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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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NOT TO BE PUBLISHED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

DATE 2-12-04 ENACTION: H.D.C

2003-SC-0090-WC

PAUL E. DAVIDSON, II — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2002-CA-849-WC
WORKERS' COMPENSATION BOARD 94-34226 & 93-01043

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

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a Court of Appeals' opinion affirming a Workers' Compensation Board opinion that affirmed an order of the Chief Administrative Law Judge that granted a motion to reopen and then denied an increase of Davidson's previous injury award of a 50% permanent disability.

Davidson raises three issues: that the ALJ applied the wrong standard to reopening; that the evidence compels reversing the ALJ; and that is was error for the ALJ not to make findings of fact regarding pain.

Davidson sustained a work related low-back injury on April 21, 1994. He was operating a rock truck for Whitaker Coal Company when the seat malfunctioned causing him to strike his head on the roof of the cab and pin his legs under the steering

wheel. On November 26, 1996, an ALJ found that Davidson suffered an occupational disability rated at 50% and recommended that he undergo Vocational Rehabilitation at Whitaker's expense. Alleging that his medical condition had worsened and pain had increased, he filed a motion to reopen on December 11, 2000. Davidson did not avail himself of the vocational rehabilitation benefit awarded in 1996 until 2001, that is, after having already filed this motion to reopen. The motion to reopen was granted and evidence was heard in support of increasing the award.

Davidson submitted evidence from Drs. Jeffrey Prater and James Templin in the reopening. Dr. Prater testified that Davidson's pain had increased since 1996 and that Davidson was unable to return to the type of work he had been performing at the time of the injury. Dr. Templin had performed an independent medical evaluation for this hearing. He had also treated Davidson at the time of the original injury. Although he originally rated Davidson at a 10% functional impairment, he testified that Davidson's subjective complaints were greater and that he would now rate Davidson's functional impairment at 11%. The results of the vocational rehabilitation assessment were also submitted. The assessment placed Davidson at 1st grade reading level and 2nd grade mathematics ability despite his 9th grade education. The ALJ had found that the record showed that Davidson had shown no serious vocational interests and he had always believed himself to be totally disabled. The ALJ said that Davidson's own testimony was the most persuasive factor in her conclusion. She noted that since the 1996 proceeding, Davidson neither believed he could return to any gainful employment nor had he made any effort to obtain a job. The ALJ applied the standard announced in Central City v. Anderson, Ky. App., 521 S.W.2d 246 (1975) and concluded that Davidson had failed to prove a change in occupational disability and thereby denied any

increase in the total disability award. Davidson appealed to the Board and the Court of Appeals. Each affirmed the ALJ. This appeal follows.

I. The Proper Standard for Reopening by KRS 342.125

Davidson states that the version of KRS 342.125 effective October 26, 1987, "change in occupational disability", should be applied to his case instead of the December 12, 1996 version, "change of disability". The substantive law applicable to an injury is generally that which was in effect on the date of the injury. However, in Garrett Mining Co. v. Nye, Ky., --- S.W.3d --- (2003); 2003 WL 22415389, we instructed that the procedural law applicable to the motion to reopen a workers' compensation case is the law in effect at the time of reopening. Here, the case was reopened in an Order dated January 18, 2001 "to the extent that this claim on reopening shall be assigned to an Administrative Law Judge for further adjudication." Effective December 12, 1996, KRS 342.125 requires that a "change of disability" be shown on reopening. Therefore, the correct standard governing whether to reopen the case was a showing of a "change of disability." Even if the wrong standard were applied, it did not cause Davidson to lose an increase in his award, however, because the motion to reopen was granted. The ALJ heard the merits of the case and determined whether to increase the award using the "change in occupational disability" principles set forth in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968).

