

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.

Supreme Court of Kentucky

2010-SC-000224-WC

SENAD MEHIC

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2009-CA-001538-WC
WORKERS' COMPENSATION BOARD NO. 05-69367

R. C. TWAY COMPANY;
HONORABLE IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the reopening of this settled claim, having found that the claimant failed to meet his burden of proving increased disability due to his work-related injury. The Workers' Compensation Board affirmed and the Court of Appeals affirmed the Board. Appealing, the claimant asserts that the ALJ erred because no evidence supported the finding that his thoracic condition was not work-related. He also asserts that the ALJ erred by failing to award benefits for his psychological condition and by failing to find increased disability at reopening.

We affirm. Having failed to meet his burden of proving every element of his claim, the claimant must show on appeal that the favorable evidence was so overwhelming as to compel findings in his favor. He has failed to do so.

The claimant was born in 1962 in Bosnia and has the equivalent of a high school education with training in auto repair. He served in the Bosnian military and then ran a furniture purchasing business with his brother that had about 20 employees. In 1992 he emigrated from Bosnia to Germany, where he was not permitted to work due to his refugee status. The claimant came to the United States in 2000 and became employed by the defendant as a laborer. He sustained a work-related low back injury on August 15, 2005, while helping co-workers lift the fifty-three-foot-long base for a trailer side.

The record indicates that an MRI performed on the date of the injury revealed multi-level lumbar spondylosis and a mild disc bulge at the L4-5 interspace. The claimant was referred to Dr. Morrasutti, a neurosurgeon, who treated him conservatively but recommended surgery eventually. The claimant declined the procedure. A June 2, 2006 letter to the claimant's attorney indicates that Dr. Morrasutti assigned a 13% permanent impairment rating based on the lumbar spine (DRE category III), using the 5th edition of the *AMA Guides to the Evaluation of Permanent Impairment*. He attributed the entire impairment to the work-related injury, noting that the injury caused pre-existing dormant degenerative changes in the claimant's spine to become disabling.

The parties settled the claim for a "back" injury for previously-paid temporary total disability (TTD) benefits and a lump sum of \$52,429.68, which was the product of 5.28% of his average weekly wage and a life expectancy of 1,804.19 weeks. The only impairment rating reflected in the agreement was the 13% assigned by Dr. Morrasutti. The claimant's restrictions at that time included: no lifting more than 10 pounds; no repetitive bending or twisting at the waist more than three to four times per hour; and no prolonged standing for more than thirty minutes without changing position. An ALJ approved the agreement on August 8, 2006.

Dr. Castro saw the claimant in May 2007 at his family physician's request. He reported a normal examination and diagnosed a musculoskeletal strain.

The claimant was referred to Dr. Shields sometime in 2007 because Dr. Morassutti left Louisville. Dr. Shields diagnosed lower back pain with S1 bilateral radiculopathy. He ordered another MRI, but the employer denied the request based on a report by Dr. Goldman. The report stated that the claimant had no radicular findings despite his radicular complaints and recommended that the request be denied as unnecessary.

Dr. Travis's July 2007 report noted that the 2005 MRI showed degenerative changes that were normal for the claimant's age but "no evidence of a frank herniated disc." Likewise, a lumbar myelogram and post-myelogram CT scan performed in May 2006 revealed only mild, non-specific findings and a broad-based herniated disc at L4-5 with no foraminal encroachment. Noting

that the studies indicated no need for surgery and no clear changes to explain the continued back pain, Dr. Travis concluded that the claimant had been "adequately studied" and that further studies would reveal only degenerative changes.

The MRI, which was performed in September 2007 by agreement, revealed abnormalities at L4-5 and L5-S1 that were severe enough in Dr. Shields' opinion to warrant considering surgery. He recommended a lumbar and thoracic myelogram and post-myelographic CT scan and submitted a request for the procedures to utilization review. The employer denied the request, again based on a report by Dr. Goldman. He stated that the MRI showed no pathological changes to explain the continued low back pain and recommended that the request be denied. Dr. Travis agreed.

The claimant filed a motion to reopen on January 11, 2008, alleging greater disability since the settlement due to a gradual worsening of his back condition and the development of a psychiatric condition. He requested an order compelling the employer to authorize the treatment prescribed by Dr. Shields as well as an increase in income benefits. Attached to the motion were a report by Dr. Drljevic, who opined that the claimant had a psychiatric impairment from depression due to his back problems, and the December 2007 utilization review report by Dr. Goldman. The motion was granted to the extent that the matter was set for further adjudication.

The report of an examination performed by Dr. Carter for the Department of Disability Determinations in September 2007 indicated that the claimant

complained of severe back and bilateral leg pain that was worse on the left and of numbness on the bottom of his feet. He noted that the claimant was in no distress; got on and off the examination table without difficulty; and had a normal gait but moved slowly. He opined that the claimant suffered from chronic back pain with evidence of spondylosis and facet arthropathy at L4-5-S1 but found no evidence of radiculopathy.

Dr. Bilkey evaluated the claimant in May 2008 and concluded that his injury caused a thoracic and lumbar strain with lumbar radiculopathy that had resolved; myofascial pain; and his present deconditioned state. He noted that the claimant no longer wished to have the two-level fusion recommended by Dr. Shields. He thought that the claimant would not be a good surgical candidate and saw no reason for further diagnostic testing. Like Dr. Morrasuti, Dr. Bilkey assigned a 13% impairment rating to the work-related injury, but he based the rating on impairments to both the thoracic spine (5%) and the lumbar spine without findings of radiculopathy (8%). He considered the restrictions imposed by Dr. Morrasutti to be appropriate and would limit the claimant to light-duty work.

