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NOT TO BE PUBLISHED OPINION

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RENDERED:MAY 28, 2020
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2019-SC-000429-WC

SOUTHWIRE CO/KY ROD & CABLE APPELLANT

V.

ON REVIEW FROM COURT OF APPEALS
CASE NO. 2018-CA-000734-WC
WORKERS' COMPENSATION BOARD NO. 11-WC-73481

SHONDESE FRAZIER; DR. SHILPI MITTAL; HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Southwire Co/Ky Rod & Cable ("Southwire"), appeals from a Court of Appeals opinion and Workers' Compensation Board[1] decision affirming the determination of the Administrative Law Judge ("ALJ") allowing the reopening of a workers' compensation claim by Shondese Frazier ("Frazier") and subsequently finding him to be completely disabled and awarding him permanent total disability ("PTD") benefits. Having reviewed the record, we affirm the Court of Appeals decision.

[1] Hereinafter "Board."

I. BACKGROUND

Frazier is a 45-year-old high school graduate. Frazier was employed with Southwire from July 2004 to September 2011. On September 23, 2011, Frazier was working as a draw machine operator when the rod he was spooling swung around at a high rate of speed and struck him in the forehead.

In 2012, Frazier filed a workers' compensation claim based on the September 2011 head injury. The original claim was decided by ALJ Edward Hays on October 3, 2013. ALJ Hays awarded Frazier permanent partial disability ("PPD") benefits and temporary total disability ("TTD") benefits. The award found a five percent impairment related to the psychological portion of the claim and five percent impairment for the physical aspect of the injury. A total ten percent whole body impairment was assessed and ALJ Hays determined Frazier was entitled to a 3x multiplier as it "accurately takes into account the restrictions imposed upon Plaintiff by his treating physician and the limitations to which he is subject under his own testimony." In addition to the award of PPD, ALJ Hays found KRS[2] 342.165 applicable based on an OSHA[3] investigation. The award was therefore enhanced by 30% because ALJ Hays found that Southwire violated a federal regulation that required guarding on the type of machine Frazier was using at the time of the injury. Frazier received PPD in the amount of $179.48 per week. Frazier was also awarded

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[2] Kentucky Revised Statute.

[3] Occupational Safety and Health Administration.

future medical care and a vocational rehabilitation evaluation. Southwire filed a petition for reconsideration which was denied.

On August 1, 2016, Frazier filed a Motion to Reopen, alleging a worsening of his condition. Included in the Motion to Reopen was a sworn affidavit by Frazier noting a worsening of his symptoms and that his condition had become disabling. Frazier indicated that he was often unable to perform daily living tasks and was unable to look for work or attempt retraining. In Frazier's affidavit he described his increased impairment, explaining:

> My migraine condition is gradually deteriorating. I had a cervical fusion in an attempt to reduce my head pain. It was not successful in doing that. Now just simple activities of daily living exacerbate my condition. Medications are not controlling my pain. I can perform virtually no housework. I now have difficulty bathing myself. When I take showers I often get light headed and I need assistance from my wife because I feel I will fall.
>
> I spend most of the day inside my house with the rooms darkened. Sunlight blinds me. I have to be covered up with hat and strong sunglasses or I can't go outside. As a result I avoid going out. Any temperature extreme leaves me immobile. Hot air or cold air makes my head pain intolerable.
>
> I can't tolerate stress or noise any longer. I can't tolerate going to family gatherings because of noise associated with that. I cannot go to basketball games. I can't go to my son's football games. I can't do things with my grandkids with my symptoms.
>
> I have not been able to work. I'm depressed and worried about my future. I've not been able to look for work or even consider retraining. I can no longer do these things. I'm a hermit as a result of my head condition. I'm convinced I am totally disabled from any substantial gainful employment.

The Motion to Reopen also included medical records of treating physician Dr. Shilpi Mittal. Dr. Mittal took over treatment of Frazier in October of 2015 when Frazier's original neurologist Dr. Elizabeth Ferluga left Vanderbilt University. Frazier's motion included medical records and a note from Dr. Mittal dated July 5, 2016. In part of the July 5th note Dr. Mittal wrote:

> He (Shondese Frazier) was last seen in April 2016 where he still continued to have chronic daily headaches without any improvement despite trials of several medications… His headaches are a combination of migraine and post traumatic headaches… So far, it seems he does have significant disability due to his headaches and is unable to perform his daily activities, even his routine activities of daily living, which makes it less likely that he would be able to carry on meaningful job related activities.

By order dated August 30, 2016, Hon. Robert Swisher, former Chief Administrative Law Judge ("CALJ") concluded Frazier set forth a prima facie case for reopening pursuant to KRS 342.125. He sustained Frazier's Motion to Reopen and the claim was to be assigned to an ALJ for further adjudication.

