

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED “NOT TO BE PUBLISHED.” PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28(4)(C), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS BINDING PRECEDENT IN ANY OTHER CASE IN ANY COURT OF THIS STATE; HOWEVER, UNPUBLISHED KENTUCKY APPELLATE DECISIONS, RENDERED AFTER JANUARY 1, 2003, MAY BE CITED FOR CONSIDERATION BY THE COURT IF THERE IS NO PUBLISHED OPINION THAT WOULD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 OPINIONS CITED FOR CONSIDERATION BY THE COURT SHALL BE SET OUT AS AN UNPUBLISHED DECISION IN THE FILED DOCUMENT AND A COPY OF THE ENTIRE DECISION SHALL BE TENDERED ALONG WITH THE DOCUMENT TO THE COURT AND ALL PARTIES TO THE ACTION.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-000551-WC

GARY WATKINS

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000383-WC
WORKERS' COMPENSATION NO. 07-01285

L3 COMMUNICATIONS;
HONORABLE IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits, having found that he failed to prove a causal relationship between his exposure to workplace chemicals and the physical and mental harms he alleged. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant asserts that the university evaluator's testimony established the requisite causal relationship and that the ALJ erred by disregarding it.

We affirm. The ALJ stated adequate specific reasons for rejecting the university evaluator's opinion that the claimant's cognitive symptoms resulted

from his work-related exposure to solvents. Nothing prevented the ALJ from relying on scientific evidence, which showed the claimant's work-related solvent exposure to be well below the level considered safe, as an additional basis to reject the opinion because the evaluator failed to consider the evidence.

The claimant worked for the defendant-employer from August 2001 through sometime in May 2007, the last three to four years of which as an aircraft mechanic. Part of his job involved disassembling rotor heads and using a bristle brush to clean the parts in a solvent washer. He stated that he used the washer about three hours per day; that his employer provided gloves and a face shield; that he used brake cleaner to scrub parts that were too large to fit in the part washer; and that he did not use a respirator, mask, or breathing apparatus. He alleged that his work-related exposure to various solvents caused peripheral neuropathy as well as cognitive, respiratory, and psychological difficulties.

The parties submitted conflicting evidence from lay and medical experts concerning the nature and duration of the claimant's exposure to workplace solvents; his numerous medical conditions; and the cause of the symptoms he attributed to solvent exposure. He also underwent university evaluations by Dr. Kraman, a pulmonologist, and by Dr. Brown, a neurologist.

Dr. Kraman evaluated the claimant's respiratory complaints in January 2008 and was later deposed. He noted a history of sleep apnea and congestive heart failure. Dr. Kraman testified that the claimant may have experienced respiratory difficulties related to solvent exposure, as indicated in the history

he related, but that they had resolved completely. He assigned a 0% impairment rating; concluded that the symptoms required no future medical treatment; and stated that the claimant could return to work.

Dr. Kraman could not state with certainty that the respiratory symptoms the claimant reported did not result from his cardiac problems. He also noted the possibility that the chemical exposure produced occupational asthma, a condition that resolves when the offending exposure ceases. He testified, however, that the inhalation of solvents generally does not cause acute respiratory difficulties.

Dr. Brown reported that the claimant suffered from a cognitive impairment, static or slowly progressive, etiology unknown; distal symmetric sensory changes suggestive of polyneuropathy; and carpal tunnel syndrome. Dr. Brown noted that solvents are known to be neurotoxic, both centrally and peripherally and, absent any other explanation, were the most likely cause of the claimant's symptoms. A brain and cervical spine MRI showed evidence of mild cortical atrophy to which he assigned a 15% impairment rating.

Dr. Brown acknowledged when deposed that the claimant's cognitive complaints were consistent with heavy alcohol use and the effects of obstructive sleep apnea as well as with solvent exposure. He also acknowledged that the EMG/NCV studies showed no evidence of peripheral neuropathy and that the claimant's carpal tunnel syndrome could be causing numbness and tingling in his hands. He concluded that it was impossible to

determine what caused the claimant's cognitive impairment and stated subsequently that solvents did not cause his neuropathy.

The ALJ conducted an exhaustive review of the voluminous evidence from both lay and medical experts and determined that the claimant failed to meet his burden of proving that his current symptoms were work-related.

