

RENDERED: APRIL 25, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2002-CA-001815-WC

CYPRUS MOUNTAIN COALS D/B/A
STARFIRE MINES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-81570

MARLOUS NAPIER; HON. JAMES L.
KERR, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

* * * * *

BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

BAKER, JUDGE. Cyprus Mountain Coals¹ D/B/A Starfire Mines
petitions for a review of an opinion of the Workers'
Compensation Board that vacated in part, reversed in part, and
remanded a decision of the Administrative Law Judge, which

¹ The petition for review erroneously pluralizes the name of
appellant. The correct name is Cyprus Mountain Coal.

awarded Marlous Napier permanent total disability benefits equal to 80% of his average weekly wage after excluding 20% based on a pre-existing active occupational disability. The Board reversed the ALJ's denial of medical benefits because of psychiatric or psychological overlay and vacated his decision with respect to the 20% exclusion for a pre-existing active disability and denial of medical expenses associated with Napier's cervical injury claim. The Board remanded the case for further explanation of his decision on the latter two issues. After reviewing the record, the law, and the arguments of counsel, we affirm.

Marlous Napier, who is 52 years old and has a high school education with no specialized or vocational training, has been employed by Cyprus as a heavy equipment operator since 1971. On May 2, 1998, he sustained a work-related injury when he fell while descending the steps on a drag line he was operating hitting his head against a handrail and twisting his back. He immediately experienced back pain, reported the incident, and went home. Napier returned to work the next day but had to leave after a few hours because of severe neck and low back pain. He was initially treated with pain medication and physical therapy by Dr. George Chaney, a family doctor, and Dr. Richard Mortara, a neurosurgeon who had operated on Napier in 1985. At the time, Napier was also suffering from

degenerative joint disease in his left hip from a prior automobile accident. Dr. Mortara suggested he be reevaluated after having hip replacement surgery, which was done by Dr. Norman Ellingsen in October 1998. On May 13, 1999, Dr. Mortara performed lumbar fusion surgery consisting of a total laminectomy at the L3-L4 level with a partial laminectomy at L2 and L4 bilateral medial facetectomies. Following the hip and spine surgeries, Napier had some relief from his hip problems and right leg pain, but he continued to suffer lower back, left leg, and neck pain. Dr. Chaney referred Napier to the Lexington Pain Center, where he has been treated by Dr. Bosomworth with medication including Sonata, Zanaflex, Neuroten, Effexor, and Oxycontin.

Napier filed an Application for Resolution of Injury Claim on April 18, 2001, involving the May 1998 incident seeking compensation based on both physical and psychological problems. In addition to the above referenced physicians, Napier has been examined and evaluated by several physicians and occupational experts in connection with his claim. Their various reports mention Napier's medical history that involved a hip injury he received in a vehicular accident in 1980 and a fractured spine received in a fall from a tree in 1985. As a result of the 1985 incident, Dr. Mortara performed spinal surgery with fusion of the L1-L3 vertebra that included the insertion and subsequent

removal of Harrington rods. Napier was off work approximately five months and nine months because of the 1980 and 1985 incidents, respectively. During each of the examinations following the May 1998 incident, Napier complained of lower back pain, left leg pain, numbness in the toes of his left foot and hands, neck pain, headaches, and depression.

On March 23, 2001, Dr. James Templin reported Napier was suffering from several conditions including degenerative disc disease, lumbar spondylolysis, chronic cervical pain syndrome, left leg radiculopathy, chronic left hip pain, depression, and post-operative scar tissue/adhesions. He assessed a conditional 16% whole body impairment due to Napier's lumbar spinal condition under the American Medical Association Guides to Evaluation of Permanent Impairment. Dr. Templin indicated that the impairment rating was conditional because he did not believe Napier had reached maximum medical improvement and further testing and evaluation of his cervical condition was necessary. Dr. Templin did state that Napier's condition was caused by the May 1998 incident and he did not have an active impairment prior to that incident.

On October 16, 2000, Dr. Russell Travis examined Napier and stated that his current complaints of chronic neck and low back pain were not supported by objective findings. Dr. Travis suggested that Napier's condition was not related to the

May 1998 injury but involved degenerative stenosis below the vertebral levels adjacent to the 1985 spinal fusion, that he had reached maximum medical improvement, and that he could return to light work activity. However, based on the fact that he had the 1999 surgery, Dr. Travis assessed a 10% whole person impairment.

On July 27, 2001, Dr. Charles Hieronymous' diagnosis included chronic low back pain with radiculopathy and atrophy, chronic cervical pain with radiculopathy and atrophy, chronic pain syndrome, degenerative disc disease, and status post lumbar laminectomy L3-L4 with partial L2 and L4 bilateral medical facectomies. He assessed a 31% whole body impairment and stated that the May 1998 injury had caused Napier's complaints and he did not have an active impairment prior to the 1998 injury.

