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RENDERED: SEPTEMBER 23, 2010
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2009-SC-000763-WC

DATE 10-14-10 EIA Grant D.C.

ICG KNOTT COUNTY, LLC

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-001155-WC
WORKERS' COMPENSATION BOARD NO. 08-00304

RONDEL KEITH THOMAS;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) relied on an opinion from Dr. Tibbs as the basis to award the claimant income and medical benefits for a work-related lumbar injury sustained on March 9, 2006 and also as a basis to find no prior active impairment. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the employer asserts that Dr. Tibbs based his opinion on an inaccurate and incomplete medical history and that the reliable medical evidence showed the claimant to have at least some prior, active impairment.

We affirm. Nothing required the ALJ to disregard Dr. Tibbs' opinions concerning the effects of the 2006 injury. Substantial evidence showed that

the claimant had no significant permanent impairment rating with respect to the lumbar spine before the injury. Substantial evidence also showed that the injury produced a 12% impairment rating based on the lumbar spine.

The claimant was born in 1959 and has an eighth-grade education and a history of performing manual labor. He sustained a work-related neck and low back injury in 1996 while setting utility poles for Thacker-Grigsby Telephone Company and filed a workers' compensation claim in 1997. An ALJ found ultimately that he failed to prove a disabling work-related injury and dismissed the claim in its entirety.

The claimant did not work from 1997 until 2004, during which time he received social security disability benefits. He worked for a construction company for a short time in 2004, after which the defendant-employer hired him to operate a roof bolter in an underground coal mine.

The claimant re-injured his neck and low back while lifting a crib block on February 18, 2005. The employer paid three periods of temporary total disability (TTD) benefits voluntarily and the claimant returned to work thereafter. He then experienced severe low back pain that radiated into his left leg while working in low coal on March 9, 2006, after which the employer paid TTD benefits from March 19, 2006 through November 10, 2006. The claimant did not return to work after the 2006 incident and claimed that he was totally disabled by the effects of the 2005 and 2006 accidents. Evidence submitted in the claim concerned his present condition as well as his condition before

February 18, 2005. The contested issues included, among other things, the extent of any prior, active impairment or disability.

Evidence Dating to Before February 18, 2005

Dr. Polisetty interpreted a lumbar CT scan taken on October 1, 1996 as showing moderate annular bulging of the L4-5 disc with possible stenosis; a protrusion of the L5-S1 disc on the left; and possible compression of the L5-S1 nerve root.

Dr. Travis evaluated the claimant in November 1996. He interpreted a lumbar MRI as showing a small bulge at L5-S1 on the left, "which could be a small herniated disc." At the claimant's request, Dr. Travis released him to return to work with respect to his neck and back conditions.

Dr. Rapier evaluated the claimant in November 1997 for complaints of neck and back pain. He interpreted a CAT scan as showing an eccentric L5-S1 disc on the left that caused some nerve root displacement. Physical examination revealed atrophy of the left calf, which was one-half inch smaller than the right. He diagnosed a cervical and lumbar strain that aggravated pre-existing dormant degenerative disc disease and produced some lumbar radiculopathy. He assigned a 10% permanent impairment rating based on the lumbar spine.

Dr. Primm evaluated the claimant in May 1998. He interpreted lumbar spine x-rays as showing mild disc space narrowing at L5-S1 and interpreted a lumbar CT scan as showing only mild degenerative changes with a history of

superimposed injury and arousal. He concluded that the 1996 incident caused no permanent harm and that the claimant could return to work with temporary restrictions. He assigned a 0-5% impairment rating based on residual symptoms due to an aggravation of the previously dormant degenerative conditions.

