

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: January 22, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0088-WC

DATE 2-12-04 E.A.A. Groun, DC.

ANDY VANOVER

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-0998-WC

V.

WORKERS' COMPENSATION BOARD NOS. 85-21717, 90-37727 & 93-30395

WHITAKER COAL CORPORATION; ROBERT
L. WHITTAKER, DIRECTOR OF WORKERS'
COMPENSATION FUND, SUCCESSOR TO
SPECIAL FUND; SHEILA C. LOWTHER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In a decision that was later affirmed by the Workers' Compensation Board (Board) and the Court of Appeals, an Administrative Law Judge (ALJ) determined that claimant failed to meet his burden of proving increased occupational disability at reopening. Appealing, the claimant maintains that although his injury occurred before December 12, 1996, the ALJ erred by applying the 1996 version of the Act, by ignoring uncontradicted evidence, and by failing to address the issue of pain. We affirm.

The claimant was born in 1953 and had a ninth-grade education. He worked as an underground coal miner for about 22 years and was a certified mine foreman. In 1985, he injured his lower back while working for the defendant-employer. Dr. Travis testified that the claimant complained of back pain that radiated into the left leg. He

performed a diskectomy at L5-S1 and released the claimant to return to work in October, 1985. Dr. Travis assigned a 5-10% impairment. In 1987, the claimant settled with his employer for a 10% occupational disability.

On June 5, 1990, a falling rock struck his head and injured his neck. He continued to work for several months. Conservative treatment proved ineffective, leading Dr. Tibbs to perform a cervical fusion in 1992. The claimant did not return to work thereafter. At the hearing, he testified that he suffered from severe headaches that caused him to vomit, from cramping and numbness in his left hand and arm, and from a reduced range of motion in his neck. He also complained of problems with both legs that he attributed to the back injury. He stated that he had difficulty helping his wife with household chores and was incapable of returning to his previous work.

Dr. Tibbs testified that the surgery was successful, that the claimant had a neurological recovery, but that he had a restricted range of motion in the neck and some arthritic symptoms. He stated that the claimant's cervical condition would render him unable to work in the restricted heights of coal mines and would prevent him from performing the duties of a mine inspector. Dr. Tibbs assigned an 18% impairment.

Dr. Lowe noted that the claimant's grip strength was weaker in the left and that he had decreased sensation over the left thumb. He also reported a C6 neuropathy and a decreased range of motion in the neck. He recommended that the claimant avoid overhead work and was of the opinion that he could not return to underground mining. Dr. Lowe placed the claimant's impairment at 30%.

Dr. Rapier reported numbness in the left radial forearm and thumb, diminished grip strength in the left hand, and neck pain. He assigned a 25% impairment and restricted the claimant from lifting more than 20 pounds.

On July 19, 1995, the claimant was awarded a 60% occupational disability for the neck injury. The opinion and award indicated that the 1985 injury had, in fact, caused a 10% disability. Dissatisfied with the award, the claimant appealed. Although he maintained that he was totally disabled, the Board affirmed.

On December 11, 2000, the claimant filed a motion to reopen. He alleged a worsening of condition due to increased pain and asserted that his occupational disability had increased since the award. The motion was granted to the extent that the taking of further proof was ordered. At reopening, the claimant testified that his symptoms were worse than in 1995 and that they prevented him from working. In support of his allegations, he offered evidence from Drs. Chaney and Templin.

Dr. Chaney testified that he began treating the claimant sometime before 1995. On a number of occasions since 1995, the claimant had complained of muscle spasms in his neck. Dr. Chaney did not see the claimant between July, 1997, and July, 1999, but in August, 1999, the claimant returned following a flare-up of back pain. Although he referred the claimant to Dr. Bean, only conservative treatment was recommended. Dr. Chaney testified that he did not see the claimant between September, 1999, and December, 2000. In his opinion, a worsening in the claimant's condition was evidenced by his increased complaints of pain, for which he took a substantial amount of medication. Dr. Chaney testified that the claimant had a 24% impairment and was incapable of working in the mines. He acknowledged, however, that no changes were evident on physical examination or x-ray and that since the neck injury and surgery, the claimant had always experienced muscle spasms and had some limitation in his range of motion and straight leg raising.

Dr. Templin evaluated the claimant in April, 2001. He noted that low back problems were a factor in the claimant's inability to return to work after the neck injury. He also noted the claimant's complaint that his condition had worsened since 1995. He assigned a 38% impairment and restricted the claimant from prolonged standing, walking, or lifting more than 20 pounds from the waist or 5 pounds from the floor.

