In the July 29, 2013 order on petition for reconsideration, the ALJ reopened proof on the limited issue of whether Pace was employed in 2006. Pace appealed the Order. The Board dismissed the appeal as interlocutory, and remanded the matter to the ALJ. On remand, the ALJ issued a second order on petition for reconsideration. In the order, entered on January 6, 2014, the ALJ determined Pace had not returned to work in 2006. However, the ALJ found nothing in Pace's additional evidence that changed the prior finding that Pace had reached MMI as of January, 2006. Therefore, the ALJ concluded that Darby Coal

remained entitled to a credit against outstanding PPD benefits for TTD benefits paid after January 1, 2006.

Pace appealed this order to the Board, which affirmed the ALJ. Pace now appeals the Board's decision. The sole issue on appeal is whether the ALJ erred in determining that Pace reached MMI as of January 2006.

On appeal, Pace contends that substantial evidence did not exist to support the ALJ's decision that he had reached MMI by January 2006. Pace challenges the ALJ's conclusion with several arguments. He first attacks the validity of Dr. Fritzhand's report. Although Pace acknowledges Dr. Fritzhand's opinion about his MMI, he contends the doctor's opinion is not based on substantial evidence because he did not explain how he arrived at that conclusion.

In making this argument, Pace ignores the report of Dr. Fritzhand who performed an independent medical examination ("IME") on October 14, 2011, at Darby Coal's request. Dr. Fritzhand reviewed extensive medical records, reports from Investigations Unlimited, and notes from BRI Case Management. Additionally, Dr. Fritzhand was provided diagnostic studies and performed a physical examination. Dr. Fritzhand opined Pace reached MMI by January 2006. Although his report included a notation that Pace had returned to work as a miner, there is no indication in the report that the doctor relied on this fact in formulating his opinion concerning Pace's date of MMI.

Pace further believes Darby Coal created a false impression that he returned to work in 2006. Notwithstanding that on a 2009 job application he

provided his last date of work as 2006, Pace alleges that he put this date on the application because he was told to do so. According to Pace, any work he performed in 2006 was merely "make work." As such, he argues Darby Coal should only receive credit for the weeks he was paid wages. Finally, Pace proffers that since he did not return to employment until sometime in 2009 that is the appropriate date for ascertaining his MMI.

There are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. Kentucky Revised Statutes 342.0011(11)(a); *Double L Constr., Inc. v. Mitchell*, 182 S.W3d 509, 513-4 (Ky. 2005). Both conditions must be satisfied. In the present case, Pace argues that he was entitled to TTD until he returned to employment. However, this argument ignores the other condition; that is, he must not have reached MMI. Here, the ALJ decided that he had reached MMI as of January 2006, which is not dependent on when he returned to employment. Thus, whether Pace worked between 2006 and 2009 is irrelevant to the duration of the TTD benefits. Furthermore, Dr. Fritzhand's opinion constitutes substantial evidence that Pace reached MMI by January 1, 2006.

Hence, after carefully examining the record and the law, we hold that there is no basis for disturbing the Board's opinion. The Board correctly upheld the

determination of the ALJ that Pace achieved MMI as of January 2006. Where the party who bears the burden of proof is successful before the ALJ, the question on appeal is whether the decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). Substantial evidence is defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky. 1971).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. *Square D. Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge the weight to be accorded to and the inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). And finally, mere evidence contrary to the ALJs decision is not adequate to require reversal on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence to support his decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Here, the ALJ had substantial evidence to support his decision that Pace reached MMI as of January 2006.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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