Dr. Martyn Goldman at the University of Louisville conducted an independent medical evaluation of Napier on September 20, 2001, pursuant to a request from the Department of Workers' Compensation and the ALJ under Kentucky Revised Statute (KRS) 342.315. In a Form 107 report, Dr. Goldman's diagnosis of Napier was status post lumbar decompressive laminectomy, mild degenerative joint disease cervical and dorsal spine, and narrowing of the L3-L4 level with retrolisthesis narrowing of the L3-L4. He stated Napier's May 1998 injury was at least partially responsible for his current condition but would not have resulted in persistent symptoms absent the fused segment

from L1 to L3. Dr. Goldman indicated that 50% of Napier's current impairment was due to arousal of a pre-existing dormant non-disabling condition, that his neck problems were due to the effects of natural aging, and that he could not return to the type of work he performed before the May 1998 injury. Dr. Goldman assessed a 13% permanent whole body impairment under the AMA Guides for the 1998 injury. In a subsequent deposition, Dr. Goldman expanded on his evaluation by stating that he would have assessed a total 30% whole body impairment rating based on a combination of the 1998 and 1985 injuries with a 20% impairment rating assigned to the 1985 injury, and that he would have imposed physical restrictions on Napier based on the 1985 injury and attendant spinal fusion surgery.

Also on September 20, 2001, Dr. John Harpring conducted a university medical evaluation pursuant to a request from the Department of Workers' Claims under KRS 342.315. Dr. Harpring diagnosed Napier as suffering from lumbar stenosis and neck pain caused by the May 1998 injury and did not believe Napier had a pre-existing active impairment. Dr. Harpring did not provide an impairment rating.

The record contains two reports related to Napier's psychological claim. Phillip Pack, a certified clinical psychologist performed various tests on June 15, 2001, and concluded Napier suffered from major mild depression without

psychotic symptoms. He assessed a Class 2 impairment rating under the current AMA guidelines, which he stated corresponded with a 10% impairment rating under the previous guidelines. Pack found no evidence of malingering.

On August 30, 2001, Dr. David Shraberg, a psychiatrist, evaluated Napier at the request of the employer. Based on his interview and testing, Dr. Shraberg concluded that Napier exhibited a high degree of symptom magnification and that any medical problems were due to natural aging and arthritis. Dr. Shraberg stated Napier had personality factors that predisposed him to developing physical symptoms under stress and diagnosed a psychophysiological adjustment disorder associated with multiple surgeries and a passive/dependant personality. He indicated that Napier's primary psychological problem was an addiction to Oxycontin. Dr. Shraberg found no active psychiatric impairment related to the May 1998 injury and suggested that detoxifying Napier from Oxycontin would relieve him of any depression and allow him to return to work.

On January 14, 2002, the ALJ conducted an evidentiary hearing. Napier testified that he has constant pain in his neck, left leg, and lower back. He said that he is unable to sit or stand for over thirty minutes, has severe headaches, and has trouble sleeping. He stated that he receives treatment and counseling for depression at the pain clinic. Napier indicated

that he had routinely worked 11-40 hours of overtime per week without any physical restrictions since his spinal fusion surgery in 1985-86 and approximately 84 hours per week for several months just prior to the May 1998 incident.

On March 7, 2002, the ALJ issued an opinion awarding Napier permanent total disability benefits for his lumbar spinal condition computed on an 80% occupational disability rate and denying compensation related to Napier's cervical condition. The ALJ found Dr. Goldman's testimony to be the most credible of the medical experts and relied heavily on his assessment of a 20% impairment rating for the 1985 injury in carving out 20% from the total disability award for that injury as a non-compensable pre-existing active disability. Although the ALJ referred to the testimony of Napier, Dr. Goldman, and Mr. Pack as supporting a finding of total occupational disability, he again relied on Dr. Goldman's attributing Napier's cervical problems to the natural aging process in finding this condition to be not work-related. Consequently, the ALJ awarded Napier permanent income benefits commensurate with 80% of his average weekly wage and medical expenses associated solely with his lumbar spinal condition.

On March 13, 2002, Napier filed a petition for reconsideration seeking reversal or alternatively additional findings on the 20% exclusion based on the 1985 injury and the

denial of benefits for his neck problems. Napier also requested findings and clarification as to compensability for the psychological component of his claim. On April 2, 2002, the ALJ issued an order generally reaffirming his previous decision. He stated the finding of a 20% pre-existing active disability was based on Dr. Goldman's 20% impairment rating and the physical restrictions he would have imposed as a result of the 1985 injury. He also reiterated Dr. Goldman's attribution of Napier's neck problems to the natural aging process and a finding that these problems did not arise for several months following the May 1995 incident. The ALJ did supplement his decision by specifically denying any compensation related to Napier's psychological condition based on Dr. Shraberg's testimony.

On appeal, the Workers' Compensation Board vacated in part, reversed in part, and remanded the case for further findings related to the ALJ's finding that the 1985 injury constituted a pre-existing active occupational disability and the compensability of medical care costs in connection with Napier's cervical injury. The Board reversed the denial of compensation for medical expenses associated with the psychological component of the claim. This appeal followed.

Cyprus contends the Board should have affirmed the ALJ's opinion because it was supported by substantial evidence.

