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Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000433-WC

PINE BRANCH MINING, LLC — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-16-00609

LONNIE HENSLEY;
HONORABLE JANE RICE WILLIAMS, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** ** ** **

BEFORE: COMBS, DIXON, AND TAYLOR, JUDGES.

DIXON, JUDGE: Pine Branch Mining, LLC seeks review of an opinion of the Workers' Compensation Board affirming in part, reversing in part, and remanding

an Administrative Law Judge's award of permanent total disability benefits to Lonnie Hensley. After careful review, we affirm the Board's decision in part, vacate in part, and remand this matter to the ALJ for further proceedings.

Hensley was employed as a heavy equipment operator at surface coal mines for forty-three years. While working for Pine Branch, he operated an end loader, which subjected him to repetitive jarring and jolting as he maneuvered the bucket to chop the coal and scoop it from the seam. In 2014, he began experiencing low back pain and later developed radiating pain in his left leg. He ultimately left his job with Pine Branch on October 23, 2015, due to ongoing pain in his low back and leg. Hensley filed a claim for workers' compensation benefits alleging occupational hearing loss and a cumulative trauma injury to his lower back. Hensley's claim for occupational hearing loss was not disputed, and the parties agreed with a 17% impairment rating assessed by Brittany Brose, Au.D. In support of his cumulative trauma claim, Hensley submitted the medical records of Dr. Raichel and the IME report of Dr. Burke. Dr. Raichel's records showed an office visit in May 2015, wherein Hensley complained of worsening low back pain that was radiating down his left leg. Dr. Raichel assessed left-sided lumbar radiculopathy and referred Hensley for an MRI. Hensley saw Dr. Burke for an IME on March 24, 2016. Dr. Burke reviewed medical records, MRI films, and conducted a physical examination of Hensley. Dr. Burke noted the imaging

studies showed a loss of lumbar lordosis with degenerative changes at L4-5 and L5-S1 in the facet joints. Dr. Burke diagnosed Hensley with a repetitive loading strain injury to his lumbosacral spine with symptomatic left-side L5 radicular pain caused by repetitive vertical and side to side jolting during his work as a heavy equipment operator. Dr. Burke concluded Hensley lacked the physical capacity to return to that type of work and assessed 7% whole person impairment. Pine Branch submitted the IME report of Dr. Primm, who assessed no impairment and concluded Hensley's complaints were mild age-related changes not attributable to his work. Hensley testified he had an eighth-grade education and had always worked as a heavy equipment operator in coal mines. At Pine Branch, he worked a twelve-hour shift, five days per week, operating an end loader in the surface mining pit. Hensley described the operation of the end loader as rough, with constant jarring and jolting of his body.

In a January 2017 opinion and award, the ALJ found Hensley suffered a work-related cumulative trauma injury to his low back that rendered him permanently totally disabled. The ALJ awarded permanent total disability benefits beginning October 23, 2015 and continuing until Hensley qualified for old-age social security benefits. Pine Branch filed a petition for reconsideration requesting additional findings of fact regarding causation and cumulative trauma. The ALJ issued an order denying the petition and reiterating her previous findings that

Hensley's low back pain was the result of cumulative trauma sustained during his work as a heavy equipment operator.

Both Hensley and Pine Branch appealed the ALJ's decision to the Board. Pine Branch challenged the sufficiency of the evidence regarding causation/cumulative trauma, total disability, and onset date of the compensable disability period. In his appeal, Hensley challenged the constitutionality of Kentucky Revised Statutes (KRS) 342.730(4), which limited workers' compensation benefits based on eligibility for old-age social security. The Board rendered an opinion affirming in part, reversing in part, and remanding. As to Pine Branch's claims, the Board concluded substantial evidence supported the ALJ's finding that Hensley suffered a work-related cumulative trauma injury to his low back that resulted in permanent total disability. Regarding Hensley's argument, the Board determined reversal of the award was required due to the Kentucky Supreme Court's decision in *Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017), which held KRS 342.730(4), as amended in 1996, was unconstitutional on equal protection grounds. The Board remanded the claim to the ALJ for calculation of an award pursuant to the tier-down provision contained in the 1994 version of KRS 342.730(4) . This petition for review followed.

The findings of an ALJ in favor of an injured worker will not be disturbed on appeal where the decision is supported by substantial evidence. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). "The [ALJ], as the finder of fact, and not the reviewing court, has the authority to determine the quality, character and substance of the evidence presented . . . ." *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Furthermore, the ALJ is free "to believe part of the evidence and disbelieve other parts of the evidence whether it came 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). When this Court reviews a workers' compensation decision, our function is to correct the Board only where we believe "the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

As it did before the Board, Pine Branch challenges the sufficiency of the evidence supporting the ALJ's decision regarding causation/cumulative trauma, total disability, and onset date of the compensable disability period. Pine Branch opines that Dr. Burke's report was unreliable and emphasizes that Dr. Primm attributed Hensley's complaints to age-related changes rather than his work operating heavy equipment.

