

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000807-WC

ELLIS COLEMAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-10-79408

KENTUCKY DEPARTMENT OF
TRANSPORTATION; DEPARTMENT OF
TRANSPORTATION, OFFICE OF GENERAL
COUNSEL; HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: DIXON, MAZE, AND SPALDING, JUDGES.

SPALDING, JUDGE: Ellis Coleman appeals the denial of a motion to reopen his 2010 award of workers' compensation disability benefits. Mr. Coleman sought increased benefits due to an alleged worsening of his condition and an increase in his impairment stemming from a July 2010 injury to his back, abdomen, and left

leg, as well as resulting in anxiety and depression. The Workers' Compensation Board upheld the Administrative Law Judge's determination that Mr. Coleman failed to demonstrate by objective evidence that there had been a worsening of his condition or an increase in his disability rating due to the effects of his 2010 work injury. We affirm.

In 2010, Mr. Coleman was awarded benefits based upon a determination that he had sustained a 16-percent impairment rating consisting of 9 percent for his physical injuries and 8 percent for a psychological condition. Mr. Coleman filed a motion to reopen his claim in January 2018 alleging a change in his disability and an increase in impairment. After a hearing, the ALJ denied the motion holding that Mr. Coleman failed to meet his burden of showing a decrease in wage-earning capacity stemming from the effects of his 2010 injury as required under the standard for reopening described in *Peabody Coal Company v. Gossett*, 819 S.W.2d 33 (Ky. 1991). Outlining in detail the considerable medical evidence he considered, the ALJ ultimately based his decision on the fact that he did not find Mr. Coleman's evidence sufficiently persuasive to meet his burden of proof. The ALJ explained that he did not find the testimony of Dr. David Muffly to be reliable, relying instead on the testimony of Dr. G. Christopher Stephens that Mr. Coleman's condition had not worsened.

An appeal to the Board resulted in an opinion affirming the decision of the ALJ. After reiterating the well-established principle that a “party seeking to increase an award has the burden of proving that there has been a change of condition resulting from the original compensable injury,” *Griffith v. Blair*, 430 S.W.2d 337, 339 (Ky. 1968), the Board stated that because Mr. Coleman had been unsuccessful in meeting that burden, the question on appeal was whether the evidence before the ALJ compelled a different result. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Citing *Square D Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993), the Board also noted that where the evidence is conflicting, an ALJ is free to choose to believe that which he finds to be most credible.

The Board thus concluded that because the record contained substantial evidence in the form of Dr. Stephens’ testimony that there had been no worsening of Mr. Coleman’s condition since the time of the initial award, it could not be said that the evidence compelled a finding of increased disability or an increased impairment rating. Acknowledging that the record contained evidence in favor of Mr. Coleman, the Board nevertheless held that the ALJ acted well within his discretion in determining what evidence upon which he would rely. The Board therefore determined that the ALJ’s conclusions were not so unreasonable as to compel a different result. In other words, the Board concluded that Mr. Coleman’s

evidence was not so overwhelming that the ALJ's decision must be viewed as erroneous as a matter of law. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

Mr. Coleman's argument for reversal of the Board's decision focuses primarily upon his contention that both the ALJ and the Board used an incorrect standard in resolving his claims on reopening. Specifically, he insists that the failure to utilize the standard set out in *Roberts Brothers Coal Company v. Robinson*, 113 S.W.3d 181 (Ky. 2003), constituted a misapplication of the law sufficient to require reversal. We disagree.

As the employer correctly notes in its brief, *Robinson* simply has no application to this motion to reopen. *Robinson* settled a question of statutory interpretation regarding the proof required to support exclusions from workers' compensation awards under Kentucky Revised Statutes (KRS) 342.730(1)(a) and (b):

KRS 342.730(1)(a) requires the ALJ to determine the worker's disability, while KRS 342.730(1)(b) requires the ALJ to determine the worker's impairment. Impairment and disability are not synonymous. We conclude, therefore, that an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a

finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

Id. at 183. The employer correctly points out that a prior ALJ has already carved out a portion of Mr. Coleman’s permanent partial disability based upon a pre-existing active condition. The matter at hand is the motion to reopen a claim alleging a worsening in condition which must be evidenced by objective medical findings. Both statutory and well-established caselaw confirm that a claimant alleging such a worsening in condition must demonstrate that the change results from the *injury which was the subject of the award*.

The plain language of KRS 342.125(1)(d) defines “change of disability” to be “shown by objective medical evidence of worsening or improvement of impairment due to a condition *caused by the injury since the date of the award or order*.” (emphasis added). Our Supreme Court explained this requirement in *Whittaker v. Ivy*, 68 S.W.3d 386 (Ky. 2002), emphasizing:

It is axiomatic that a worker who seeks an increased award at reopening must demonstrate that the **increased disability for which compensation is sought is the direct and proximate result of the injury that is the subject of the award**. *Sky Top Coal Co. v. Roark*, Ky., 407 S.W.2d 411 (1966); *Jude v. Cabbage*, Ky., 251 S.W.2d 584, 585 (1952). Furthermore, the effects of a subsequent work-related injury is not the basis for increasing a prior award; any disability that is attributable to the effects of a subsequent injury is properly the subject of a claim for that injury. *Robinson v. Bailey Mining Co.*, Ky., 996 S.W.2d 38 (1999).

The Court of Appeals was correct in stating that nothing requires a worker to show at reopening that the entire increase in disability is attributable to the effects of the initial injury. **The fact remains, however, that only disability that is attributable to the claim that is reopened can be the basis for increasing the award for that claim.**

Id. at 388 (emphases added).

Thus, there is nothing to suggest that the Board misapplied the law by imposing an incorrect standard to Mr. Coleman's motion. The Board simply applied the well-settled standard applicable to motions to reopen and made a factual conclusion that Mr. Coleman failed to meet his burden. Mr. Coleman does not argue that the Board fundamentally erred in regard to the burden of proof in this matter. While Mr. Coleman forcefully argues the factual basis and evidence in support of his claim, he does not argue there was no substantial evidence supporting the decision of the ALJ.

The ALJ acted well within his authority in finding Dr. Muffly's testimony less than persuasive given that he did not appear to be fully aware of the extent of Mr. Coleman's 2002 injury. In his role as arbiter of the weight to be assigned testimony, the ALJ was free to consider that factor in assigning more weight to the testimony of Dr. Stephens. As the Board properly noted, the ALJ did not err in considering Mr. Coleman's 2002 and 2008 MRI's in the context of determining the weight to be accorded the testimony of the various experts.

Because Mr. Coleman failed to demonstrate that the evidence compelled a result in his favor, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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