

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: SEPTEMBER 23, 2004
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0907-MR

DATE 12-16-04 Elia Grant, DC

LAUREL GROCERY

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
NO. 2003-CA-0783-WC
WORKERS' COMPENSATION BOARD NO. 02-00129

DARRELL WAYNE WOODS; HON.
LLOYD R. EDENS, ADMINISTRATIVE
LAW JUDGE; KENTUCKY WORKERS'
COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from an opinion of the Court of Appeals which upheld the Workers' Compensation Board in affirming the decision of the Administrative Law Judge to award benefits to Woods for work-related injuries.

The questions presented are whether the ALJ erred by finding that Woods proved the existence of an upper extremity injury and whether the ALJ erred in finding that Woods proved a cervical injury pursuant to KRS 342.0011(1).

Woods worked in the coal industry as a heavy equipment operator from approximately 1971-1989 when he was employed by Laurel Grocery as a truck driver and scanner. He testified that he would lift items ranging from 25 to 40 lbs. and also pick up boxes containing items and set them on tables to be processed. He also indicated that he would occasionally have to lift up to 100 lbs.

In July 1995, while on vacation, Woods began experiencing numbness in his hands. Initially he believed his symptoms were the result of the long drive to his Tennessee vacation spot and the numbness eventually subsided. He subsequently injured himself at work in December 1999, while pulling a pallet that was stuck. He had severe pain in his upper back at that time and experienced a continued worsening of pain and numbness in his hands over the following week. He reported that incident to his supervisor, but no incident report was completed. He did seek medical treatment and was advised that he simply strained his back and thus he continued to work, believing the problem to be minor. He again sought medical treatment in January 2000, when his condition became more severe. His family physician ordered an MRI which revealed canal stenosis and a disc herniation. His family physician referred him to a neurosurgeon, Dr. Gilbert. He was referred for a second opinion to Dr. Muckenhausen, who issued an off-work slip directing Woods to cease employment for a minimum of two years beginning as of February 2, 2000. Woods completed his employment with Laurel on February 1, 2000, and nearly two years later, on January 25, 2002, he filed a claim for workers' compensation benefits.

Neither Woods nor Laurel Grocery filed any records from the treating physicians in the proceedings before the ALJ; however, depositions of two independent medical examiners, Dr. Brandon and Dr. Kriss, were submitted as evidence. Dr. Brandon evaluated Woods on the claimant's request and Dr. Kriss evaluated Woods at the request of Laurel Grocery. Both physicians were aware of the MRI study evidencing a narrowing of the spinal canal at C5-6 and C6-7, and a small central herniated disc at C6-7.

Dr. Brandon, a family practitioner, determined that the symptoms in the upper extremities were related to radiculopathy produced by the herniated nucleus pulposus seen in the MRI. The physician further concluded that Woods qualified for category III, a 15% permanent impairment rating, for the cervical injury. He acknowledged that his diagnosis of the radiculopathy was based on reported symptoms by Woods. Dr. Brandon also stated that the permanent impairment rating was based on both the presence of a herniated disk and the radicular complaints. Dr. Brandon also reported that the condition was due to employment both as a heavy equipment operator and as a manual laborer performing lifting.

Dr. Kriss, a neurosurgeon, did not find any positive correlation between the subjective complaints of pain, his clinical findings and the MRI. Dr. Kriss testified that there was no objective evidence to support the complaints of physical injury and assigned no functional impairment. He concluded that no diagnosis could be made to support an assessment of permanent impairment.

The ALJ also considered the testimony of two of Woods' coworkers and his supervisor as well as the records of the East Bernstadt Medical Clinic. After reviewing all the evidence, the ALJ determined that Woods suffered a cervical injury and an upper extremity injury as defined in KRS 342.0011(1) as a result of work-related cumulative trauma. He awarded permanent partial disability benefits for a cervical injury on the basis of the 15% impairment rating and awarded medical benefits for both the cervical injury and the upper-extremities injury. The Board affirmed the award by the ALJ and the Court of Appeals affirmed the decision of the Board. This appeal followed.

I. Upper Extremity Injury

Laurel Grocery argues that there was no objective medical evidence in the record that established that Woods suffered an upper extremity injury independent of his alleged cervical injury. In connection with the upper extremity injury, the ALJ awarded medical benefits and not income benefits. The Board noted in its opinion that a claimant need only prove the occurrence of an injury in order to establish entitlement to medical treatment. It is not necessary that there be an AMA impairment rating. Consequently, because the only award in connection with the upper extremity injury was of medical benefits, there was no error in connection with the failure of the ALJ to assign an impairment rating. The finding of the ALJ in regard to medical benefits for the upper extremities was supported by substantial evidence including the testimony of Woods, the results of the MRI and the opinion of Dr. Brandon.

As noted by the Board, it is of no consequence whether the upper extremity injury symptoms are a product of the cervical injury or a separate upper extremity injury. In either event, medical treatment was compensable.

II. Cervical Injury

Laurel Grocery contends that the diagnosis by Dr. Brandon of radiculopathy was based only on statements made to him by Woods and not on any objective medical findings. Laurel Grocery argues that Dr. Brandon did not have the MRI films available to him and that he relied entirely on the rendition by Woods of what the MRI scan showed. They support their argument by reference to Gibbs v. Premier Scale Co., Ky., 50 S.W.3d 754 (2001), which states that a patient's complaints of symptoms are not objective medical findings as the term is defined by KRS 342.0011(33). Laurel also notes that the MRI results were not filed as evidence.

As observed by the Board, both physicians agreed that the cervical MRI revealed canal stenosis and a disc herniation. The Board stated that Dr. Brandon relied upon these objective findings in making his diagnosis and that his opinion constituted substantial evidence to support the findings of the ALJ in regard to the cervical spine injury.

Symptoms alone obviously do not constitute objective medical findings; however, here the complaints of pain and numbness were not the only signs of injury reflected in the medical evidence. The medical experts agree that there was canal stenosis and disc herniation. Dr. Brandon expressly relied on these objective findings together with the testimony of Woods in reaching his diagnosis.

The claimant must demonstrate by way of objective medical findings, the occurrence of a harmful change in the human organism caused by his work situation.

Subsequent to the Gibbs, supra, decision, this Court has indicated that the “objective medical findings” standard is not as broad as some might think. Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001) and Ryan’s Family Steakhouse v. Thomasson, Ky., 82 S.W.3d 889 (2002), both noted the distinction between objective medical findings of harmful change and such evidence on causation. The burden is on the claimant to prove by objective medical standards that the incident alleged produced a harmful change; it is not necessary that the claimant submit “objective medical findings” in order to establish causation or a permanent impairment rating.

In this case, the ALJ was presented with two different medical opinions on the issue of permanent impairment. It is the responsibility of the ALJ to weigh the probative value of the evidence and determine which is more credible. As a finder of fact, the ALJ may reject any testimony and believe or disbelieve various parts of evidence,

regardless of whether it comes from the same witness or the same adversary party's total proof. See Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000) *citing* Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Here, the ALJ chose to believe Dr. Brandon and we conclude that his testimony constituted substantial evidence to support the award of benefits. See also Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The function of the reviewing court is to correct the Board only where the court perceives the Board has overlooked or misconstrued controlling statutes or precedents or committed an error in assessing the evidence so flagrant as to cause injustice. See Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685 (1992). In this case, there is evidence of substantial value that supports the opinion of the ALJ and it cannot be said that there is evidence which compels any different result.

The opinion of the Court of Appeals is affirmed.

All concur.

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