IMPORTANT NOTICE

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THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: October 23, 2003
NOT TO BE PUBLISHED

FINAL

Supreme Court of Kentucky

2002-SC-0929-WC

DATE 11-13-03 Ella Grouitt, D.C.

J. CRESS COAL COMPANY APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-1438-WC
WORKERS' COMPENSATION BOARD NO. 95-28085

HAROLD DEAN HALL; HON. RICHARD H. CAMPBELL, ADMINISTRATIVE LAW JUDGE; HON. SHEILA C. LOWTHER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The claimant sustained a work-related shoulder injury on April 6, 1995, and on May 8, 1997, he was awarded a 25% occupational disability. He moved to reopen the claim on April 25, 2001, and subsequently was awarded a permanent, total disability. Although the award was affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, the employer continues to maintain that the reopening should have been decided under the December 12, 1996, version of KRS 342.125(1)(d) and that the total disability award was not supported by substantial evidence. We affirm.

The claimant was born in 1955. He lives in Pike County and has a seventh-grade education with no specialized or vocational training. He has worked as a laborer, security guard, and underground coal miner.

On April 6, 1995, the claimant injured his left shoulder and collarbone while working. After undergoing surgery, he filed a workers' compensation claim. He testified that although the surgery relieved his symptoms for a while, they had returned and interfered with his ability to sleep. He could not lift overhead with his left arm and could do only minor household chores. Furthermore, he thought that until his shoulder problems were resolved, he would be unable to work.

Exercise, injections, and physical therapy failed to relieve the claimant's shoulder pain, so Dr. Shockey performed diagnostic surgery that revealed a ligamentous tear in the shoulder joint. After consulting with Dr. Kibler, he performed reconstructive surgery to correct the instability. As of September 10, 1996, the claimant had reached maximum medical improvement (MMI), but his complaints of pain and stiffness persisted. Dr. Shockey assigned a 5% AMA impairment. He testified that the claimant could not return to underground coal mining, that his left arm should be used only as a "light helper," that it would be difficult for him to work overhead, and that his pain syndrome could increase over time.

Dr. Sheridan, an orthopedic surgeon, evaluated the claimant in September, 1996. He diagnosed the shoulder tear, aggravation of an underlying rotator cuff tendonitis, and acromioclavicular joint arthritis, and he assigned a 22% AMA impairment. Dr. Sheridan restricted the claimant from the use of his left arm in overhead work at more than 90 degrees of abduction or forward flexion; from climbing, lifting, pushing or pulling more than 10-15 pounds frequently or 20-30 pounds infrequently; and from repetitive retraction or protraction of the left shoulder blade.

Dr. Goodman, an orthopedic surgeon, examined the claimant in December, 1996, and noted some cervical tenderness on the left. Although noting full flexion,

extension, and 60 degrees of rotation to the right with respect to the left shoulder, he also noted some evidence of left arm atrophy. He assigned an 8% AMA impairment and indicated that the claimant could return to his former work with restrictions against frequent activities requiring him to hold or work with his arms overhead and against lifting more than 50 pounds.

Dr. Rapier evaluated the claimant in January and October, 1996. He diagnosed an impingement syndrome in the left shoulder and noted the shoulder surgery. He assigned a 7% impairment and restricted the claimant from lifting with the left arm or using it above shoulder level.

On May 8, 1997, an Administrative Law Judge (ALJ) determined that the claimant was not unemployable and awarded a 25% occupational disability. On April 25, 2001, the claimant moved to reopen, alleging that his condition had worsened and that his present occupational disability was total. Accompanying the motion were a deposition from Dr. Mann concerning the claimant's post-award medical treatment and a report from Dr. Templin. The motion was granted, and the parties proceeded to take additional proof.

The claimant testified that he developed reflex sympathetic dystrophy in his left upper arm and shoulder after receiving his partial disability award, that he was in constant and severe pain, and that he was no longer able to help with even minor household chores. He complained of swelling, temperature changes in his left shoulder and arm, and numbness and blisters in his left hand. He testified that he began taking Oxycontin in 1998, that he used a TENS unit, and that his arm and shoulder pain were so severe that he did not know of any work he could do.

Dr. Mann, the claimant's family physician, testified that over the past four years the claimant's condition had deteriorated and that he had developed a complex regional pain syndrome also known as reflex sympathetic dystrophy. Dr. Mann noted that the employer's carrier had sent the claimant to Dr. Witt, Chairman of the Department of Anesthesiology at the University of Kentucky Medical School. He verified the presence of the condition and recommended the implantation of a spinal cord stimulator. Dr. Mann also indicated that the claimant has been prescribed three antidepressants to treat the effects of the increased pain and has been referred to a pain management specialist.

