

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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

2007-SC-000650-WC

DATE 12-18-08 E.L.A. Grant PC.

RINKER MATERIALS CORPORATION

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2007-CA-000435-WC
WORKERS' COMPENSATION BOARD NO. 04-01875

WILLIAM BRATCHER;
HONORABLE LAWRENCE SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) rejected a university evaluator's opinions and determined that the claimant was permanently and totally disabled by a pulmonary condition due to his exposure to rock and lime dust while working at the defendant-employer's quarry. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer continues to assert that the ALJ erred by failing to afford presumptive weight to the university evaluator's opinion regarding causation and by failing to rely on the uncontradicted medical opinions that the claimant is not permanently and totally disabled.

We affirm. The ALJ stated reasons for rejecting the university evaluator's opinions that complied with KRS 342.315 as construed in Magic Coal Co. v. Fox, 19

S.W.3d 88 (Ky. 2000). Although a medical expert must determine the permanent impairment rating and restrictions that result from an injury, an ALJ must decide whether they cause partial or total disability under the standards found in KRS 342.0011(11)(b) and (c) as construed in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The ALJ reached a reasonable legal conclusion under the lay and medical evidence.

The parties stipulated that the claimant was born in 1950 and completed the third grade without a GED. In 1968 he began working as a pit loader/operator in the employer's quarry, where he received continuous exposure to rock dust, lime dust, and a powdery dust produced after dynamite explosions. He filed an application for benefits in November 2004, alleging that he suffered from occupational bronchitis or asthma, which produced a pulmonary impairment and rendered him totally disabled.

The claimant testified that he has never smoked. He began to have breathing problems in the 1980s and sought treatment with his family doctor. Dr. O'Bryan, a pulmonary specialist, diagnosed asthma in 1988. He noted a familial history of the condition, noted that spirometric studies were normal, and also noted that rock dust exposure definitely exacerbated the asthma. The claimant sought treatment eventually with Dr. Gallo, a pulmonary specialist at the Trover Clinic. He quit working in February 2004 and testified subsequently that he had breathing difficulties almost every night, that he had shortness of breath when he walked at a normal pace or walked the 200 feet to his mailbox, and that his symptoms had increased since he quit working.

Dr. Gallo began treating the claimant in January 2003. The claimant related a history of 35 ½ years' exposure to rock and lime dust and of never having smoked.

Pulmonary function studies performed at the time revealed mild restrictive and obstructive impairments. Dr. Gallo diagnosed industrial bronchitis and a history of bronchial asthma, and he treated the conditions with various medications and inhalers. He assigned a 26% permanent impairment rating in February 2005, based on recent pulmonary function studies. He noted that they had worsened since 2003 and probably would not improve. In his opinion, the claimant's work was a substantial cause of the dysfunction. Dr. Gallo advised him to avoid climbing, lifting more than 50 pounds, temperature extremes, noxious fumes, and dusty conditions.

When deposed in April 2005 Dr. Gallo testified that a substantial part of his practice for the past 32 years involved treating patients for occupational lung diseases. He stated that his working diagnosis was industrial bronchitis, which was based on the claimant's exposure history, non-smoking history, and abnormal pulmonary function. When questioned about causation, Dr. Gallo testified that the continuous inhalation of high concentrations of inorganic dust, such as rock dust, causes the tracheobronchial mucosa to be irritated. This results in increased mucous secretion and, if the exposure continues, a thickening of the mucosa and some airway compromise. Bronchial spasms (a narrowing of the bronchi in response to agents such as heat, cold, dust, odors, or perfumes) may also occur in patients who are susceptible, at which point the patient may "act like an asthmatic." He acknowledged that the absence of a smoking history would indicate that the claimant was susceptible to developing lung disease, but he thought that the claimant's lengthy exposure to rock dust was a substantial cause of his condition. He characterized the condition as being an occupational asthma, supporting his opinion with two articles from Chest (the journal of the American College

of Chest Physicians), entitled "Chronic Airway Limitation: Its Relationship to Work in Dusty Occupations" and "Occupational Pollution."

