

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky

2002-SC-0519-WC

FINAL
DATE 4-10-03 SUPC COURT D.C.

JAMES EDWARD ELDRIDGE

APPELLANT

APPEAL FROM COURT OF APPEALS

2001-CA-1959-WC

V.

WORKERS' COMPENSATION BOARD NOS. 91-46605, 93-7283 & 93-42794

HUBB CORPORATION; SPECIAL FUND; AND
HON. SHEILA LOWTHER, ADMINISTRATIVE LAW JUDGE

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The Workers' Compensation Board (Board) and the Court of Appeals have affirmed a finding that the claimant failed to meet his burden of proving a change of occupational disability at reopening. Nonetheless, he continues to maintain that the finding was erroneous because it was not supported by substantial evidence. Having concluded that the evidence did not compel a favorable decision, we affirm.

The claimant was born in 1956 and had an eighth-grade education with no specialized or vocational training. He had worked for approximately 18 years in underground coal mining when, on February 27, 1993, he was struck in the head, neck, and upper back by a falling rock and sustained a compression fracture of one or more thoracic vertebrae. Although he maintained that he was totally disabled and testified that he had applied for social security disability, the Administrative Law Judge (ALJ) who considered his claim awarded only a 50% occupational disability. In doing so, the

ALJ noted that the claimant was relatively young and had the mental capacity to perform a number of jobs despite his limited education. Furthermore, the ALJ was of the opinion that the claimant substantially exaggerated his physical complaints, that the psychological problems he alleged were not disabling, and that he was not unemployable.

The claimant began to receive social security disability benefits shortly after the hearing and did not attempt to return to work. On August 2, 1999, he moved to reopen the claim, alleging a worsening of his physical condition and increased occupational disability. He indicated that his symptoms had worsened and presently included back pain, headaches, and pain that radiated into his leg. He admitted that he had never sought employment since the injury, did not think that he could return to any type of work, and indicated that he had received social security disability benefits continuously since sometime in 1994.

Dr. Chaney, the claimant's family physician, provided conservative treatment for the effects of the injury from the outset and continued to treat him for low back pain and depression at reopening. In January, 2001, he averred that the claimant's disability had increased since the award and attributed the change to a small herniation at the C3-4 level that was revealed in a November, 1999, MRI. He also noted complaints of increased neck and back pain that radiated into both arms and legs.

Treatment records from the Samaritan Pain Center were also introduced. Dr. Cartia evaluated the claimant in November, 1998, with regard to continuing pain in the area of the compression fracture. He recommended Lortab for severe pain, Ultram for baseline pain, and Restoril for sleep. In 1999, he discontinued the Ultram prescription and substituted Oxycontin. Dr. Cartia's treatment notes from May 20,

2000, explain that most compression fractures heal and become stabilized in three to six months although there might be some chronic pain in the area. They indicate that the claimant's three compression fractures were stable and that although he was occupationally disabled, he could return to at least light or sedentary work and, possibly, to medium duty with some restrictions. The Oxycontin prescription was continued.

Dr. Witt saw the claimant in October, 2000, and diagnosed possible thoracic facet arthropathy for which he recommended a medial branch block. Dr. Holtman performed the procedure, after which Dr. Witt changed his diagnosis to thoracic facet syndrome. He recommended a thoracic radiofrequency medial branch rhizotomy at T8-11, but the procedure had not yet been approved by the insurance carrier.

Dr. Muckenhausen testified both in the initial proceeding and at reopening. In 1993, she assigned a 22-28% impairment and was of the opinion that the claimant could not return to underground coal mining. In 1999, she diagnosed chronic progressive headaches, chronic progressive neck and mid-back pain with radiculopathy, and sleep disturbance with elements of anxiety and depression. Furthermore, she reported that the claimant's impairment was in the range of 47-55%, that he could lift less than 10 pounds frequently, and that he could sit, stand, or walk for less than 1-2 hours out of a period of 8 hours.

Dr. Sweasey, a neurosurgeon, evaluated the claimant in December, 1999, to consider whether surgery was appropriate. He diagnosed lumbago, cervicalgia, strain, and muscle spasm, and he ordered a myelogram. Although the claimant returned in June, 2000, there is no indication that the test was ever performed.

An MRI of the thoracic spine that was performed in November, 1999, revealed mild dextroscoliosis of the lower dorsal spine. Although it revealed old compression fractures at D10, D11, and D12, and degenerative changes at D9 and D10, there was no evidence of a herniation. An MRI of the cervical spine, also made in November, 1999, revealed a small herniation at C3-4 on the right.

Dr. Goodman first evaluated the claimant on the employer's behalf in May, 1994. He performed another evaluation in December, 1999, at which time the claimant complained of headaches as well as back and neck pain. Dr. Goodman reported that recent x-rays of the cervical, thoracic, and lumbar spine were virtually identical to those from 1994. He diagnosed the arousal of pre-existing degenerative disc disease of the cervical spine and assigned a 6% impairment. He thought that the claimant could work but recommended that lifting be limited to 50-60 pounds. Noting that both the objective and subjective findings were essentially the same as in 1994, he concluded that the claimant's condition had not worsened.

In April, 2000, Dr. Ensalada reviewed the medical records at the employer's request. He indicated that the November, 1999, MRI showed improvement in the compression fracture and no new findings. In his opinion, there was no objective medical evidence of a worsening of condition and no basis for changing the initial impairment rating or restrictions.

After reviewing the evidence and relying on the opinions of Drs. Cartia, Goodman, and Ensalada, as well as the claimant's own testimony, the ALJ concluded that the claimant had failed to meet his burden of showing an increase in occupational disability as demonstrated by objective medical evidence. In support of the conclusion, the ALJ pointed to the claimant's initial testimony that he was unable to work, to his

failure to seek employment, and to his continuous receipt of social disability benefits since shortly after the hearing. Furthermore, the ALJ noted that other than a change from one pain medication to another, there was little change in the conservative treatment that he had received from the outset. Although acknowledging that the claimant could not return to coal mining or other heavy work, the ALJ concluded that his condition had not worsened since the initial award and that he remained capable of some type of employment.

The claimant bears the burden of proof and risk of nonpersuasion before the fact-finder with regard to every element of his claim. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984); Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979); Roark v. Alva Coal Corporation, Ky., 371 S.W.2d 856 (1963). Although KRS 342.285 permits an appeal from an ALJ's decision to the Board, it provides that the decision is "conclusive and binding as to all questions of fact" and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board.

We have construed KRS 342.285 to mean that the fact-finder, rather than the reviewing court, has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Thus, an ALJ 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. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). Contrary to the claimant's assertion, a finding that the party with the burden of proof failed to meet that burden need not be supported by substantial evidence.

Butcher v. Island Creek Coal Co., Ky., 465 S.W.2d 49 (1971). Instead, that party's burden on appeal is to establish that the evidence compelled a favorable decision. In other words, the party must show that the favorable evidence was so overwhelming that no reasonable person could have failed to be persuaded by it and, therefore, that the ALJ's decision to the contrary was unreasonable. Special Fund v. Francis, *supra* at 643; Paramount Foods v. Burkhardt, *supra*; REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224, 226 (1985); Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Although the party may note evidence that would have supported a favorable decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

In a case, such as this, where the medical evidence was conflicting, the ALJ had the sole authority to determine which witnesses to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). Although there was evidence to support the claimant's assertions, there was also evidence that his disability was no greater at reopening than it had been at the time of the initial decision. Under those circumstances, the ALJ's decision was not unreasonable.

The decision of the Court of Appeals is affirmed.

All concur.

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