

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0074-WC

DATE 11-13-03 EJA Gravit + D.C

CHARLES CLEARING CONTRACTORS

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-0644-WC

V.

WORKERS' COMPENSATION BOARD NOS. 92-24202 & 92-24206

HANSEL WEBB; HON. DONNA H. TERRY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that a 1992 settlement accurately reflected the claimant's occupational disability at that time and awarded him a permanent total disability at reopening. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Appealing, the employer continues to maintain that the claimant's actual disability at settlement was total and, therefore, that there could be no greater disability at reopening. We affirm.

The claimant was born in 1959 and had a ninth-grade education with no specialized or vocational training. His work experience was as a heavy equipment operator in the surface mining industry. After falling from an end loader and injuring his low back on June 11, 1990, he filed applications for both the back injury and a work-related hearing loss.

A myelogram revealed a herniated disc, but Dr. Dempsey, a University of Kentucky neurosurgeon, did not recommend surgery at that time. Likewise, Dr. Rapier diagnosed degenerative disc disease and possible nerve root irritation. He reported that an MRI revealed a disc herniation at L5-S1 without definite nerve root compression, and he assigned a 15% impairment. Dr. Parr's diagnosis was similar, but he thought that the claimant's disability was total and only temporary. He recommended surgery, after which he thought the claimant would be able to return to work as a heavy equipment operator. On October 22, 1992, the claimant, his employer, and the Special Fund agreed to settle the claims for a 62.5% occupational disability, and the agreement was approved by an ALJ.

The claimant's back condition deteriorated after the settlement. In 1999, he was referred to Dr. Mortara, a neurosurgeon. At that time, MRI revealed an L5-S1 disc herniation with moderate encroachment of the thecal sac, left nerve root sheath, and left neural foramen. Dr. Mortara indicated that this was a significant change from 1991, and he recommended and performed an L5-S1 discectomy. Although surgery relieved some of the claimant's left leg symptoms, it did not alleviate his back pain. Dr. Scott, Dr. Mortara's partner, ordered epidural steroid injections to mitigate the symptoms of S1 radiculopathy, but they were not performed because the workers' compensation carrier refused to cover them. Dr. Scott's notes indicated that the claimant's complaints of pain returned to pre-surgical levels and that by October, 2000, he walked with an antalgic gait, favoring his left leg.

On December 8, 2000, the claimant moved to reopen, alleging an increase in occupational disability due to a worsening of his back condition and the development of a resulting psychiatric condition. The claimant admitted that he thought he was totally

disabled in 1992 and that he had not worked since then. He testified, however, that he was in more severe pain than in 1992, that he had numbness on his right side and foot, and that he presently had a nervous condition that interfered with his sleep and caused episodes of panic.

In 2000, Dr. Rapier diagnosed a herniated disc at L5-S1 that resulted in a discectomy and chronic radicular symptoms. Using the same edition of the AMA Guides as in 1991, Dr. Rapier indicated that the condition now warranted a 23% impairment. Furthermore, he restricted the claimant from occasionally lifting more than 20 pounds, from regularly lifting more than 10 pounds, and from bending, lifting, turning, or twisting.

Dr. Travis, a neurosurgeon, examined the claimant in January, 2000 and reviewed his medical records. He recommended three to four weeks of work hardening and conditioning, followed by a return to work. He reported that MRI revealed no evidence of recurrent disc herniation or nerve root compression and, therefore, saw no reason that the claimant's symptoms were worse than before surgery.

Dr. Patrick, a general surgeon, evaluated the claimant and assigned a 26% impairment to the back condition.

Dr. Cooke, a clinical and forensic psychologist, evaluated the claimant and diagnosed atypical anxiety disorder and adjustment disorder with depressed mood. He assigned a 20% psychiatric impairment of which 15% was work-related and 5% was not. He reported that the claimant could read at the seventh grade level and was below average to very below average in intellectual functioning.

Testing performed by Dr. Granacher, a psychiatrist, revealed a fifth-grade reading level and below average intellectual functioning. He diagnosed pain disorder

due to a worsening of the L5-S1 disc. In his opinion, the condition warranted a 5% AMA impairment.

Dr. Weikel, a vocational expert, reported that the claimant was totally disabled and that, if Dr. Parr's opinions were believed, the claimant had no permanent occupational disability in 1991. Based upon Dr. Rapier's findings, Dr. Weikel determined that the claimant lost at least 45% of his prior access to the labor market. Whereas, based upon Dr. Patrick's findings, he lost 80%.

After reviewing the lay and medical evidence, the ALJ determined that the settlement accurately reflected the claimant's occupational disability in 1992 and that his present disability was total. In doing so, the ALJ pointed to the deterioration of his physical condition since the settlement, his increased physical impairment, and the development of the psychiatric impairment. Although the Board and the Court of Appeals affirmed, the employer continues to maintain that the decision was erroneous.

Asserting that the claimant was totally disabled at settlement, the employer emphasizes his failure to return to work. The employer also points to Dr. Parr's 1991 testimony that the claimant was totally disabled but that the condition was only temporary because he would be able to return to work after surgery. Its argument is that because the claimant did not undergo surgery until 1999, Dr. Parr's testimony supports the view that he was totally disabled in 1992. The employer concludes that it is not material that the claimant's physical condition worsened after the settlement because he was totally disabled at that time and, therefore, could become no more disabled.

At reopening, the claimant was seeking an award of permanent total disability. Therefore, he had the burden to show that his permanent occupational disability was

greater than it had been at settlement and that it had become total. It is among the functions of the ALJ to decide which evidence to rely upon and to translate the lay and medical evidence into a finding of occupational disability. In doing so, the ALJ is bound by neither the worker's perception of the extent to which he is disabled, the vocational evidence, nor a physician's opinion in that regard. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334 (1985). Here, the ALJ determined that the claimant's occupational disability at settlement was 62.5% considering his age, education, and work experience. The finding was reasonable under the evidence as a whole and, therefore, it was properly affirmed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The decision of the Court of Appeals is affirmed.

All concur.

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