

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD ADEQUATELY ADDRESS THE ISSUE BEFORE THE COURT. OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

FINAL

2006-SC-000614-WC

DATE 5-10-07 ELAGROW+PC

RANDALL STUMP

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-002393-WC
WORKERS' COMPENSATION NO. 01-89345

MOUNTAIN EDGE MINING, INC.,
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

At the reopening of a settled award, an Administrative Law Judge (ALJ) found that the claimant failed to prove his entitlement to additional income benefits and that no type of knee surgery was reasonable or necessary. The Workers' Compensation Board (Board) and the Court of Appeals determined that the evidence did not compel favorable findings and affirmed. Finding no error, we affirm.

The claimant worked in the coal mining industry as a maintenance foreman and certified electrician. In 1986, he fractured his left patella in a non-work-related accident. Dr. Nadar performed surgery to secure the fracture with two screws, and the claimant was hospitalized for a week. He later testified that he recovered completely and was able to work for the following 13 years without any knee problems.

The injury presently at issue occurred on May 9, 2000, when the claimant twisted his left knee while helping a co-worker carry a 300-pound set of torches. He continued to work and first sought treatment from Dr. Nadar on November 13, 2000, for pain and swelling in the knee. X-rays revealed no significant degenerative changes or other abnormality. The initial diagnosis was a sprained medial collateral ligament (MCL). Despite conservative treatment, the pain persisted. In early 2001, the claimant began to complain of popping and a catching sensation in the knee. On April 19, 2001, arthroscopic surgery revealed Grade II chondromalacia and also revealed a torn medial meniscus for which Dr. Nadar performed a partial medial meniscectomy. The claimant testified subsequently that he missed only a day of work for the procedure and returned to light duty. Dr. Nadar released him to return to full duty as of July 9, 2001, but recommended that he avoid crawling and squatting.

The claimant filed an application for benefits in December, 2001. He testified subsequently that he continued to perform his usual job as a maintenance foreman until April 27, 2002, when dull pain, stiffness, and swelling in the knee caused him to quit. He and his employer agreed to settle the claim based on the 3% permanent impairment rating that Dr. Nadar assigned and to reserve the claimant's right to reopen and to receive future medical benefits. An ALJ approved the agreement on May 15, 2002.

On April 22, 2003, the claimant returned to Dr. Nadar for treatment of pain and swelling in the left knee. He complained of occasional popping and catching in his knee and stated that he had been unable to return to work since the settlement. X-ray revealed osteoarthritic changes over the medial joint space with some narrowing and spurring. Noting that the claimant was 5'10" tall and weighed 300 pounds at that time, Dr. Nadar recommended weight loss and other conservative treatment, which might

include a steroid injection if the symptoms continued. When the claimant's symptoms continued in June, 2003, Dr. Nadar recommended Synvisc injections, but the insurance carrier refused to approve them. Over the following year, he continued to prescribe analgesic and anti-inflammatory medication. He noted that the claimant began to walk with a limp and eventually complained of right knee and ankle pain that he attributed to bearing greater weight on that side due to his left knee pain.

On July 28, 2004, the claimant filed a motion to reopen based on a worsening of condition. Attached to the motion was a report from Dr. Nadar, which indicated that he had seen the claimant periodically since April, 2003; that his condition had progressively worsened; and that he was unable to return to work in the underground coal mines. The report also indicated that the insurance carrier continued to refuse Synvisc injections. The claim was reopened and assigned to an ALJ for further adjudication.

The claimant testified at reopening that he had taken a voluntary layoff in April, 2002, hoping that his condition would improve while he was on unemployment. Instead, it had grown progressively worse and prevented a return to work. After the settlement, his injured left knee began to catch and lock up, and he began to experience back pain and right knee and ankle pain. He stated that he had gained about 55 pounds since the injury and presently weighed 315 pounds.