The Order reopening Davidson's case stated that it granted reopening because the initial showing met the purposes set forth in Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972). The requirements of Stambaugh, supra., save the non-moving party on a motion to reopen from the costs of litigation unless a prima facie case for reopening pursuant to KRS 342.125 has been shown by the movant. Here,

the ALJ found the motion sufficient to warrant both parties litigating before the ALJ. The motion to reopen was thereby granted, and although the standard applied to allow reopening was not explicitly stated, Davidson benefited nonetheless. Even if Davidson's argument were correct in this case, he would be complaining of the ALJ having gotten the right result for the wrong reasons. The case was reopened, however, by the January 18, 2001 Order thereby giving Davidson the benefit of having the case reopened, regardless of which version of KRS 342.125 was applied. A correct decision will not be disturbed because the court gave a wrong or insufficient reason therefor. Prewitt v. Wilborn, Ky., 212 S.W. 442 (1919).

Davidson further argues that the reopening should have been determined using the "change in occupational disability" standard. In Nye, supra., we instructed that "once reopened, the ALJ could determine the extent of the occupational disability in accordance with the principles set forth in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968)." The ALJ stated that she found no increase in occupational disability. Even though the language of the final order states that the "motion to reopen is dismissed", this was only after the case was reopened for further adjudication and determined on the "change of occupational disability" standards, that is, the principles set forth in Osborne, supra. This standard is the same "change in occupational disability" standard for which Davidson argues. Davidson therefore had his "day in court", even if he got there under the wrong standard as he claims, and had his case ultimately adjudicated under the correct law. Davidson's argument over which law should have applied to the reopening therefore carries no merit here.

Davidson argues within this issue that the ultimate standard used to determine whether to increase the award was applied incorrectly. Davidson argues that the ALJ

looked at the case in a "backwards" fashion and compared Davidson's 2001 condition to his 1996 condition. He argues that because the ALJ took note that Davidson said in 1996 that he felt he was totally disabled, the ALJ placed an impossible burden of proving a change in 2001. This argument is identical to that put before the Board and the Court of Appeals. The Court of Appeals analyzed this issue and concluded that there was "no basis to depart" from the meticulous reasoning of the Board's opinion. It adopted the Board's opinion as its own and affirmed, concluding that the ALJ properly analyzed the evidence before her in determining whether Davidson had shown a "change in occupational disability" such that she could increase the award.

II. The Evidence Did not Compel an Increase in Davidson's Award

Davidson argues that the ALJ ignored uncontradicted expert testimony and charges the ALJ with mischaracterizing some of the expert testimony. He argues that the ALJ incorrectly stated the opinions of Dr. Templin regarding pain were based solely upon Davidson's comments to Dr. Templin. Finally, he states that the facts of this case are identical to those of Commonwealth v. Workers' Compensation Board of Kentucky, Ky. App., 697 S.W.2d 540 (1945). Relying on the argued similarity, he states that the uncontradicted expert testimony requires an increase of his award. We cannot, however, agree that the cases are at all similar because the Commonwealth case dealt with the issue of whether Miss Payne, the claimant in that case, was entitled to any benefits at all on first adjudication. This case is a motion to reopen and therefore has expert testimony from the first adjudication against which the ALJ compares the testimony presented on reopening. In Payne's case, she presented medical opinions on the issue of a work-related injury and no contradicting evidence was presented. There, the court said that the Board could not ignore such testimony absent sufficient

explanation of the reasons for doing so. Here, new medical evidence is being compared to old medical evidence to support the claim that Davidson has experienced a change in occupational disability worthy of increasing his award. This case does not hinge on a matter of uncontradicted expert opinion concerning the existence of a disability caused by a work-related injury, rather, the ALJ had the task of comparing the condition of Davidson at the time of his original award to his condition at the time of the motion to reopen. At both times, there is expert testimony rating him with certain disabilities. The ultimate issue in this case then is whether the testimony compels a finding of change of occupational disability such that the original award must be increased. The Board and the Court of Appeals both reviewed the record and found that the evidence did not compel a finding either way and therefore affirmed the ALJ's decision not to increase the award.

