

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-000561

JAMES A. WILKERSON

APPELLANT

APPEAL FROM DEPARTMENT OF WORKERS' CLAIMS
v. HONORABLE REBEKKAH B. RECHTER, JUDGE
ACTION NO. WC-12-85251

KIMBALL INTERNATIONAL, INC.;
DR. DAVID P. ROUBEN;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** **

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

JONES, JUDGE: The Appellant, James A. Wilkerson, appeals from the Workers' Compensation Board's ("Board") decision affirming the Administrative Law Judge's ("ALJ") October 16, 2017, Opinion, Order, & Award ("Opinion")

awarding him temporary total disability (“TTD”), permanent partial disability (“PPD”), and medical benefits for a back strain injury he sustained while working for the Appellee, Kimball International Inc. (“Kimball”). Wilkerson argues that the Board erred when it affirmed the ALJ’s determination that his knee injury and two low back surgeries were not causally related to his employment, and therefore, not compensable. Having reviewed the record in conjunction with all applicable legal authority, we AFFIRM.

I. BACKGROUND

Wilkerson was employed by Kimball from 1989 through 2002, and again from 2005 through 2015. Wilkerson held various positions at Kimball including, repairman, finisher, and line loader. On April 4, 2012, while working as a line loader, Wilkerson sustained an alleged work-related injury. Wilkerson described the injury as a “pop” in his low back, with a burning sensation in his leg. Wilkerson immediately reported the injury to Kimball.

According to the record, Wilkerson first treated with Dr. Robert Byrd on April 16, 2012. Wilkerson reported a lifting injury ten days prior. His chief complaint was “low back pain” that radiated into his left leg. Dr. Byrd diagnosed “Lumbar Spasm” and indicated that Wilkerson could return to work on April 19, 2012. Wilkerson returned to Dr. Byrd’s office April 26, 2012, for a follow-up

visit. Wilkerson again reported a chief complaint of “low back pain” that radiated into his left leg. Dr. Byrd diagnosed Wilkerson with acute low back pain.

On May 29, 2012, at the direction of Dr. Byrd, Wilkerson underwent an MRI. That MRI revealed mild disc bulging at L3-4, no evidence of nerve root compression, and, when compared to Wilkerson’s 2006 MRI, there was no additional prominence in the disc bulge. Wilkerson continued to treat with Dr. Byrd through July 2012. Dr. Byrd eventually referred Wilkerson to Dr. Eric Goebel, a neurosurgeon, for an evaluation of Wilkerson’s low back complaints. Wilkerson never made any complaints regarding left knee pain to Dr. Byrd.

Wilkerson saw Dr. Goebel on July 3, 2012. At that time, Wilkerson complained of low back pain radiating in to his left leg. He told Dr. Goebel that his pain began approximately three months earlier. He indicated that that he was lifting a cabinet and felt a “pop” in his low back. Dr. Goebel’s records indicate Wilkerson’s chief complaint was low back pain. Dr. Goebel also noted that Wilkerson’s “lower extremity symptoms are improving with physical therapy as well as some of the back pain.” Dr. Goebel recommended that Wilkerson remain off work for three more weeks and continue with physical therapy. Dr. Goebel indicated that there was no basis for low back surgery for Wilkerson’s alleged injury.

Wilkerson testified that he continued with his physical therapy regimen and while at home, on July 12, 2012, he experienced a distinct pop in his left knee while performing squats at home as part of his physical therapy regimen. Wilkerson sought treatment at Owensboro Health Regional Hospital.

On July 18, 2012, Wilkerson sought treatment from Dr. Charles Milem, an orthopedic physician. Wilkerson was initially treated by an APRN¹ in Dr. Milem's office. Wilkerson reported that his left knee popped and gave out when "he was getting up from doing his home exercise program for his back off of the couch" Wilkerson reported that he had been off work since April 4, 2012, for a herniated disc which was being treated with physical therapy. Wilkerson was diagnosed with "Left knee pain, rule out torn meniscus" and an MRI of Wilkerson's left knee was ordered.

