

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 12, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0529-WC

FINAL
DATE 2-3-03 E.J.A.G. + D.C.

LYNN H. SMITH

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
NO. 2002-CA-0149
WORKERS' COMPENSATION BOARD NO. 96-08318

MATE CREEK DEVELOPMENT;
WORKERS' COMPENSATION BOARD;
HON. ROBERT WHITAKER, DIRECTOR
OF WORKERS' COMPENSATION
FUNDS, SUCCESSOR TO SPECIAL
FUND AND HON. RONALD W. MAY,
ADMINISTRATIVE LAW JUDGE

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an opinion of the Court of Appeals reversing that part of a decision of the Workers' Compensation Board which reversed and remanded an opinion and order of the Administrative Law Judge dismissing the claim by Smith on reopening.

Smith was injured on December 8, 1993 when a rib of coal rolled over him while he was working for Mate Creek Development in an underground coal mine. He has not returned to work since this accident. In August 1994, the ALJ approved Smith's settlement with Mate Creek for a lump sum of \$15,000, representing a 13.95% occupational disability. The settlement agreement described the injury as "acute pain in the lumbar area, radiating to the right leg." The word "psychological" was handwritten

just above this description and was initialed only by Smith. In May 1995, Smith filed a form 101 alleging injuries to his back, neck and head with resulting physical and psychological disability. Approximately six months later, he settled his claim with the Workers' Compensation Funds, successor to Special Fund, for a lump sum of \$13,800, representing a 15.9% occupational disability.

In December 2000, Smith filed a motion to reopen alleging a worsening of condition from a physical and psychological standpoint. The contested issues were whether the December 1993 injury had worsened to cause an increase in vocational disability since the settlement agreements and "limitations as to psych claim." After reviewing all the submitted medical evidence, the ALJ dismissed the motion by Smith to reopen the back injury claim. The ALJ found that the submitted medical evidence was not so compelling as to require the reopening of this matter. The Board upheld the dismissal of the ALJ on this ground and neither party appealed that decision. Consequently, the claim involving the back injury is not before this Court.

As to his cervical condition, Smith testified that he started having headaches within a couple of months of his injury and that his neck problems began approximately one year later. He thought that his headaches could be related to the neck condition. Smith claimed that his neck pain had increased since 1996 and his headaches have been more frequent. He testified that he complained to his doctors about the neck pain as early as 1996, but that the doctors continued to only treat his lower back pain.

Smith submitted the report of Dr. Templin, who diagnosed chronic cervical pain syndrome and degenerative cervical disc disease. He assessed a 15% or 33% impairment, but did not render an opinion as to whether the condition had worsened since the settlements.

Mate Creek offered the report of Dr. Travis, who concluded that Smith's cervical complaint had not progressed since the x-rays taken in 1993. He assessed a 5% permanent partial impairment rating related to the neck. The Workers' Compensation Funds submitted the report of Dr. Patrick, who found Smith to have full range of motion of the neck. He stated that despite x-ray evidence of degenerative disc disease at C5-C6 and C6-C7, Smith had normal findings about the cervical spine and no measurable functional impairment.

With respect to his psychological condition, Smith testified that he had such a condition during 1994 and 1995. In the original claim, Dr. Vyas assigned a 45% permanent partial disability, with 5% attributed to "mental anguish." Although the report did not define "mental anguish", Smith indicated that it related to anxiety and depression from the work-related injury. Smith further testified that he now feels useless and irritable, but acknowledged that he has never sought treatment for this condition.

On reopening, Smith offered the uncontradicted report of Dr. Cooke, who diagnosed adjustment disorder with depressed mood. He noted that Smith felt depressed over certain family matters. Dr. Cooke assigned a 15% permanent partial disability rating, with 12% attributed to the 1993 work injury. He did not state whether this was a change in condition from the time of the settlements.

Ultimately, the ALJ dismissed the neck and psychological claims of Smith, stating:

The ALJ is not persuaded that the work related injury of December 8, 1993 produced any neck injury nor any psychological condition as is evidenced by the lack of any medical documentation of any significant injury in those areas. The regulations at the time of the filing of plaintiff's application required the filing of medical reports with the

application documenting the existence of the alleged injuries. Plaintiff did not document the allegation of neck and psychological disability when he filed his application and his attempt to do so at this late date which is eight years after the accident comes far too late.

The Board reversed and remanded the decision of the ALJ dismissing the neck and psychological claims, stating:

Since Smith's 1995 application for benefits specifically included the neck and psychological claims and the 1994 and 1995 settlements also refer to the psychological injury, we believe the ALJ erred in concluding Smith's neck and psychological claims are barred by the statute of limitations. Thus, Smith's neck and psychological claims are viable for consideration upon reopening, even though our view of the evidence lends itself to little, if any, factual basis for increased benefits on reopening.

The Court of Appeals disagreed with the Board's interpretation of the ALJ's opinion, and relying on Slone v. Jason Coal Company, Ky., 902 S.W.2d 820 (1995), it reversed the Board on the issue concerning the neck and psychological claim. This appeal followed.

Smith argues that the Court of Appeals erred in relying on Slone, supra, to prohibit his neck and psychological claims. He also contends that the Court of Appeals erred in finding that the ALJ did not rule on this matter as a violation of the statute of limitations.

Mate Creek responds that the Court of Appeals properly held that the ALJ overruled the motion by Smith to reopen for failure to prove that the neck and psychological conditions were caused by the 1993 injury. It argues that the evidence does not compel a finding that the neck and psychological conditions are the result of the 1993 injury. Mate Creek asserts that the Court of Appeals appropriately relied on Slone.

The Workers' Compensation Funds contends that Smith failed in sustaining his burden of proving a worsening of his condition.

After careful review of the record, we must conclude that the evidence in the record does not compel this Court to reach a different result from that made by the ALJ. As the party moving for reopening, Smith had the burden of proving that his occupational disability had increased and that said increase was related to the incident for which compensation was sought. Peabody Coal Co. v. Gossett, Ky., 819 S.W2d 33 (1991). When the party that bears the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Compelling evidence is defined as evidence so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985).

It is not enough for Smith to show that there is evidence, no matter how persuasive, that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). If any evidence of substance supports the opinion of the ALJ, it cannot be said that the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). As fact finder, the ALJ has the sole authority to determine the weight, credibility, substance, and inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The ALJ has the discretion to choose whom and what to believe. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977).

Here, Smith did not present compelling evidence that his alleged neck or psychological problems have worsened since the settlements. Dr. Travis found no objective basis to support the claim by Smith that his condition had worsened. Dr.

Patrick opined that Smith had normal findings about the cervical spine and no measurable functional impairment. Even Dr. Templin provided no opinion as to whether Smith's condition had changed since the initial settlements.

For his psychological claim, Smith relied on the report of Dr. Cooke. Although Dr. Cooke did assess a 15% psychological impairment, he also cited many non-work related factors which contributed to this impairment. More important, like Drs. Travis, Patrick, and Templin, he provided no evidence that this was a change from Smith's condition in 1995.

It is abundantly clear that the evidence in this record simply does not compel a different result, and the Court of Appeals was correct in concluding that a remand for additional findings was unnecessary. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). We find it unnecessary to delve into a lengthy analysis of whether Slone is controlling in this situation or to interpret the language employed by the ALJ. The simple fact remains that the evidence in this record does not compel a different result.

Therefore, the decision of the Court of Appeals is affirmed.

All concur except Graves, J., who dissents because the decision of the Board was correct.

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