Dr. Kraman performed a university evaluation in January 2005 and prepared a report. Chest x-rays revealed "Questionable small nodules at bases" and pulmonary function tests revealed moderately severe obstructive airways disease that responded significantly to bronchodilators. Dr. Kraman ruled out pneumoconiosis and diagnosed asthma, stating that it is common in the general population and has no known relation to rock dust exposure. He assigned a Class 3 (26%-50%) permanent impairment rating. He reported that the claimant required no restrictions on his exposure to chemicals in the workplace and that he retained the physical capacity to return to his work in the rock quarry, noting that the claimant remained capable of performing his previous work from a pulmonary standpoint.

When deposed, Dr. Kraman described asthma as being a disease in which the airways constrict and secrete excessive amounts of mucous in response to certain triggers. This increases airway resistance and makes it difficult for the individual to breathe freely. He reiterated his opinion that occupational exposure to rock dust did not cause the claimant's asthma. He acknowledged that industrial bronchitis exists and may not be entirely reversible but saw no reason to believe that the claimant suffered from the condition, which usually involves a very dusty environment and an enclosed space. He also acknowledged that occupational asthma exists and can become permanent but stated that the condition is not described in the medical literature as being associated with rock dust or with the history that the claimant gave him. He noted that the studies Dr. Gallo cited involved mostly coal miners and pit miners and did not

support his conclusions regarding the claimant's work environment.

On cross-examination Dr. Kraman testified that rock dust could be an irritant but is not an allergen because it is inorganic. He acknowledged that the American Journal of Respiratory and Critical Care Medicine is an authoritative publication and reviewed a consensus statement from the American Thoracic Society, which indicated that asthma probably develops from a combination of genetic susceptibility and exposure to certain environmental factors. He stated that rock or lime dust could trigger an asthma attack and make it worse but would not cause the underlying condition. Thus, he would not eliminate rock or lime dust exposure as a factor that contributed, along with the claimant's genetic susceptibility, to causing his asthma to be symptomatic. He stated, however, that he saw no evidence that the claimant's exposure caused permanent pulmonary impairment rather than temporary symptoms. Dr. Kraman stated that occupational asthma may result from exposure to certain irritants but knew of no instance where it resulted from exposure to inorganic dust.

When deposed for the second time, in January 2006, Dr. Gallo testified that the claimant's pulmonary function had not changed significantly in the past year. He took issue with Dr. Kraman's opinions regarding causation and remained steadfast that the claimant's respiratory impairment resulted from his work-related dust exposure. Dr. Gallo supported his opinion with a recent article from the American Journal of Respiratory and Critical Care Medicine, entitled "Occupational Asthma." He took issue with the distinction that Dr. Kraman drew between organic and inorganic pollutants. Although he acknowledged that asthma is a disease of the general public, he noted that the claimant had no familial history of allergic respiratory disease and had never

smoked but did have a lengthy history of occupational dust exposure. He concluded that the claimant suffered from both occupational bronchitis and occupational asthma.

Noting that "two very highly trained and well respected pulmonary experts" presented opposing opinions, the ALJ found Dr. Gallo to be more persuasive. The ALJ acknowledged that Dr. Kraman was a medical school professor with "impressive and extensive credentials" but reasoned that Dr. Gallo had been treating patients with occupational lung diseases for over 32 years, had been treating the claimant for three years, and supported his opinions with scholarly articles. The article cited during Dr. Gallo's January 2006 deposition appeared to contradict Dr. Kraman's position that the claimant's continued dust exposure would not have caused asthma. Dr. Kraman agreed with Dr. Gallo that such exposure would make asthma or chronic obstructive pulmonary disease worse. Finally, although Dr. Kraman stated that workplace dust would cause only a temporary exacerbation of asthma, the claimant's FEV1 value changed little in the last two years, which indicated that he was not improving.

Magic Coal Co. v. Fox, supra at 97, explains that KRS 342.315 does not deprive an ALJ of the authority to weigh conflicting medical opinions but requires an ALJ to state a reasonable basis for rejecting a university evaluator's clinical findings and opinions. The employer complains that the ALJ failed to do so and erred by relying on Dr. Gallo's opinions regarding causation. We disagree.

