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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: November 1, 2007
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 11-26-07 ELAGroup P.C.

2006-SC-000773-WC

BOYD ANDERSON — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2005-CA-002607-WC
WORKERS' COMPENSATION NO. 04-93965

MCCOY ELKHORN COAL, D/B/A
JAMES RIVER COAL COMPANY,
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined that the claimant's work-related back injury caused a 10% impairment and that he lacked the physical capacity to return to work as a coal miner but was capable of other work. The Workers' Compensation Board affirmed. The Court of Appeals affirmed although a dissenting opinion found the award of partial rather than total disability to be clearly erroneous. Because the evidence would have supported but did not compel a total disability award under Ira A. Watson Department Stores v. Hamilton, 34 S.W.3d 48 (Ky. 2000), we affirm.

The claimant was born in 1952. He had a seventh-grade education with no specialized or vocational training. He began working as a coal miner in 1983 and had worked for the defendant-employer since 1990, shoveling the belt line. He felt a pull in

his back while shoveling mud on February 27, 2004. After completing his shift, he sought treatment at Pikeville Methodist Hospital.

The claimant never returned to work. His application for benefits alleged the back injury and resulting anxiety and depression. He testified that his back and left leg hurt constantly, that he had to change positions frequently and to lie down two or three times per day, that he sometimes had difficulty walking, and that he drove a little bit but otherwise sat around the house. He refused to have surgery that Dr. Bean recommended because its success could not be guaranteed. He acknowledged that his employer had offered a light-duty job but stated that he could not perform it due to his back pain and his nerves. He had twice sought but been denied Social Security Disability benefits.

Hospital records indicated that the claimant presented on February 27, 2004. He was diagnosed with an acute lumbar strain with radiculopathy. X-rays revealed advanced degenerative disc disease at L5-S1.

Dr. Siddiqui began treating the claimant on March 18, 2004, for acute lower back pain that was associated with the injury, for possible herniated discs and lumbosacral radiculopathy, and for arthritis. After an April 8, 2004, MRI revealed a bulging disc at L4-5 and strongly suggested the possibility of a herniated disc at L3-4, Dr. Siddiqui took the claimant off work. Treatment continued until December 1, 2004, when the practice closed and Dr. Siddiqui referred the claimant to his primary care physician, Dr. Samuel King. None of Dr. King's treatment notes concerned the work-related injury, but they did indicate that the claimant had been treated in 1998 and 1999 for symptoms of mechanical low back pain.

A report from the Injury and Rehab Centers of Kentucky indicated that Dr. John A. King evaluated the claimant on May 6, 2004. He diagnosed a herniated nucleus pulposis at L3-4, foraminal stenosis of the L3 nerve root, and intractable lumbar pain. Dr. King recommended a series of epidural steroid injections in an attempt to relieve the swelling and inflammation at the L3 nerve root. Due to the extreme pressure at the nerve root, Dr. King did not think that epidural blocks would provide long-lasting relief and that the claimant would become a surgical candidate. He recommended that the claimant be kept off work other than telephone duties or other light-duty tasks.

Dr. Bean saw the claimant once, on September 27, 2004, at which time he complained of left hip and leg pain. He confirmed the existence of a herniated disc and recommended a lumbar diskectomy; however, the claimant refused to have the procedure because its success could not be guaranteed. Dr. Bean stated that the procedure had a 90% success rate and that the claimant was a good candidate based on the MRI findings, history, and physical findings. Without the surgery, the claimant would have reached maximum medical improvement (MMI) after six to nine months of treatment and would retain a 10% permanent impairment rating. He would be restricted to light-duty work, lifting no more than 20 pounds and bending, stooping, or kneeling only occasionally. Even with the surgery, Dr. Bean would not recommend a return to coal mining unless it was the only way that the claimant could earn a living.

Dr. Rapier evaluated the claimant on October 4, 2004, for complaints of low back pain. He found no evidence of radiculopathy and diagnosed a low back strain that had aggravated pre-existing, dormant degenerative changes. He assigned a 5% permanent impairment rating and stated that the injury caused the claimant's complaints. Also, he

restricted the claimant to occasional lifting of 20 pounds or less, to frequent lifting of 10 pounds or less, and to no repetitive bending, lifting, turning, or twisting. After reviewing Dr. Bean's report, Dr. Rapier stated that he would assign a 10% permanent impairment rating if the report and MRI findings were correct.

Dr. Granacher performed a psychiatric evaluation on September 23, 2004. He examined the claimant, reviewed medical records, and conducted psychological testing, noting that the claimant's effort was spotty and that it had not been possible to test him adequately. Dr. Granacher diagnosed pre-existing mild mental retardation and functional illiteracy. He also diagnosed anxiety and depression, which were induced by the back injury and resulted in a 15% permanent impairment rating. In his opinion, the claimant's limited intelligence and poor education caused him to be unable to cope with what would be a relatively minor injury to other coal miners. His conclusions remained the same after reviewing Dr. Bean's report.