Dr. Templin examined the claimant in April, 2001. In addition to the surgeries, he diagnosed chronic left shoulder pain syndrome, left shoulder reflex sympathetic dystrophy, and depression. His report notes various physical findings, including tests of left shoulder range of motion and comparative hand strength, and it also notes that the claimant is right hand dominant. Dr. Templin stated that the conditions he noted were work-related and caused a 55% AMA impairment. He restricted the claimant from any use of his left arm for pushing, pulling, lifting, twisting, turning, grasping, holding, carrying, or activities above shoulder level, and he stated that the claimant did not retain the physical capacity to return to the work he performed when he was injured.

Dr. Rapier evaluated the claimant both in the initial claim and in February, 2001. He noted the additional diagnosis of reflex sympathetic dystrophy and the claimant's complaints of left shoulder pain with stiffness, popping, and cracking. Yet, x-rays revealed no significant change, and Dr. Rapier questioned whether the claimant suffered from reflex sympathetic dystrophy. He assigned an 8% AMA impairment and indicated that the claimant would have difficulty if required to use his left arm at or

above shoulder level, to use his left shoulder repetitively, or to lift with his left arm. In his opinion, the claimant no longer had the physical capacity to return to the work he performed when injured, and his condition was approximately the same as in 1996. In a subsequent letter, he indicated that if the claimant did suffer from reflex sympathetic dystrophy, the condition would warrant an additional impairment of 4-14%.

Dr. Ensalada has written a number of articles concerning impairment and disability assessment in cases of complex regional pain syndrome and reflex sympathetic dystrophy. He reviewed the claimant's medical records and indicated that there was "no change in disability as shown by objective medical evidence of a worsening of impairment" since the initial award. In his opinion, the claimant did not suffer from reflex sympathetic dystrophy and was no less able to work than he had been in 1997.

Testing performed as part of a vocational evaluation indicated that the claimant could read at the seventh grade level and perform math at the sixth grade level. Mr. Haas, a vocational expert, concluded that the claimant could perform light duty work or work that required only the use of his right arm and hand.

After reviewing the lay and medical evidence, the ALJ chose to rely upon Drs. Mann and Templin. Persuaded that the claimant's condition had deteriorated since the initial award and that his increased symptoms prevented him from performing even a sedentary or light duty job, the ALJ determined that his disability had become total. The employer appeals from decisions affirming the award.

Pointing to the claimant's testimony that he was unable to work at the time of the initial claim, the employer maintains that he was no more disabled at reopening than in 1997. We note, however, that the claimant's testimony concerning the extent of his

disability did not compel a particular result and that the ALJ who considered the initial claim awarded only a 25% disability. See Grider Hill Dock v. Sloan, Ky., 448 S.W.2d 373 (1969). Once the award became final, the finding that the claimant had a 25% disability became the law of the case and was no longer open to dispute.

Contrary to the employer's argument, this is not a case in which the ALJ failed to relate sufficient facts to set forth a basis for the ultimate conclusion. Unlike the situation in Shields v. Pittsburg and Midway Coal Mining Company, Ky.App., 634 S.W.2d 440 (1982), the ALJ summarized the testimony of each witness and specified which evidence was most persuasive. Although the employer complains of the ALJ's failure to rely upon Dr. Rapier, who examined the claimant at both relevant points in time, an ALJ is not required to rely upon any particular medical evidence. Instead, the ALJ is authorized to weigh the evidence, to determine the credibility of witnesses, and to decide which evidence is most persuasive. KRS 342.285; Whittaker v. Rowland, Ky., 998 S.W.3d 479, 481-82 (1999). The ALJ may consider vocational evidence when determining the extent of a worker's occupational disability, but such evidence does not compel a particular result. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985). Only a decision that is unreasonable under the evidence will be reversed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The ALJ found Drs. Mann and Templin to be most persuasive and also found the claimant to be "an extremely credible witness." The claimant testified to an increase in disabling symptoms and to a loss of his ability to perform certain activities that he could perform at the time of the initial award. Dr. Templin's report contained his physical findings and observations as well as the results of range of motion and grip strength testing, information that came within the definition of objective medical findings. See

Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001). The assessment of impairment under the AMA Guides is a medical question. Although there was a difference of medical opinion concerning the extent of the claimant's impairment, no medical evidence established that Dr. Templin's application of the Guides was erroneous. Furthermore, the impairment to which he testified was substantially greater than any of the impairments in evidence at the time of the initial award.

Since the claimant's injury occurred in 1995, he was not required to prove his right to additional benefits at reopening under the 1996 standard. See Woodland Hills Mining, Inc. v. McCoy, Ky., 105 S.W.3d 446 (2003). Nonetheless, it is apparent that there was substantial evidence not only of a "change in occupational disability" but also of a "change of disability as shown by objective medical evidence of worsening . . . of impairment." We conclude, therefore, that the award that was entered at reopening was properly affirmed on appeal.

The decision of the Court of Appeals is affirmed.

All concur.

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