KRS 342.0011(1) defines a compensable injury as being "any work-related traumatic event or series of traumatic 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 evidenced by objective medical findings." The statute also defines "[o]bjective medical findings" as "information gained through direct observation and testing of the patient applying objective or standardized methods[.]" KRS 342.0011(33). In *Staples, Inc. v. Konvelski*, 56 S.W.3d 412, 415-16 (Ky. 2001), the Kentucky Supreme Court advised that, although the statute requires objective medical findings to prove a harmful change, such objective medical findings are not necessary to establish causation.

In this case, the ALJ weighed the conflicting medical opinions of Dr. Primm and Dr. Burke. Following an examination, Dr. Primm assessed mild age-related low back pain, and he believed Hensley retained the capacity to return to his regular work. In contrast, Dr. Burke observed that Hensley was not capable of heel or toe raising and had limited extension and flexion due to ongoing back spasm. Dr. Burke diagnosed a repetitive loading strain injury to Hensley's lumbosacral spine with left-sided radiating pain. Dr. Burke opined Hensley's injury resulted from cumulative trauma sustained while performing his job as a heavy equipment operator, noting that Hensley experienced repetitive vertical and

lateral movement inside the end loader throughout a twelve-hour shift. Further, in his own testimony, Hensley credibly described the operation of the end loader as rough, with constant jarring and jolting of his body.

Although Pine Branch is dissatisfied with the ALJ's assessment of the evidence, the ALJ had "the authority to determine the quality, character and substance of the evidence[,]" *Burkhardt*, 695 S.W.2d at 419, and she was free "to believe part of the evidence and disbelieve other parts of the evidence . . . ." *Caudill*, 560 S.W.2d at 16. The ALJ weighed the conflicting evidence and found Dr. Burke's medical opinion and Hensley's lay testimony to be the most credible; accordingly, we conclude substantial evidence supported the ALJ's finding of a work-related cumulative trauma injury to Hensley's low back.

We now address the ALJ's finding of permanent total disability. Pine Branch challenges the sufficiency of the evidence and contends the ALJ erroneously relied on the combined effect of Hensley's hearing loss and back injury in concluding Hensley was permanently totally disabled.

KRS 342.0011(11)(c) defines "[p]ermanent total disability" as "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury[.]" In *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48

(Ky. 2000), the Kentucky Supreme Court noted several factors relevant to an ALJ's determination of partial or total disability, including:

> the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

Id. at 51.

In the case at bar, the ALJ considered Hensley's age, education, vocational skills, and restrictions. The ALJ noted Hensley was age sixty-two, with an eighth-grade education, had worked exclusively operating coal mining equipment for forty-three years, and had no vocational training or skills. The ALJ also cited Dr. Burke's opinion that Hensley could not return to his prior work due to the physical requirements of the job. The ALJ further found credible Hensley's testimony regarding the limitations on his ability to sit, stand, and walk. It is well settled that "[a] worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured." *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001).

Our review indicates the ALJ sufficiently articulated her reasoning and the evidence supporting her finding of total disability. Pine Branch is correct, however, that the ALJ referenced Hensley's hearing loss when analyzing his physical restrictions. The Board thoroughly addressed this issue in its opinion, explaining:

> KRS 342.730(1)(a) prevents the ALJ from considering Hensley's hearing loss when determining permanent total disability. However, we are unable to conclude the ALJ's brief and single reference to Hensley's hearing loss constitutes "consideration" within the meaning of KRS 342.730(1)(a). The ALJ provided a detailed articulation of the many factors she considered in finding Hensley permanently totally disabled, none of which related to his hearing loss. As articulated above, these factors sufficiently support the ALJ's award. When assessed against the substantial proof the ALJ identified supporting the finding of permanent total disability, we are simply unable to conclude Hensley's hearing loss was a significant or determining factor in the ALJ's ultimate conclusion. For this reason, we conclude the ALJ's determination was based solely on his cumulative trauma injuries and any brief reference to his hearing loss did not violate KRS 342.730(1)(a).

We agree with the Board's reasoning on this issue and cannot conclude the ALJ improperly considered the combined effect of Hensley's hearing loss and back injury to conclude he was permanently totally disabled. We are satisfied substantial evidence supported the ALJ's finding of permanent total disability.

Next, Pine Branch contends the ALJ made inconsistent findings regarding the date Hensley's injury became manifest and the onset date of

disability. The ALJ determined Hensley was totally disabled as of his last date of employment and awarded benefits beginning on October 23, 2015. Pine Branch asserts the disability onset date should correspond to the date of manifestation, March 24, 2016, when Dr. Burke diagnosed Hensley with a work-related injury.

