

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 21, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-0801-WC

FINAL
DATE 9-11-03 EJA/Growth DC

LARRY SMITH

APPELLANT

V.

APPEAL FROM THE COURT OF APPEALS
2002-CA-0325-WC
WORKERS' COMPENSATION BOARD NO. 93-18538

BATTLE RIDGE COMPANIES; ROBERT
WHITTAKER, DIRECTOR OF SPECIAL
FUND; HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Larry Smith contests an affirming Court of Appeals, who 2-1 upheld the Workers' Compensation Board's rejection of an Administrative Law Judge's finding of permanent total disability for the claimant Smith

Smith presents three issues: 1) whether the Board and the Court of Appeals overlooked or misconstrued controlling precedent; 2) whether the Board and the Court of Appeals substituted their evaluation of the evidence for that of the Administrative Law Judge; and 3) whether the Board and the Court of Appeals unfairly overlooked or ignored evidence that supported the ALJ's finding of increased occupational disability. The real issue is whether the findings of the ALJ were supported by substantial evidence.

Smith contends there was substantial evidence to support the opinion of the Administrative Law Judge, who found the appellants condition had worsened from 65% permanent disability to total permanent disability.

A brief summary of the facts is necessary because it is the significance of certain facts that determines this case. Smith was injured on the job in December of 1992 and January of 1993. He applied for disability, and was given an occupational disability of 65% in August of 1995. Smith has seen Dr. James Adams on a regular basis and his notes characterize no changes in Smith's back condition. Regarding prescriptions, Dr. Adams started Smith on Librium and Lortat in 1993. The doctor then prescribed Xanax in lieu of the Librium for Smith's nerves. In 1997, an arthritis medicine, Naprelan, was added. The doctor then substituted Celebrex after 2000. The claimant reopened his claim for disability, stating that he was totally disabled. Before a second Administrative Law Judge, the same two doctors testified. Dr. Adams testified towards Smith's increased pain and lack of improvement in his condition. Dr. Goodman testified towards the lack of objective change in Smith's condition.

Claimant argues that the increase in pain, testified to by both himself and Dr. Adams, is substantial evidence to uphold the findings of the Administrative Law Judge. In most circumstances, the testimony of a treating physician and the claimant is more than sufficient evidence. However, the same evidence happens to be what won the award of partial permanent disability. The claimant contends that new issues of pain and medication have arisen. This is a fact established in the record. But the complaints are merely of more severe pain, with no demonstrable change in condition.

Here, the Board could and did take the earlier claim into consideration. It found that none of the new evidence Smith presented was of any substance. Smith could

point to nothing which was demonstrable and substantially different from his previous claim. In such reopening proceedings, the Board is well within its powers to require a showing of demonstrable evidence. As noted in the Board's opinion, the new law requires a finding of objective medical evidence. This would be an X-ray showing new and substantial degeneration. The Board did not require such evidence. However, it did want one of the doctors to say, in his opinion, Mr. Smith could not accomplish as much as he could during the first claim, and the injury was responsible for this limitation. Dr. Adams only said that the pain from the injury was worse.

It may be that Dr. Adams believed the first Administrative Law Judge got it wrong the first time. Adams testified Smith was totally disabled. So his testimony would not change for the second hearing. In fact, this seems to be the case. But then, the hearing seems to be nothing more than Smith and Dr. Adams coming back and saying Smith feels more pain. The Board is well within its prerogative to find such difference between the first and second hearing to be insubstantial and a changed rating to be nothing more than second guessing by the second Administrative Law Judge.

The Board and the Court of Appeals did not err in determining that there was no substantial evidence to support the findings of the ALJ of a worsening of the occupational disability. The Board and the Court of Appeals did not improperly substitute their findings of fact for those of the ALJ and they did not overlook evidence supporting the findings of the Administrative Law Judge.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., Keller, Stumbo and Wintersheimer, JJ., concur. Cooper and Johnstone, J.J., concur in result only. Graves, J., dissents and would adopt the reasoning of Judge Combs of the Court of Appeals in her dissent.

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