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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: OCTOBER 23, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2008-SC-000016-WC

DATE 11-13-08 Ella Grantt, D.C.

RICHARD A. SUTTON, JR. APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
2007-CA-000905-WC
WORKERS' COMPENSATION BOARD NO. 05-86241

NATIONAL ENVIRONMENTAL CONTRACTORS;
HONORABLE MARCEL SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded partial disability benefits for an injury to the claimant's left arm and right foot but determined that his cervical complaints were not work-related and that he was not entitled to an enhanced benefit under KRS 342.730(1)(c). The Workers' Compensation Board affirmed. Noting the ALJ's failure to mention the claim for depression or the related evidence, the Court of Appeals remanded for that purpose but affirmed in all other respects. The claimant argues that the ALJ erred by failing to afford his treating physician's testimony greater weight than an evaluating physician's, by failing to find that cervical surgery was compensable, by failing to find him to be totally disabled, and by failing to enhance his award.

We affirm. Neither Chapter 342 nor the regulations affords greater weight to a treating physician's testimony. We are not convinced that the ALJ overlooked or

misunderstood any relevant evidence. The favorable evidence was not so overwhelming as to compel the findings that the claimant sought.

The claimant was born in 1975. He completed high school, two years of college, and four years of training as a journeyman insulator. His medical history included a non-work-related C6-7 fracture in 1992 for which Dr. Changaris performed a posterior fusion. Released from treatment in 1993, the claimant remained asymptomatic until the injury that is at issue presently. He worked for the defendant-employer as an asbestos abatement supervisor and as an insulator. The work required him to climb ladders, reach overhead, crawl, stoop, bend, stand for prolonged periods of time, lift up to 100 pounds, cut insulation, and wrap pipes with insulation and aluminum sheeting. A concurrent job involved unloading trucks and operating a forklift.

While working on April 28, 2005, the claimant fell from a height of about 20 to 30 feet onto a concrete surface. He was diagnosed with a sprained right ankle and fractures to the left wrist and elbow, which were repaired surgically. X-rays revealed no evidence of an acute fracture or subluxation of the cervical spine, so the orthopedic surgeon advised him to see Dr. Changaris for his complaints of neck pain

Dr. Holt, an orthopedic surgeon, first saw the claimant on June 11, 2005, on referral from Dr. Changaris. The claimant complained of neck pain and of bilateral upper extremity weakness, numbness, and tingling. EMG suggested very mild C7 radiculopathy, worse on the left, and nerve blocks failed to relieve the pain. Dr. Holt recommended an anterior C6-7 fusion, the purpose of which was to decompress the C7 nerve roots and decrease the claimant's pain. He testified subsequently that x-rays taken on November 8, 2005, revealed evidence of motion on flexion and extension. He

acknowledged that degenerative changes noted on the May 2005 MRI scan were "very consistent with a non-union" of the 1992 fusion. He also acknowledged that x-rays taken in May and August 2005 revealed pre-existing degenerative changes but no evidence of motion at the previously-fused C6-7 level. When asked whether the 2005 accident caused or contributed to the claimant's symptoms, he stated that it was "a significant exacerbating event." Although he attributed the non-union at C6-7 to the 1992 surgery, he thought that the 2005 accident caused it to become symptomatic.

Dr. Garretson, a neurosurgeon, evaluated the claimant for the employer in December 2005 and reviewed the post-injury medical records, including Dr. Holt's records through November 8, 2005. He noted that a C7 nerve block seemed to have increased the claimant's pain and that Dr. Holt recommended an anterior fusion at C6-7. Dr. Garretson found no objective evidence that the accident caused a new cervical injury and thought that surgery was unwarranted. He found no MRI evidence of a herniated disc and no MRI or clinical evidence of nerve root compression despite the "very mild" EMG findings at C7.

