

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: December 18, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2002-SC-1030-WC

FINAL

DON NAPIER

APPELLANT

DATE 1-8-04 *Carla Post CDC*

V.

APPEAL FROM COURT OF APPEALS
2002-CA-0887-WC

WORKERS' COMPENSATION BOARD NO. 95-17136

WHITAKER COAL CORPORATION; ROBERT
L. WHITTAKER, DIRECTOR OF WORKERS'
COMPENSATION FUNDS, SUCCESSOR TO
SPECIAL FUND; HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

After settling his back injury claim for a 50% occupational disability, the claimant was permitted to reopen and received an additional 10% disability. Although he maintained on appeal that uncontradicted medical evidence compelled an award of total disability at reopening, the award was affirmed by the Workers' Compensation Board (Board) and a majority of the Court of Appeals panel. We affirm.

The claimant was born in 1954 and has a twelfth-grade education as well as specialized training in auto mechanics, plumbing, and mine technology. He worked for the defendant-employer as an underground coal miner. In April, 1994, he had an episode of back pain while shoveling coal but missed no work due to the incident. On July 25, 1994, the cart that he was riding into the mine jumped the track, jolting him and

injuring his back. When deposed, the claimant testified that he did not think he could return to his former job due to back pain and trouble walking. He later settled the claim for a 50% occupational disability, and the agreement was approved on November 21, 1995. The claimant did not return to any type of work after the accident. On December 11, 2000, he filed a motion to reopen, alleging that a worsening of his physical condition had caused an increase in his occupational disability. The motion was granted, and the parties proceeded to take proof.

At reopening, the claimant testified that his pain had increased since the settlement, that it was exacerbated by activity, and that it prevented him from engaging in some of his former activities. In 2000, he sought treatment by Dr. Reasor, a pain specialist. The claimant testified that he experienced more severe back pain and numbness in the left leg. Questioned about a 1996 automobile accident, he testified that although the primary injury was to his neck, the accident also aggravated his back pain. He indicated that the pain was present daily; that it was very severe on the average of twice each week; and that he took Tylox, Lortab 10, and Xanax. He testified that although he had thought he would return to work after the settlement, his employer had terminated the employment. He indicated that he had not looked for work since the settlement was approved.

Rodney Valentine, the employer's human resources manager, testified in the initial claim. He indicated that no jobs were available within the claimant's restrictions but that the employer was willing to make reasonable accommodations to enable him to continue working. Valentine also indicated, however, that the employer terminated operations on March 30, 1995, at which time all employees were laid off.

In January, 1995, Dr. Morgan examined the claimant and reviewed the medical records with respect to the initial claim. At that time, the claimant complained of back pain that radiated to the right hip and leg. Physical examination revealed a reduced range of motion, tight hamstrings, and some positive straight leg raising. Diagnostics revealed degenerative disc disease in the lower lumbar spine without evidence of a herniated disc. Dr. Morgan indicated that the claimant was at maximum medical improvement and that he could not return to work doing any heavy lifting, prolonged crawling, squatting, or lifting more than 20 pounds.

Dr. Gilbert testified that he first saw the claimant on October 26, 1994, at which time he diagnosed a permanent soft tissue injury. He treated it with prescription medication and work conditioning. In 1995, he assigned a 7% impairment rating and restricted the claimant from lifting more than 10 pounds; from sitting or standing less than 15-20 minutes; and from bending, stooping, crouching, crawling, or operating heavy equipment.

