

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000635-WC

MCCOY ELKHORN COAL CORP.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-00496

DONALD LOWE;
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: JONES, D. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: McCoy Elkhorn Coal Corporation appeals from an opinion and order of the Workers' Compensation Board affirming in part and remanding a decision of the Administrative Law Judge (ALJ) awarding permanent

total disability benefits and medical benefits to Donald Lowe for cumulative trauma injuries to his neck, back, bilateral shoulders, upper extremities, and bilateral hips. The Board affirmed the ALJ's findings that Lowe gave timely notice of Lowe's spine injury and suffered an injury as defined by the Workers' Compensation Act. However, the Board remanded the case to the ALJ to assign a specific impairment rating to each cumulative trauma injury suffered by Lowe. The issues presented are whether the Board erred in affirming the ALJ's conclusion that notice was timely and the claim was filed within the applicable statute of limitations. We conclude there was no error and affirm.

Lowe, born on August 1, 1961, is a high school graduate and certified electrician. From 1979 until September 2013, he was employed in the mining industry. Although ownership of the mine changed numerous times, he remained employed at the same mine. In Lowe's early years at the mine, he performed manual labor working in coal seams twenty-eight to forty-two inches high and was required to crawl or duck walk. In the recent past, he worked as a safety tech and for the last nine months of his employment, Lowe worked as a belt examiner, which required that he inspect and service the belts going into the mine. He testified that in the early 1980s, he had a prior workers' compensation claim following a back injury but returned to work without restrictions.

On September 13, 2013, Lowe was laid off work. On February 25, 2014, Lowe provided written notice of his injury to McCoy and on February 28,

2014, he filed a Form 101 alleging cumulative trauma injuries to his neck, back, hips, left and right upper extremities, and left and right lower extremities.

The medical records submitted with Lowe's Form 101 were introduced as evidence, including a medical statement by Dr. Dale Williams, a chiropractor, stating Lowe was diagnosed with cerviclagia with widespread moderate/severe degeneration throughout the cervical spine. He also diagnosed shoulder and mid back pain, lumbalgia with moderate degeneration throughout the lumbar spine, and radiculitis in both lower extremities. Dr. Williams opined Lowe's conditions are consistent with his work of 34 years as a miner.

McCoy introduced the medical records of Dr. Paul Maynard from 2002 through 2013. In 2002, Lowe complained of severe back pain and was prescribed medication. He made similar complaints on October 8, 2013. Lowe again saw Dr. Maynard on October 29, 2013 and November 26, 2014, and reported his back pain had worsened. Although Lowe testified Dr. Maynard restricted him from heavy lifting during his last nine months of employment, there is no indication of such restriction in the medical records.

After his layoff, Lowe saw Dr. Sujata Gutti, a neurologist. A nerve conduction study was performed on November 21, 2013. Dr. Gutti concluded the findings were consistent with bilateral tibial neuritis, with no evidence of radiculopathy. A report following a lumbar MRI performed on December 4, 2013, indicated Lowe's disc spaces are normal in height with slight desiccation of the

disk material between L3 and S1 with no herniated disks. The spinal canal was normal.

Dr. Arthur Hughes performed an independent medical evaluation (IME) on March 27, 2014. He performed a physical examination and reviewed Lowe's medical records. Dr. Hughes diagnosed neck pain with radicular symptoms, bilateral ulnar neuropathy, right shoulder pain with restricted range of motion, lower back pain with radicular symptoms, and bilateral hip pain. He attributed Lowe's physical complaints to his work. He assessed a 37% whole person impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (AMA Guides). Dr. Hughes opined Lowe's physical restrictions prevent him from returning to work in the mine and that his disability was the result of that work with no pre-existing active disability.

On May 16, 2014, Dr. Daniel Primm performed an IME and conducted a physical examination and reviewed Lowe's medical records. He diagnosed chronic complaints of neck and back pain with no evidence of significant pathology. He interpreted the MRI scan as normal for Lowe's age. He found no harmful trauma to Lowe's neck, back, or shoulders and did not assess an impairment rating pursuant to the AMA Guides.

McCoy's argument on appeal focuses on Lowe's testimony concerning his treatment with Dr. Baretta Casey. He testified as follows:

Q: When were you first told that you had any type of spine related problems related to your work?

A: It's been probably ten years or better.

Q: Who told you?

A: They told me that I had arthritis, that it was probably due to work exposure.

Q: Did you tell your employer?

A: No.

Q: Who was the doctor?

A: Baretta Casey

Regarding his current back and hip pain, Lowe testified that it is more prominent on the right side and worsens with activity. He has pain, burning, numbness and tingling in his hips and becomes worse upon standing, sitting or walking for prolonged periods. Lowe added that his neck pain extends to his shoulder and arms and is constant. He testified that he could not return to his prior duties in the mines.

