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NOT TO BE PUBLISHED OPINION

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Supreme Court of Kentucky

2020-SC-0548-WC

RICHARD COLE

APPELLANT

ON APPEAL FROM COURT OF APPEALS
NO. 2019-CA-1519
WORKERS' COMPENSATION BOARD
NO. WC-13-67013

V.

KY FUELS CORP.; HONORABLE
JONATHAN WETHERBY, ADMINISTRATIVE
LAW JUDGE AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Kentucky Revised Statute (KRS) 342.125(1)(d) permits a workers' compensation claim to be reopened and an award to be modified based on proof of a post-award change in disability "due to a condition caused by the [work-related] injury." The present case is a reopened claim in which the Court of Appeals directed the Workers' Compensation Board to vacate the ALJ's award of permanent total disability benefits (PTD) and remand the claim to the ALJ to determine whether the claimant's post-award change in disability was caused by the work-related injury. We affirm the holding of the Court of Appeals.

I. FACTS AND PROCEDURAL BACKGROUND

Richard Cole filed a workers' compensation claim for injuries to his lower back, neck, and hip allegedly suffered while working for KY Fuels Corp in 2013.¹ In 2015, ALJ Thomas Polites resolved that claim, finding that Cole's work-related injury resulted in the arousal of a previously dormant, non-disabling degenerative condition of the lumbar spine for which the ALJ awarded Cole permanent-partial disability benefits for a 10 percent impairment. Finding that Cole did not retain the physical capacity to return to his pre-injury job, the ALJ enhanced his benefits by application of the three-multiplier.² Important to the issues raised in this reopening, the ALJ dismissed as non-work related Cole's claim for alleged hip and neck injuries.

Two years later, Cole moved to reopen the claim, alleging that his condition had gradually worsened to the point of total disability. He supported his motion with a medical report from Dr. Anbu Nadar, who noted a gradual worsening of low back pain that radiated into the legs, increasing the level of functional impairment.³ ALJ Jonathan Weatherby ultimately awarded PTD benefits attributable to the work-related injury.

KY Fuels appealed to the Board, arguing that ALJ Weatherby's findings lacked support by substantial evidence that Cole's worsening condition was

¹ Cole worked as a bulldozer operator and truck driver for KY Fuels and was 30 years old at the time of his injury. Cole alleged he was injured while driving a truck equipped with an air cushion that failed when he hit a sharp dip in the road.

² Kentucky Revised Statute (KRS) 342.730(1).

³ The medical report was from Dr. Nadar, who also presented testimony in Cole's original claim, finding his work-related condition had increased since 2014.

caused by the 2013 low-back injury. The Board affirmed the ALJ's determination that Cole has suffered a worsening of his work-related injury since the rendition of ALJ Polites's 2015 opinion but vacated the PTD award and remanded the case to ALJ Weatherby, citing ALJ Weatherby's failure to perform the individualized analysis required to find permanent total disability. The Board emphasized that ALJ Polites dismissed Cole's 2013 claim for a work-related injury to the hip. The Board stated, "Because the ALJ specifically cited Cole's difficulty ambulating as a primary reason he is now permanently totally disabled, [the ALJ] is required to cite a medical opinion establishing this difficulty is caused by his work-related injuries."

On remand, ALJ Weatherby once again awarded PTD benefits and included a slightly more thorough explanation of the evidence attributing the disability to the injury. KY Fuels again appealed to the Board, arguing that Cole's difficulty ambulating was due to non-work-related conditions and the ALJ erred by failing to rely on medical opinion to establish the work-relatedness of Cole's worsened functions. But this time the Board affirmed the ALJ. Despite the ALJ's failure to cite medical evidence relating Cole's current functional impairment to the work-related injury, the Board concluded that the ALJ had provided a "minimally sufficient analysis" of the PTD issues and that the ALJ's PTD determination was supported by substantial evidence.