I. STANDARD OF REVIEW.

An injured worker bears the burden of proof and risk of non-persuasion before the ALJ with regard to every element of his claim.¹ KRS 342.285 designates the ALJ as the finder of fact in workers' compensation cases and 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." Thus, the ALJ has the sole discretion to determine the quality, character, and substance of evidence.² 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.³

The courts have construed KRS 342.285 to require a party who appeals a finding that favors the party with the burden of proof to show that no substantial evidence supported it, *i.e.*, that the finding was unreasonable under

¹ See *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 *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).

the evidence.⁴ A party who fails to meet its burden of proof before the ALJ must show that the unfavorable 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.⁵ Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.⁶

II. The ALJ's Application of KRS 342.315(2).

KRS 342.315(2) states as follows:

The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the commissioner. Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

The claimant argues that Dr. Brown's opinion established a causal relationship between his work-related solvent exposure and his cognitive impairment and that the ALJ misapplied KRS 342.315(2) by disregarding his opinion in favor of scientific evidence from non-physicians. We disagree. The

⁴ *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, 226 (Ky. App. 1985).

⁵ *Id.*

⁶ *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

ALJ stated ample specific reasons for rejecting Dr. Brown's opinion, which renders moot the argument that the opinion proved causation.

Dr. Brown reported that a causal relationship between the claimant's solvent exposure and his cognitive symptoms was "impossible to prove, but solvents are well known to be neurotoxic." He also stated, "Without evidence for another etiology, solvent exposure must be considered the most likely cause of the claimant's cognitive dysfunction and possibly his neuropathy." He acknowledged when deposed, however, that "[w]e don't know what's causing [the claimant's] symptoms. I don't know what's causing his symptoms." He also stated, "There is no way to prove a causal relationship in this case . . . [b]etween his – there's no way to prove that his work exposure caused his mild cognitive impairment"

The ALJ found that the claimant may have had some temporary respiratory discomfort from his work-related solvent exposure, which resolved without permanent impairment, but that he failed to show a causal relationship between the exposure and his cognitive symptoms. The ALJ reasoned that he would have sustained permanent damage to his lungs had he been subjected to toxic levels of the chemicals, but there was no evidence of a pulmonary impairment. The ALJ rejected Dr. Brown's conclusion that the claimant's cognitive problems resulted from toxic exposures, reasoning that Dr. Brown appeared not to have reviewed the results of tests performed to determine the air quality and toxicity of the solvents used in the workplace, which showed them to be well below the levels considered to be safe; that he

did not attribute the peripheral neuropathy to solvent exposure; and that he failed to consider the other explanations offered for the claimant's cognitive problems.

Addressing other potential causes, the ALJ noted specifically that the claimant ceased using the CPAP machine for his sleep apnea; that he suffered from cardiomyopathy and congestive heart failure as well as hypertension; that Dr. Brown found the cortical atrophy revealed by a brain MRI to be consistent with chronic alcohol abuse; and that the MRI did not reveal the type of findings that the claimant's expert, Dr. Middaugh, and other medical experts associated with toxic solvent exposure. Moreover, medical evidence indicated that many of the claimant's symptoms were known to result from a combination of alcohol, which he admitted ingesting daily, and Triazolam, which was one of his medications.

The ALJ also found the lay and scientific evidence concerning the nature of the claimant's exposure to solvents and the toxicity of the solvents to be very persuasive. Pointing to a co-worker's testimony that the claimant was exposed to solvents for less than the three hours per day that he alleged, the ALJ noted that Dr. Middaugh appeared to have formed her opinions under the incorrect assumption that he was exposed to solvents for eight hours per day in air that "was saturated with fumes from open containers and no ventilation." Moreover, she failed to consider the results of air and solvent sampling, which showed the exposure to be safe. The ALJ concluded that the claimant's solvent exposure was "far below the levels which have been established as being toxic."

The evidence did not compel a finding in the claimant's favor. The ALJ complied with KRS 342.215(2) by listing ample specific reasons for rejecting Dr. Brown's opinion of causation and for finding that the claimant failed to meet his burden of proof. Moreover, the claimant points to nothing that prevented the ALJ from relying on scientific evidence that showed his solvent exposure to be well below the level considered safe as an additional basis to reject Dr. Brown's opinion. Both he and Dr. Middaugh failed to consider the evidence.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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