

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001628-WC

JET COAL, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-16-02466

MICHAEL ALLEY;
HON. BRENT DYE,
ADMINISTRATIVE LAW JUDGE; AND
KENTUCKY WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** ** *

BEFORE: COMBS, DIXON, AND GOODWINE, JUDGES.

GOODWINE, JUDGE: Jet Coal, Inc. ("Jet Coal") petitions for review of an opinion of the Workers' Compensation Board ("the Board") affirming a decision by the Administrative Law Judge ("ALJ") awarding Michael Alley ("Alley") temporary total disability benefits and medical benefits for cumulative trauma to

his neck and knees. On appeal, Jet Coal argues it is not responsible for payment of benefits to Alley because he did not suffer cumulative trauma, his condition was attributable to pre-existing or active condition, and even if Alley sustained cumulative trauma, Jet Coal was not liable for payment of benefits. After careful review, finding no error, we affirm.

BACKGROUND

The relevant facts and posture of this case were summarized by the Board as follows:

Alley filed his claim on October 14, 2016, alleging cumulative trauma injuries to his back, shoulders, neck, arms, wrists, legs, knees, and feet, complicated by depression and anxiety. Alley also filed a claim for occupational hearing loss with a last exposure on June 22, 2016. This appeal concerns only the ALJ's findings with respect to Alley's claims for neck and knees.

Alley testified he has worked in the mining industry for thirty years, primarily underground as a roof bolter. His work required constant reaching overhead and looking up while operating the roof bolter. He began to experience shoulder, neck, arm, wrist, knees, leg, and foot pain fifteen years ago. Alley began working for Jet Coal in early May 2016. He testified his pain worsened during his employment with Jet Coal due to the strenuous nature of the daily tasks. Just a few months after being hired by Jet Coal, Alley was laid off on June 22, 2016. However, he stated he would have quit if he had not been laid off. Alley has not worked since June 2016. His condition did not improve after he ceased working.

...

Dr. Anbu Nadar performed an IME on September 5, 2017. Dr. Nadar noted a history of thirty years of mining employment with ten years in low coal. His work required a lot of bending, twisting, kneeling and crawling. Alley reported neck and back pain for several years. Dr. Nadar reviewed medical records from Drs. Hall and Akers, as well as a cervical MRI in February 2016. The MRI revealed degenerative changes without disc herniation. On examination, Alley had reduced cervical range of motion and tenderness without spasm. Alley had full range of motion of the knees with no swelling or effusion in the right knee. However, Dr. Nadar found patellar grinding in both knees, in addition to painful crepitus in the left knee. Dr. Nadar diagnosed chronic lumbar and cervical strain with radiculopathy, and bilateral patellofemoral arthrosis.

Regarding causation, Dr. Nadar stated, “the work incidents have caused permanent physical change to soft tissues.” He noted Alley had cumulative trauma from multiple injuries suffered over the years. Dr. Nadar restricted Alley from heavy lifting, frequent bending, twisting, turning, kneeling, and crawling. He assigned a 5% impairment rating for the cervical condition and 2% impairment ratings for each knee pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). He indicated Alley did not have an active impairment prior to this injury. Dr. Nadar concluded Alley does not have the physical capacity to return to the type of work performed at the time of the injury.

The ALJ found Alley did not sustain compensable shoulder, arm/wrist, foot, low back or psychological injuries. Relying on Dr. Nadar’s opinion and Alley’s testimony, he determined Alley sustained a compensable cumulative trauma injury to his neck. The ALJ noted Alley had to constantly look up and work with his neck bent, twisted and turned in awkward positions. While the

ALJ acknowledged the cervical MRI did not reveal any herniated discs, it did reveal degenerative changes and disc bulges. Dr. Nadar diagnosed a chronic cervical strain based on pain and reduced range of motion on examination. The ALJ further noted Dr. Hall documented that Alley experienced neck pain and difficulty turning his head. Based on this proof, the ALJ determined Alley's job duties aggravated his degenerative changes.

To conclude Alley suffered cumulative trauma injuries to his knees, the ALJ again relied upon Dr. Nadar's opinion and Alley's testimony. The ALJ noted working in low coal required duck walking, crawling, bending, kneeling, and stooping. These positions required Alley to bend his knees, placing stress on them. Alley testified he also had to shovel the beltline, occasionally while on his knees. Dr. Nadar's examination revealed bilateral patellar grinding and patellofemoral crepitus. He diagnosed bilateral knee arthrosis. Relying on Alley's testimony and Dr. Nadar's opinion, the ALJ was convinced the stress and strain over Alley's thirty-year career produced bilateral knee injuries. He was further convinced Alley's job duties aggravated his degenerative changes, producing his bilateral knee injuries.

