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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2010-SC-000825-WC

BARRY BORDERS

APPELLANT

V. ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000486-WC
WORKERS' COMPENSATION NO. 04-95838

BUSH & BURCHETT;
HONORABLE DOUGLAS GOTT,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) determined in this reopening that the claimant experienced greater permanent disability from his cervical injury; that he lacked the physical capacity to return to the type of work performed at the time of the injury; but that his work-related disability remained partial rather than total. The Workers' Compensation Board and Court of Appeals affirmed.

Appealing, the claimant asserts that the ALJ erred by refusing to make the specific findings requested in his petition for reconsideration and, as a consequence, failed to support the finding that his disability remained partial with sufficient factual findings. He also asserts that the medical evidence compelled a finding of total disability.

We affirm. The ALJ recited sufficient facts to reveal the basis for concluding that the claimant's work-related disability remained partial. The Court of Appeals did not err by affirming the conclusion because substantial evidence supported it.

The claimant was born in 1954. He is a high school graduate and certified welder with some coursework in electricity. The claimant had experience working on an assembly line that built mining equipment as well as working for various employers as a heavy equipment mechanic and operator, welder, truck driver, and electrician's helper. He began to work for the defendant in 1995 as a mechanic and welder, working both in the shop and in the field. He testified that the job required heavy manual labor, including heavy lifting.

The claimant's application for benefits alleged that he sustained cervical and lumbar spine injuries in separate work-related accidents. His cervical spine injury occurred on June 1, 2003, when he ran into a ditch while driving his truck on a mining road and was thrown against the top of the cab. His neck became sore and painful after the incident, but he continued to work. The lumbar spine injury occurred on June 19, 2003, when he was lifting a steel strap that weighed approximately 250 pounds. He stated that he missed about five days' work then returned to his normal duties with the assistance of co-workers. He worked until July 3, 2003, when he determined that his injuries prevented him from continuing to do so.

The claimant alleged that his injuries were permanently and totally disabling and testified subsequently that they produced a dull headache that radiated from the base of his skull into his shoulders and between his shoulder blades; constant lower back pain that radiated into his left hip and leg; and depression due to his inability to recover from his injuries sufficiently to return to work. He filed a social security disability claim based on the same complaints.

The claimant based his argument that the injuries were totally disabling on *Ira A. Watson Department Store v. Hamilton*¹ in which the court addressed the partial versus total disability analysis under the post-1996 versions of KRS 342.0011(11) and KRS 342.730(1). The court explained that the statutes require an individualized determination of what the worker is and is not able to do after recovering from a work-related injury. The analysis of whether the worker is totally disabled also includes a consideration of some of the *Osborne v. Johnson*² factors that were codified in the pre-1996 version of Chapter 342.

In February 2005 an ALJ rendered a decision finding that the claimant's cervical injury produced a 5% permanent impairment rating but did not prevent him from returning to his previous work; that it was partially disabling as of June 2, 2003; and that it entitled him to double benefits during periods that he failed to earn the same or a greater wage. The ALJ also determined that the lumbar injury produced a period of temporary total disability (TTD)

¹ 34 S.W.3d 48, 51-52 (Ky. 2000).

² 432 S.W.2d 800 (Ky. 1968).

from June 20, 2003 through June 7, 2004; an 8% permanent impairment rating; and prevented the claimant from returning to the type of work he performed at the time of the injury.

The ALJ entered separate partial disability awards for the cervical and lumbar conditions and dismissed the psychological claim having found that the claimant's depression was unrelated to his injuries. The opinion and award did not contain the analysis described in *Watson v. Hamilton* or address the claimant's argument that he was totally disabled. No timely petition for reconsideration or appeal was filed and the decision became final.

The claimant filed the motion to reopen that is the subject of this appeal on January 16, 2009. He based the motion on a worsening of condition and a complete inability to work due to increased pain in his neck, shoulders, and lower back as well as radiating pain and numbness in his arms and legs. The motion to reopen was granted to the extent that the matter was assigned to an ALJ for the taking of further proof and a decision on the merits.

The claimant supported his allegation that he had become totally disabled from his injuries since 2005 with a decision rendered on October 31, 2008 that found him to be disabled as of July 3, 2003 under sections 216(i) and 223(d) of the Social Security Act.³ He also testified and submitted medical

³ The social security decision states that "[d]isability is defined as the inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or combination of impairments that can be expected to result in death or that has lasted or can be expected to last for a continuous period of not less than 12 months."

evidence, some from physicians who testified both in the initial claim and at reopening.

