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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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: SEPTEMBER 22, 2011
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2010-SC-000799-WC

WESTERN IRVING DIE CAST — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-001248-WC
WORKERS' COMPENSATION NO. 04-95492

LOREN RICE;
HONORABLE R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

The same Administrative Law Judge (ALJ) who awarded benefits for permanent total disability in the initial litigation dismissed the motion to reopen that is the subject of this appeal, having found that the employer failed to prove a decrease in disability. The Workers' Compensation Board and the Court of Appeals affirmed.

Appealing, the employer asserts that its motion must be remanded for reconsideration, perhaps by a different ALJ, because the ALJ considered the merits of the reopening in an arbitrary and capricious manner and failed to base the decision on substantial evidence. We disagree and affirm.

Nothing in the opinion indicates that the ALJ gave the reopening less than careful consideration or weighed the evidence improperly. The employer's evidence was not so overwhelming as to compel a reduced award. Moreover, the testimonies of Drs. Vincent and Adams provided substantial evidence that the claimant experienced no post-award improvement in his condition and supported a reasonable finding that his disability did not decrease.

The claimant was born in 1972 and graduated from high school with no specialized or vocational training. His employment history included experience in construction, machine operation, and tool and die repair. His medical history included a work-related shoulder injury that was sustained in a previous employment. It also included complaints of back pain and depression, both of which dated to a February 2001 motor vehicle accident and resulting L5-S1 diskectomy. The claimant missed about four months' work after the accident and then returned without restrictions.

The claimant began working for the defendant-employer as a tool and die repair person in October 2001. He sustained the work-related lumbar spine injury that is at issue presently on January 3, 2004. He underwent surgery for a recurrent disc herniation and began to suffer from depression for which he was hospitalized briefly. The employer argued that the back condition was pre-existing and active and that the psychiatric condition did not result directly from the back injury as required by KRS 342.0011(1). Nonetheless, an ALJ determined in April 2005 that the back and psychiatric conditions were work-

related; resulted in permanent impairment ratings of 17% and 75% respectively; and alone caused the claimant to be permanently and totally disabled.[1] The Board affirmed and no further appeal was taken.

The employer filed a motion to reopen for a reduction in benefits in November 2007, asserting that the claimant's post-award physical and psychiatric conditions had improved substantially. Accompanying the motion were medical reports from Drs. Schiller, Cooley, and Shraberg, who evaluated the claimant for the employer and attributed no permanent impairment rating to the conditions as a result of the injury. The filing also included a sworn statement taken on May 18, 2006 from Dr. Vincent, the claimant's family physician. It contained statements indicating that the claimant's complaints of back pain were worse after the January 2004 injury but that his condition was the same objectively as it had been one month before the injury.

The claimant objected to the motion, asserting that the evaluators' reports showed only that they disagreed with the physicians the ALJ relied upon when awarding benefits. He noted that at no time did Dr. Vincent characterize his condition as having improved since the award. He also submitted a recent letter from Dr. Vincent, which stated that his condition was "basically unchanged at this time" and that Dr. Vincent did not anticipate any improvement.

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[1] *See Schneider v. Putnam*, 579 S.W.2d 370 (Ky. 19790); *International Harvester Co. v. Poff*, 331 S.W.2d 712 (Ky. 1959).

The same ALJ who rendered the initial award considered the employer's motion and overruled it for failure to make the required *prima facie* showing. The order explained that the employer "introduced no proof to show anything other than what they argued in the underlying claim which was not persuasive then, and is not persuasive now." Convinced that the employer provided evidence of decreased psychiatric impairment sufficient to demonstrate a substantial possibility that it would be able to prove a post-award decrease in disability,[2] the Board reversed and remanded the matter for the taking of further proof and a decision on the merits. The reopening proceeded accordingly.

Dr. Schiller, an orthopedic specialist, evaluated the claimant's back condition for the employer in March 2007. He attributed any back problems the claimant had to the 2001 accident and opined that the January 2004 accident caused only a lumbar strain and left no residual impairment. Dr. Schiller noted multiple Waddell findings, which indicated to him that there were psychosomatic aspects to the claimant's complaints. Noting the "secondary gain features of a work-related accident especially in someone who already knows about the legal methods about getting a settlement," he questioned "the motivation and the secondary gain problems of a patient of this type."

