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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: AUGUST 25, 2005
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2004-SC-0536-WC

DATE 9-15-05 E.W.A. Growth P.C.

DARIO NAVARRO LOPEZ — APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2003-CA-2043-WC
WORKERS' COMPENSATION BOARD NO. 97-WC-89654

BARDSTOWN BARRELS, INC.;
HON. JAMES L. KERR, ALJ; AND
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 dismiss the claim to reopen the 1997 workers' compensation claim of Lopez.

Counsel for Lopez argues that it was error for ALJ Kerr to rely on the "natural aging process" defense after that defense had been rejected by the previous ALJ Nanney in the original decision in this case. It is also submitted that it was required of ALJ Kerr to consider the uncontroverted evidence regarding the arousal of a dormant nondisabling degenerative condition into a disabling reality. Lopez contends that there is compelling evidence that requires the case to be remanded to ALJ Kerr with directions that he take into account issues relating to dormant, nondisabling diseases or conditions and their arousal and consider the application of McNutt Construction/First

General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

Lopez was employed as a cooper for Bardstown Barrels, Inc., when he sustained an injury to his lower back which occurred while he was lifting heavy oak whiskey barrels on March 20, 1997. In October of that year, he filed a petition for workers' compensation benefits. The claim was initially assigned to an arbitrator who rendered a benefit review determination awarding Lopez temporary total disability benefits and concluding that Lopez had not yet reached maximum medical improvement. Lopez filed a request for *de novo* review and the case was assigned to ALJ Nanney for purposes of final adjudication. Medical evidence was submitted to the ALJ which included treatment notes from two physicians, reports from an independent medical examiner and a university evaluator appointed pursuant to KRS 342.315.

In August 1998, ALJ Nanney rendered an opinion that Lopez had suffered a back strain as a result of his work injury; however, the ALJ accepted the conclusion of Dr. Gleis, the university medical evaluator, that Lopez suffered a zero impairment rating as a result of the injury. ALJ Nanney did award temporary total disability benefits through December 1, 1997 based on the evaluator's impairment assessment, but concluded that Lopez had not suffered any permanent disability as a result of the injury and retained the physical capacity to perform his past work.

On May 30, 2000, Lopez filed a motion to reopen his claim pursuant to KRS 342.125. He asserted that the medical condition of his low back had greatly deteriorated despite surgery. It had worsened to the point where he is now completely unable to engage in any work.

Ultimately, the case was assigned to ALJ Kerr who proceeded to take proof and conduct a benefit review conference as well as a formal hearing. ALJ Kerr issued an opinion and order dismissing the claim for reopening because Lopez had not met his

burden of demonstrating that there had been a worsening of occupational disability as a result of the 1997 injury. ALJ Kerr noted that Lopez had never returned to work after his injury and he relied on the evaluation of Dr. Gleis, who determined that Lopez had continued to have an impairment rating of 0% related to the injury and that the surgery was not for the effects of the injury. The Board affirmed the ALJ as did the Court of Appeals and this appeal followed.

The essential question to be reviewed is whether the decision of ALJ Kerr upon reopening is supported by substantial evidence. ALJ Kerr determined that Lopez has not met the burden of showing he had sustained any change in disability because of a condition caused by the injury since the date of the original opinion and award. It is fundamental that the burden of proof is on the person seeking reopening. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968). The burden was on Lopez to prove that the effects of the injury of March 20, 1997 had worsened since ALJ Nanney's opinion of August 14, 1998, so as to cause an increase in disability. It was the obligation of the ALJ to determine whether there had been a change and to review not only the evidence presented at the time of reopening but also the evidence previously introduced. W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (Ky. 1946).

In his August 14, 1998 opinion, ALJ Nanney stated that the evidence in this case does not rebut the conclusions of Dr. Gleis. The mere fact that Dr. Whobrey and Dr. Hurt found different impairment ratings under the AMA Guidelines is insufficient in and of itself to rebut the testimony of Dr. Gleis. It is clear that in the original review, ALJ Nanney accepted the assessment by Dr. Gleis that Lopez had a 0% occupational disability rating as a result of the March 20, 1997 work injury. In the reopening conducted by ALJ Kerr on December 30, 2002, he found that the claimant had very little wrong with him at the time of "Judge Nanney's decision" and despite the complicated

medical course, continues to have little wrong with him caused by the work-related injury. Thus, ALJ Kerr concluded that the claimant had not met his burden of proof of a worsening of the condition or injuries in occupational disability, and, therefore, the claim for reopening should be dismissed.