Dr. Garretson did diagnose an aggravation of pre-existing arthritis in the foot, a resolving left median nerve injury, and status post left arm fracture of the distal and proximal radius. He did not assign a permanent impairment rating to the foot injury, noting that the foot was asymptomatic at the time, but he stated that a rating would be appropriate if the condition produced impairment with activity. He attributed the left hand symptoms to the median nerve injury, which he did not expect to reach maximum medical improvement (MMI) until at least mid-March 2006. Dr. Garretson assigned a 15% permanent impairment rating based on decreased range of motion in the left arm.

He stated that the impairment would affect the claimant's ability to perform heavy lifting and pulling with the left arm but would not permanently restrict him from a return to any type of work.

Dr. Kirsch performed a utilization review in January 2006 regarding the surgery request. After reviewing the medical records, including Dr. Holt's notes, the November 2005 x-ray report, and Dr. Garretson's report, he recommended that the request be denied. Noting a lack of any objective findings of residual harm, he concluded that the accident caused no more than a cervical sprain or strain that resolved. In his opinion, the current symptoms were unrelated to the April 2005 accident. The accident did not arouse a pre-existing dormant condition into disabling reality.

Dr. Changaris evaluated the claimant in March 2006 and reviewed the medical records. He assigned a combined 35% permanent impairment rating, which included impairments from a traumatic loss of motion to the ankle (3%), elbow (10%), and wrist (13%); cervical spine diskopathy (10%); and depression due to chronic pain (4%). Dr. Changaris stated that the 1992 fusion at C6-7 "was dormant and non-disabling by any standard." He attributed the cervical pain to possible instability due to progressive diskopathy and noted that the fall probably increased the diskopathy above the fusion. In his opinion, the claimant was incapable of working.

The claimant testified that he returned to restricted work in January 2006. He stated that wearing a hard hat put extreme pressure on his neck and that walking and climbing ladders caused his ankle to "swell up and pound." He worked through part of March 2006 but was never able to complete a full day's work and finally quit. He maintained that he was permanently and totally disabled and stated that he could not lift

even a gallon of milk due to left arm pain.

Convinced that the cervical complaints were not work-related and that the surgery was not compensable, the ALJ noted that Dr. Garretson found no evidence of cervical instability and that Dr. Changaris testified that the cervical pain and possible instability resulted from progressive diskopathy. The ALJ determined that "Plaintiff's work demonstrates that he is not totally disabled" and relied on the 15% permanent impairment rating that Dr. Garretson assigned to the left arm and the 3% rating that he assigned to the right foot, which equaled a 17% rating using the Combined Values Table.[1] The ALJ found that neither KRS 342.730(1)(c)1 nor 2 applied.

I. Weight to be afforded a treating physician's testimony

The claimant argues that the ALJ erred by failing to afford his treating physician's opinions greater weight and attempts to distinguish the authority upon which the Court of Appeals relied. He also relies on the concurring opinion, which urged the courts to give greater deference to a treating physicians' testimony based on Walker v. Secretary of Health and Human Services, 980 F.2d 1066, 1070 (6th Cir. 1992). Walker relied on authority which explains that federal social security regulations entitle a treating physician's opinion to substantial deference and entitle it to complete deference if uncontradicted.

Kentucky workers' compensation claims are governed by Chapter 342 and the applicable regulations. KRS 342.285 gives the ALJ the sole authority to judge the weight, credibility, and inferences to be drawn from the evidence of record.[2] In

1 Although the ALJ stated incorrectly that Dr. Garretson assigned a 3% rating to the right foot, Dr. Changaris did assign such a rating.

2 Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997).

Sweeney v. King's Daughters Medical Center, ___ S.W.3d ___ (Ky. 2008), the court reaffirmed the longstanding principle that nothing requires an ALJ to give greater weight to a treating physician's testimony.[3] The court noted specifically that although the legislature enacted KRS 342.315(2) in 1996 to require an ALJ to afford a university evaluator's clinical findings and opinions presumptive weight, Chapter 342 and the regulations continue to be silent regarding the weight to be afforded a treating physician's testimony. The court construed the silence as evincing a legislative intent to give a treating physician's testimony no particular weight.