Dr. Ruth performed a psychiatric evaluation on February 1, 2005, and diagnosed pre-existing mental retardation. Noting that the claimant did not presently endorse the symptoms of anxiety and irritability that he said he had experienced at the time of the injury, Dr. Ruth concluded that the conditions had resolved. He assigned a 12% permanent impairment rating (class II or mild impairment) and restrictions that he based on the claimant's intellectual weakness and illiteracy rather than the effects of the injury.

William Spears was a production services manager for the employer and one of the claimant's supervisors. Spears testified that he authorized an offer of light-duty work that was within the claimant's restrictions, but the claimant failed to attempt it. He stated that the offer remained open and that the job would pay between $9.50 and

$11.00 per hour, which was less than the claimant earned when he was injured.

Relying on Dr. Ruth, the ALJ determined that no causal relationship existed between the claimant's psychiatric impairment and the work-related injury. The ALJ summarized the evidence, recited the standard set forth in Ira A. Watson Department Stores v. Hamilton, supra, and found him able to work although he lacked the physical capacity to return to coal mining. The ALJ acknowledged that he would not be able to earn the same or a greater wage even if he returned to the work that he had been offered.

The claimant continues to assert that the ALJ erred as a matter of law by failing to consider the factors set forth in Ira A. Watson Department Stores v. Hamilton, supra, when concluding that he was only partially disabled. He asserts that he suffers from occupational hearing loss and pneumoconiosis in addition to the back and leg injury, but the record contains no evidence of an award for either condition. Stressing his lack of education and functional illiteracy, he asserts that he cannot reasonably be expected to work answering telephones or providing other service in a place of business. We disagree.

It was the claimant's burden to prove every element of his claim for benefits, including the assertion that he was totally rather than only partially disabled. Although Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979), indicates that a worker's testimony is competent evidence of his physical condition, Bullock v. Gay, 177 S.W.2d 883 (Ky. 1944), points out that the fact-finder is not required to give any particular weight to a claimant's testimony even when it is uncontradicted. Addressing the standard of review on appeal, Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that if

the party with the burden of proof fails to convince the fact-finder, that party must show on appeal that the favorable evidence was so overwhelming that no reasonable person could have failed to be persuaded.

KRS 342.0011(11)(c) states that a totally disabled worker "has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. . . ." KRS 342.730(1)(a) prohibits impairment from non-work-related conditions, pneumoconiosis, or hearing loss to be considered when determining if a worker is totally disabled. Ira A. Watson Department Stores v. Hamilton, supra, explained, however, that some of the Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), factors remain relevant when determining if a worker is totally disabled under the post-1996 Act. There was evidence that Hamilton's work-related injury caused a permanent impairment rating and no evidence of a non-work-related permanent impairment rating, occupational hearing loss, or pneumoconiosis. Hamilton was found to be totally disabled based on the medical evidence, his age, the nature of his back injury, and the fact that he customarily performed manual labor. The question before the court was whether substantial evidence supported the award, and the answer was that it did.

At issue in the present case is whether the claimant's evidence of total disability was so overwhelming as to compel such a finding. He testified to symptoms of anxiety and depression; to constant and severe back, leg, and foot symptoms; and to occasional difficulty walking. He stated that he did not wish to have surgery if the outcome could not be guaranteed and that Dr. King had advised him not to have it. He used a cane, although no physician prescribed one, and he thought himself to be incapable of working due to his back injury and his nerves.

Although Dr. Granacher thought that the claimant exhibited mild mental retardation, he assigned a permanent impairment rating based solely on anxiety and depression due to the injury. When evaluated by Dr. Ruth several months later, the claimant denied current symptoms of anxiety and depression, and Dr. Ruth concluded that the symptoms had resolved. He assigned a permanent impairment rating based solely on pre-existing mental retardation, but both he and Dr. Granacher noted that much of the psychological testing was invalid. Neither expressed an opinion that the claimant's physical and intellectual status rendered him incapable of working. Although the claimant testified to continued symptoms of depression and anxiety at the hearing, it was reasonable for the ALJ to conclude that the conditions had resolved.

No expert who treated or evaluated the back injury stated that it rendered the claimant incapable of working. Although medical evidence limited him to light duty work, Dr. Bean implied that surgery would render him capable of heavier work. The claimant's employer offered to provide work within his restrictions, but he refused to attempt it. Thus, although there was evidence to have supported a finding of total disability had one been made, it was not so overwhelming as to compel such a finding.

The decision of the Court of Appeals is affirmed.

Lambert, C.J., and Abramson, Cunningham, Minton, Noble, and Schroder, JJ., concur. Scott, J., recuses.

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