It is well settled that the ALJ, as a finder of fact, has the sole authority to determine the weight, credibility, quality, character and substance of the evidence and the inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has the discretion to choose whom and what to believe. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or an adversarial party. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Certainly a party may submit evidence which would have supported a conclusion different from that of the ALJ but such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). In cases where medical evidence is conflicting, such as in this case, the sole authority to determine which witness to believe is with the ALJ. Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977).

Moreover, where the decision of the fact finder is in opposition to the party with the burden of proof, that party must bear the additional burden on appeal of showing that the evidence was so overwhelming that it compelled a finding in his favor and that no reasonable person could have failed to be so persuaded. Mosely v. Ford Motor Co., 968 S.W.2d 675 (Ky.App. 1998). In that situation the issue on appeal is whether the evidence compels a finding in his favor. Paramount Foods, supra. In order to be so compelling, the evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224

(Ky.App. 1985). In addition, a reviewing agency cannot substitute its judgment for that of the finder of fact as to the weight of evidence on questions of fact. KRS 342.285(2).

Review by the Board must be limited to a determination whether upon a consideration of all of the evidence, a contrary conclusion was compelled. Lopez had the burden of proof before the ALJ and he did not meet it. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). If a decision of the ALJ is supported by any substantial evidence of probative value, it may not be reversed on appeal. Francis, supra.

Here, ALJ Kerr compared the condition of Lopez at the time of the original award to his condition on reopening to determine whether there had been a change in disability as demonstrated by objective medical evidence as a worsening of impairment due to a condition caused by the injury. ALJ Kerr found no change. A review of the evidence presented here indicates that the decision by ALJ Kerr is supported by substantial evidence of probative value. Both the Board and the Court of Appeals agreed, as do we.

Next, Lopez raises the argument that ALJ Kerr was erroneous in relying on the "natural aging process defense" in denying the reopening. Lopez relies on McNutt Construction v. Scott, supra, at 859, which holds that "where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the harmful change comes within the definition of an injury." No evidence of such a situation was introduced before ALJ Nanney, so the McNutt rationale does not apply to this case. KRS 342.0011(11) requires that a worker must have a permanent impairment in order to be found disabled. Although it is apparent that Lopez had a preexisting condition, the overwhelming evidence was that he suffered only a strain and that there was no arousal of a preexisting condition resulting in a functional impairment disability. A reviewing agency or court cannot substitute its

judgment for that of the finder of fact as to the weight of the evidence on questions of fact. KRS 342.285(2). It is not the proper subject of reopening. Lopez did not produce any evidence of a worsening of impairment.

Counsel for Lopez complains of the complete inability of his client to read, write or speak English or even Spanish to any great degree. Lopez is a native of Mexico who immigrated to the United States in 1981. He has only a third grade education. There is no evidence of probative value that a language barrier frustrated his medical diagnosis. Surgery had been performed on Lopez by Dr. Glassman, but there was never evidence to indicate that such surgery was reasonable, necessary or related to the work injury. In addition there was no evidence that a language barrier was the basis for Dr. Gleis to question credibility of Lopez indicating symptom magnification. Several other physicians as noted by ALJ Kerr indicated similar magnification including one who stated that Lopez was "histrionic" which by common definition means "acting dramatic or emotional."

In this case, a careful review of the record in regard to reopening and to the record as a whole, indicates that both ALJs considered all the lay and medical testimony in the record in very great detail. The Board correctly concluded that it did not have the authority to overrule the ALJ or substitute its judgment for his in matters involving the weight to be given to the evidence in questions of fact. The Court of Appeals correctly determined that the evidence was not so overwhelming as to require it to supersede the findings of the Board or the ALJ. Cf. Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992).

The decision of the Court of Appeals is affirmed.

All concur.

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