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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

RENDERED: MAY 21, 2009
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

DATE 6/11/09 Kelley Kraber D.C.

2008-SC-000624-WC

CANTEEN SERVICE COMPANY
APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2008-CA-000148-WC
WORKERS' COMPENSATION BOARD NO. 01-91364

ROBERT ALLEN; HONORABLE R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD
APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) awarded permanent total disability benefits for the claimant's work-related lower back injury. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer asserts that the ALJ erred by failing to consider what it characterizes as inconsistencies between the claimant's testimony and other proof and by failing to state a reason for finding the claimant to be more credible. We affirm because the ALJ recited sufficient evidence to permit the basis for the decision to be reviewed and because the decision was reasonable under the evidence.

The claimant was born in 1966. He has a tenth-grade education with no specialized training and a work history consisting of unskilled labor. He began working for the defendant-employer as a temporary employee in 2000 and was hired to work full time in the warehouse early in 2001. His duties were to load soft drinks and snacks onto a cart, pull it to the delivery trucks, and load the products onto the trucks. The claimant injured his lower back on February 16, 2001, while working. He continued to perform light duty for two or three days and then worked for a bakery for four days before quitting work altogether due to back pain. He has not worked since then.

A chiropractor provided initial medical treatment, after which the claimant sought treatment with Drs. Cannon, Dimar, and Harpring. Dr. Harpring diagnosed a herniated lumbar disk for which he performed surgery in April 2002. Although it relieved the claimant's symptoms temporarily, he continued to experience low back pain that shot down his left leg as well as numbness in his feet. At an initial hearing held in February 2005, the claimant testified that his condition was worsening and caused him to be depressed. Drs. Harpring and Dimar recommended a lumbar fusion, which the employer contested. The employer also contested the psychological claim.

In the first of two decisions, the ALJ determined that the claimant sustained a work-related back injury and a directly resulting psychological injury. The ALJ found the recommended surgery to be reasonable and necessary, directed the employer to pre-certify it, and placed the claim for

permanent income benefits in abeyance pending maximum medical improvement (MMI) after the surgery.

The claimant underwent lumbar fusion surgery in October 2005. Later, the claim was removed from abeyance and the parties took additional proof. The issues submitted for a decision were whether the depression was work-related; the reasonableness and necessity of pain management treatment; whether the permanent disability was partial or total; and the claimant's entitlement to additional temporary total disability (TTD) benefits.

The claimant testified at the second hearing that the lumbar fusion relieved the pain in his left leg but that he continued to experience pain in his right leg. He acknowledged that his back pain had improved some. He stated that Dr. Harpring recommended pain management therapy but that the employer refused to approve it. He also stated that he had not worked since the previous hearing and was receiving Social Security Disability benefits. He stated that he could stand for 45 minutes but had difficulty bending, lifting, and getting up. He was very irritable and depressed and did not think that he could work. His wife testified to the severe impact that the claimant's physical and emotional condition had on their marriage.

Dr. Harpring noted in May 2006 that the surgery provided relief from the claimant's left leg pain but that significant right leg pain remained, which was consistent with scarring. Finding no evidence of nerve impingement on a

lumbar myelogram or CT scan, he concluded that the pain resulted from scarring. He recommended pain management therapy.

Dr. Dimar noted in January 2006, that the claimant's back pain had improved. He noted in April 2006 that the claimant was having minimal back pain but recommended a CT/myelogram to evaluate the continued right leg pain. He noted in June 2006 that the tests failed to show any significant stenosis and that the fusion appeared to be solid.

In a letter dated September 21, 2006, Dr. Dimar indicated that everything looked good when he saw the claimant in January 2006. The fusion appeared to be solid on subsequent visits and the back pain relieved. In his opinion, the claimant would reach MMI one year after the surgery, i.e., on October 31, 2006. He attributed the ongoing pain down the leg to a chronic nerve injury due to scarring and nerve compression and stated that it might or might not resolve with time. He restricted the claimant from lifting more than 20 to 25 pounds and from repetitive bending, lifting, and twisting. He also stated that any job must give the claimant the freedom to sit, stand, or walk.

The claimant was seen at Tri-State Advanced Pain Management, initially in June 2006. He was examined and diagnosed with post lumbar laminectomy syndrome, neuropathy, right lower extremity, and numbness of the left foot. Recommended therapy included medication and injections.

Dr. Jackson evaluated the claimant for his attorney in November 2006, as she had done before the initial hearing. She diagnosed chronic low back

pain with radiculopathy, status post lumbar decompression and spinal fusion. She recommended pain management therapy. Dr. Jackson assigned a 25% permanent impairment rating and restricted the claimant from lifting more than 20 pounds as well as from repetitive bending or twisting. She also stated that he would need to be allowed to move about and to change positions frequently.

Dr. Adams, a psychologist, updated his previous evaluation in August 2006. He performed a mental status examination and psychological testing. He reported that the claimant's full-scale IQ measured 79 and he read at the fourth-grade level, which was consistent with borderline intellectual functioning. Dr. Adams noted that the MMPI profile was very similar to the profile from 2004 except for an increase in the anxiety and psychotic scales. He noted that although the current profile was statistically invalid because of additional elevation of the clinical scales, the claimant's symptoms were now more pronounced. Thus, he concluded that it probably reflected current functioning. Dr. Adams diagnosed major depression, severe, single episode continuous, with psychotic features. Noting the absence of any previous symptoms, he attributed the condition directly to the work-related injury. He explained that the claimant could no longer perform manual labor and knew of no other work that he could do. Dr. Adams assigned class III or moderate impairment, stating that the condition would cause significant difficulty in functioning in a job and would prevent the claimant from working.

