

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: JUNE 17, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2003-SC-0480-WC

DATE 7-8-04 ELLAGROWMPC

BIG FIST COAL COMPANY

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
NO. 2002-CA-2512-WC
WORKERS' COMPENSATION BOARD NO. 93-21986

FERRELL O'QUINN; DIVISION OF
WORKERS' COMPENSATION FUNDS
(SUCCESSOR TO SPECIAL FUND);
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Big Fist Coal Company appeals from an opinion of the Court of Appeals affirming a decision of the Workers' Compensation Board affirming an award of the Administrative Law Judge of increased benefits to O'Quinn granted on petition to reopen a previous award.

Big Fist argues that the ALJ improperly ordered greater benefits because there was not substantial evidence to support either the award or a causal relation to the original injury and such a decision was clearly erroneous.

O'Quinn originally injured his low back on January 23, 1988, while installing a beltline structure when he was employed by Big Fist. On April 19, 1989, an ALJ awarded benefits based on 60% permanent partial disability.

In 1991, O'Quinn attempted to work again, this time at Eastern Coal Company as a shuttle car operator. This type of employment exacerbated his previous injury, though, resulting in injuries on September 7, 1991, and October 23, 1992. While he was still on total temporary disability from these injuries, Eastern Coal closed and laid off its employees. O'Quinn filed a consolidated claim for these two injuries together with a petition to reopen the 1988 claim against Big Fist. The resulting decision rendered September 30, 1994 was that there was no new injury from the work at Eastern, but rather exacerbations of the original injury to the low back attributable to Big Fist. Subsequently, the award granted temporary total disability benefits for those exacerbations experienced at Eastern. After being permanently laid off by Eastern on October 23, 1992, O'Quinn never returned to the workforce except for some light carpentry and electrical work on a temporary basis. His last work was in 1996.

In 1998, O'Quinn received Social Security disability benefits back-dated to August 1996. Since then he has not looked for permanent work. His lower extremities now have more symptoms and the pain in his low back has increased. He has also experienced psychiatric difficulties associated with the realization that he is unable to work as he once did. These psychiatric symptoms are being treated with Zoloft.

Among the physical symptoms, O'Quinn had experienced an acute exacerbation of his low back pain while helping his wife plant flowers in their garden in 1998. This event is referred to as the "flower bed incident" throughout the appeals and decisions below and it is this event that was the straw that "broke the camel's back" as the ALJ

called it. The findings of the ALJ as to whether this incident could be attributed to the original work injury at Big Fist are the critical findings for this appeal.

After the “flower bed incident,” O’Quinn’s physical examinations revealed diminished Achilles reflex on the right. An MRI performed on September 3, 1998 revealed a large herniated disc at L5-S1 on the right side. This diagnosis was the first time a herniated disc was found. Despite a motion by Big Fist to reopen and contest the charges, a March 7, 2000 ALJ decision ordered that the MRI expenses be covered.

Later that year on December 11, 2000, O’Quinn filed a motion to reopen in order to increase the income benefits, and later on March 16, 2001, he amended the claim to include an alleged psychiatric condition arising out of the work injury. On June 11, 2001, the claim was reassigned and a hearing was held March 4, 2002. The parties submitted medical proof from VA hospital records; several doctors’ reports; a psychologist, Phil Pack; a neuropsychiatrist, Dr. David Shraberg; and, a vocational evaluator, Dr. Ralph Crystal. From all of this evidence, plus O’Quinn’s deposition, the ALJ issued an award on May 3, 2002 that found O’Quinn to be permanently and totally occupationally disabled. The ALJ attributed the increased disability to a worsening of the original injury rather than the flower bed incident.

The ALJ had several factors supporting the decision including the facts that O’Quinn had a history of exacerbations of this injury, that two doctors attributed the current condition to the original injury and another doctor that believed the condition to be related to the disc bulging from the first injury, that O’Quinn was credible in explaining increased pain and an onset of depression being treated. In addition to those points, the ALJ took into account O’Quinn’s age, injury, impairment, medical restrictions, prior training and experience, and the area where he resides. The ALJ

concluded that the original injury contributed to the later onset of the psychiatric illness as well as the 1998 physical injury. Finally, relying on Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), the ALJ added coverage for the reasonable and necessary medical treatment of O'Quinn's depression and anxiety as well.

Big Fist appealed this order to the Board and the Court of Appeals and each affirmed. Big Fist now appeals to this Court arguing that the ALJ's decision was clearly erroneous and lacked substantial evidence to support the award.

Big Fist contends that there was no substantial evidence to support the ALJ's findings of a worsened condition and increasing the occupational disability causally related to the original injury. Further, they assert that the ALJ's award was clearly erroneous. Our task in reviewing the award is to determine whether substantial evidence of probative value supported the ALJ's conclusions. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is defined as evidence of relevant consequence, having fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chem. Co., Ky., 474 S.W.2d 367 (1971). Neither the Board nor the Court of Appeals found Big Fist's argument to be persuasive, and after our careful review, we must agree.

O'Quinn was seen by several doctors, but Big Fist relies mostly upon attacking the testimony of Dr. Patrick. While Dr. Patrick agreed that the 1998 incident was "the straw that broke the camel's back", Big Fist argues that his testimony does not support a causal connection between the 1998 herniation incident and the original 1988 injury while employed at Big Fist. Dr. Patrick was only one of the doctors among many. A review of the record reveals that Big Fist has found one statement of Dr. Patrick's and magnified it to be the total conclusion. The ALJ did not need to rely solely on Dr.

Patrick because there were several doctors who reported treating O'Quinn. The ALJ saw that within Dr. Patrick's own conclusions, he agreed with Drs. Rapier and Lyons who each saw the herniation as causally related to the original injury at Big Fist, and those conclusions were supported by the physical evidence that the injury occurred at the same disc in the back, namely, the L5-S1.

In regard to liability for psychiatric treatment, the ALJ carefully considered the reports from the psychologist and the neuropsychiatrist and correctly determined that the claimant had developed symptoms of depression and anxiety related to his increased pain for which he was entitled to reasonable and necessary medical care for the condition. The medical evidence was present to support the ALJ's conclusion on causality. The ALJ also found O'Quinn's own testimony to be credible on the matter. Big Fist is arguing that it is possible to draw conflicting conclusions from the medical evidence, but selecting from among such evidence is the function of the ALJ. See Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123 (1977).

The purpose of this Court's review is not to substitute our judgment for that of the ALJ, but rather to see if there was substantial evidence of probative value to support the award below. See Wolf Creek Collieries v. Crum, supra.; see also Square D Company v. Tipton, Ky., 862 S.W.2d 308 (1993). Finding such evidence in the record, specifically in the reports and testimony of Drs. Rapier, Lyons, and Patrick, we must affirm.

The opinion of the Court of Appeals is affirmed.

All concur.

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