Turning next to the question of pre-existing, active impairment, the ALJ found no evidence Alley's compensable neck and bilateral shoulder (corrected on reconsideration to reflect injury to the knees) conditions were impairment ratable immediately before he last worked, or that a non-work related condition/injury caused the alleged prior impairment. The ALJ determined Alley's manifestation date is September 5, 2017, the first date a physician concretely diagnosed gradual injuries, and advised Alley his repetitive work duties caused them.

Jet Coal filed a petition for reconsideration, making essentially the same arguments it raises on appeal. In his June 27, 2018 Order, the ALJ reaffirmed his finding that Alley's job duties aggravated his cervical degenerative changes and bilateral knee degenerative changes and arthrosis. The ALJ found the thirty-year work history, including the last work with Jet Coal, caused these injuries and he again pointed to Dr. Nadar's opinion.

In response to Jet Coal's argument that Alley suffered a pre-existing, active condition, the ALJ provided the following analysis, citing Hale v. CDR Operations, Inc., 474 S.W.3d 129 (Ky. 2015):

Under Hale, the claimant must prove his last employment's job duties, as well as the ones he performed during his working career, produced and contributed to a cumulative trauma injury. The Plaintiff satisfied the standard. First, the Plaintiff demonstrated that his last employment required extremely repetitive motions and heavy work. Secondly, the Plaintiff demonstrated performing these motions and activities caused and increased his symptoms. Third, the Plaintiff's expert, Dr. Nadar, opined the Plaintiff's work, which the ALJ found, and inferred, meant the Plaintiff's entire working career (including his last employment), caused and contributed to his injuries. The Plaintiff met the appropriate standard.

The ALJ found there is no credible evidence that a non-work-related injury or condition caused Alley's impairment rating, and no portion of the rating is time barred. Further, the ALJ noted Dr. Nadar had indicated there was no prior active impairment before the injury.

On appeal to the Board, Jet Coal presented essentially the same three arguments now before this Court. It argued that the ALJ erred: (1) in his analysis of the evidence; and (2) in failing to find Alley suffered pre-existing, active neck and knee conditions. Jet Coal also argued it could not be responsible for an injury which occurred when Alley was not an employee on the date of manifestation. The Board agreed with the ALJ's findings as to all three of Jet Coal's arguments and affirmed the ALJ's order. This appeal followed.

ANALYSIS

On appeal, Jet Coal argues the Board erred in affirming the ALJ's decision to award Alley benefits. Specifically, Jet Coal argues the ALJ failed to: (1) apply the correct standards of law in determining the existence of cumulative trauma to the evidence presented; (2) attribute Alley's conditions to pre-existing and active medical conditions; and (3) find Jet Coal not liable for Alley's cumulative trauma that did not manifest until Alley was no longer employed by Jet Coal. "The standard of review on appeal is whether the ALJ's decision is supported by substantial evidence." *Hale v. CDR Operations, Inc.*, 474 S.W.3d 129, 140 (Ky. 2015) (citing *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984)).

Alley did not submit a response to Jet Coal's petition for review.

Although CR¹ 76.12(8)(c) permits three courses of action upon the failure of an appellee to file a brief, said actions are not mandatory and not warranted here.

If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

CR 76.12(8)(c). Based on the record before us, Jet Coal's arguments must fail.

First, Jet Coal argues the Board erred in affirming the ALJ's erroneous analysis of the evidence because the ALJ failed to utilize the correct legal standard to determine whether Alley sustained cumulative trauma while employed by Jet Coal. Jet Coal attempts to construe its argument as a legal issue, but its argument is based on whether the ALJ correctly weighed the evidence before it.

KRS² 342.0011(1) defines "injury" as "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."

Causation is a factual issue to be determined within the discretion of the ALJ as

¹ Kentucky Rules of Civil Procedure.

² Kentucky Revised Statutes.

fact-finder. *Ford Motor Company v. Jobe*, 544 S.W.3d 628, 633 (Ky. 2018).

Medical causation is also a question of fact. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004).

Medical causation must be proved to a reasonable medical probability with expert medical testimony but KRS 342.0011(1) does not require it to be proved with objective medical findings. *Staples, Inc. v. Konvelski*, Ky., 56 S.W.3d 412, 415 (2001); *Dupree v. Kentucky Department of Mines and Minerals*, Ky., 835 S.W.2d 887 (1992). It is the quality and substance of a physician’s testimony, not the use of particular “magic words,” that determines whether it rises to the level of reasonable medical probability, i.e., to the level necessary to prove a particular medical fact.

Id.

