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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: FEBRUARY 20, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0389-WC

FINAL DATE 3-13-03 ELIA Grant D.C.

KIRK & BLUM MANUFACTURING COMPANY APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2001-CA-2389-WC
WORKERS' COMPENSATION BOARD NO. 00-91695

LAMAR HOBBS, SR.;
HON. JOHN EARL HUNT, ALJ;
HON. SHEILA C. LOWTHER, CHIEF ALJ;
AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

After determining that the Administrative Law Judge (ALJ) applied an erroneous interpretation of KRS 342.0011(11)(c) when awarding the claimant a total disability, the Workers' Compensation Board (Board) reversed and remanded the claim for additional findings of fact and a decision under a correct interpretation of the statute. The Court of Appeals determined, however, that there was substantial evidence of record to support the award and that the Board should not have disturbed it on appeal. Having concluded that the finding of total disability was not clearly based upon a correct interpretation of KRS 342.0011(11)(c) and also that the evidence did not compel a finding of total disability, we reverse.

The claimant was born in 1948, graduated from high school, and worked as a journeyman sheet metal worker for 34 years. His duties were those of a laborer. They

required climbing, lifting, carrying, the use of both arms and hands, and working with heavy sheets of metal while in awkward positions. On January 25, 2000, he was welding some metal when the step stool on which he was standing tipped over, causing him to fall and injure his left shoulder. After the accident, the employer placed him in a light-duty job that consisted solely of sitting at a conference table for eight hours a day, reading OSHA reports. He continued in that capacity for five weeks until he quit on March 16, 2000, for shoulder surgery. He has not worked since then.

At the hearing, the claimant testified that despite surgery and physical therapy, he experienced a decreased range of motion, loss of strength, and shoulder pain for which he took prescription pain medications and used a TENS unit each night. He indicated that he was unable to lift any weight with his left arm or to do any sort of overhead work or climbing. Furthermore, the pain medication made him drowsy. He admitted that he could perform the light-duty job that he had been given but indicated that the job was created only to give him work. When asked if he could perform any other type of work, such as being a gas station attendant, he indicated that he did not think he could do so. Asked why he was taking Elavil, he stated that it was disheartening to be unable to take care of his property or do household chores. He testified that he was receiving social security disability and a union disability benefit.

On cross-examination by the employer, he testified that there was no light-duty sheet metal work but admitted that he was physically able to perform the job that his employer had created. Asked whether he thought he could go back to that job, he testified that he could not, explaining that "it's so depressing to sit there at a table for eight hours." Responding to a question that the Administrative Law Judge (ALJ) posed shortly thereafter, he testified that the job consisted solely of removing OSHA reports

from an envelope, reading them, and placing them in a book.

Dr. Renda, an orthopedic specialist, submitted treatment notes from March 9, 2000, through February 16, 2001. They indicate that the claimant sustained a full thickness rotator cuff tear and had significant AC joint arthritis. Despite surgery and physical therapy, he had not made much progress by May, 2000, and appeared to be developing reflex sympathetic dystrophy. In October, 2000, Dr. Renda restricted the claimant to sedentary work and to lifting no more than 10 pounds, with an option to sit or stand. As of November, 2000, he appeared to be making slow progress and had somewhat less pain and more strength. In February, 2001, Dr. Renda indicated that the claimant was close to maximum medical improvement (MMI) and assessed a 14% AMA impairment for decreased range of motion and causalgia.

Dr. Bonnarens evaluated the claimant in September, 2000, and characterized his prognosis as "fair." He indicated that the claimant had reached MMI; that he could perform only light duty work, with no overhead use of the left arm or lifting more than 10 pounds; and that he could not return to his former work without further surgery. Absent further surgery to improve the claimant's range of motion, his AMA impairment was 7%.

Records from First Physical Therapy indicated a 40% improvement in the claimant's symptoms as of December, 2000.