Southwire subsequently filed a petition for reconsideration, arguing that Frazier had not provided medical evidence to establish a worsening of impairment caused by the injury. The ALJ denied Southwire's petition, concluding that Frazier's motion was sufficiently supported by Frazier's affidavit and the medical records of Dr. Mittal.

On August 1, 2017, Dr. Tracy Jackson was deposed. Dr. Jackson was Frazier's pain management physician and had been treating Frazier since July 2012. During Dr. Jackson's deposition the following testimony was provided regarding Frazier's worsening impairment:

> **Q:** Now, the complaints that are being expressed by Mr. Frazier, is that something that you have been able to pick up on any diagnostic testing, or do you have to rely upon his self-explanations as to his pain complaints?
>
> **A:** So the combination of things. Certainly you rely on the patients history, but his physical exam findings are very consistent with the reported mechanism of injury. He had some sensory deficit in those areas around what look like to be traumatic scarring from the area which was consistent. And then the way he describes his distribution of pain sort of is a testament to where those nerves from the face and the nerves to the head, where the trigeminal and the cervical nerves meet in the spinal cord he has some sensitivity there. So he has a lot of consistency in his story and what we're seeing in his symptoms based on that mechanism.
>
> He's – honestly, it's unusual to see this straightforward of a patient, particularly in – straightforward meaning consistent; story makes sense; not on opioids – in the workers' compensation population. He really is trying to do the right thing.

Dr. Jackson further testified:

> **Q:** When you first started treating Mr. Frazier in 2012 to when you last saw him in 2016, how, if any, have his symptoms changed, or is he still complaining of the same complaints?
>
> **A:** From what I remember the pain is in the same distribution and the quality goes up and down in terms of severity, but overall, more importantly, **his level of ability to function has gone down and down.**
>
> **Q:** How has his level of ability went down?
>
> **A:** He just reports that he's not able to work and participate in his life the way that he would want to, that he really feels like this headache has reached the end of his ability to cope with it as effectively as he had in the past. And I see a lot of patients with chronic

> pain, and he's relatively resilient, and so it's just been increasingly frustrating to him, particularly given that he thinks this procedure and I think and several physicians think this procedure might help and he's not been able to get it. (emphasis added).

During his hearing, Frazier reiterated most of his affidavit. He testified that his medication dosage had increased, but it had not improved his ability to function. He testified that he suffered from headaches daily. Additionally, Regina Frazier, Frazier's wife, testified about her husband's condition and how it had worsened over the last two to three years.

On November 21, 2017, ALJ Miller found Frazier's disability had increased to PTD, relying primarily on the opinion of Dr. Jackson that Frazier's impairment had worsened. The ALJ relied not only on Dr. Jackson's discussion of Frazier's reported symptoms but indicated that Frazier's reported symptoms aligned with performed examinations. The ALJ opined:

> The vocational factors the ALJ must consider are the plaintiff's age, now 45, which is now considered an older worker (especially considering the labor intensive work he is trained to do). Even ALJ Hays found 4 years ago that Mr. Frazier did not have the physical capacity to return to the same type of job he was performing at the time of the injury. This factor has only worsened in 4 years—from the standpoint that there is convincing evidence that his physical pain has kept him from functioning in any work environment on a regular and sustained basis.
>
> Mr. Frazier's education remains at a high school level without specialized training or vocational skills—as he has not been able to participate in any rehabilitation as ordered by ALJ Hays. The pain level of the headaches would keep him from returning to a regular and sustained work day. As Dr. Jackson opined Mr. Frazier's ability to function has gone "down and down."

> It is important to note that this has not been brought about by any lack of effort on Mr. Frazier's part—as all the treating physicians have discussed that he is very compliant with medical instructions/treatment. He has not asked for opioids or other narcotic pain medicine. However, the medical treatment is only for "relief" and has not provided a "cure" or even an improvement of his symptoms.

The ALJ awarded Frazier $938.56 for PTD benefits based upon the maximum PTD for 2011, plus the thirty percent increase for the safety violation.

Southwire appealed the decision and the Board affirmed. The Board noted that Southwire raised an issue in a motion for reconsideration and in its appeal that was not properly preserved. The Board indicated that on appeal Southwire only properly raised whether Frazier had a "worsening of condition/occupational impairment." Regardless, the Board chose to address all issues, including those unpreserved, and rejected Southwire's appeal.

Southwire then appealed the Board's opinion and order affirming the ALJ decision to the Court of Appeals. Southwire reiterated their arguments that the ALJ erred in allowing the reopening of Frazier's claim and subsequently finding Frazier to be entitled to PTD benefits. The Court of Appeals affirmed the decision, opining that substantial evidence supported the ALJ's decision to reopen and find that Frazier was now completely disabled.

