RENDERED: February 14, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000927-WC

GORMAN SHEPHERD — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 87-38684

NATIONAL MINES CORPORATION; RONALD W. MAY, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING
** ** ** ** **

BEFORE: COMBS AND DYCHE, JUDGES; AND POTTER, SPECIAL JUDGE.[1]

POTTER, SPECIAL JUDGE: Gorman Shepherd petitions for review from an opinion of the Workers= Compensation Board (Board) affirming a decision by the Administrative Law Judge (ALJ) to deny Shepherd=s motion to reopen his claim against National Mines Corporation (National Mines). We affirm.

On August 3, 1987, Shepherd injured his back in a work-related accident. Shepherd subsequently filed an application for workers= compensation benefits wherein he alleged that he was

[1]Senior Status Judge John Woods Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution.

totally and permanently occupationally disabled due to the physical and psychiatric consequences of the back injury. By award and order entered March 29, 1989, the ALJ awarded Shepherd occupational disability benefits based upon an occupational disability of 45%. The ALJ apportioned 10% of the occupational disability to the physical consequences of the back injury, and 35% to the psychiatric problems Shepherd suffered as a result of the accident.

On November 18, 1994, Shepherd filed a motion to reopen his 1989 award, alleging that he was totally and permanently disabled due to a worsening of his physical and psychiatric conditions. On March 14, 1996, the ALJ rendered a decision holding that there had been no worsening of Shepherd=s physical condition, but that his psychiatric impairment had worsened over time to the extent that Shepherd had sustained an additional occupational disability of 25%, for a total occupational disability of 70%. On June 7, 1996, the Board rendered an opinion affirming the ALJ=s decision.

On December 11, 2000, Shepherd filed the present motion to reopen, again alleging entitlement to total and permanent occupational disability benefits. On October 3, 2001, the ALJ entered an opinion holding that Shepherd had not met the burden of proof required of him to establish a worsening of his injury since the previous reopening. Shepherd subsequently filed an

appeal with the Board. On April 4, 2002, the Board entered an opinion affirming the ALJ. This petition for review followed.

Shepherd contends that the medical evidence presented by Dr. William Weitzel compels a finding that there has been a worsening of his condition since the March 1996 opinion and award, and that the evidence further compels a finding that he is now totally occupationally disabled. Shepherd alleges that given the emphasis that had been placed upon Dr. Weitzel=s opinion in the original two decisions regarding this claim, his opinions concerning Shepherd=s condition and his ability to perform work activities are compelling evidence that should have been relied on by the ALJ. Shepherd alleges that his failure to rely on Dr. Weitzel=s opinion in this claim is sufficiently erroneous to warrant a reversal of the ALJ=s denial of his petition to reopen.

Certain basic principles exist in a reopening of a workers= compensation claim. First, the burden of proof falls upon the party seeking reopening. Griffith v. Blair, Ky., 430 S.W.2d 337, 339 (1968). Here, that party is Shepherd. Consequently, pursuant to the applicable version of KRS 342.125, it was Shepherd=s burden to prove that the effects of the injury of August 3, 1987, had worsened since the amended award of March 14, 1996, so as to cause Shepherd to suffer an increase in vocational disability. In ascertaining whether there has been a change, it was the ALJ's obligation to analyze not only the evidence presented at the time of reopening, but also the

evidence presented previously. W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453, 455 (1946). Here, the comparison is to Shepherd=s condition after his 1994 reopening, and not as compared to his original problem.

Dr. Weitzel examined Shepherd during the original proceeding, during the first reopening, and during the present case. On the first occasion, Dr. Weitzel assigned a 5% impairment, on the second a 15% impairment, and in the present reopening, a 20% impairment. In both the initial proceeding and the first reopening, Dr. Weitzel was of the opinion that while Shepherd had some significant psychological problems, he remained capable of working. In the present reopening, Weitzel determined that Shepherd was worse psychologically and likely would have difficulty working. Shepherd contends that since Dr. Weitzel had been involved with the case from the beginning, and because his medical opinions had been relied upon in the two previous considerations of his claim, his medical evidence is entitled to special deference in the current proceeding.