On July 31, 2012, Wilkerson followed-up with Dr. Milem. Dr. Milem noted Wilkerson's history of knee pain. Dr. Milem's records indicate that Wilkerson reported injuring his knee in April 2012 while carrying furniture. The records indicate that Wilkerson also said he was having "problems" around the same time, and that he described that his back pain radiated into his calf and ankle. Dr. Milem noted that Wilkerson's back pain had improved with therapy, but Wilkerson was still having pain in the calf on the medial side, as well as down to

¹ Advanced Practice Registered Nurse

almost his ankle. After reviewing Wilkerson's left knee MRI, Dr. Milem diagnosed a medial meniscal tear. He recommended left knee surgery. Dr. Milem performed a partial medial meniscectomy on Wilkerson's left knee on August 16, 2012. Wilkerson continued to follow-up with Dr. Milem. Additional records from Dr. Milem's office indicate that Wilkerson continued to complain of worsening left knee pain and lumbar symptoms.

On January 22, 2013, Wilkerson sought treatment from Dr. Mladen Djurasovic. Dr. Djurasovic reviewed Wilkerson's prior back MRI report and found moderate degenerative spondylosis but no significant neural compressive lesions. Dr. Djurasovic ordered an EMG study, which revealed no evidence of lumbosacral radiculopathy or generalized peripheral neuropathy in either of Wilkerson's legs. Dr. Djurasovic did not recommend surgery for Wilkerson. He did, however, refer Wilkerson to Dr. Louis Williams for a nonoperative treatment program. Wilkerson continued to treat with Dr. Djurasovic through February of 2014.

On May 13, 2014, Wilkerson treated with Dr. David Rouben. Wilkerson reported persistent low back pain since the April 2012 work incident. Dr. Rouben diagnosed Wilkerson with disc disease of the L5-S1 segment. Dr. Rouben performed a decompression and fusion low back surgery on

March 25, 2015. According to Wilkerson, the surgery did not provide any pain relief; to the contrary, Wilkerson testified that his back pain was actually worse after Dr. Rouben's surgery.

Wilkerson eventually sought treatment from Dr. John Johnson. He first saw Dr. Johnson on December 15, 2015. Dr. Johnson performed a revision of the fusion surgery on Wilkerson's low-back on January 17, 2016. Dr. Johnson, who later testified by deposition in this claim, was questioned about the Dr. Rouben's surgery. Dr. Johnson testified that he could not say that Dr. Rouben's surgery was reasonable, necessary, or work-related. Dr. Johnson testified that Wilkerson had no indications for fusion surgery and that he would not have performed surgery on Wilkerson. Dr. Johnson attributed Wilkerson's low back pathology to a degenerative condition.

On or about April 4, 2014, Wilkerson filed a Form 101 Application for Resolution of Injury Claim with the Department of Workers' Claims. In his Form 101, Wilkerson alleged that he injured his lumbar back and left leg while working for Kimball. He alleged that he sustained these injuries on or about April 4, 2012.

On August 5, 2014, Wilkerson underwent an independent medical evaluation ("IME") performed by Dr. Thomas Loeb. Dr. Loeb noted a history of longstanding mild multilevel degenerative disc disease with no cord or nerve root

compromise. Dr. Loeb diagnosed Wilkerson with a transient low back strain related to the work incident. Dr. Loeb assigned Wilkerson a 5% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”) for his low back. Dr. Loeb noted, however, that Wilkerson’s April 4, 2012, low back “strain or sprain would not have lasted more than 3-4 weeks. Any ongoing symptoms would be due to his long standing, preexisting, underlying multilevel degenerative disk disease, which has been active off an[d] on for many years.” Dr. Loeb concluded that the surgery performed by Dr. Rouben on Wilkerson’s back was non-work-related, unreasonable, and unnecessary.

Regarding Wilkerson’s left knee, Dr. Loeb noted Wilkerson’s history of being involved in a motorcycle accident in 2008, which resulted in a right medial meniscus tear. That tear was surgically repaired in 2008. Consequently, because of Wilkerson’s history and the lack of objective evidence relating Wilkerson’s left knee pathology to the work incident, Dr. Loeb opined Wilkerson’s left knee injury was unrelated to the April 4, 2012 work incident.

On December 9, 2015, Dr. Robert Jacob performed an IME of Wilkerson. Dr. Jacob opined the April 4, 2012, work incident caused only a low back strain with no permanent impairment. Dr. Jacob noted Wilkerson had none of the normal indications for fusion surgery and concluded that the procedure was

unnecessary. He further concluded that Wilkerson's left knee condition was not work-related, but rather, it was related to getting up off the couch.