The ALJ was persuaded by Dr. Hughes's opinion and found Lowe suffered work-related injuries as defined by Kentucky Revised Statutes (KRS) Chapter 342 and adopted Dr. Hughes's 37% impairment rating resulting from cumulative trauma to the neck, bilateral shoulders, upper extremities, back, and bilateral hips. The ALJ determined Lowe is permanently totally disabled.

McCoy filed a petition for reconsideration arguing that based on Lowe's testimony of his treatment with Dr. Casey for back pain over ten years ago, Lowe failed to provide timely notice of his work-related injury and the claim was barred by the statute of limitations.

The ALJ determined notice was timely given and the claim was timely filed. The ALJ found there was no medical evidence to establish that he was diagnosed by Dr. Casey with a harmful change to the human organism to trigger the notice provision and the statute of limitations. McCoy appealed.

The Board affirmed the ALJ regarding the notice and statute of limitations. It remanded to the ALJ to address each alleged injury and its impairment. McCoy appealed to this Court arguing Lowe's testimony regarding Dr. Casey's diagnosis was sufficient to establish "manifestation" of his cumulative trauma injuries for purposes of notice and the statute of limitations.

We begin with the well accepted standard of review. As pointed out in *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009), different standards apply depending on whether the question is one involving law or one involving a question of fact. Questions involving issues of law or an ALJ's interpretation and application of the law to the facts are reviewed *de novo*. Questions of fact are reviewed under a stricter standard with deference to the fact finder. *Id.*

Pursuant to KRS 342.285, the ALJ is the finder of fact and "has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence." *Id.* Mere evidence contrary to the ALJ's decision is not adequate to require reversal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). The ALJ's decision must be affirmed if supported by substantial evidence. *Special Fund v. Francis*, 708

S.W.2d 641, 643 (Ky. 1986). “In short, appellate courts may not second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. Discretion is abused only when an ALJ’s decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *Bowerman*, 297 S.W.3d at 866. (citation omitted). The issue presented regarding when Lowe’s injury became manifest for the notice and statute of limitations purposes is a question of fact. *See Howell v. Shelcha Coal Co.*, 834 S.W.2d 693, 695 (Ky.App. 1992).

The notice and limitations periods of the Act are contained in KRS 342.185(1):

Except as provided in subsection (2) of this section, no proceeding under this chapter for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof and unless an application for adjustment of claim for compensation with respect to the injury shall have been made with the department within two (2) years after the date of the accident, or in case of death, within two (2) years after the death, whether or not a claim has been made by the employee himself or herself for compensation. The notice and the claim may be given or made by any person claiming to be entitled to compensation or by someone in his or her behalf. If payments of income benefits have been made, the filing of an application for adjustment of claim with the department within the period shall not be required, but shall become requisite within two (2) years following the suspension of payments or within two (2) years of the date of the accident, whichever is later.

In cases of cumulative trauma, when the notice and limitation periods are triggered can be difficult to determine. As its name suggests, there is no single

event which triggers the provisions because the injury occurs over time and is progressive in nature. In such cases, a discovery rule is applicable: “[T]he date for giving notice and the date for clocking a statute of limitations begins when the disabling reality of the injuries becomes manifest.” *Randall Co./Randall Div. of Textron v. Pendland*, 770 S.W.2d 687, 688 (Ky.App. 1988). A cumulative trauma injury manifests when “a worker discovers that a physically disabling injury has been sustained [and] knows it is caused by work[.]” *Alcan Foil Products v. Huff*, 2 S.W.3d 96, 101 (Ky. 1999).

In *Hill v. Sextet Min. Corp.*, 65 S.W.3d 503 (Ky. 2001), the Court held that in cumulative trauma cases, the notice and limitation periods are triggered when the worker is informed by a physician that he has an injury and that it is work-related. The triggering event is generally when a “physician informs the worker that the cause of the condition is work-related.” *General Elec. Co. v. Turpen*, 245 S.W.3d 781, 784 (Ky.App. 2006).

The ALJ concluded Lowe’s testimony that ten years prior to giving notice and filing his claim he was told by Dr. Casey he had arthritis that was “probably” caused by his mine work was insufficient to establish that the disabling reality of his condition became manifest. We conclude the ALJ’s decision is based on substantial evidence.

As noted by the Board, no medical records from Dr. Casey were introduced and no physician who treated Lowe diagnosed arthritis. The only testimony was Lowe’s general recollection that he was told he had arthritis that

was probably caused by his work. Moreover, Lowe's current condition, as testified to by Dr. Hughes, is distinctly different from arthritis, a common condition after years of performing manual labor. Finally, after Lowe was told he had arthritis probably related to his work, he was not restricted from work and continued to work for the next ten years.

We conclude the Board did not err in affirming the ALJ. There is substantial evidence to support the ALJ's decision that Lowe gave timely notice to McCoy and timely filed his claim.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Terri Smith Walters
Rachel Wagner Kennedy
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Mc Kinnley Morgan
London, Kentucky