Here, Southwire appeals the Board and Court of Appeals decisions on the basis that they erred by: (1) affirming the ALJ's reopening of Frazier's claim without a *prima facie* showing of a worsening of his condition, and (2) affirming the ALJ's determination that Frazier was 100% disabled.

II. STANDARD OF REVIEW

This Court has held that it is within the broad discretion of the ALJ "to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof."[4] "KRS 342.285 designates the ALJ as finder of fact and has been construed to mean that the fact-finder has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence."[5] In reviewing a decision by the ALJ we hold an ALJ has abused its discretion when its decision is "arbitrary, unreasonable, unfair or unsupported by sound legal principles."[6]

Pursuant to *Abel Verdon Const. v. Rivera*, this Court held: "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."[7] Substantial evidence as defined by this Court is "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."[8]

In reviewing a decision of the Board, we will affirm, absent a finding that the Board has misconstrued or overlooked controlling law or so flagrantly erred

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

[5] *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

[6] *Id.*

[7] 348 S.W.3d 749, 754 (Ky. 2011).

[8] *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971).

in assessing the evidence that a gross injustice has occurred.[9] With these standards in mind, we examine Southwire's issues raised on appeal.

III. ANALYSIS

A. THE ALJ PROPERLY REOPENED THE CLAIM

Southwire argues that the ALJ's determination to reopen Frazier's claim resulted in reversible error as Frazier failed to present *prima facie* evidence for reopening. In reviewing the opinion of the Board, we note that it was determined that Southwire failed to preserve the issue that "Frazier failed to provide *prima facie* basis for reopening." The Board held that the issue was waived as it was not a contested issue in the September 19, 2017 Benefit Review Memorandum and Hearing Order. The Board specifically cited 803 Kentucky Administrative Regulations ("KAR") 25:010 Sec 13 (11) and (12). In the present case, Southwire did not raise the issue regarding prima facie evidence until appealing through a petition for reconsideration. Addressing Southwire's appeal, the Board opined: "[A] petition for reconsideration is not the vehicle to raise an objection which should have been raised initially. Southwire did not raise the issue again until on appeal."

Nonetheless, the Board chose to address Southwire's assertions regarding Frazier's evidence in his motion to reopen. The Board found Frazier's motion provided objective medical evidence that his impairment had worsened.

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[9] *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Though we agree that the issue is waived, we also choose to address Southwire's argument on the merits.

In the present case, Frazier moved to reopen pursuant to KRS 342.125(1)(d) arguing there is a "Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order."

KRS 342.0011(33) defines "Objective medical findings" as "information gained through direct observation and testing of the patient applying objective or standardized methods[.]" In *Gibbs v. Premier Scale Company/Indiana Scale Co.*, this Court held it is not enough to rely only on patients complained of symptoms to establish objective medical evidence.[10] Specially, the *Gibbs* Court held:

> We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purposes of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class of worthy claims. A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33). Therefore, we must conclude that a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an "injury" for the purposes of Chapter 342.[11]

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[10] 50 S.W.3d 754, 762 (Ky. 2001).

[11] *Id.* at 761-62.

However, in *Staples, Inc. v. Konvelski*, this Court held that medical records were sufficient to establish objective medical findings when coupling claimant's complaint of symptoms with "information concerning direct observations of the physicians."[12]

Furthermore, this Court has held that upon application for reopening the claimant is not guaranteed a determination by the ALJ, but rather is first "**required to make a reasonable *prima facie* preliminary showing of the existence of a substantial possibility of the presence of one or more of the prescribed conditions**…."[13] Additionally, this Court has held the claimant need only to establish the prospect of prevailing upon reopening the claim, stating:

> [T]he reopening of a workers' compensation award involves a two-step process. The first step of this process involves the filing of a motion to reopen the award, with the movant being required to make a sufficient ***prima facie*** **showing of the possibility of prevailing on the merits**.[14]

In Frazier's motion to reopen it includes not only an affidavit explaining his complained of symptoms but includes attached medical records of treating Neurologist Dr. Mittal. In the records Dr. Mittal noted that medications prescribed to Frazier continue to fail, that Frazier is agreeable to try Botox, and that the headaches are getting worse each day. Dr. Mittal further notes he

[12] 56 S.W.3d 412, 416 (Ky. 2001).

[13] *Stambaugh v. Cedar Creek Mining Co.*, 488 S.W.2d 681, 682 (Ky. 1972) (emphasis added).

[14] *AAA Mine Services v. Wooten*, 959 S.W.2d 440, 441 (Ky. 1998) (emphasis added).

would recommend repeating an MRI and would recommend him to a pain clinic. Additionally, in a letter provided by Dr. Mittal, he stated Frazier's quality of life had been severely affected, that Frazier suffers significant disability due to headaches, and the headaches make it less likely that Frazier could carry on meaningful job-related activities.