On appeal by KY Fuels, the Court of Appeals reversed the Board's decision and remanded the case to the Board with directions to vacate the PTD award and resubmit the claim to the ALJ with direction to issue explicit

findings determining whether Cole’s work-related injury caused his total disability based upon expert medical evidence. Specifically, the Court of Appeals’ holding directed the Board to require the ALJ on remand to address “whether Cole’s difficulty ambulating, and other functional difficulties are caused by his work-related low-back injury and whether his current medical restrictions stem from his work-related low-back injury or other medical conditions.”

II. ANALYSIS

A. Standard of Review

The appellate-review standard of a workers’ compensation decision is “to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent or committed an error in assessing the evidence so flagrant as to cause gross injustice.”⁴ Under KRS 342.125(1)(d), the party seeking to reopen and review an award must show a “[c]hange of disability as shown by objective medical evidence of worsening . . . impairment due to a condition caused by the injury since the date of the award” The claimant seeking to increase the award bears the burden of proof and the risk of non-persuasion with respect to proving a post-award increase in disability.⁵ Because the ALJ found in Cole’s favor, Cole’s burden on appeal is

⁴ *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992) (comma omitted).

⁵ *James T. English Trucking v. Beeler*, 375 S.W.3d 67, 68 (Ky. 2012) (citing *Griffith v. Blair*, 430 S.W.2d 337 (Ky. 1968)).

only to show that substantial evidence supports the ALJ’s finding, i.e., that the finding was reasonable under the evidence.⁶

B. The Court of Appeals correctly reversed the Board’s decision based upon the ALJ’s failure to make a finding supported by substantial evidence that Cole’s work-related injury caused permanent total disability.

Cole’s sole argument to us is that the Court of Appeals erred by reversing the Board’s decision and in directing the Board to remand the case to the ALJ for further findings because principles of “res judicata” foreclose further litigation over whether substantial evidence supports a finding that the worsening of Cole’s current low back condition renders him totally disabled. Cole points to language in the Board’s present opinion describing as “res judicata” its affirmance of the issue before the Board in its previous 2016 opinion—from which no appeal was taken—“that substantial evidence supported [ALJ Weatherby’s] determination [on reopening] that Cole’s work-related low back condition had worsened since the rendition of the underlying . . . opinion by ALJ Polites.”⁷

Addressing Cole’s “res judicata” argument, the Court of Appeals’ opinion acknowledges as established beyond dispute the fact that Cole suffered a work-related low-back injury in 2013 and that the Board had previously determined in its 2019 opinion that Cole’s low-back condition had worsened since ALJ

⁶ *Id.* (citing *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986)).

⁷ The Board’s invocation of the doctrine of res judicata notwithstanding, Cole’s argument on this point asserts application of the law of the case doctrine. See *Brooks v. Lexington-Fayette Urb. Cnty Hous. Auth.*, 244 S.W.3d 747 (Ky. App. 2007) (distinguishing law of the case doctrine from res judicata).

Polites awarded PTD to Cole in 2015. And the Court of Appeals correctly found—with “minimally sufficient analysis”—no reversible error in the Board’s affirming ALJ Weatherby’s finding that Cole is now unable to perform work of any type. But the Court of Appeals panel held that the Board erred when it seemingly accepted without a finding by ALJ Weatherby based on substantial evidence that Cole’s worsened low-back condition caused the current functional impairment that prevents him from being able to perform work of any type. We agree with the Court of Appeals.

The ALJ’s order must adequately set forth facts that support the conclusions reached so that the parties and reviewing Board and the courts understand the basis of the decision.⁸ So, to award Cole PTD benefits, the ALJ must cite evidence that the work-related injury has caused Cole’s total disability. The portions of ALJ Weatherby’s order relevant to the cause of Cole’s impairments on remand state:

The ALJ reiterates the reliance upon the opinion of Dr. Nadar who concluded that the Plaintiff had continued residuals from his neck and back secondary to the work injury and the Plaintiff needed ongoing medical treatment because his condition had worsened. Dr. Nadar restricted the Plaintiff generally from lifting twisting, turning, and prolonged sitting.

. . .