Dr. Weiss, a neurosurgeon, evaluated the claimant for the employer in 2004 and again in 2009. He opined in 2004 that the claimant suffered a strain

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[2] *See Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681 (Ky. 1972).

or sprain rather than a herniated disc and did not need surgery or any other additional medical treatment. Moreover, the injury caused no permanent impairment and warranted no restrictions. Dr. Weiss stated in 2009, "My opinion remains the same as on the last date I saw him."

Dr. Cooley, a forensic psychiatrist, evaluated the claimant for the employer in 2006. He opined that the claimant was malingering and did not have a legitimate psychiatric disorder based on a medical records review, mental status examination, and psychological testing.

Dr. Shraberg, a psychiatrist, evaluated the claimant for the employer in 2007. He found no signs of a psychiatric disorder due to the January 2004 injury and opined that the claimant's primary symptoms resulted from a dependence on opiate pain medication and tobacco, which was reversible. Relying on the tests conducted by Dr. Cooley, he also opined that the claimant magnified his chronic pain symptoms.

Dr. Butler performed a psychiatric evaluation for the employer in March 2009. He concluded that the claimant did not have a psychiatric disorder directly caused by the January 2004 incident. He opined that any mild depressive symptoms the claimant had were pre-existing, non-disabling, and unrelated to the January 2004 injury.

The sworn statement from Dr. Vincent indicated, in addition to the statements mentioned previously, that he had treated the claimant since 2001 for chronic back and leg pain and had treated him for depression in 2002. It

indicated that he diagnosed depression again in March 2004 and referred the claimant to a psychiatrist for treatment. As of February 2006 the claimant continued to complain of chronic daily back pain, which he rated at seven to eight on a ten-point scale. He was also beginning to experience pain in his left leg as well as the right and complained of worsening depression. Dr. Vincent continued to prescribe Percocet and Soma and acknowledged that narcotics can enhance depression.

Records from Dr. Vincent indicated that he had treated the claimant for chronic back pain and major depression every two months since September 22, 2004. Treatment notes for the years 2006 through 2009 documented consistent complaints of chronic back pain and depression for which Dr. Vincent prescribed medications and injections. He also made pain management and psychiatric referrals.

Dr. Vincent's February 24, 2009 report indicated that the claimant's back and psychiatric conditions continued to deteriorate after April 2005. He required greater doses of more potent medication for pain; had been treated by a pain specialist; and demonstrated no significant improvement in his subjective complaints or objective findings. He also had increasing anxiety over his financial status as well as sleep disturbance, anhedonia, irritability, and decreased appetite, and family members expressed concerns about the possibility of suicide. Dr. Vincent reported that the psychiatric condition now required higher doses of antidepressant and anti-anxiety medications. He

opined that the claimant's physical and psychiatric conditions and his problems with concentration prevented him from performing any type of full-time work. He stated that he had no reason to doubt the claimant's credibility, noting that he kept his medical appointments regularly and had been extremely honest.

Dr. Adams, a licensed clinical psychologist, evaluated the claimant's psychiatric complaints in December 2004 and in March 2009. His March 2009 report noted the continued presence of auditory hallucinations and extreme paranoia as well as multiple episodes of crying and extreme anger per day, difficulty focusing due to racing thoughts, and isolation from others. After attempting to conduct psychological testing but noting that the claimant could not focus long enough to stay on task, Dr. Adams diagnosed major depression, severe with psychotic features, and pain disorder associated with psychological factors and medical condition. He found no significant change in the claimant's mental status since December 2004.

Dr. Adams prepared a supplementary report in May 2009 after reviewing Dr. Cooley's deposition testimony. He reiterated that he found very little difference in his 2004 and 2009 evaluations of the claimant and took issue with Dr. Cooley's opinion that the claimant was malingering. He attributed the invalid psychological test results obtained by Dr. Cooley to the claimant's inability to concentrate; to indifference resulting from his depression and paranoia; and to the psychotic aspects of his depression. Dr. Adams concluded that the claimant continued to require treatment and psychotropic medication.

