

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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 21, 2004

NOT TO BE PUBLISHED
FINAL

Supreme Court of Kentucky

2003-SC-0854-WC

DATE 11-11-04 ELLA GROUTT, DC.

DOTCO ENERGY COMPANY

APPELLANT

APPEAL FROM COURT OF APPEALS

2003-CA-0655-WC

V.

WORKERS' COMPENSATION BOARD NO. 96-75271

JENIOUS MAYNARD; ROBERT L. WHITTAKER,
DIRECTOR OF WORKERS' COPENSATION FUNDS,
(SUCCESSOR TO SPECIAL FUND); HON. RICHARD
M. JOINER, ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

In the reopening of a workers' compensation claim, an Administrative Law Judge (ALJ) determined that the claimant met his burden of proving increased occupational disability due to a worsening of his work-related back and psychological injuries and also determined that his present disability was total. The Workers' Compensation Board (Board) determined that although the ALJ's analysis was flawed insofar as it did not compare the evidence of occupational disability at the two relevant points in time, the record contained substantial evidence to support the decision. The Court of Appeals affirmed. Likewise, we affirm.

The claimant was born in 1957. He completed the eighth grade but was functionally illiterate and had difficulty counting and adding. He performed various types of manual labor at a railroad and in coal mines. He worked for the defendant-employer for about 11 years, in coal as low as 32-33 inches. The claimant testified that he injured

his back in July, 1989, and missed about a week of work. He injured his back again in September, 1990, and missed a couple of months. The injury that is the subject of this appeal occurred on September 18, 1996, when he strained his back while lifting a steel-framed door that weighed 40-50 pounds. As he bent to pick up the door, he experienced a sharp pain that was higher in his back than the pain caused by the previous incidents. He reported the injury to his supervisor immediately. The next day, his neck began to hurt as well. In the initial proceeding, he testified that he did not attempt to work again and did not apply for unemployment benefits when the mine shut down at the end of 1996 because he was unable to work.

In consolidated applications for workers' compensation benefits, the claimant alleged neck and back injuries, a psychological injury, and hearing loss. On September 30, 1998, an arbitrator awarded a 60% permanent partial disability on the basis of the back condition, noting that the claimant's back was not as bad as he thought it was but that he could no longer work in 33-inch coal. Relying upon Dr. Granacher and noting that Dr. Forester evaluated the claimant before he was awarded a Social Security disability, the arbitrator determined that the claimant also sustained a psychological injury but that it was only temporary. Therefore, he received medical benefits for the condition but no income benefits. The ALJ dismissed the hearing loss claim for lack of timely notice. On January 28, 2002, the claimant moved to reopen, alleging a worsening of both his physical and psychological conditions. The motion was granted.

At reopening, the claimant testified that no physician had ever released him to return to work and that he had not worked since he was injured. He testified that he continued to see Dr. Vyas, his family physician, with regard to his neck and back and to go to Mountain Comprehensive Care for treatment of his nervous condition. He

asserted that both conditions had worsened since 1998, testifying that he had more back pain and that his nerves were worse. He was unable to stand for eight hours a day and could not tolerate visitors. He could no longer drive a standard transmission vehicle because he could not push the clutch.

Dr. Rapier evaluated the claimant at the time of the initial claim and at reopening. In 1997, he thought that the claimant had strained his back, aggravating pre-existing dormant degenerative disc disease, but he did not find significant radiculopathy. He assigned a 5% impairment based upon DRE lumbosacral Category 2 and imposed extensive restrictions. Although indicating that the claimant lacked the physical capacity to return to the type of work he performed when injured, Dr. Rapier thought he could perform work that permitted him to move around freely and did not subject him to vibrations, jars, and jolts.

Dr. Rapier's diagnosis was unchanged at reopening, but he found more signs of radiculopathy and also found atrophy in the thigh and calf on the left side. He assigned a 10% impairment based upon DRE lumbosacral Category 3. In other respects, his findings and opinions were essentially unchanged.