Medical records that were introduced at reopening indicated that after the 1996 automobile accident, Dr. Gilbert diagnosed low back pain with a possible ruptured disc. They also indicated that the claimant continued to have increased low back pain in 1997 and 1998. As of May 7, 2001, Dr. Gilbert indicated that he had last seen the claimant on November 1, 1999. At that time, his diagnoses included degenerative disc disease at L4-L5 and L5-S1, lumbar sprain/strain syndrome, muscle spasms, nerve root injury syndrome, insomnia, and numbness and tingling in the left leg. In his opinion, the increased pain and muscle spasms in the claimant's back and leg showed a worsening of his condition since the settlement. Dr. Gilbert found no evidence of symptom magnification or malingering. He assigned a 21% AMA impairment and restricted the

claimant from lifting more than 10 pounds; from walking, standing, or sitting for more than 30 minutes; from bending, climbing, reaching, grasping, or operating machinery. In his opinion, the claimant did not have the physical capacity to return to the type of work performed at the time of the injury. In Dr. Gilbert's opinion, a worsening of the work-related low back injury was the cause of the claimant's present complaints, independent of any disability that a 1997 neck injury may have caused.

Dr. Reasor, an anesthesiologist/pain management specialist, first saw the claimant on January 5, 2000. He noted a history that included the work-related accident but did not include the 1994 episode of back pain or the 1996 automobile accident. Physical examination revealed tenderness over the spinous processes from L-3 to S1 with a reduced range of motion. Dr. Reasor diagnosed degenerative lumbar disc disease with lumbar facet arthropathy and prescribed lumbar facet injections. When questioned concerning the cause of the conditions, he testified that the claimant may have had some pre-existing problems that were exacerbated by the injury and that, in the absence of the 1994 MRIs, he could not determine what changes had occurred since then. In his opinion, the claimant's pain had been progressive. When Dr. Reasor last examined the claimant on February 26, 2001, he complained of pain and difficulty sitting; therefore, Dr. Reasor recommended a discogram to determine the source of the pain.

After reviewing the lay and medical evidence, the ALJ determined that the claimant's actual disability at settlement was 50%. Noting the higher impairment rating and increased pain at reopening, the ALJ determined that the claimant's occupational disability had increased due to a worsening of his condition after the settlement.

Rejecting the claimant's argument that he was totally disabled, the ALJ determined that

when his age, education, and work experience were taken into account, the increased pain and restrictions warranted a finding that his present occupational disability was 60% under the principles of Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968).

Furthermore, noting that the claimant was able to work full time and without restrictions up until July 25, 1994, the ALJ determined that there was no prior active disability due to the incident while shoveling coal.

The claimant petitioned for reconsideration, maintaining that the uncontradicted testimony of Drs. Gilbert and Reasor established that he was permanently and totally disabled. Relying upon Commonwealth v. Workers' Compensation Board of Kentucky, Ky.App., 697 S.W.2d 540 (1985), he asserted that unless specific reasons were given for rejecting the evidence, the ALJ was required to rely upon the testimony and to conclude that he was totally disabled. He maintained, therefore, that the award that was entered at reopening must be set aside and replaced with an award of total disability. The petition did not request any specific findings concerning work that the claimant could perform or its availability in the local area. The petition was overruled summarily as being no more than a reargument of the merits.

The claimant asserts that Dr. Gilbert's testimony is uncontroverted and that the restrictions contained therein would prevent him from working. On that basis, he asserts that he met his burden of proving total disability at reopening and that the finding of a 60% disability rather than total disability was erroneous as a matter of law. He explains that he presented prima facie evidence of a worsening of condition, an increase in pain, and his inability to work; that the employer presented no conflicting evidence; and that there was nothing in the record to rebut the evidence that he offered. He maintains, therefore, that the ALJ was not authorized to reject the uncontroverted

medical testimony that he had become totally disabled at reopening without stating a reasonable basis for doing so. Commonwealth v. Workers' Compensation Board of Kentucky, supra. In a second argument, the claimant asserts that the ALJ failed to make findings from the record concerning work that he remains capable of performing or of its availability in the local market. Absent evidence in the record that such employment is available, he maintains that a finding of total disability was compelled.