Dr. Tutt, a neurosurgeon, evaluated the claimant in June 2006 for the employer. He determined that the claimant sustained a back injury as described in February 2001 but had no active findings of nerve root compression. After reviewing some of the diagnostic tests performed between the surgeries, Dr. Tutt made the assumption that the claimant had an L4-5 disc protrusion after the injury. He stated that the claimant reached MMI about 3 to 4 months after the second surgery and that the injury and surgeries warranted a 20% impairment rating. Dr. Tutt found the continued complaints of pain to be inexplicable, noting that the objective findings did not support the subjective complaints. In his opinion, the claimant could work provided that he used proper body mechanics when performing heavy lifting.

Dr. Griffin, a psychiatrist, updated his previous evaluation for the employer in September 2006. He noted that the claimant's pain was improving gradually and that he seemed to be more optimistic. He took issue with Dr. Adams' methodology, stating that he did not use psychological testing and that Dr. Adams' reports were invalid. He also stated that he saw mild depressive symptoms and no evidence of psychosis. Dr. Griffin diagnosed mild depressive disorder to which he assigned a 15% impairment rating. He attributed the condition to an underlying personality disorder but acknowledged that the claimant's inability to work probably contributed to the condition.

As in the earlier decision, the ALJ remained convinced that the claimant sustained a work-related psychological injury as a direct result of his physical

injury. Finding the testimony from Drs. Harpring and Jackson to be more persuasive than that of Dr. Tutt, the ALJ determined that pain management therapy was reasonable and necessary. The ALJ noted that all of the physicians assigned a permanent impairment rating although Dr. Griffith opined that the rating he assigned was not work-related. Rejecting an argument that the claimant embellished his symptoms and that his testimony contradicted Dr. Harpring's, the ALJ found his description of his limitations to be "very credible." The ALJ concluded that he was permanently and totally disabled as a result of the injury and had been so since TTD benefits ended. Rejecting the employer's petition for reconsideration, the ALJ stated that he "did properly consider what the Defendant has described as inconsistencies" in the claimant's testimony and testimony by Drs. Dimar and Griffin but found them not to be persuasive.

The employer argues that the ALJ failed to consider all of the medical evidence of record. Moreover, the ALJ failed to explain why he characterized the claimant's testimony regarding his present condition as being "very credible" despite evidence to the contrary from Drs. Dimar, Tutt, and Griffin and from the claimant's wife. The employer concludes that the ALJ must make additional findings regarding inconsistencies in the claimant's testimony and between his testimony and the medical evidence. We disagree.

The claimant bore the burden of proof and risk of non-persuasion with regard to every element of his claim.[1] KRS 342.285 designates the ALJ as fact-finder and prohibits the Board from substituting its judgment "as to the weight of evidence on questions of fact." An ALJ must recite sufficient evidence to permit a legal conclusion to be reviewed meaningfully but is not required to recite all of the medical evidence or to conduct a detailed analysis of the evidence or the law.[2] KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and to errors of law arising before the Board. KRS 342.285 means that an ALJ has the sole discretion to determine the quality, character, and substance of evidence.[3] 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.[4] Although a party may note evidence that would have supported a different decision, such evidence is not an adequate basis for reversal on appeal.[5] When the party with the burden of proof prevails before the ALJ, the opponent's burden on appeal is to show the decision to be unreasonable because no substantial evidence supported it.[6]

---

[1] 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).

[2] Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526, 531 (Ky. 1973).

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

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

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

[6] Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

This is not a case such as Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982), which involved legal conclusions made with no recitation of the evidence that supported them. Nor is it a case such as Bullock v. Goodwill Coal Co., 214 S.W.3d 890, 893 (Ky. 2007), in which KRS 342.315(2) required the ALJ to state specific reasons for rejecting a university evaluator's clinical findings and opinions. This case does not involve a university evaluator.

After summarizing the lay and medical evidence thoroughly and accurately, the ALJ noted that Drs. Jackson, Tutt, and Adams assigned permanent impairment ratings to the injury "that translate to permanent disability." When denying the employer's petition for reconsideration, the ALJ made it clear that he had considered the alleged inconsistencies between the claimant's testimony and certain testimony from Drs. Dimar and Griffin but found the latter not to be persuasive. Nothing required the ALJ to do more. The claimant's age, intellectual ability, limited education, and history of performing unskilled manual labor; his testimony concerning the physical and psychological effects of the injury on his ability to work; and the physical and psychological limitations noted by Drs. Harpring, Jackson, and Adams provided substantial evidence that he was permanently and totally disabled as defined in KRS 342.0011(11)(c).[7] Thus, the finding may not be disturbed on appeal.

---

[7] See McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001); Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT,
CANTEEN SERVICE COMPANY:

Richard Christion Hutson
Sharlott Kay Thompson
Whitlow, Roberts, Houston & Straub, PLLC
300 Broadway Street
P.O. Box 995
Paducah, KY 42002-0995

COUNSEL FOR APPELLEE,
ROBERT ALLEN:

Thomas M. Rhoads
Rhoads & Rhoads, P.S.C.
9 East Center Street
P.O. Box 1705
Madisonville, KY 42431