While Dr. Weitzel=s medical evidence establishes a worsening of Shepherd=s condition from the previous reopening, Dr. Arnold Ludwig also examined Shepherd in conjunction with the present reopening. Dr. Ludwig determined that in his view, the worsening identified by Dr. Weitzel was attributable primarily to an alteration in Shepherd=s medications, and that when the effects of this alteration are excluded, Shepherd had not

experienced a worsening in his condition since the previous reopening.

With respect to the conflicting medical evidence, the ALJ stated in his opinion and order of October 3, 2001, as follows:

> Dr. Ludwig found that plaintiff was suffering from a Class II impairment at the current time with generally no percentage impairment change in his condition and certainly no worsening of his psychiatric condition. In his current report Dr. Weitzel rated plaintiff=s class of impairment as to specific activities and then gave an overall rating. He felt plaintiff was between Class I and Class II for activities of daily living; Class II for social functioning; and between Class II and Class III for concentration persistence, pace, and adaptation to stressful conditions. He felt his condition was mild/moderate overall. The most noteworthy thing about Dr. Weitzel=s current examination was that his opinion of worsening was based upon the medication plaintiff was taking which has a very sedating effect. All other components of the examination including psychological testing were Aremarkably similar when the results from 1988, 1995 and 2000 are compared.@ Apparently the new psychiatrist who had undertaken plaintiff=s treatment had been experimenting with various medications and dosages to determine what would work best for plaintiff as plaintiff was no longer taking the heavy duty tranquilizer, Risperidol, when examined by Dr. Ludwig only three months after plaintiff had been examined by Dr. Weitzel. When the sedating effect of Risperidol is removed, there is nothing remaining, according to Dr. Weitzel himself, to support any worsening of plaintiff=s psychiatric condition as all other components of the examination of November 9, 2000 were essentially unchanged from Dr. Weitzel=s examinations of September 13, 1988 and his examination of January 23, 1995.

> Accordingly, plaintiff has not met the burden of proof required of him to establish a worsening of his injury conditions since the reopening Opinion and Award of March 14, 1996. Accordingly, plaintiff=s motion to reopen will be over-ruled.

The fact-finder, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). 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. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977).

Where the decision of the fact-finder is in opposition to the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence was so overwhelming it compelled a finding in his favor and that no

reasonable person could have failed to be persuaded by it. Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 678 (1998). In such cases, the issue on appeal is whether the evidence compels a finding in his favor. Paramount Foods at 419; Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 800 (1995). To be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

In this case, two expert medical witnesses presented conflicting medical opinions. According to Dr. Weitzel, there has been a worsening of Shepherd=s psychiatric condition since the previous reopening while Dr. Ludwig determined that there has not. In such cases, it is the function of the ALJ to resolve the conflict in the opinions. Pruitt v. Bugg Brothers, supra. In light of Dr. Ludwig=s medical opinion, we are not persuaded that the evidence is so overwhelming as to compel a decision in favor of Shepherd.

With regard to Shepherd=s argument to the effect that because Dr. Weitzel has been involved, and his opinions relied upon, in the two previous considerations of Shepherd=s claim, we agree with the Board:

> [W]e would remind the parties that while it is frequently beneficial to have a physician who had seen the individual during the original action and also upon reopening, this in no way compels the ALJ to follow that physician=s opinion. The same is true even if an ALJ had previously relied upon that physician=s testimony. The determination of

> weight and credibility, of course, is uniquely for the fact finder. Smyzer v. B. F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971) and Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88 (2000).
>
> A witness, whether lay or expert, who offers testimony during more than one proceeding is not clothed with a greater degree of credibility, even if previously relied upon. Credibility is to be determined during each and every litigation event. While certainly Dr. Weitzel=s previous experience with Shepherd might tend to lend greater weight to his testimony, it in no way mandates a specific finding nor reliance upon that witness in a subsequent proceeding, even involving the same transaction. It is nothing other than a question of weight to be accorded the evidence and, as the parties herein are well aware, weight, like credibility, is solely for the determination of the fact finder.