Dr. Potter evaluated the claimant at both relevant points in time. He assigned the 8% permanent impairment rating for the lumbar spine that the ALJ relied upon when awarding benefits in 2005 and was the only physician to assign impairment ratings at reopening. He prepared two reports at reopening, the first shortly before the claimant had surgery for a herniated C6-7 disc and the second after he recovered.

In January 2009 Dr. Potter assigned a 7% rating based on the cervical spine; continued to assign an 8% rating based on the lumbar spine; and assigned a 3% rating based on headaches and periscapular myofascial pain, which yielded a combined rating of 17% using the Combined Values Table. He attributed the claimant's current complaints to the work-related injuries and opined that his condition had deteriorated since 2005, stating that his pain, restrictions, and occupational disability had increased. He noted that cervical and lumbar epidural steroid injections were beneficial but that subsequent pain management was denied.

Dr. Potter reported in May 2009 that the claimant's impairment rating based on the cervical spine was at least 25% since the February 2009 fusion surgery. He thought it could be as much as 28% depending on the amount of pain the claimant experienced and its impact on his activities of daily living.

Dr. Bell, a pain management specialist, noted when he first saw the claimant in June 2007 that he complained of constant neck and shoulder pain.

that radiated into his arms with activity. Dr. Bell administered cervical and lumbar epidural steroid injections in October 2007, noting subsequently that the claimant's pain levels improved. He administered additional injections in January 2008. In an April 2008 report for the social security claim, he responded "yes" to the question, "Were the claimant's impairment(s) singly or in combination of such a nature so as to disable the claimant from engaging in substantial gainful activities?"

Dr. Kousa, the claimant's primary care physician, noted that he rated his pain at ten on a scale of one to ten when seen shortly after his lumbar injury in June 2003. The claimant rated his pain at a level of eight in September 2007. Dr. Kousa opined that he had reached maximum medical improvement; noted that his medications impaired his cognition and mental capacity; and stated, "Mr. Borders remains unable to perform gainful employment." He noted in November 2008 that the claimant's pain had increased since he stopped seeing Dr. Bell and that his current pain medications provided inadequate relief.

Dr. Ravvin, a neurosurgeon, first saw the claimant in June 2003 on referral from Dr. Kousa for complaints of neck and shoulder pain, headaches, and radiating low back pain such that "he could hardly walk." The claimant returned in January 2009, complaining of increased neck pain that radiated down the right upper extremity. Dr. Ravvin performed a microdiscectomy and fusion in February 2009 to address a herniated C6-7 disc.

The claimant testified when deposed in April 2009 that the surgery alleviated the "excruciating" right arm pain but that he still experienced some

pain, numbness, and tingling in the arm. He also continued to experience neck and shoulder pain that he rated at four on a ten-point scale, stating that it was "nothing like it was before." He stated that his current pain level was "about the same" as it was in 2004 and that his current complaints were essentially the same.

The claimant testified in September 2009 at the hearing that his condition worsened gradually after 2005 and became more symptomatic with less activity. He stated that his neck was worse than his lower back and that the surgery helped relieve his neck pain initially, but his current pain was "just like it was before." When questioned about the statement, he testified that the pain in his neck and shoulder blades was "increasing where the injections have worn off" but that he no longer experienced the sharp pain that radiated into his right hand and fingers that he had experienced before the surgery. He complained of pain across his back and down his left leg, which he stated was increasing gradually but was not as severe as it had been previously.

The claimant acknowledged that he had made no attempt to work since the lumbar injury. He stated that he did not think he could perform any type of work, even a light duty job such as working at the counter of an auto parts store, because he could not stand for an extended period of time without relaxing his back and propping up his neck.

The ALJ found that the permanent impairment rating produced by the cervical injury increased to 26% due to the surgery and that the claimant lacked the physical capacity to return to his former work but remained only

partially disabled. Thus, the ALJ awarded TTD benefits from the date of the cervical spine surgery through May 13, 2009; suspended the existing partial disability award during the period of TTD; and awarded triple partial disability benefits based on a 26% impairment rating from May 14, 2009 through the balance of the compensable period. The award for the lumbar injury remained unchanged.