After reviewing the lay and medical evidence, the ALJ determined that the claimant was totally disabled, stating as follows:

> I am persuaded based upon my review of the record that the opinions of Drs. Renda and Bonnarens establish that the plaintiff has a permanent impairment rating; and, that the opinion of Dr. Renda when coupled with the plaintiff's testimony establish that the plaintiff has a complete and permanent inability to perform any type of work as a result of the injury. I have considered the opinion of Dr. Bonnarens, a one-time evaluator, that the plaintiff could return to light duty work. However, I find that there is no light

> duty work available to the plaintiff in his opinion for which he has trained to do for the last 34 years [sic]. I find the opinion of Dr. Renda, who has seen and treated the plaintiff on numerous occasions, to be more persuasive than the opinion of Dr. Bonnarens, a one-time evaluator. Although, Dr. Renda limits the plaintiff to sedentary work I find that the plaintiff cannot do sedentary work in his opinion 'because it's so depressing to sit there at a table for eight hours.'

A petition for reconsideration by the employer asserted that because the medical evidence established that the claimant was capable of sedentary work, a finding of only partial disability was compelled. The petition was denied, after which the employer appealed. Its argument was that the ALJ considered inappropriate factors when determining that the claimant was totally disabled and that the evidence supported only a partial disability award.

Reversing the award, the Board pointed out that the relevant inquiry under KRS 342.0011(11)(c) was whether the claimant was able to perform any type of work. Although his ability to return to sheet metal work was a factor to be considered, it was not the only factor. The availability of work within the claimant's medical restrictions and his ability to compete for such work must also be considered. Turning to the ALJ's opinion, the Board determined that the finding that there was no light duty work available for a sheet metal worker was insufficient to comply with the statute. Furthermore, taking issue with the ALJ's basis for determining that the claimant could not perform sedentary work, the Board pointed out that a worker's desire to perform a particular type of work was an inappropriate consideration under the statute. It concluded, therefore, that the claim must be remanded for additional findings of fact and for a decision under a correct interpretation of the law.

Reversing the Board, the Court of Appeals emphasized that the light duty job that the claimant performed after his injury did not exist in the labor market and,

therefore, that his ability to perform it was immaterial when assessing his occupational disability. Noting his age, education, work experience, medical restrictions, and his testimony that he did not think there were any jobs on the market that he was able to perform, the Court concluded that the finding of total disability was supported by substantial evidence in the record and should have been affirmed by the Board.

Appealing the decision, the employer concedes that the type of light duty that it provided to the claimant does not exist in the labor market. It maintains, nonetheless, that the claimant's ability to perform the job demonstrates that he is physically capable of performing sedentary work on a full-time basis. Focusing on the ALJ's statement that the claimant cannot return to sheet metal work and the statement that he found the type of work that the employer provided after his injury to be depressing, the employer maintains that the finding of total disability was erroneous because it was based upon inappropriate considerations. It argues that when those inappropriate considerations are eliminated, the evidence compels a finding of permanent, partial disability.

Effective December 12, 1996, KRS 342.0011(11)(c) was amended to define total disability. In addition to a permanent disability rating, KRS 342.0011(11)(c) requires "a complete and permanent inability to perform any type of work." KRS 342.0011(34) defines "work" as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." When deciding a claim, the finder of fact is required by KRS 342.275 to set forth in the opinion a sufficient factual basis to support the conclusion of law that is reached. Shields v. Pittsburgh & Midway Coal Mining Co. Ky. App., 634 S.W.2d 440 (1982). Furthermore, KRS 342.285(2)(c) permits the Board to reverse a decision that is not rendered in conformity with Chapter 342.

Having reviewed the evidence of record in light of our decision in McNutt Construction v. Scott, Ky., 40 S.W.3d 854 (2001), it is apparent to this Court that a finding of total disability was authorized under a correct interpretation of the law but was not compelled. The ALJ stated that the testimonies of Dr. Renda and the claimant established the claimant's "complete and permanent inability to perform any type of work as a result of the injury," but the rationale that followed was not in conformity with KRS 342.0011(11)(c) and (34). Although the record contains substantial evidence from which the ALJ could properly conclude that the claimant was totally disabled, it is not clear that the finding that was made was based upon a correct interpretation of the law. Nor is it clear that the same finding would have been made had a correct interpretation of the law been applied. Under those circumstances, the Board was within its authority to determine that the claim must be remanded for further findings of fact and for a conclusion of law that is consistent with a proper interpretation of KRS 342.0011(11) and (34).

The decision of the Court of Appeals is reversed.

All concur.

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