II. Factual issues

The claimant's remaining arguments address the weight of evidence on factual matters. He argues that the ALJ erred by failing to find the cervical surgery to be work-related, by failing to find his permanent disability to be total or, in the alternative, by failing to award either a triple or double income benefit.

The worker bears the burden of proof and risk of non-persuasion before the fact-finder with regard to every element of a claim.[4] KRS 342.285 permits an appeal to the Board; thus, an ALJ must recite sufficient facts to permit a meaningful appellate review.[5] KRS 342.285 provides, however, that the ALJ's decision is "conclusive and binding as to all questions of fact" and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.290

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3 Wells v. Morris, 698 S.W.2d 321, 322 (Ky. App. 1985) (principle "that the [fact-finder] was obligated to give more weight to the evidence of the attending physician . . . clearly is not the law").

4 Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984); Snawder v. Stice, 576 S.W.2d 276 (Ky.App. 1979).

5 Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982).

limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board. Thus, KRS 342.285 means that the ALJ has the sole discretion to determine the quality, character, and substance of evidence.[6] 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 adversary party's total proof.[7] Although a party may note evidence that would have supported a different decision, such evidence is not an adequate basis for reversal on appeal.[8] When the party with the burden of proof fails to convince the ALJ, the party's burden on appeal is to show that overwhelming favorable evidence compelled a favorable finding, i.e., that no reasonable person could fail to be persuaded by the evidence.[9]

A. Proposed surgery

The claimant asserts that the evidence compelled a finding that the proposed C6-7 surgery was work-related and compensable. He argues that the ALJ disregarded uncontradicted testimony by Dr. Holt, which indicated that November 2005 x-rays revealed a non-union at the site of the previous C6-7 surgery, that the April 2005 accident caused the non-union to be symptomatic, and that the proposed surgery would correct the non-union and resolve the pain and other symptoms that began immediately after the accident. He asserts that Dr. Garretson's opinions regarding causation must be disregarded because he did not review the November 2005 x-ray that revealed the

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6 Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

7 Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977).

8 McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

9 Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986); Paramount Foods, Inc. v. Burkhardt, supra; Mosley v. Ford Motor Co., 968 S.W. 2d 675 (Ky. App. 1998); REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985).

non-union; thus, his opinions were based on inaccurate findings and did not constitute substantial evidence under Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). We disagree.

Unlike the situation in Cepero, Dr. Garretson did not base his opinion of causation on a grossly inaccurate and incomplete medical history. He examined the claimant, reviewed the medical records, received a history of the 1992 injury and surgery as well as the April 2005 accident, and reviewed the May through August 2005 diagnostic tests. He also reviewed Dr. Holt's office notes, including those from November 8, 2005, which contained the results of x-rays taken on that date. Nothing required him to review the x-rays, themselves.

The evidence that the accident caused the claimant's cervical complaints was not so overwhelming as to compel a favorable finding. Although Dr. Holt testified that the complaints were work-related and warranted surgery, the ALJ found Dr. Garretson to be most persuasive and determined that they did not result from the 2005 injury. Dr. Garretson found no clinical or diagnostic evidence of cervical instability and no other objective evidence of a cervical injury due to the accident. Dr. Kirsch's testimony and portions of Dr. Changaris's testimony also supported the decision. The claimant has failed to show that the ALJ misunderstood Dr. Changaris's testimony. Nothing prevented the ALJ from relying on his opinion that the cervical pain complaints resulted from possible instability due to progressive diskopathy but rejecting his opinion that the 2005 accident caused the harm.

B. Partial or total disability

KRS 342.0011(11)(c) requires a finding of permanent total disability to be based

on "a complete and permanent inability to perform any type of work as a result of an injury." KRS 342.730(1)(a) prohibits non-work-related impairment to be considered. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000), explains that an ALJ must weigh the evidence concerning the worker's ability to earn an income by providing services on a regular and sustained basis in a competitive economy. The ALJ must consider the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. The ALJ must also consider the likelihood that the worker will be able to find work consistently under normal employment conditions, including the individual's ability to work dependably and the extent to which any physical restrictions will interfere with the individual's vocational capabilities.

