

**IMPORTANT NOTICE**  
**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***

RENDERED: JANUARY 23, 2003  
NOT TO BE PUBLISHED

**Supreme Court of Kentucky**

2002-SC-0188-WC

**FINAL**

DATE 2-13-03 EIA COURT, D.C.  
APPELLANT

PEGS BRANCH MINING

V.

APPEAL FROM COURT OF APPEALS  
2001-CA-1579-WC  
WORKERS' COMPENSATION BOARD NO. 98-61013

FLOYD COLEMAN; DONALD G. SMITH,  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

APPELLEES

and

2002-SC-0189-WC

FLOYD COLEMAN

CROSS-APPELLANT

APPEAL FROM COURT OF APPEALS  
2001-CA-1579-WC  
WORKERS' COMPENSATION BOARD NO. 98-61013

PEGS BRANCH MINING; DONALD G. SMITH  
ADMINISTRATIVE LAW JUDGE; AND  
WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board (Board) and the Court of Appeals have affirmed a finding that the claimant lacked the physical capacity to return to the work that he performed when injured. They have also rejected an argument that by basing

permanent partial disability awards upon American Medical Association (AMA) impairment ratings, KRS 342.730(1)(b) amounts to an unconstitutional delegation of legislative power to the organization. Ky. Const. §§ 29 and 60. We affirm.

On October 15, 1998, the claimant was thrown from a shuttle car and injured his back. He continued to work for the next two days, missed the following five days due to his injury, and returned to work until the mine shut down on December 19, 1998. As noted by the Board, the medical evidence in the claim was extensive and conflicting. After reviewing the evidence, the Administrative Law Judge (ALJ) chose to rely upon the opinions and impairment ratings offered by Drs. Templin and Weitzel and, therefore, calculated a combined physical and psychiatric impairment rating of 20%. Furthermore, the ALJ determined that the claimant lacked the physical capacity to return to the type of work performed at the time of the injury, enhanced the resulting award by a factor of 1.5, and refused to exclude any portion of the award as being due to the effects of the natural aging process.

KRS 342.730(1)(c)1 provides that upon a finding that an injured worker lacks the physical capacity to return to the type of work that was performed at the time of the injury, the worker's benefit for permanent, partial disability shall be enhanced by a factor of 1.5. The claimant bears the burden of proving every element of a workers' compensation claim. Tackett v. Sizemore Mining Co., Ky., 560 S.W.2d 17 (1977). Thus, he was required to prove that he lacked the physical capacity to return to coal mining. KRS 342.285 vests the ALJ with the sole discretion to weigh conflicting evidence, to determine the credibility of witnesses, and to choose the evidence upon which to rely. For that reason, where the party with the burden of proof prevails before the ALJ with respect to a question of fact, the finding may not be disturbed on appeal

unless it is unreasonable. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

After reviewing the conflicting evidence in this case, the ALJ determined that the claimant lacked the physical capacity to return to coal mining and enhanced his income benefit under KRS 342.730(1)(c)1.

Appealing, the employer continues to maintain that the claimant was not entitled to the enhancement. It points out that he returned to the same job after a five-day absence and continued to work for nearly two months until he was laid off. He later applied for and drew unemployment benefits, holding himself out as being ready, willing, and able to work. Furthermore, the employer maintains, he testified that he would have taken a job as a coal miner if he had been offered one.

Although Drs. Primm and Sheridan were not persuaded that the claimant suffered a significant back injury, Dr. Templin diagnosed a chronic low back pain syndrome and lumbar disc bulge at L5-S1, with right leg radiculopathy. He noted some pre-existing, age-related degenerative changes, but he was of the opinion that the disc bulge and the claimant's present condition were due to the work-related injury. He assigned a 10% AMA impairment, half of which he attributed to the arousal of a pre-existing, dormant, nondisabling condition. Furthermore, he restricted the claimant from extensive riding in or on vibratory vehicles and from frequent bending, stooping, kneeling, crouching, crawling, carrying, or climbing. In his opinion, the claimant did not retain the physical capacity to return to the type of work that he performed at the time of his injury.

Dr. Shraberg determined that the claimant suffered from mild, chronic depression that was not work-related and that he had no permanent, work-related psychiatric impairment. Whereas, Dr. Weitzel diagnosed anxiety and depressive

disorder that accounted for a 10% AMA impairment. In his opinion, the impairment was due to the arousal of a pre-existing, dormant, non-disabling condition by the work-related back injury. Furthermore, he indicated that when the impairment was considered together with the claimant's physical impairment and pain, it would probably prevent him from returning to his usual occupation.

A worker's testimony that he is unable to perform various activities is competent evidence that he is unable to do so. See Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). Nonetheless, in the face of contrary medical evidence, his testimony alone will not compel a finding in his favor. Likewise, in the face of contrary medical evidence, a worker's willingness to return to his previous employment and his return to work for a relatively short period of time will not necessarily compel a finding that he is physically capable of continuing to do so indefinitely.

The claimant did return to work for approximately two months but also testified that he thought he could no longer engage in coal mining. Furthermore, he indicated that he had sought work in the mines after being laid off because he needed the money. As noted by the Court of Appeals, the evidence showed that "the reality of the situation was not that the claimant could or should have returned to work, but rather that he did so only out of necessity." When the claimant's testimony and actions are considered in light of the testimony from Drs. Templin and Weitzel, the ALJ's finding was not unreasonable. Under those circumstances, it was properly affirmed by the Board and the Court of Appeals. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Cross-appealing, the claimant maintains that by mandating use of the most recent edition of the AMA Guides to the Evaluation of Permanent Impairment (Guides)

when determining a worker's income benefit, KRS 342.730(1)(b) improperly delegates legislative power to the AMA. Ky. Const. §§ 29 and 60. As we pointed out in Adkins v. R & S Body Co., Ky., 58 S.W.3d 428 (2001), KRS 342.730(1)(b) and (c) operate together. A worker's AMA impairment is but one of three factors that are considered when calculating a partial disability award. The statutory multiplier weights the formula to favor individuals who are more severely impaired and, therefore, are more likely to have difficulty finding work after being injured. Furthermore, the formula takes into account the worker's post-injury income and physical capacity to return to the same type of work. Although the formula may imperfectly measure a particular worker's loss, it continues to base a partial disability award on the extent of the worker's occupational disability. We concluded, therefore, that it bore a rational relationship to the purpose of the income benefit and was not arbitrary.

As the claimant points out, the Guides are revised periodically by groups of well-qualified experts who are nominated by state medical societies and medical specialty societies. Thus, the impairment rating for a particular condition may change, causing a change in the resulting partial disability award. The fact remains, however, that requiring use of the most recent edition of the Guides assures that a uniform standard of assessing impairment is used in all claims that are being considered at a given point in time and that the standard is consistent with current medical thinking. It also assures that each physician who testifies in a particular claim uses the same standard for measuring the worker's impairment. Nothing in Chapter 342 deprives an ALJ of the authority to weigh conflicting evidence and to choose among the AMA impairments that are in evidence when deciding a particular worker's impairment. Likewise, nothing interferes with the ALJ's discretion to determine whether a worker lacks the physical

capacity to return to the type of work that was performed at the time of the injury. As aptly stated by the Court of Appeals, "[T]he ultimate authority to determine the existence, extent, and duration of the claimant's disability remains vested in the ALJ." We conclude, therefore, that KRS 342.730's limited reliance on the AMA Guides does not delegate legislative power to the AMA or otherwise violate Ky. Const. §§ 29 and 60.

The decision of the Court of Appeals is affirmed.

All concur.

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