Dr. Nadar, an orthopedic surgeon, stated that he diagnosed a sprained medial collateral ligament of the left knee in November, 2000. He assigned a 3% permanent impairment rating in August, 2001, but the claimant's condition had worsened since then. His present impairment rating was at least 10%. Dr. Nadar attributed half of the impairment to pre-existing conditions and half to the 2000 injury, and he stated that the

patellar fracture did not contribute to the rating. He recommended that the present treatment be continued and supplemented with steroid or Synvisc injections but noted that knee replacement might become necessary in the future.

Dr. Lowe, an orthopedic surgeon, evaluated the claimant on his own behalf on October 8, 2004. Left knee x-rays revealed asymmetry of the joint space, narrowing on the medial edge of the proximal tibial plateau, and widening of the lateral joint space. He noted that the screws uniting the patella were positioned from the medial to the lateral side. In his opinion, the claimant's present permanent impairment rating was in the range of 13-20%, and at 340 pounds, he was "too big for his own good." Dr. Lowe recommended the Synvisc injections as the first treatment option and knee replacement surgery if they were not successful. He thought that the claimant lacked the physical capacity to perform any of his previous work due to the knee injury.

Dr. Wagner performed an independent medical evaluation for the employer on October 28, 2004. After examining the claimant and reviewing medical records, he noted that arthritic changes to the medial femoral and medial tibial condyles were evident when the arthroscopic procedure was performed in 2001. He thought that they were probably due to the patellar fracture and the claimant's morbid obesity. In his opinion, the partial medial meniscectomy warranted a 1% permanent impairment rating. He recommended continued use of anti-inflammatory medication as well as a dramatic weight loss, and he thought that the claimant's weight and many other medical problems would make it very difficult for him to work in the coal mining industry.

Noting that Dr. Wagner "conducted an appropriate exam" and that "his opinions are supported by objective medical findings," the ALJ found that the claimant experienced no increase in disability. The ALJ also determined that no surgery,

including knee replacement surgery, was reasonable or necessary but that anti-inflammatory medication and Synvisc injections were reasonable and necessary. The claimant petitioned for reconsideration of the finding regarding surgery, but the petition was overruled summarily.

Appealing, the claimant argues that diagnostic testing and the testimony of Drs. Lowe and Nadar provided objective medical evidence of a worsening of his condition since the settlement and that both physicians noted the possibility of future knee replacement surgery. In contrast, Dr. Wagner "undertook no diagnostic testing or other objective means of evaluation." The claimant argues that his present disability is total and that no reasonable person would have failed to be convinced that it had increased since the settlement. He also argues that he offered credible and substantial evidence that knee replacement surgery is reasonable and necessary, that only physicians are qualified to determine reasonable treatment for his injury, and that the ALJ erred by summarily refusing to approve any "surgery of any type."

KRS 342.285 designates the ALJ as the finder of fact; therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. See Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). An ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof and to choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). It is the worker's burden to prove his right to additional benefits at reopening. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968). If he fails to do so, his burden on appeal is to show that the favorable evidence was so overwhelming as to compel a favorable decision. Special

Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). The mere existence of evidence that would have supported a different decision will not compel reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Shortly before the settlement, the claimant took a voluntary layoff due to his injury. He never returned to work. Although testimony from Drs. Nadar and Lowe indicated that his permanent impairment rating had increased since the settlement, testimony from Dr. Wagner indicated that it had not. Contrary to what the claimant would have us believe, Dr. Wagner examined him, made various clinical findings and observations, and reviewed at least some of the medical records. Although the favorable evidence would have supported an increased award, it was not so overwhelming as to compel a finding that the claimant's disability increased after the settlement.

The settlement reserved the claimant's right to future medical expenses. Drs. Nadar and Lowe recommended Synvisc injections, but the employer refused to approve them. Although the physicians noted that knee replacement surgery might be necessary if the injections failed, neither stated that it was necessary presently. Under the circumstances, the ALJ did not err in refusing to approve it.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Cunningham, McAnulty, Minton, Noble and Scott, JJ., concur.
Schroder, J., not sitting.

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