

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001604-WC

DENHAM-BLYTHE CO., INC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-92-26541

RUFUS WOOTEN;
ROBERT L. WHITTAKER, DIRECTOR
OF WORKERS' COMPENSATION FUND;
LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: GUIDUGLI, JOHNSON, AND KNOPF, JUDGES.

KNOPF, JUDGE: Denham-Blythe Co., Inc. has petitioned for review of an opinion and order of the Workers' Compensation Board (Board). The Board affirmed an opinion and award on reopening by the Administrative Law Judge (ALJ) based upon a finding that Rufus Wooten now has a total and permanent occupational disability. The ALJ further found that Wooten is suffering from

work-related depression and held that he was entitled to medical treatment as provided by KRS 342.020 and 342.035. Denham-Blythe argues that the ALJ's findings on both of these matters were not supported by substantial evidence. We disagree, and hence, affirm the Board's opinion and order.

On January 23, 1992, while he was employed by Denham-Blythe, Wooten sustained a work-related injury to his neck and lower back. Thereafter, he filed a claim for benefits, and in 1995, an ALJ found Wooten to be 50% occupationally disabled. Although the ALJ in that proceeding found that Wooten could not return to heavy manual labor or a full range of medium-duty work, the ALJ concluded that Wooten was not totally occupationally disabled.

In 2000, Wooten filed a motion to reopen based on a worsening of his back and neck condition, and alleging that he had developed severe depression. As a result of these conditions, Wooten asserted that he is now totally occupationally disabled. Wooten submitted medical evidence and testimony in support of his motion. Likewise, Denham-Blythe submitted medical evidence controverting Wooten's claim of increased occupational disability and disputing Wooten's claim that his depression was compensable. In an opinion and award entered on January 8, 2002, the ALJ found that the worsening of Wooten's physical condition alone had made him totally

occupationally disabled. The ALJ further concluded that Wooten's depression was the result of his work injury. Accordingly, the ALJ granted Wooten's motion to reopen, awarding lifetime benefits and requiring Denham-Blythe to pay for the treatment of Wooten's depression. The Board affirmed, finding that the ALJ's determinations were supported by substantial evidence. This appeal followed.¹

Certain basic principles exist in a reopening. First, the burden of proof falls upon the party seeking reopening.² Wooten had the burden to prove not only a deterioration of his medical condition, but also some occupational transformation in his condition.³ 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 that which was considered in the original claim.⁴ Denham-Blythe again argues that Wooten failed to carry his burden on re-opening to show that his depression was work-related, and that his physical

¹ The ALJ also assigned responsibility to the Special Fund for one-half of the award of lifetime benefits to Wooten. Based on Wooten's life-expectancy, the Fund's liability for payment of benefits will commence upon Denham-Blythe's completion of 648.88 weeks of payment. The Workers' Compensation Funds, as successor to the Special Fund, has joined in Denham-Blythe's appeal from the ALJ's award of lifetime disability benefits.

² Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972); Griffith v. Blair, Ky., 430 S.W.2d 337 (1968); Jude v. Cabbage, Ky., 251 S.W.2d 584 (1952).

³ See KRS 342.125(1).

⁴ W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946).

condition had deteriorated to the point where he is now totally occupationally disabled. For the reasons that follow, we disagree with Denham-Blythe.

When the party who bears the burden of proof is successful before the ALJ, the question on appeal is whether substantial evidence in the record supported the decision.⁵ Substantial evidence is evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people.⁶ As fact finder, the ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from the evidence.⁷ The ALJ has the discretion to choose whom and what to believe.⁸ It is not enough for Denham-Blythe to show that there is merely some evidence that would support a contrary conclusion.⁹ Moreover, the function of further review of the Board in this Court 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

⁵ Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

⁶ Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971).

⁷ KRS 342.285; see Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

⁸ Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977).

⁹ McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

cause gross injustice.¹⁰

Denham-Blythe first argues that the ALJ erred in finding Wooten's depression to be compensable because Wooten knew of his condition at the time of his original award. It further points to evidence showing that Wooten was prescribed medication for depression in 1992 and 1993. Given this evidence, Denham-Blythe contends that Dr. Chaney's testimony linking Wooten's depression to his work-injury was not sufficient to support a finding of compensability.

We find the Board's analysis of this issue to be convincing, and we adopt the following portion of the Board's opinion:

Concerning the psychiatric condition, Denham-Blythe contends Wooten knew of his condition at the time of the original award. It contends that a counselor in Dr. Chaney's office, rather than Dr. Chaney, treated Wooten for depression and Dr. Granacher, while diagnosing depression, did not indicate its cause. It further points to Dr. Granacher's notation that Wooten had been previously treated for depression. Denham-Blythe relies on Slone v. Jason Coal Co., [Ky., 902 S.W.2d 820 (1995)], wherein the claimant knew of his psychiatric condition prior to the original opinion and award. The court held that pursuant to KRS 342.125, the reopening statute, the claim could not be reopened on the basis of a showing of "change of occupational disability, mistake or fraud, or newly discovered evidence."

¹⁰ Western Baptist Hospital. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

The court held that a motion to reopen could not be based on a condition known to the claimant during the time of the original action but that, for some reason, he did not choose to litigate. In Slone, the claimant filed a Social Security claim about the same time he filed his workers' compensation claim. In the Social Security claim, Slone submitted psychiatric evaluation evidence and was granted disability benefits, but did not present any psychiatric complaints in his workers' compensation claim. The court held that the attempt to prosecute a psychiatric claim via a motion to reopen pursuant to KRS 342.125 violated the prohibition against piecemeal litigation.

Wooten's original application for adjustment of claim was for a neck and back injury. Dr. Chaney, the claimant's treating physician, testified he did not begin to treat Wooten for depression until 1997, following the 1995 opinion and award. Thus, he assessed work-relatedness. Dr. Granacher indicated that Wooten began receiving medication in 1992. Dr. Chaney indicated that Wooten's depression was due to either his pain, his lack of improvement or inability to work. However, Denham-Blythe points to no medical evidence in the record at the time of the original award documenting Wooten had a psychological condition that was work-related.

While the evidence from Dr. Granacher would support the position of noncompensability as argued by Denham-Blythe, clearly the ALJ's decision is supported by the testimony of Dr. Chaney. The ALJ was faced with contradictory medical evidence; thus, it was within his province to rely on the evidence of his choosing and we are without authority to find otherwise. [Citations omitted]

Denham-Blythe next argues that Wooten failed to carry his burden of showing that his occupational disability had

increased since the time of his original award. The ALJ pointed to Wooten's testimony and other medical evidence which established that Wooten's condition has continued to worsen despite surgical intervention. Moreover, Dr. Chaney testified that Wooten is no longer capable of performing the medium or light-duty work which he was capable of at the time of the first award. Although Denham-Blythe presented medical evidence to the contrary, we agree with the Board that the ALJ's determination on this question was supported by substantial evidence and may not be disturbed on appeal.

Accordingly, the opinion and order of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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