Shepherd also contends that the ALJ mischaracterized Dr. Weitzel=s medical conclusions. In his November 9, 2000, medical report, Dr. Weitzel stated, in relevant part, as follows:

> [Shepherd=s] psychological testing is remarkably similar when the results from 1988, 1995 and 2000 are compared. These results confirm the diagnosis of Major Depression.
>
> . . . .
>
> The reason I can use to support my opinion that his condition has worsened is the mix of medications that he is now taking when compared with that administered by Dr. Rank in 1995. In 1995, he was prescribed Prozac, 20 mgm, one per day; in the year 2000 he is prescribed Celexa, 20 mgm, three per day. In 1995, he was prescribed Trazodone, 100 mgm, two at bedtime. At this time he takes Imipramine 25 mgm, two at bedtime. In 1995, he was prescribed Wellbutrin, 100 mgm, taking one three times a day. In 2000,

> he takes Risperdal, 1 mgm, twice per day and Valium, 5 mgm, twice per day. In other words, he is taking a higher dose of the seratonin re-uptake inhibitor (Celexa) and has had the addition of an atypical anti-psychotic included in his daily regimen, along with the addition of Valium. It is for this reason that I conclude that his impairment rating has increased from 15% to 20%. Although this regimen may be helping him maintain his level of coping, it is also very sedating and would put him at risk if he returned to the mines as a section foreman. Dr. Stumbo continues to prescribe the non-steroidal anti-inflammatory agent (Flurbiprofen) and a medication to help him with his breathing (Azmacort).

In his opinion, the ALJ stated, AIt was on the basis of [Shepherd] taking a higher dose of the Seratonin re-uptake inhibitor (Celexa) and the addition of an atypical anti-psychotic included in his daily medication along with the addition of Valium that was the reason [Dr. Weitzel] concluded that his impairment rating had increased from 15% to 20%.@ We are persuaded that the ALJ=s summary fairly characterized Dr. Weitzel=s basic conclusions regarding the impact of Shepherd=s medications.

Shepherd also contends that, in rebutting Dr. Weitzel=s testimony, Dr. Ludwig engaged in speculation. Specifically, Shepherd alleges that Dr. Ludwig engaged in speculation when he stated that the removal of Shepherd from his Risperdal prescription, which occurred prior to his examination of Shepherd, Amore likely reflected the prescribing practices of a new psychiatrist rather than an indication of clinical status.@ However, we agree with the Board:

> The ALJ, in our opinion, thoroughly analyzed the evidence and offered not only a sound basis for her reliance upon Dr. Ludwig but also one that is eminently reasonable under the circumstances. As we view the evidence, it is clearly a reasonable inference that the primary reason for Dr. Weitzel assessing a greater degree of impairment and concluding a significant worsening of condition was attributable to the medication and, more specifically, Risperidol, as being a deciding factor in his determination. Simply because Dr. Ludwig saw Shepherd later by itself did not necessitate the ALJ=s reliance upon him. However, Clearly his analysis of the medications and considering the statement that Risperidol was no longer being prescribed had a major impact upon his opinion and it was reasonable for the ALJ to infer that it would have likewise impacted Dr. Weitzel=s opinion. Reasonable inferences, so long as that are born out by the record, and this one was, are for the ALJ. Jackson vs. General Refractories, Ky., 581 S.W.2d 10 (1979).

For the foregoing reasons the opinion of the Workers= Compensation Board is affirmed.

ALL CONCUR.

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