The ALJ compared the evidence from 2005 with the evidence at reopening and listed numerous reasons for finding that the claimant remained partially disabled. They included the fact that his permanent impairment rating from the lumbar injury was no greater than in 2005; that any increase in the restrictions Dr. Potter assigned was minimal; and that Dr. Ravvin appeared to have considered the claimant to be unable to work since the time he was injured. The listed reasons also included the claimant's testimony that his medications were the same as in 2005; his testimony concerning his limitations due to the lumbar injury, which indicated that they were no more severe than what he described in 2004 and in some respects better; and, finally, the lack of a significant difference between his testimony that his symptoms prevented him from performing any work in 2004 and his testimony at reopening.

The claimant filed a petition for reconsideration in which he asserted that the uncontradicted medical evidence showed he was totally occupationally disabled and requested the ALJ to reconsider the decision. He also requested specific findings "as to what if any jobs the Plaintiff could possibly do given his

age, education and current restrictions” and asserted that the ALJ was “required to come forth with some positive evidence” of work he could perform. The ALJ denied the petition, after which the claimant appealed.

I. THE SUFFICIENCY OF THE FACTUAL FINDINGS.

The claimant argues that the ALJ failed to support the conclusion that he was only partially disabled with sufficient factual findings. We disagree.

The claimant bases the argument on the ALJ’s refusal to make the specific findings requested in his petition for reconsideration and “come forth with some positive evidence” of jobs he could perform. He relies on *Shields v. Pittsburg and Midway Coal Mining Co.*,⁴ which stands for the principle that an ALJ must recite sufficient evidence to explain the basis for the ultimate finding and, thus, permit a meaningful appellate review. Nothing in the decision or in Chapter 342 permits much less requires an ALJ to produce evidence to support the finding.

In the present case the ALJ recited the evidence thoroughly; found that the permanent impairment rating from the claimant’s cervical injury increased; and listed numerous reasons for finding insufficient evidence to support a finding that his work-related disability increased from partial to total between the 2005 award and the motion to reopen. The recitation of the evidence and rationale stated for the ultimate finding provided an adequate basis for review.

⁴ 634 S.W.2d 440, 444 (Ky. App. 1982).

II. THE FINDING OF PARTIAL DISABILITY.

The claimant argues that the ALJ erred by denying his request for total disability benefits. He relies on his restrictions; the finding of increased impairment to the cervical spine; and on statements that Drs. Bell and Kousa made after 2005, which indicated that he remained unable to perform gainful employment. He notes that the employer failed to offer any contrary evidence and asserts that the medical evidence compels a finding of total disability.

KRS 342.285 provides that an ALJ's decision is "conclusive and binding as to all questions of fact" and, together with KRS 342.290, prohibits the Board or a reviewing court from substituting its judgment for the ALJ's "as to the weight of evidence on questions of fact." The ALJ has the sole discretion to determine the quality, character, and substance of evidence.⁵ As fact-finder, 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.⁶ The courts have construed KRS 342.285 to require a party who fails to convince the ALJ to show on appeal that the decision was clearly erroneous because overwhelming favorable evidence compelled a favorable finding, *i.e.*, no reasonable person could have failed to be persuaded by the

⁵ *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

⁶ *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

evidence.⁷ Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.⁸

KRS 342.0011(11) defines partial and total disability as follows:

(b) "Permanent partial disability" means the condition of an employee who, due to an injury, has a permanent disability rating but retains the ability to work; and

(c) "Permanent total disability" means the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. . . .

KRS 342.730(1) prohibits non-work-related impairment to be considered when determining that a worker is totally or partially disabled.⁹

The claimant was found to be partially disabled in 2005 and bore the burden of proving that his disability had become total at reopening.¹⁰ The ALJ determined that he failed to do so, largely because he had claimed to be totally disabled in 2005; because he made no attempt to work at any time after the injury; and because his present complaints and restrictions were not significantly greater than in 2005 although his impairment rating from the cervical condition was greater. The social security disability determination was made under standards different from those found in Chapter 342 and, thus,

⁷ *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).

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

⁹ KRS 342.730(1)(a) and (e).

¹⁰ *Griffith v. Blair*, 430 S.W.2d 337, 339 (Ky. 1968).

failed to show that he became totally disabled after 2005. Although the claimant offered some evidence of increased disability under the applicable standards, it was not so overwhelming as to compel a finding that he became totally disabled during the interval between his 2005 award and the reopening.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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