Dr. Johnson, a psychologist, evaluated the claimant at reopening. His diagnostic impressions were: Axis I: major depression, single episode, moderate and generalized anxiety disorder; Axis II: mild mental retardation; Axis III: low back pain, pneumoconiosis, and decreased auditory acuity; Axis IV: financial stresses; and Axis V: Current GAF of 55. Noting that treatment of the depression and anxiety had not been very effective, Dr. Johnson thought that the claimant's prognosis was guarded and that he would not be able to make occupational adjustments. In his opinion, the claimant's psychological difficulties were work-related. He thought that further improvement was

possible with aggressive treatment and that the claimant had not reached maximum medical improvement (MMI). Although he noted that a previous evaluation had yielded a permanent impairment rating of 20%, he thought that the claimant's permanent impairment after aggressive treatment would be in the range of 30%.

The evidence included records from Mountain Comprehensive Care from December 1, 1997, through May 4, 2001. They chronicled treatment for depression and anxiety due to back pain. Despite treatment and medication, the claimant showed little improvement.

Dr. Vyas's office notes from December 2, 1999, to April 11, 2002, indicated that the claimant was seen regularly for low back pain and leg pain, primarily on the left. On April 11, 2002, his chief complaint was low back pain that radiated into both legs but was worse on the left.

Dr. Goldman, an orthopedic surgeon, evaluated the claimant on March 5, 2002. He characterized the claimant's back injury as a strain, found a voluntarily limited range of motion in the lumbar spine with normal reflex and motor examinations of the legs, and found no evidence of muscle spasm and no evidence of atrophy in either leg. Concluding that the claimant's complaints had no objective basis, he classified the back condition as DRE lumbar Category 1 and thought that the condition had improved since the initial award. Although he acknowledged that the decreased range of motion would support an argument for DRE Category 2, Dr. Goldman thought that the claimant's condition was no worse than at the initial award and that nothing in his examination warranted greater restrictions than were imposed in 1997. Due to evidence of symptom magnification, he found the functional capacity evaluation to be of very little help.

Furthermore, he found nothing to preclude the claimant from working within the same restrictions as in 1997.

Dr. Primm, an orthopedic surgeon, evaluated the claimant in both the initial claim and at reopening. In November, 1997, he thought that the injury had aroused mild pre-existing degenerative disc disease of the lumbar spine and caused a 0-5% impairment. He thought that the claimant's prognosis was very good and that more active exercise and perhaps work hardening would enable him to make a full recovery. In 2002, Dr. Primm added chronic deconditioning due to chronic inactivity to his previous diagnosis. He thought that the claimant had the physical potential to improve significantly but that it would require insight and motivation. He found no objective evidence that the back condition had worsened and estimated the claimant's impairment at 0-5%. In his opinion, the claimant was capable of light work with some lifting restrictions. In a supplemental report, he explained that the restrictions were due to the deconditioning and that the claimant had the capacity to recover further and work without restrictions.

Dr. Granacher evaluated the claimant both in the initial claim and at reopening. On April 1, 1998, he noted a pre-injury diagnosis of anxiety; found no evidence of a mental disorder due to a work-related injury; noted the claimant's functional illiteracy, mild mental retardation, and severe hearing impairment; and assigned a current GAF of 70. In his opinion, Dr. Forester had treated the claimant for situational depression due to financial difficulties, and it resolved after he received financial benefits.¹ Dr.