Evidence Dating from February 18, 2005 to the Present

Dr. Patel interpreted a March 2005 MRI as showing mild degeneration of the L4-5 and L5-S1 disc spaces and a left paracentral bulge at L5-S1. Dr. Potter interpreted an April 2005 EMG/nerve conduction study as confirming left S1 radiculopathy and bilateral sensorimotor neuropathy. Dr. Bond interpreted lumbar x-rays taken in July 2005 as showing degenerative disc disease at L5-S1. He interpreted a September 2005 MRI as showing minimal disc bulging at L4-5 with a small amount of left foraminal narrowing and as showing moderate herniation of the L5-S1 disc that caused mild S1 nerve root compression on the left. Finally, he interpreted a June 2006 lumbar MRI as showing a minimal disc protrusion at L4-5 on the left, with findings suspicious for a small annular tear, and a small herniation at L5-S1 on the left.

Dr. Kriss evaluated the claimant for the employer in July 2006. He received a history of work-related injuries in 1996, 2005, and 2006. He noted that the claimant reported a "little back pain" that persisted after the 1996 injury but denied experiencing any leg symptoms at that time. The claimant reported that he experienced both low back and leg pain after the 2005 injury;

that the symptoms failed to respond to medication and physical therapy; and that they worsened permanently after the 2006 injury. Dr. Kriss diagnosed a left L5-S1 herniation that compressed the left S1 nerve root and chronic left S1 radiculopathy, both of which had been present for "roughly 12 years." He opined that the 2005 and 2006 incidents produced only temporary exacerbations of the claimant's "pre-existing active longstanding chronic back condition."

Dr. Rapier evaluated the claimant in April 2007 with respect to complaints of back pain that radiated into the left leg. He noted that the claimant experienced a significant low back injury about twelve years earlier that caused him to miss work for seven years. He also noted atrophy of the left calf, which was about three-fourths of an inch smaller than the right. He interpreted a June 2006 lumbar MRI as showing degenerative disc disease with a disc fragment at L5-S1. He opined that the claimant's three back injuries aggravated pre-existing degenerative disc disease with radiculopathy and that his back condition was work-related. Dr. Rapier assigned a 22% impairment rating based on the lumbar spine. Although he noted the presence of an active impairment "prior to this injury," he failed to apportion the rating. He stated that the claimant lacked the physical capacity to return to the type of work he performed when injured.

Dr. Tibbs began treating the claimant in August 2006. He received a history of the 2006 injury and noted that the claimant "had some problems

with his back, a long time ago, that got better with physical therapy." He diagnosed a herniated disc at L5-S1 with left S1 radiculopathy; recommended surgery; and took claimant off work. The claimant never had the recommended surgery.

Dr. Tibbs completed a Form 107 in October 2008. He stated that the 2006 injury described by the claimant was sufficient to produce a disc herniation in an individual with pre-existing dormant degenerative disc disease. He also stated that "by history" the 2006 injury caused the claimant's present complaints and assigned a 12% impairment rating, which he attributed entirely to the 2006 injury. Like Dr. Rapier, he opined that the claimant lacked the physical capacity to perform the type of work performed at the time of his injury (*i.e.*, to work as a coal miner or laborer).

Having summarized the evidence in the previous and present claims in detail, the ALJ noted that the "true" question to be decided was whether the claimant sustained an injury on March 9, 2006 or whether his present disability was active before the incident. Finding Dr. Tibbs' opinions to be most persuasive, the ALJ determined ultimately that the March 9, 2006 incident caused the claimant to sustain a partially disabling herniated disc at L5-S1; that the condition warranted a 12% impairment rating; and that the impairment and resulting disability resulted entirely from the injury. The ALJ enhanced the claimant's income benefit by a factor of 3.4 based on findings

that he lacked the physical capacity to return to the type of work performed at the time of the injury and that he had an eighth-grade education with no GED.

The employer's petition for reconsideration took issue with the ALJ's reliance on Dr. Tibbs insofar as he attributed the entire 12% impairment rating to the 2006 injury. The employer argued that Dr. Tibbs' opinion was the product of an incomplete and inaccurate medical history and, thus, was unreliable. Denying the petition, the ALJ noted that Dr. Tibbs received and considered the claimant's history of previous back problems when completing the Form 107. Convinced that the 2006 injury warranted future medical benefits and no exclusion for pre-existing active impairment, the ALJ noted specifically when denying the employer's petition for reconsideration that the claim for the 1996 injury was dismissed.