Like Dr. Kraman, Dr. Gallo was a highly-credentialed and respected pulmonary expert. Although Dr. Kraman conducted an asthma clinic, Dr. Gallo had 32 years of highly specialized experience in treating occupational lung diseases. Although Dr. Kraman evaluated the claimant and ruled out industrial bronchitis or occupational

asthma, Dr. Gallo treated him for three years and supported his conflicting opinions with scholarly articles. Although the article on occupational asthma cited in his January 2006 deposition fails to list rock dust as a cause of the condition, the article does not purport to list all causative agents. While evidence of a familial history of asthma would show an increased likelihood that the claimant was susceptible to the condition, it would not prove that something other than occupational dust exposure caused the susceptibility to develop into what is known as occupational asthma. Nor would his long history of treatment for asthma prove that occupational dust exposure was not a significant cause of the condition because the treatment began after many years of the exposure. Finally, although the lack of improvement in the claimant's pulmonary function after he quit working does not prove that occupational dust exposure caused an occupational bronchitis or asthma, it does support Dr. Gallo's conclusion that the condition is permanent.

The employer's second argument is that the ALJ failed to give presumptive weight to Dr. Kraman's opinions concerning the claimant's restrictions and ability to work and erred by finding him to be permanently and totally disabled despite uncontradicted medical evidence to the contrary. Again, we disagree.

KRS 342.0011(1)(c) requires a totally disabled worker to have a permanent impairment rating and a complete and permanent inability to perform any type of work. Ira A. Watson Department Store v. Hamilton, *supra*, explains that at least some of the principles of Osborne v. Johnson, 432 S.W.2d 800 (Ky. 1968), remain viable when determining whether a worker's disability is total rather than partial. Relevant factors include the worker's physical, emotional, intellectual, and vocational status. The

analysis also includes a consideration of how the various factors interact, of the likelihood that the worker will be able to find work consistently under normal employment conditions, of the worker's ability to work dependably, and of whether any physical restrictions will interfere with the worker's vocational capabilities. The court stated specifically that although the effect of the worker's medical condition must be considered, the ALJ is not bound by the medical experts' vocational opinions. Citing Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979), the court also noted that a worker's testimony is competent evidence of what the individual is and is not able to do.

Assigning a permanent impairment rating and work restrictions are medical questions; thus, KRS 342.315 entitles a university evaluator's opinions on these matters to presumptive weight unless the ALJ states specific reasons for rejecting them. Deciding whether the permanent impairment rating and restrictions produce a partial or total disability is a legal question to be decided under KRS 342.0011(11)(b) and (c) as construed in Ira A. Watson Department Store v. Hamilton, *supra*. Nothing requires an ALJ to give a reason for rejecting a physician's vocational opinion.

Dr. Kraman assigned a 26% to 56% permanent impairment rating and reported that the claimant remained capable of performing his previous work from a pulmonary standpoint. He testified subsequently that rock dust was an irritant that could trigger an asthma attack and exacerbate the condition. Dr. Gallo assigned a 26% permanent impairment rating. He expressed no opinion regarding the claimant's ability to work but did advise him to avoid climbing and lifting more than 50 pounds and to avoid temperature extremes, noxious fumes, and dusty conditions.

The claimant was 56 years old when the claim was heard. He had a third-grade

education, testified that he could not read a newspaper or fill out an employment application, and testified extensively about the dusty conditions under which he had worked. He also testified that he became short of breath if he walked at a normal pace or walked the 200 feet to his mailbox, that he had difficulty breathing, that he used inhalers four times per day, and that he did not think he could perform the duties required in his previous work. The ALJ considered his testimony, his age, and his very limited education, which the ALJ noted would probably limit him to jobs that required intensive physical labor. Noting also that the claimant's breathing problems would probably prevent him from performing such labor adequately, the ALJ concluded that he was permanently and totally disabled.

Nothing indicates that the ALJ disregarded Dr. Kraman's opinion that the claimant had a significant permanent impairment rating due to his pulmonary condition or his opinion that continued dust exposure could trigger an asthma attack and make the condition worse. Having stated a reasonable basis for rejecting Dr. Kraman's opinions regarding causation, nothing in Magic Coal Co. v. Fox, *supra*, in KRS 342.315, or in the present facts required the ALJ to state an additional basis for rejecting his opinion that the claimant's pulmonary condition warranted no restrictions in favor of Dr. Gallo's opinion that it did. The Board and the Court of Appeals did not err by affirming because the ALJ determined reasonably from the lay and medical evidence that the claimant's work-related pulmonary impairment and restrictions rendered him permanently and totally disabled.

The decision of the Court of Appeals is affirmed.

Minton, C.J.; Cunningham, Noble, Schroder, Scott and Venters, JJ., concur.

Abramson, J., not sitting.

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