With respect to the back injury, the employer relied upon testimony that Dr. Travis gave in the initial proceeding. The employer also introduced testimony from Dr. Brooks, an associate of Dr. Travis who saw the claimant in November, 1990. At that time, EMG/NCV studies and an MRI of the cervical spine were normal. Dr. Brooks prescribed physical therapy and medication, kept the claimant off work for 30 days, and was of the opinion that he could return to full duty thereafter.

After reviewing the lay and medical evidence, the ALJ determined that the claimant's testimony at reopening was essentially the same as in 1995. At both times, he testified that his symptoms were so severe that he could not return to any type of employment. The ALJ noted that although Dr. Chaney testified that he was prescribing more pain medication, the claimant had gone for periods of as long as two years without treatment. Although Dr. Templin indicated that the claimant now voiced more subjective complaints, there was no objective evidence of a worsening of condition. Furthermore, the claimant had been receiving social security disability benefits for at least six years. The ALJ concluded, therefore, that the claimant failed to prove that his physical condition had worsened or that he was more disabled at reopening than he had been in 1995.

The claimant petitioned for reconsideration, asserting that the ALJ had effectively found him to be permanently and totally disabled when he received the initial award.

Rejecting the assertion as incorrect, the ALJ explained that the claimant had failed to show a change of condition since the initial award. Following the denial of his petition, the claimant appealed.

A workers' compensation award is the equivalent of a final judgment and is enforceable as such in circuit court under KRS 342.305. KRS 342.125 gives some relief from the principles of the finality of judgments by permitting the reopening and modification of a final award upon proof of a post-award change of occupational disability. An allegation of a change of occupational disability may be supported by evidence of either physical or economic changes. See Peabody Coal Co. v. Gossett, Ky., 819 S.W.2d 33, 35 (1991).

The 1995 award established, as a matter of law, that the claimant had a 70% occupational disability, i.e., a 10% disability for the back condition and a 60% disability for the neck condition. This reopening was not based upon an allegation of increased occupational disability due to a change of economic conditions. Thus, the claimant's burden at reopening was to prove that a change in his physical condition since the 1995 award caused him to be more occupationally disabled than he was in 1995.

The claimant argues that Dr. Chaney testified to his inability to return to coal mining and to the fact that x-rays, the presence of muscle spasms, and difficulty with straight leg raising all supported the claimant's assertion that he was in pain. He also argues that Dr. Templin noted that the surgeries and residual scar formation were consistent with chronic pain and that the claimant lacked the physical capacity to return to coal mining. The issue at reopening, however, was not whether the claimant was in pain or was able to return to coal mining. It was whether there was a worsening of his

physical condition since 1995 and, if so, whether it resulted in increased occupational disability under the Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), standard.

Contrary to the claimant's assertion, there is no indication that the ALJ applied the 1996 version of the Act or failed to consider the effects of pain when deciding the merits of his motion. In reciting Dr. Templin's testimony, the ALJ noted a statement that the claimant's condition had "subjectively worsened" since the settlement of the back claim and award for the neck claim but also noted that Dr. Templin reported no diagnostic studies or other objective evidence that supported the claimant's subjective complaints of increased pain. Completing the analysis, the ALJ noted that the claimant's testimony at reopening "was essentially the same" as in 1995, at which time he had also argued that he was totally disabled. He had made no attempt to work since then and had been receiving social security disability benefits for at least six years. Although Dr. Chaney prescribed greater doses of pain medication, his records indicated that the claimant's complaints had remained essentially unchanged for the past six years. Furthermore, there were treatment gaps of as much as two years. When Dr. Bean saw the claimant in 1999, he recommended no change in treatment and did not believe that further diagnostic testing was necessary.

Although a worker's testimony is competent evidence of his physical condition at particular points in time, it will not compel a particular finding even when it is uncontradicted. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979); Grider Hill Dock v. Sloan, Ky., 448 S.W.2d 373 (1969). Here, the ALJ noted that the claimant's testimony at reopening was essentially the same as in 1995. In pre-1996 claims, both objective and subjective factors are relevant to determining whether there are changes in a worker's physical condition. See Beale v. Rolley, Ky., 777 S.W.2d 921, 923 (1989). Both Dr.

Templin and Dr. Chaney based their opinions that the claimant's physical condition changed after 1995 on his complaints of increased pain. Thus, the claimant's credibility and the lack of objective evidence to support the complaints of increased pain were relevant when weighing the medical opinions and provided an adequate basis for rejecting them. The ALJ's conclusion that the claimant failed to show a worsening of physical condition was reasonable under the circumstances and, therefore, a favorable finding was not compelled. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986). Likewise, in view of the claimant's failure to attempt any type of work since undergoing surgery in 1992, it was reasonable for the ALJ to conclude that he failed to show a post-award increase in occupational disability due to his injuries. Id.

The decision of the Court of Appeals is affirmed.

All concur.

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