On January 11, 2017, Dr. James Farage performed an IME of Wilkerson. Dr. Farage attributed Wilkerson's low back surgeries and left knee condition to the April 4, 2012 work incident. Under the AMA Guides, Dr. Farage assigned a 32% impairment rating consisting of a 23% impairment for the lumbar condition and 20% for the left knee. Dr. Farage apportioned 10% of the knee rating to pre-existing degenerative changes.

Following a Benefit Review Conference ("BRC") and final evidentiary hearing, the ALJ rendered his findings of fact and conclusions of law. Specifically, as related to this appeal, the ALJ concluded that Wilkerson's left knee problems were not work related. To this end, the ALJ noted that Wilkerson's initial treatment records following the April 4, 2012, work injury did not mention any complaints regarding left knee pain. The ALJ further noted that he did not find Wilkerson's testimony that he injured his left knee doing physical therapy credible. The ALJ noted that this explanation was contradicted by the statement in his initial treatment records that he injured his left knee when he attempted to rise from a couch. The ALJ also rejected Wilkerson's claim that the fusion surgery and related treatment were reasonably necessary to treat his lumbar strain. The ALJ based this conclusion on the fact that none of Wilkerson's other medical providers

recommended surgery, and Wilkerson had returned to work with no restrictions prior to having the surgery. Accordingly, the ALJ concluded that Wilkerson's only compensable impairment came from his condition as it existed before Dr. Rouben's surgery. Based on these findings and conclusions, the ALJ awarded Wilkerson a 5% impairment rating, based on the opinion of Dr. Loeb, for the April 4, 2012, work injury enhanced by the 2x multiplier pursuant to KRS 342.730(1)(c)(2). He also awarded Wilkerson TTD benefits for the initial period Wilkerson was off work following the lumbar strain. Wilkerson appealed to the Board. The Board affirmed the ALJ.

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).

Since the ALJ found against Wilkerson with respect to the compensability of the injuries at issue, his burden is a high one. To prevail, he must demonstrate that the evidence was “so overwhelming as to compel a finding in his favor.” *Mosely v. Ford Motor Co.*, 968 S.W.2d 675, 678 (Ky. App. 1998). “Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.” *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456, 461 (Ky. 2012). Compelling evidence is evidence that “no reasonable person could have failed to be persuaded by[.]” *Id.*

III. ANALYSIS

The sole issue before this Court is whether the evidence of record compelled a determination in Wilkerson’s favor. While Wilkerson points to evidence of record that supports the compensability of his claims, the evidence as a whole certainly did not compel a finding of compensability. As pointed out by the

ALJ, the issue with respect to the compensability of Wilkerson's left knee boiled down to the ALJ's assessment of Wilkerson's credibility. The ALJ determined that Wilkerson's testimony that he injured his left knee doing physical therapy exercises at home was not believable. The ALJ explained his reasons for making this determination. "The appellate tribunal may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility[.]" *Miller v. Go Hire Employment Development, Inc.*, 473 S.W.3d 621, 629 (Ky. App. 2015). Whether to believe Wilkerson's version of the facts, was a matter for the ALJ to decide. The evidence of record certainly did not compel the ALJ to accept Wilkerson's testimony with respect to how the injury occurred.

The evidence of record is also not compelling with respect to Wilkerson's back surgery and related impairment. The ALJ concluded that Wilkerson had been returned to work following his initial back injury without restrictions and several physicians opined that the work injury did not necessitate surgery. The ALJ cited the evidence he relied on to reach this conclusion, chiefly the opinion of Dr. Loeb. The evidence certainly did not compel a finding that the back surgery and related impairment were compensable.

Wilkerson's claim was hotly contested. The ALJ considered the evidence before him. In doing so, he made reasoned and articulated conclusions that are supported by the record. While Wilkerson has pointed to evidence that

supports the compensability of his claims, he has failed to demonstrate that the evidence compelled a decision in his favor. The Board was correct to affirm the ALJ.

IV. CONCLUSION

For the reasons set forth above, the March 9, 2018, decision of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

A.V. Conway, II
Hartford, Kentucky

BRIEF FOR APPELLEES:

Judson F. Devlin
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