Dr. Mittal relied on both reported symptoms and objective measures to determine that Frazier's condition had worsened. Dr. Mittal noted that throughout his observations Frazier's medication has continued to fail as the headaches have worsened, and his functionality has drastically decreased. The CALJ held that Frazier's evidence was sufficient to establish a *prima facie* showing to reopen the case. We hold that the decision will not be disturbed on appeal as we agree the prima facie evidence was sufficient to reopen Frazier's claim.

B. THE ALJ DID NOT ERR IN DETERMINING FRAZIER IS NOW TOTALLY DISABLED

Southwire argues that Frazier failed to demonstrate substantial evidence that he is now 100% permanently and totally disabled. Southwire further argues that Frazier's impairment is unchanged, his restrictions remain unchanged, and his vocational status remains unchanged. In the present case, the ALJ found that Dr. Jackson's testimony and records were persuasive in finding a worsening impairment of Frazier. Regardless, Southwire maintains that Dr. Jackson's records do not demonstrate any change in Frazier's work-related condition.

This Court has held that when the party with the burden of proof is successful, the ALJ's decision must be upheld on appeal if it is supported by substantial evidence.[15] The *Whittaker* Court goes on to define substantial evidence as:

> Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable men. Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal.[16]

In the present case, ALJ Miller reviewed medical records from Dr. Mittal regarding Frazier's worsening impairment in the decision to reopen the claim. Dr. Mittal recounted that Frazier is now unable to perform daily living tasks, and during treatment referred him to a psychologist to address his depression.

Furthermore, both the ALJ and Board determined that Dr. Jackson's testimony provided persuasive medical evidence that Frazier's impairment had worsened. Dr. Jackson testified treatment had been unable to improve Frazier's condition, that the impairment had gotten worse, and that Frazier's "level of ability to function has gone down and down." It was determined that Dr. Jackson's treatment was not only based on complained of symptoms but included testing and direct observations of Frazier.

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[15] *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999) (citing *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986)).

[16] *Id.* at 481-82.

Additionally, the ALJ was able to listen and evaluate the testimony of both Frazier and his wife regarding the worsening of his impairment. Frazier testified in-depth about his condition worsening and how the impairment now significantly impacts his daily life. This Court has held that the ALJ may deem that a worker's testimony was competent evidence that his impairment worsened.[17] In *Transportation Cabinet v. Poe*, this Court held:

> Although the ALJ is required to consider the medical condition of the worker when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. **The testimony of the worker is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured**.[18]

The ALJ noted that the original determination by ALJ Hays found that Frazier did not have the physical capacity to resume working in a similar field, and now four years later it has only worsened. Specifically, ALJ Miller noted, "his physical pain has kept him from functioning in any work environment on a regular and sustained basis."

In addition to claiming that the ALJ erred in determining Frazier to be total disabled, Southwire argues that ALJ Hays' original findings bar the reopening of the claim as it violates *res judicata*. In the present case, the Board evaluated the statutes and requirements for reopening and determined that *res judicata* did not bar reopening.

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[17] *See Transportation Cabinet v. Poe*, 69 S.W.3d 60, 64 (Ky. 2001).

[18] *Id.* (emphasis added).

Pursuant to *Stambaugh v. Cedar Creek Mining Co.*, "Where the statute expressly provides for reopening under specified conditions, the rule of *res adjudicata* has no application when the prescribed conditions are present."[19]

The ALJ indicated that the landmark case regarding requirements for reopening of a claim for an increase in disability is *Colwell v. Dresser Instrument Division*.[20] In *Colwell*, this Court distinguished the requirements for reopening between permanent total disability and permanent partial disability.[21] This Court opined:

> KRS 342.730(1)(a) and KRS 342.0011(11)(c) require a worker who was **partially disabled at the time of the initial award and totally disabled at reopening to show only that a worsening of impairment due to the injury** is permanent and causes the worker to be totally disabled.[22]

The Board determined pursuant to *Colwell*, Dr. Jackson's testimony provided persuasive medical proof that Frazier's partial disability impairment had worsened to total disability as required to properly reopen his claim.

In reviewing the record, we have determined that the ALJ's decision that Frazier suffered total disability was supported by substantial evidence and was

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[19] 488 S.W.2d 681, 682 (Ky. 1972).

[20] 217 S.W.3d 213 (Ky. 2006).

[21] *Id.* at 218.

[22] *Id.* (emphasis added).

proper pursuant to applicable statutes. Therefore, we hold that the ALJ's decision must be upheld.

IV. CONCLUSION

Finding no error below, we affirm. Both the ALJ's reopening of Frazier's claim and the factual findings regarding his worsening condition were supported by substantial and credible evidence. The Workers' Compensation Board and Court of Appeals therefore did not err in affirming the ALJ's decision.

All sitting. All concur.

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