The ALJ finds based upon the testimony and presentation of the Plaintiff as supported by the objective medical evidence cited by Dr. Nadar . . . that the Plaintiff is permanently and totally disabled.

⁸ *Cornett v. Corbin Materials, Inc.*, 807 S.W.2d 56 (Ky. 1991).

In sum, absent from ALJ Weatherby's order is the causal link between Cole's current condition and his work-related injury. As KY Fuels argues, ALJ Weatherby's award does not compare Cole's current condition to his original impairment nor does the award explain in what way the work-related low-back condition has worsened. Dr. Nadar's report and findings could potentially support the conclusion that Cole's disability is caused by his work-related injury, but the order must make that clear by pointing to where in the record that was shown.

In deciding if Cole is permanently totally disabled, the ALJ is not to consider "nonwork-related impairment."⁹ ALJ Weatherby's order did not distinguish between Cole's work-related impairment and his acknowledged non-work injury impairments. And we find that distinction to be necessary in circumstances like this, where the record establishes claimant suffers from both work-related injury and non-work-injury conditions.¹⁰ For this reason, a remand is proper.

C. ALJ Weatherby erred by relying on his own assessment of Cole contrary to uncontroverted medical evidence.

We similarly find remand is appropriate because the Board overlooked the failure of the ALJ to cite adequate evidence of Cole's functional impairments. KY Fuels argues that the ALJ erred in relying on his own

⁹ KRS 342.730(1)(a).

¹⁰ *City of Ashland v. Stumbo*, 461 S.W.3d 392, 397 (Ky. 2015) ("Here, again, the ALJ fell short because he failed to delineate which, if any, of Stumbo's restrictions are related to the knee injury and which are related to the pre-existing antiphospholipid syndrome.").

observation of Cole to assess whether his functional difficulties rendered him totally permanently disabled because medical evidence showing otherwise was uncontroverted. The Court of Appeals found that the ALJ could not rely on his own assessment of Cole’s impairments contrary to uncontroverted medical evidence presented by KY Fuels. For reasons explained below, we agree.

KY Fuels presented evidence from Dr. Thomas Loeb, who opined that Cole’s current impairment is the result of non-work injury related conditions, osteoarthritis and osteomyelitis in his leg. Cole presented the report of Dr. Anbu Nadar, who addressed the same conditions but failed to say whether they were related to the work-related low-back injury. Instead, Dr. Nadar’s report focused on how Cole’s injuries have worsened. So KY Fuels’s evidence appears to be uncontroverted that Cole’s functional impairment was a result of his non-work injury related conditions.

In *Kingery v. Sumitomo*,¹¹ we explained that we generally require medical evidence to prove medical causation.¹² And our caselaw also provides that when both parties offer conflicting evidence on an issue, the ALJ, as the fact finder, must decide what evidence is more convincing.¹³ But, as the Court of Appeals stated, when the “medical causation is uncontroverted, an ALJ may

¹¹ 481 S.W.3d 492, 496 (Ky. 2015) (“But, as the Court of Appeals noted, ALJs are not permitted to rely on lay testimony, personal experience, and inference to make findings that directly conflict with the medical evidence, except in limited situations, such as matters involving observable causation. In other words, when the question is one properly within the province of medical experts, the [ALJ] is not justified in disregarding the medical evidence.”).

¹² *Id.*

¹³ *Stumbo*, 461 S.W.3d at 396.

not properly rely on personal experience, inference, or lay testimony, and cannot disregard medical proof.” Here, as previously explained, the medical evidence of the cause of Cole’s impairments was uncontroverted, so ALJ Weatherby could not rely on his own assessment of Cole.

As the dissent points out, we do not disagree that there is conclusive evidence that Cole’s injury has worsened. Critically, though, the cause of his worsened condition remains unclear. It is true that in 2018 Dr. Nadar reported Cole’s back condition had worsened since 2014, but the report fails to relate the worsening to the work-related injury, an important point the dissenting opinion ignores. Dr. Nadar’s report regarding Cole’s 2018 MRI reads:

[The 2018 MRI] was compared with a previous MRI of the lumbar spine, done on June 25, 2014. From review of the MRI it appears the current MRI shows the progression of his disc-osteophyte complex at L3-4 and L-5 level. It appears his condition has progressed since the previous MRI.