The claimant moving for reopening has the burden of showing that the decrease of wage earning capacity, whether the result of physical deterioration, or subsequent unemployability without a physical change, is due to the effects of the injury in order for an award to be increased. Peabody Coal Company v. Gossett, Ky., 819 S.W.2d 33 (1991). Because Davidson had the burden of proof before the ALJ, and was unsuccessful, the question on appeal is whether the evidence compelled a different result. Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735 (1984). Compelling evidence is defined as evidence that is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224 (1985). It is not enough for Davidson to show there is merely some evidence that would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). The Board analyzed Davidson's argument as turning upon

his own testimony that the pain is now worse. The Board also noted that the remainder of the evidence provides that Davidson's condition is essentially the same. The ALJ, as fact-finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. The ALJ is free to assign little credibility to self-serving testimony. Paramount Foods, Inc. v. Burkhardt, Ky., 595 S.W.2d 418 (1985).

The ALJ had conflicting evidence presented such that she was free to pick and choose from the evidence. On reviewing the record, we agree with the Court of Appeals that the changes noted were insignificant. The work restrictions placed on Davidson by Dr. Templin were identical between 1996 and 2000. The 1% increase in Dr. Templin's total impairment rating supports a finding that Davidson's occupational disability has not so significantly changed such as to support an increase in the original award. Likewise, Dr. Prater's opinion that Davidson's condition was worse is mostly placed on the history and complaints provided by the patient, Davidson. The ALJ was therefore free to see this testimony as self-serving. Because the ALJ did not believe Davidson's own testimony was credible regarding the changes, she was free to disregard the physician's opinion, even though it was uncontradicted, because Dr. Prater's opinion was merely a reiteration of Davidson's own testimony. See Osborne v. Pepsi Cola, Ky., 816 S.W.2d 643 (1991).

Turning to other evidence, no significant non-medical changes can be noted in Davidson's condition either: he has not worked or attempted to work since the original award; he had not even availed himself of the vocational rehabilitation award until after this motion to reopen; and, he has been drawing Social Security Disability prior to and since the date of his original award. Even though the evidence could have supported

an increase in the award, we cannot find any evidence that compels a conclusion that Davidson has experienced a change in occupational disability meriting an increase in his original award.

III. The ALJ did not err with regard to findings of fact on pain.

Davidson argues that Witten v. Terry Elkhorn Mining Company, Ky., 449 S.W.2d 744 (1969), requires the ALJ to make findings of fact regarding Davidson's pain to contradict testimony that Davidson is not suffering from pain more severe than in 1996. In Witten, the claimant had experienced severe pain from two work-related accidents. He attempted to work again, but his pain prevented it. We noted that "there is abundant evidence in the record that as the direct result of these two accidents he is seriously and permanently disabled." Id., at 745. However, the doctor appointed by action of KRS 342.121 had submitted a brief, skeletal opinion that stated that he could find no objective evidence of any disability. In the face of the other evidence, it was blatantly apparent that the doctor was not objective in his assessment of Witten. We noted that the doctor's report was technically flawed as well because that doctor did not take any subjective testimony from Witten regarding pain and thus it was apparent that the doctor was evading the purpose of the examination. Therefore, the issue in Witten was whether a doctor's opinion sought under authority of KRS 342.121 should determine the ultimate conclusion when all other evidence contradicted it. We decided that given the poor quality of the doctor's opinion in that case, it should have little to no weight in the ultimate conclusion and that the ALJ should make findings of fact from all the other evidence available in that case, including the subjective accounts of pain to support a finding of permanent disability.

Here, the doctors did not evade any examination, and the opinions of each support Davidson's testimony. As discussed above, Dr. Prater relies on Davidson's subjective pain complaints to make his opinion. Because we remanded for a finding of disability in the Witten case, Davidson appears to be arguing to us that we look only to his subjective accounts of pain and remand for an award of permanent disability based solely on the subjective accounts. The ALJ did not believe that the pain reported at the time of the motion to reopen was significantly different from that reported in 1996. Furthermore, the ALJ was aware of the pain reports, but not convinced by that testimony. Likewise, the other testimony supports that no significant change occurred. Unlike Witten, there is no great disparity in the conclusions to be drawn from the various evidence here. The ALJ properly considered Davidson's subjective accounts of pain.

The decision of the Court of Appeals is affirmed.

All concur.

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