The Supreme Court of Kentucky “has consistently held that a finding of the Board on a question of fact cannot be disturbed on appeal if there is *any* substantial evidence to support it. . . . When one of two reasonable inferences may be drawn from the evidence, the finder[] of fact may choose.” *Jackson v. General Refractories Co.*, 581 S.W.2d 10, 11 (Ky. 1979) (emphasis added) (citations omitted); *see also Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). “The fact-finder 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.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky.

2000) (citing *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977)).

Here, the Board held that the ALJ's "findings constitute substantial evidence sufficient to support the finding that Alley sustained cumulative trauma injuries to his neck and knees." Specifically, the Board opined:

Dr. Nadar reviewed records and diagnostic studies, and conducted a physical examination and testing. His findings were documented by means of direct observation and/or testing applying objective or standardized methods. He found Alley's work produced a permanent change in soft tissues. Dr. Nadar stated the work-related trauma to Alley's knees and neck produced a permanent impairment rating pursuant to the AMA Guides, and specifically indicated there was no pre-existing active impairment. He clearly stated his opinions within the realm of reasonable medical probability.

...

We find no error in the ALJ's inference that Dr. Nadar attributed at least some of Alley's current condition to his work at Jet Coal. Dr. Nadar clearly and repeatedly stated his medical opinion that Alley suffered cumulative trauma injuries to his neck and knees. He twice declined the opportunity to apportion some of Alley's current impairment to a pre-existing condition. His findings constitute substantial evidence sufficient to support the finding that Alley sustained cumulative trauma injuries to his neck and knees.

It is clear the ALJ weighed the evidence presented and that substantial evidence supported its finding. Thus, we agree with the Board's holding that Dr.

Nadar's medical opinion was substantial evidence of cumulative trauma caused by Alley's work at Jet Coal.

Next, Jet Coal argues the ALJ failed to attribute Alley's conditions to pre-existing and active medical conditions. When an employee makes a claim for cumulative trauma, the "date of accident" is the "date of discovery." *Consol of Kentucky, Inc. v. Goodgame*, 479 S.W.3d 78, 82 (Ky. 2015) (quoting KRS 342.185(1)). The Board stated:

no physician opined the condition was impairment ratable prior to the employment with Jet Coal. . . . As noted by the ALJ, Dr. Nadar attributed the conditions to cumulative trauma throughout his work history and did not exclude the employment with Jet Coal. The evidence does not compel a finding of a preexisting active impairment rating.

Again, the ALJ weighed the evidence before it and concluded that no evidence supported a finding that Alley had a pre-existing or active impairment rating prior to his employment with Jet Coal. As such, we agree with the ALJ and the Board that the evidence did not support a finding of a pre-existing or active impairment rating.

Finally, Jet Coal argues it cannot be held responsible for Alley's injury because he was not an employee of Jet Coal on the date of manifestation. Jet Coal's argument is based upon the following statement in *Hale*: "Nothing in KRS Chapter 342 limits the liability of the employer, *in whose employ the date of*

manifestation occurred, to the percentage of the claimant’s work-life spent there.” *Hale*, 474 S.W.3d at 138 (emphasis added). Jet Coal reasons that because the date of manifestation occurred after Alley’s employment with Jet ceased, it cannot be liable for payment of benefits for Alley’s cumulative trauma.

The Board considered Jet Coal’s argument and agreed with the ALJ’s finding that Jet Coal was liable for payment of benefits for Alley’s cumulative trauma, holding:

We find no error in the ALJ’s determination that Jet Coal is responsible for benefits to commence following the cessation of work on June 22, 2016. It is uncontroverted that Alley had no employment after being laid off by Jet Coal. There is no evidence of any non-work-related event or cause contributing to his conditions after he ceased working for Jet Coal.

In *Begley v. Mountain Top, Inc.*, 968 S.W.2d 91, 96 (Ky. 1998), the Supreme Court of Kentucky held that it was not “unfair” to hold “the last employer wherein claimant was injuriously exposed . . . responsible for payment of claimant’s occupational disability benefits.” Although “the claimant bears the burden of proving every element of a workers’ compensation claim, including causation[,]” the burden shifts to the employer to prove “with substantial evidence that the injury . . . was not work-related[.]” *Williams v. White Castle Systems, Inc.*, 173 S.W.3d 231, 235 (Ky. 2005). Jet Coal presented no evidence to prove that Alley’s cumulative trauma was caused by anything other than his work for Jet

Coal. Thus, we agree with the Board's holding that the ALJ did not err in holding Jet Coal responsible for Alley's claim for benefits.

CONCLUSION

For the foregoing reasons, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

J. Gregory Allen
Pikeville, Kentucky

BRIEF FOR APPELLEE:

Appellee did not file a brief.