Having failed to convince the Board or the Court of Appeals, the employer continues to argue that Dr. Tibbs' opinion could not constitute substantial evidence of the impairment resulting from the 2006 injury. The employer maintains that the opinion was unreliable because Dr. Tibbs' records fail to mention a prior back injury. It concludes that the ALJ erred by failing to attribute at least some of the claimant's impairment to a condition that was active before the 2006 incident.

Analysis

The employer bases its argument on *Cepero v. Fabricated Metals Corp.*,¹ in which the court prohibited reliance on an opinion of causation that is based

¹ 132 S.W.3d 839, 842-43 (Ky. 2004).

on a substantially inaccurate or largely incomplete medical history and "unsupported by any other credible evidence." Mr. Cepero bumped his left knee while working and was sent to a clinic where he was diagnosed with a contusion and strain. He failed to mention the accident when seeking treatment from Dr. Box one week later. He did, however, report that he had been confined to a wheelchair for three months a few years earlier after sustaining a left knee injury while performing martial arts. He again reported only the martial arts injury when he saw Dr. Goddy, stating that he had experienced "good days and bad days" thereafter. Dr. Goddy diagnosed a torn anterior cruciate ligament (ACL) and lateral collateral ligament, which he attributed to the martial arts injury because a torn ACL cannot repair itself. Drs. Changaris and Ballard, both of whom were unaware of the martial arts injury, attributed Cepero's knee condition to the incident at work. Dr. Ballard changed her opinion, however, when informed of the previous injury. Mr. Cepero denied the previous injury when deposed until he was confronted with Dr. Goddy's records. He stated then that the injury occurred 15 years earlier and was "no big deal," a position he continued to take at the hearing. He also insisted that he had reported the work-related injury to Drs. Box and Goddy.

The ALJ found Cepero to be credible despite his contradictory testimony and relied on records from the clinic, on Dr. Changaris' opinion, and on Dr. Ballard's initial opinion. Convinced that the ALJ erred, the court stated:

[I]n cases such as this, where it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or

largely incomplete, any opinion generated by the physician on the issue of causation cannot constitute substantial evidence. Medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable. Furthermore, to permit a ruling of law to stand based upon such evidence that is not reliable, probative and material would be fundamentally unjust. We therefore conclude that the opinions of Dr. Changaris and, to a limited degree, the earliest opinions of Dr. Ballard on causation, do not measure up as substantial evidence, and it was error for the ALJ to blindly elect to adopt their flawed conclusions to support any ruling of law.²

To summarize, *Cepero* prohibits an ALJ from relying on an opinion of causation that is based on an incomplete or erroneous history and "unsupported by any other credible evidence." This is not such a case.

Nothing indicates that the claimant attempted to conceal his previous injury from any physician who evaluated him concerning the present claim. Dr. Tibbs' records fail to note a previous back injury but do indicate that he recorded a history of medical treatment for previous back problems. Moreover, he stated that the 2006 injury was of a type that could produce a herniated disc and indicated on the Form 107 that he considered the claimant's previous back problems when assigning a 12% impairment rating to the 2006 injury.

Substantial evidence supported the decision to exclude no prior, active disability from the claimant's award. Although some medical records indicated that the 1996 injury caused a significant impairment, Dr. Primm opined that it did not. The ALJ who decided the claim for the 1996 injury agreed and the

² *Id.* at 842-43.

claimant was able to return to work eventually as a laborer in construction and underground coal mining. The ALJ who decided the present claim noted specifically that the decision in the claim for the 1996 injury played a role in the decision to rely on Dr. Tibbs with respect to the effects of the 2006 injury. Mindful also that Dr. Rapier assigned an impairment rating in the present claim that was 12% higher than he had assigned to the 1996 injury, we conclude that substantial evidence supported the decision to attribute a 12% impairment rating and the associated disability to the 2006 injury.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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