Granacher's diagnoses at reopening were: Axis I: major depression associated with mental retardation; Axis II: mild mental retardation; Axis III: no evidence of active

¹ On January 9, 1998, Dr. Forester performed a psychiatric evaluation and diagnosed an episode of major depression that was associated with anxiety. He noted that the claimant was taking medication for the conditions but had shown little improvement. He recommended comprehensive psychiatric treatment, determined that the conditions warranted a 20% AMA impairment, and concluded that chronic pain and restrictions due to the work-related injury were the cause of the conditions.

medical condition affecting mental state; Axis IV: no evidence of external stressors outside the limits of this case affecting the claimant's mental state; and Axis V: Current GAF of 65. In his opinion, the claimant's mental state due to the injury had not worsened at reopening. His depression was not temporally related to the work-related injury and probably resulted from his poor coping ability due to mental retardation.

Dr. Crystal performed a vocational evaluation at reopening and concluded that the claimant's vocational status was unchanged since the initial award. He continued to have the physical and mental capacity to perform a number of entry-level jobs. Noting that achievement testing yielded grade-level scores of 2.6 in reading, 1 in spelling, and 2 in arithmetic, Dr. Crystal recommended educational remediation to prepare the claimant for a broader range of clerical jobs.

When deposed, Dr. Crystal testified that he based his conclusions on the claimant's global assessment of functioning (GAF) scores. He explained that the GAF score represents the clinician's impression of an individual's ability to adapt socially, vocationally, and in general. It is based on a 100-point scale, with most individuals falling in the range of 55 to 85. An individual rating above 85 is well-adjusted, self-actualizing, and doing very well. The usual standard for precluding regular work is a rating of 50 or less, and work is problematic for those rating below 55. Dr. Crystal explained that because Dr. Johnson assigned a score of 55, he had concluded that the claimant was capable of working. Questioned about the effect of Dr. Johnson's opinion that the claimant would be unable to make occupational adjustments, Dr. Crystal testified that he viewed Dr. Johnson's report as being comparable to that of Dr. Forester, who had assigned a 20% impairment in the initial proceeding. On cross-

examination, Dr. Crystal testified that if the claimant suffered from the level of anxiety and depression that he presently claimed, it would preclude him from working.

The ALJ noted that the claimant's burden at reopening was to prove an increase in occupational disability due to the 1996 injury and that the arbitrator's finding of a 60% occupational disability in 1998 was final. Relying upon Dr. Rapier and the claimant's testimony, the ALJ determined that the claimant's physical condition had worsened. The ALJ noted Dr. Granacher's testimony in the initial proceeding that the claimant's psychological condition was in complete remission and noted that he presently diagnosed major depression although he did not relate it to the injury. The notes from Mountain Comprehensive Care also documented an improvement at the time of the initial decision that was followed by a progression of psychological problems, but they appeared to relate the change to the back condition. Also, Dr. Johnson diagnosed major depression and related it to the injury although he did not think that the claimant had reached maximum medical improvement. The ALJ concluded that the claimant's psychological condition had worsened, that he presently suffered from major depression, and that the condition resulted from the 1996 injury. Noting that the initial finding of a 60% disability was final, that the claimant suffered an increase in both physical and expected psychological impairment, and that Dr. Johnson's report indicated an inability to work, the ALJ determined that the claimant's present disability was total.

In a petition for reconsideration, the employer asserted that there was no evidence of an increase in occupational disability, pointing to the claimant's failure to attempt any type of work after the injury and to his belief that he was totally disabled from the outset. The ALJ noted, however, that the employer had found no fault in the

initial decision awarding only a 60% disability but now appeared to maintain that the claimant's disability in 1998 had been total. Noting that there had been a change of condition since 1998 and that the claimant's present disability was total, the ALJ denied the petition.

Appealing decisions that affirmed, the employer argues that there was no evidence of a worsening of the claimant's physical or psychological condition, no objective medical evidence of a worsening of impairment as required by KRS 342.125(1)(d), and no evidence of increased occupational disability. Noting that the ALJ failed to compare the evidence concerning the claimant's occupational disability in 1998 with the evidence at reopening, the employer asserts that the ALJ's analysis was defective under KRS 342.125(1)(d). It maintains that the Board should have reversed the decision and that regardless of whether the claimant's impairment ratings had increased since 1998, there was no substantial evidence to support a finding that his occupational disability at reopening was any greater than it had been at that time. Gro-Green Chemical Co. v. Allen, Ky., 746 S.W.2d 69 (1987); Central City v. Anderson, Ky., 521 S.W.2d 247 (1975). The employer asserts that, in the least, the Board should have remanded the claim for further consideration.