The claimant testified at reopening that his income consisted of his workers' compensation and social security disability benefits. He stated that his condition had worsened if anything since the award. He explained that he continued to take narcotic pain medications and antidepressants, but they were less effective. He complained of constant back pain that radiated from his right hip, down his right leg, and into his toes. He stated that he also had difficulty sleeping; experienced more frequent crying spells; and had less desire to be with others.

The ALJ summarized the evidence; found the opinions of Drs. Vincent and Adams to be most persuasive; and determined that the claimant remained permanently and totally disabled, noting that the employer presented the same arguments at reopening that it presented in the initial litigation of the claim. Having failed to convince the Board or the Court of Appeals, the employer continues to assert that the ALJ dealt with the reopening in what it considers to be an arbitrary and capricious manner.

I. STANDARD OF REVIEW.

An employer who seeks to reopen a final workers' compensation award and have it reduced bears the burden of proof and risk of non-persuasion concerning every element of its claim.[3] KRS 342.285 permits an appeal to the Board but provides that the ALJ's decision is "conclusive and binding as to all questions of fact." Together with KRS 342.290, it prohibits the Board or a

[3] *W.E. Caldwell Co. v. Borders*, 301 Ky. 843, 193 S.W.2d 453 (1946).

reviewing court from substituting its judgment for the ALJ's "as to the weight of evidence on questions of fact."

KRS 342.285 gives the ALJ the sole discretion to determine the quality, character, and substance of evidence.[4] 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 party's total proof.[5] KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;"[6] whether the decision "was procured by fraud;"[7] or whether the decision was erroneous as a matter of law.[8] Legal errors would include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion.

A party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence.[9] In contrast, a party who fails to meet its burden of proof before the ALJ must show that the unfavorable

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

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

[6] KRS 342.285(2)(a).

[7] KRS 342.285(2)(b).

[8] KRS 342.285(2)(c), (d), and (e). *See also American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964).

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

finding was clearly erroneous because overwhelming favorable evidence compelled a favorable finding, *i.e.*, no reasonable person could have failed to be persuaded by the favorable evidence.[10] Evidence that would have supported but not compelled a favorable decision is an inadequate basis for reversal on appeal.[11]

II. ANALYSIS.

The employer supports its argument that the unfavorable decision was arbitrary and capricious with two assertions. First, the employer asserts that the ALJ conducted a "cavalier review and analysis" of its evidence. It maintains that the ALJ refused to view its evidence as showing a change of condition rather than a difference of opinion with respect to the findings that supported the initial award. Second, it claims that the ALJ failed to base the ultimate finding on substantial evidence. We disagree.

The decision finding the claimant to be permanently and totally disabled as of April 2005 was final. Thus, the question to be resolved at reopening was whether his disability decreased between April 2005 and 2009 and, if so, to what degree. Contrary to the employer's assertion, we find nothing in the ALJ's opinion to indicate that the reopening received less than a serious consideration.

The opinion contains an accurate summary of the parties' arguments and their evidence and it explains the rationale for the ultimate finding.

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[10] *Id.*

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

Although testimony by the employer's experts could be viewed as implying that a change of disability occurred after April 2005, it could also be viewed as showing no more than a disagreement with the physicians whose opinions supported the initial decision. The discretion to decide what reasonable inferences to draw from the evidence rested with the ALJ. Likewise, the discretion to decide whether an expert's professional credentials render the individual's opinions more persuasive than those of another expert with lesser credentials rested with the ALJ.

Evidence that the claimant's injury caused no permanent impairment rating at reopening might have permitted but did not compel the ALJ to infer that his disability decreased after April 2005. Moreover, the testimonies of Drs. Vincent and Adams provided substantial evidence that he experienced no post-award improvement in his condition. They supported a reasonable and well-reasoned finding that his disability did not decrease.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

COUNSEL FOR APPELLANT,
WESTERN IRVING DIE CAST:

Walter Elliott Harding
Boehl Stopher & Graves, LLP
2300 Aegon Center
400 West Market Street
Louisville, KY 40202

COUNSEL FOR APPELLEE,
LOREN RICE:

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