The claimant's injury occurred on July 24, 1994, and he settled the claim in November, 1995. His burden at reopening was to show that his actual occupational disability had increased under the Osborne v. Johnson, supra, standard as set forth in the pre-December 12, 1996 version of KRS 342.0011(11). "Occupational disability" is a legal term of art that focuses on the extent to which an injured worker's earning capacity is affected by the injury. Factors such as the individual's age, education, work experience, medical condition, and restrictions; the availability of work in the area under normal employment conditions; and the prevailing wage rates for such employment all are relevant considerations. It is the function of the ALJ to translate evidence of a worker's functional impairment and restrictions into a finding of occupational disability. Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469 (1976).

KRS 342.285 provides that an ALJ's decision with respect to a question of fact is "conclusive and binding." Thus, the ALJ 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). 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). Although the parties are entitled to a sufficient

explanation of the basis for the decision to permit meaningful appellate review, a detailed analysis of the facts or the law is unnecessary. Big Sandy Community Action Program v. Chaffins, Ky., 502 S.W.2d 526 (1973); Shields v. Pittsburgh & Midway Coal Mining Co., Ky.App., 634 S.W.2d 440 (1982). Where the party with the burden of proof does not prevail before the ALJ, the existence of evidence that would have supported a favorable result is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). Instead, the burden on appeal is to establish that the favorable evidence was so overwhelming that no reasonable person could have failed to be persuaded by it and, therefore, that it compelled a favorable finding as a matter of law. See Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986); Paramount Foods v. Burkhart, *supra*; American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission, Ky., 379 S.W.2d 450 (1964).

The claimant's testimony that he was unable to work as a result of his injury was some evidence of the effect that his back condition had on his ability to earn an income, but his testimony would not compel a finding of total disability. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979); Grider Hill Dock v. Sloan, Ky., 448 S.W.2d 373 (1969). He relies on Commonwealth v. Workers' Compensation Board of Kentucky, *supra*, which stands for the principle that where there is uncontradicted medical evidence that an injured worker is capable of only sedentary work, a finding of some degree of occupational disability is compelled unless reasons are given for rejecting the medical testimony. At reopening, Dr. Gilbert testified that the claimant was unable physically to perform the type of work that he performed when injured, *i.e.*, coal mining. Although this uncontroverted testimony compelled a finding that the claimant had some

occupational disability at reopening, it did not compel a finding that he was totally disabled as defined by KRS 342.0011(11).

We note that the claimant does not dispute the finding that his actual occupational disability at settlement was only 50% although he admitted that he did not attempt to look for work after the mine shut down. Dr. Gilbert testified to significant work restrictions at reopening, but they differed little from the restrictions that he had imposed in 1995 and were less severe with respect to sitting and standing. We would agree that both sets of restrictions compelled a finding that the claimant's occupational disability was significant. Although we would also agree that there was evidence of increased disability at reopening, we are not persuaded that the more recent set of restrictions compelled the ALJ to determine that the claimant's disability had doubled since the settlement.

The ALJ rejected the claimant's argument that he was totally disabled, indicating that factors such as his age, education, and work experience were taken into account when finding a 60% disability. Although the claimant petitioned for reconsideration, he did not request specific findings with respect to the type of work that he remained capable of performing or its availability on the local job market. Under those circumstances, he can no longer complain that they were not made. Eaton Axle Corp. v. Nally, Ky., 688 S.W.2d 334, 338 (1985). Finally, he complains that the record contained no evidence of available work that he could perform to support a finding of less than total disability, overlooking the fact that it was his burden to prove that he was totally disabled because the local job market lacked any work he could perform.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

James D. Holliday
109 Broadway
P.O. Box 29
Hazard, KY 41702

COUNSEL FOR APPELLEE,
WHITAKER COAL CORPORATION:

Charles W. Berger
207 N. Main Street, Ste. 1
P.O. Box 876
Harlan, KY 40831

COUNSEL FOR APPELLEE,
ROBERT L. WHITTAKER, DIRECTOR OF
SPECIAL FUND:

David W. Barr
Workers' Compensation Funds
1047 U.S. Hwy. 127 South, Suite 4
Frankfort, KY 40601