In Dingo Coal Co. v. Tolliver, Ky., 129 S.W.3d 367 (2004), we explained that although the December 12, 1996, amendment to KRS 342.125(1) is remedial and governs motions to reopen that are filed after its effective date, it does not govern the criteria for awarding additional income benefits in a reopened claim. They are determined under the version of KRS 342.730 that was effective on the date of injury. In other words, KRS 342.125(1)(d) describes the necessary prima facie showing to

prevail on a post-December 12, 1996, motion to reopen, but it has no effect on the substantive proof requirements for a claim that arose before December 12, 1996.

This appeal was taken from a decision on the merits; therefore, the claimant's burden was to prove a post-award change of occupational disability under the Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), standard. This required the ALJ to compare the evidence of the claimant's occupational disability in 1998 with the evidence of his occupational disability at reopening. Because the initial award was final, a proper analysis would begin with the premise that the evidence upon which the arbitrator relied when making the award represented a 60% disability.

Just as the claimant's testimony in the initial proceeding would have supported but did not compel a finding of total occupational disability at that time, it did not preclude a finding that he had become totally disabled at reopening. See Hush v. Abrams, Ky., 584 S.W.2d 48 (1979); Grider Hill Dock v. Sloan, Ky., 448 S.W.2d 373 (1969). Although the ALJ who considered the reopening did not devote a portion of the opinion to comparing the evidence of occupational disability at the two relevant points in time, we are convinced that the ALJ considered whether there was substantial evidence of a post-award worsening of occupational disability. We say this because the ALJ clearly recognized the need for the claimant to prove such an increase, noting from the outset that the issues included whether "the plaintiff experienced an increase in occupational disability as a result of a worsening of the condition attributable to the work injury." At various points in the opinion, the ALJ compared factors that affected the extent of the claimant's occupational disability under the relevant standard at the relevant points in time. For example, the ALJ noted that at the time of the initial decision, the claimant had low back pain that went down his left leg to his foot and that

presently the claimant had bilateral foot pain and had pain in both the left leg and part of the right leg. The ALJ noted the claimant's testimony that he could no longer drive a standard shift truck due to leg pain and that he could no longer tolerate being around other people for eight hours per day. An increase in back pain and in radicular symptoms such as leg pain are factors that decrease the ability of an individual who is mentally retarded and has a history of performing manual labor to find and keep regular employment. Regardless of what Dr. Forester thought in 1998, the arbitrator relied upon Dr. Granacher and determined that the claimant had no permanent psychological injury at that time. At reopening, the ALJ relied upon Dr. Johnson's findings and also upon Dr. Crystal's deposition testimony addressing the effect of those findings and the effect of the claimant's depression and anxiety on his ability to work at reopening. It is apparent that there was substantial evidence of a post-award worsening of both the physical and psychological conditions, that the changes caused the claimant to have a greater occupational disability at reopening than in 1998, and that his disability at reopening was total. We are convinced that the ALJ's decision was made under a correct understanding of the law, that the findings of fact were reasonable under the circumstances, and that they were properly affirmed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

The claimant requests the imposition of sanctions against the employer on the ground that the appeal is frivolous insofar as it concerns only a factual issue that has twice been affirmed. He asserts that the appeal is consistent with what he maintains is the employer's continuing philosophy of appealing all unfavorable decisions to this Court. Nonetheless, having considered the evidence and the arguments of the parties,

we are not persuaded that the appeal is so lacking in merit as to warrant the imposition of sanctions.

The decision of the Court of Appeals is affirmed.

All concur.

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