After summarizing the evidence very briefly but adequately, the ALJ determined that the claimant's work-related injury caused him to be partially rather than totally disabled. Factors the ALJ considered included the claimant's age, education, and work experience as well as the medical evidence. The decision was reasonable.

The ALJ relied on Dr. Garretson, who assigned a 15% permanent impairment rating for loss of upper extremity motion, noting the complaints of left wrist pain, left forearm pain, and limited motion of the elbow and wrist. No medical evidence compelled a finding that he used an improper method for rating the left wrist and elbow fractures. Nor did any medical evidence compel a finding that he erred by failing to assign a rating for the right foot, which was not symptomatic at the time, or for the median nerve injury, which had not reached at MMI.[10] Although he stated that the left arm injury might affect the claimant's ability to perform heavy lifting and pulling with the

10 See Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003) (proper method for assigning a permanent impairment rating is a medical question).

arm, he also stated that it required no permanent restriction from any type of work. Finally, nothing prevented the ALJ from using the Combined Values Table to combine the permanent impairment rating that Dr. Garretson assigned for the left arm with the rating that Dr. Changaris assigned for the right foot because no medical expertise is necessary to do so.[11]

The claimant's youth, educational level, Dr. Garretson's testimony, and the fact that Dr. Holt released him to return to restricted work supported the finding of partial disability. Although the claimant considered himself to be incapable of work, he based his conclusion in part on the non-work-related cervical condition that KRS 342.730(1)(a) does not permit to be considered. His testimony would not have compelled a favorable decision even if the ALJ had found the condition to be work-related.[12] Finally, although Dr. Changaris considered the claimant to be incapable of work, a physician's vocational opinions do not bind an ALJ.

C. KRS 342.730(1)(c)1 and 2

KRS 342.730(1)(c)1 permits a triple benefit if, due to an injury, the worker does not retain the physical capacity to return to the type of work performed at the time of injury. We are not convinced that the ALJ misunderstood the claimant's testimony about his ability to work, that the evidence compelled a triple benefit, or that the evidence compelled at least a double benefit.

The ALJ considered the claimant's return to work to be evidence that he was not permanently and totally disabled but noted previously in the decision that he returned to

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11 See Caldwell Tanks v. Roark, Ky., 104 S.W.3d 753 (Ky. 2003).

12 Grider Hill Dock v. Sloan, 448 S.W.2d 373 (Ky. 1969) (even uncontradicted testimony by an interested witness does not bind the fact-finder).

"part-time sporadic work after the injury" and had "no present wages," which belies a misunderstanding. Dr. Garretson noted that the left arm fractures would not prevent the claimant from performing any type of work but might affect his ability to lift or pull heavy weights with the arm. The claimant quit working before his claim was heard but attributed it in part to a worsening of his non-work-related neck condition. Although Dr. Changaris also considered him to be unable to work, neither his testimony nor the claimant's compelled a favorable finding under KRS 342.730(1)(c)1.

KRS 342.730(1)(c)2 permits a double benefit if an injured worker "returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury. . . ." The claimant returned to work at the same pay rate but admitted that he was never able to work a full day. Thus, he could not have earned a wage that equaled his average weekly wage at the time of injury and was not entitled to a double benefit.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT,
RICHARD A. SUTTON, JR.:

ROBERT L. CATLETT, JR.
325 WEST MAIN STREET
SUITE 1900
LOUISVILLE, KY 40202

COUNSEL FOR APPELLEE,
NATIONAL ENVIRONMENTAL CONTRACTORS:

LYN DOUGLAS POWERS
FULTON & DEVLIN
2000 WARRINGTON WAY
SUITE 165
LOUISVILLE, KY 40222