Dr. Kriss evaluated the claimant for the employer in June 2008. He characterized the thoracic and lumbar changes that were evident on imaging studies as being degenerative and naturally occurring. He recommended that the claimant be weaned from narcotic pain medication and muscle relaxers and that they be used only occasionally for severe flare-ups. Dr. Kriss assigned a 5% impairment rating to the lumbar injury but declined to rate the thoracic

complaints because they did not correlate with the pathology. Moreover, he did not think it probable that the thoracic disc bulges resulted from the August 2005 injury. He considered further diagnostic studies to be unnecessary. Noting the enormous inconsistency between the claimant's subjective complaints and the objective findings, he opined that the claimant had "given up" and decided that he was disabled although his work-related injury was relatively mild.

Dr. Shraberg evaluated the claimant's psychiatric complaints for the employer in April 2008. He considered the claimant's main problem to be psychosocial and due to his language and cultural barriers, his inability to integrate into society, and family relationship stressors. He diagnosed moderate depression and a mood disorder, probably induced by the use of narcotic medications and problems with acculturation, and recommended that the use of narcotics be tapered. He noted specifically that Lortab undermined the benefit of the Wellbutrin prescribed for depression and that it could cause a depressive overlay and rebound pain that was worse than the actual pain from the injury. He stated that the claimant was not at maximum medical improvement from a psychiatric standpoint but that the August 2005 accident did not cause a psychiatric impairment.

The parties stipulated that the employer paid TTD benefits voluntarily from August 16, 2005 through June 9, 2006. The employer also paid medical benefits in excess of \$12,156.06.

The ALJ found that the claimant's actual impairment rating at settlement was 13% as assigned by Dr. Morrasutti because the record contained no other rating. The ALJ also found that he would have been entitled to enhanced benefits under KRS 342.730(1)(c)1, in other words, that he lacked the physical capacity to return to the type of work performed at the time of his injury. Noting that his present medical findings were "no different than they were initially," the ALJ found that he failed to meet his burden of proving increased disability at reopening and dismissed the claim. The ALJ reasoned that even Dr. Bilkey found no evidence of true radiculopathy and assigned no more than an 8% impairment rating to the lumbar spine. Moreover, not only did Dr. Carter assign restrictions that varied little from those assigned by Dr. Morrasutti, the claimant's work status was no different than in the initial claim. The ALJ noted the presence of degenerative changes in the claimant's thoracic spine but found there to be insufficient evidence to link them either to his work or his lower back injury. Noting that the claimant made no attempt to return to work, the ALJ found that he suffered from a situational depression caused by a lack of work rather than his work-related injury. The claimant appealed following the summary denial of his petition for reconsideration.

A claimant bears the burden of proof and risk of non-persuasion before the fact-finder with regard to every element of his claim.¹ Although KRS 342.285 permits an appeal to the Board, it provides that the ALJ's

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).

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 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.

KRS 342.285 means that the fact-finder, rather than the Board or reviewing court, has the sole discretion to determine the quality, character, and substance of evidence.² 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 adversary party's total proof.³ Although a party may note evidence that would have supported a different decision, such evidence is not an adequate basis for reversal on appeal.⁴ 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 favorable evidence.⁵ The claimant failed to meet that burden.

The claimant argues first that no evidence supported the finding that his thoracic spine condition was not work-related. We disagree. The evidence did

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

³ *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

⁴ *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

⁵ *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).

not compel a finding that the condition was work-related and supported a finding that it was not.

The ALJ found that the claimant failed to meet his burden to prove that the degenerative changes found in his thoracic spine were work-related or resulted from the August 2005 injury. The ALJ concluded as a consequence that they were not work-related and dismissed any claim for a thoracic spine injury. The decision was reasonable. Dr. Morrasutti assigned a 13% impairment rating in the initial claim based solely on the lumbar spine. Dr. Travis testified at reopening that the degenerative changes in the claimant's spine were non-work-related. Although Dr. Kriss testified that the August 2005 injury caused a lumbar and thoracic strain, he also testified that the mechanism of injury was likely to cause a permanent harmful change only to the lumbar spine and not to the thoracic spine. He also considered it improbable that the thoracic spine MRI findings resulted from the work-related injury.

The claimant argues next that the ALJ erred by failing to render an award for his psychiatric condition and by failing to find increased disability. Again, we disagree. The evidence did not compel a finding that the claimant's psychiatric condition resulted from his injury or a finding that his disability was any greater at reopening than at settlement.

Dr. Shraberg's opinions indicate clearly that the claimant's depression resulted in part from a lack of work, but Dr. Shraberg also testified that the depression was unrelated to the claimant's August 2005 injury. Although the

claimant's injury clearly accounted for his lack of work during the period of TTD, Dr. Shraberg's testimony provided substantial evidence that his present lack of work resulted from his failure to seek employment rather than from work-related disability. Absent compelling evidence that the claimant's lumbar spine impairment increased since the settlement; that his thoracic spine impairment was work-related, or that his psychiatric impairment was work-related, the evidence did not compel a finding of increased disability at reopening.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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