In cumulative trauma claims, "the obligation to give notice and the period of limitations for a gradual injury are triggered by a worker's knowledge of the harmful change and its cause rather than by the specific incidents of trauma that caused it." *American Printing House for the Blind ex rel. Mutual Ins. Corp. of America v. Brown*, 142 S.W.3d 145, 148 (Ky. 2004). However, despite Pine Branch's argument to the contrary, the disability onset date does not automatically correspond with the date a gradual injury is diagnosed for purposes of notice and statute of limitations. *Id*.

Here, the ALJ concluded Hensley's gradual injury became manifest (for purposes of notice/limitations) on March 24, 2016, when Dr. Burke diagnosed him with a work-related cumulative trauma injury. The ALJ further determined the onset date of disability was Hensley's last day of employment, October 23, 2015. The records of Dr. Raichel showed Hensley sought treatment for increased back pain and radiculopathy in May 2015. Hensley's testimony indicated his back pain gradually worsened over his last year of employment, and he ultimately resigned from his job on October 23, 2015, because he could no longer perform his

work due to the pain in his lower back and left leg. Hensley's lay testimony was competent evidence regarding the extent of his disability. *Hush v. Abrams*, 584 S.W.2d 48, 50 (Ky. 1979). After reviewing the record, we conclude substantial evidence supported the ALJ's determination of Hensley's disability onset date.

Finally, we address the newly amended version of KRS 342.730(4) and whether it applies retroactively to Hensley's claim. The ALJ awarded Hensley benefits pursuant to the 1996 version of KRS 342.730(4), which provided for termination of workers' compensation benefits when an employee qualified for normal old-age social security benefits. On appeal, the Board reversed the award, relying on the recently decided case of *Parker*, 529 S.W.3d 759, wherein the Kentucky Supreme Court held the statute was unconstitutional on equal protection grounds. The Board determined the 1994 version of KRS 342.730(4) was applicable and remanded the claim for entry of an amended award pursuant to that version of the statute.

While Pine Branch's appeal was pending in this Court, the General Assembly passed House Bill 2, effective July 14, 2018, which amended KRS 342.730(4) as follows:

> All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last occurs.

Also, during the pendency of this appeal, two panels of our Court issued Opinions concerning the retroactive application of this amendment—*Holcim v. Swinford*, No. 2018-CA-000414-WC, 2018 WL 4261757 (Ky. App. Sept. 7, 2018) and *University of Louisville v. Lanier*, No. 2018-CA-000687-WC, 2018 WL 6264422 (Ky. App. Nov. 30, 2018). This case was placed in abeyance while those cases were reviewed by the Kentucky Supreme Court. Our Opinion is consistent with the holdings in *Holcim v. Swinford*, No. 2018-SC-000627-WC, 2019 WL 4073673 (Ky. Aug. 29, 2019).[1] In Section 20(3) of HB 2, the General Assembly expressly declared the newly amended version of KRS 342.730(4) "shall apply prospectively and retroactively to all claims" where the injury occurred after December 12, 1996, and the claims "have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act." 2018 Ky. Acts Ch. 40 (HB 2), § 20(3) (eff. July 14, 2018). On October 12, 2018, this panel granted Pine Branch's motion to consider the newly amended version of KRS 342.730(4) as supplemental authority in this matter.

In matters of statutory interpretation, appellate review is *de novo*. *Workforce Dev. Cabinet v. Gaines*, 276 S.W.3d 789, 792 (Ky. 2008). KRS 446.080(3) provides that "[n]o statute shall be construed to be retroactive, unless

[1] *Lanier v. University of Louisville*, No. 2018-SC-000685-WC, was dismissed by order entered March 14, 2019 and no Opinion was rendered.

expressly so declared." "Though it is clear that the General Assembly must expressly manifest its desire that a statute apply retroactively, magic words are not required. What is required is that the enactment make it apparent that retroactivity was the intended result." *Baker v. Fletcher*, 204 S.W.3d 589, 597 (Ky. 2006).

In HB 2, the General Assembly expressly declared the amendment to KRS 342.730(4) applied retroactively to all claims where the injury occurred after December 12, 1996, and the claim was in the appellate process as of July 14, 2018. We conclude the claim at bar satisfies both conditions for retroactive application of the newly amended version of KRS 342.730(4). Here, the ALJ erroneously applied the unconstitutional version of KRS 342.730(4) to Hensley's award. The Board correctly reversed that part of the ALJ's decision but erred by remanding the claim for entry of an award pursuant to the 1994 version of the statute. Accordingly, we vacate that portion of the Board's opinion and remand this matter to the ALJ for entry of an award applying the 2018 version of KRS 342.730(4).

For the reasons stated we affirm in part, vacate in part, and remand this matter to the ALJ for further proceedings consistent with this opinion.

ALL CONCUR.

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