If Cole only suffered impairment caused by his work-injury and did not have a pre-existing condition, our holding might differ. But, Cole’s 2014 MRI revealed a pre-existing degenerative back condition. Dr. Nadar’s previous reports did not dispute Cole’s pre-existing condition. In fact, Dr. Nadar reported that the work-injury exacerbated Cole’s pre-existing condition. Because Dr. Nadar found Cole suffered impairment because of both his pre-existing condition and the work-injury, his 2018 report indicating only that Cole’s condition had worsened does not constitute evidence that the work-injury has caused the worsened impairments.

ALJ Weatherby's order cites the above medical evidence, but as explained, no medical evidence stated that Cole's functional impairment was a result of his work-related injury, nor did the ALJ state that he thought the medical evidence implied Cole's worsened condition was work-related. Instead, the only cited evidence that Cole's total disability resulted from the work-related low-back injury is Cole's own testimony and ALJ Weatherby's personal observation regarding Cole's ambulation. So we agree with the Court of Appeals that ALJ Weatherby erred in relying on his own assessment of Cole's impairments to support the PTD award.

III. CONCLUSION

For the reasons explained above, we affirm the Court of Appeals' decision to reverse the decision of the Board and direct the Board to remand the matter to the ALJ for consideration consistent with this opinion.

All sitting. Minton, C.J.; Conley, Hughes, and VanMeter, JJ., concur.

Nickell, J., concurs in part, dissents in part by separate opinion, in which Keller, and Lambert, JJ. join.

NICKELL, J., CONCURRING IN PART AND DISSENTING IN PART:

Respectfully, I concur in part and dissent in part. I concur with the majority's conclusion the ALJ's findings were insufficient to support an award of PTD benefits and therefore agree remand is appropriate. However, I cannot agree with the majority's assessment the medical evidence regarding causation of Cole's present disability was uncontroverted. Further, in my view the ALJ did not improperly rely on his own assessment of Cole's impairments as

sufficient evidence was presented to address causation in the form of lay and medical testimony and reports. Thus, I dissent in part from that portion of the majority's Opinion.

The majority acknowledges the worsening of Cole's work-related low-back injury has been conclusively determined and is not amenable to further challenge. As also noted by the majority, Cole admittedly suffers from nonwork-related impairments, thereby requiring the ALJ to make specific findings determining which conditions cause Cole's disability. Because the ALJ failed to so find here, I agree remand is necessary. I disagree, however, with the majority's conclusion that the medical evidence of the etiology of Cole's impairments as nonwork-related was uncontroverted.

My review of the record reveals Dr. Nadar concluded Cole's impairment increased from 10% to 13% between his initial examination in 2013 and his examination following reopening in 2017. The latter examination included review of a 2014 MRI and Dr. Nadar specifically concluded Cole's complaints stemmed from his prior injuries. No additional mechanisms of injury or disability were noted. Additionally, in his 2018 supplemental report, Dr. Nadar compared the results of MRI's from 2014 and 2018, noting the progression of Cole's condition.

While I agree Dr. Loeb made more specific and concrete statements about the medical causation of Cole's functional difficulties, Dr. Nadar's reports and findings at least implicitly reveal his opinion that Cole's disability is causally related to his work injury, a point conceded by the majority. Thus, I believe the

majority's logic is internally inconsistent as it first acknowledges Dr. Nadar's opinion could support the ALJ's determination yet subsequently ignores the very contents of his reports. The medical testimony of Dr. Loeb was not uncontroverted, the ALJ cited adequate evidence regarding the causation of Cole's functional impairments, and remand is not necessary as to that issue.

For these reasons, I am constrained to concur in part and dissent in part.

Keller and Lambert, JJ., join.

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