Generally, as the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 928 (2002); Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993). Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329, 331 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334, 336 (1995). The fact-finder also may reject any testimony and believe or disbelieve various parts of the evidence even if it came from the same witness. Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999). Where the party with the burden of proof is not successful before the ALJ in a workers compensation matter, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. Carnes v. Tremco Mfg. Co., Ky., 30 S.W.3d 172, 176 (2000); Bullock v. Peabody Coal Co., Ky., 882 S.W.2d 676, 678 (1994). The Board's scope of review is limited to whether the ALJ exceeded his power, abused his discretion, or issued an order that was clearly erroneous or not in conformity with statutory law. See KRS 342.285(2); Smith v. Dixie Fuel Co., Ky., 900 S.W.2d 609 (1995). In contrast to its authority to determine legal issues de novo, the Board may not substitute its

judgment for that of the ALJ on factual issues that are supported by substantial evidence and thus not clearly erroneous. See Union Underwear Co., Inc. v. Searce, Ky., 896 S.W.2d 7, 9 (1995); Jecker v. Plumbers' Local 107, Ky. App., 2 S.W.3d 107, 110 (1999). This Court's duty is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992); Huff Contracting v. Sark, Ky. App., 12 S.W.3d 704, 706 (2000).

Initially, Cyprus maintains that the Board erred in remanding for further findings on the issue of a pre-existing active disability. The ALJ relied extensively on the opinion of Dr. Goldman, who assessed a 20% functional impairment rating to the 1985 injury and stated he generally would have imposed restrictions for Napier of no bending forward with knees straight and no lifting over 25 to 30 pounds. The Board held that the ALJ's findings were insufficient because of inconsistencies in Dr. Goldman's testimony and contradictory evidence from the second university evaluator, Dr. Harpring. For instance, Dr. Goldman explicitly indicated in his Form 107 report that Napier did not have an active impairment prior to the May 1998 incident "despite the fact that he certainly would have had an impairment rating based on his pre-existing spinal

fusion from L1 through L3.” In his report, Dr. Goldman also attributed 50% of Napier’s condition to “arousal of the pre-existent dormant non-disabling condition.” In addition, Dr. Harpring indicated in his Form 107 report that the lumbar fracture and stenosis were pre-existing conditions, but that Napier was “asymptomatic at the time of his alleged work related accident [in May 1998] and subsequent low back and leg pain.”²

The Board noted the difference between an “impairment,” which refers to a health related condition that produces a physiological limitation quantified in terms of a rating under the AMA Guides, and an “active disability,” which is a legal term of art related to occupational limitations that exist immediately prior to the subject injury. See e.g., Wells v. Bunch, Ky., 692 S.W.2d 806 (1985); Griffin v. Booth Memorial Hospital, Ky., 467 S.W.2d 789 (1971). The existence or extent of a functional impairment does not necessarily correlate with an equal occupational disability. See Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985); Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 678 (1998). “Active” with reference to a pre-existing disability means disabling or negatively

² We note that Drs. Templin and Hieronymus also indicated that Napier had no pre-existing active disability at the time of the May 1998 incident.

affecting a person's ability to work prior to the subsequent injury. See Yocum v. Devine, Ky. App., 577 S.W.2d 41, 43 (1979). The fact that a claimant is employed or continues to work does not necessarily mean he has no active disability. Wells, 692 S.W.2d at 806. As the sole fact-finder, the ALJ must translate the lay and medical evidence into a finding of occupational disability, and he is not required to rely on the vocational opinions of either the medical experts or the vocational experts. Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000). However, as the Board noted, this case is complicated by the existence of reports from two university evaluators. Generally, under KRS 342.315(2), the opinion of a university evaluator creates a rebuttable presumption, which requires the ALJ to provide reasons for rejecting such an opinion. See Magic Coal Co. v. Fox, 19 S.W.3d at 96.

Cyprus insists that the Board improperly imposed its own interpretation of Dr. Goldman's report rather than allowing the ALJ to draw his own inferences from the testimony by stating it contained inconsistencies. Cyprus states:

The fact that Dr. Goldman described Respondent's pre-existing impairment as 'not active' is not inconsistent with his assessment of a 20% impairment for the 1985 injury and surgery. At most, Dr. Goldman's testimony indicates some degree of confusion by the physicians over the differences

between 'impairment' and 'disability.' It is unclear exactly what Dr. Goldman and Dr. Harpring meant by stating that Respondent's pre-existing impairment was not 'active.' Petitioner submits that the only logical conclusion is that they intended 'active impairment' to be synonymous with 'disability.'

In fact, in his deposition, Dr. Goldman acknowledged that the AMA Guides note a distinction between "impairment" and "disability."

Attorney for Napier:

Okay. As I understand the AMA Guidelines, there's a distinction between impairment and disability.

Dr. Goldman:

Absolutely.

. . . .

Attorney for Napier:

Okay. But in that sense, just because an individual has an impairment, they don't necessarily have any job disability; is that correct?

Dr. Goldman:

Well, again, they're two entirely different things and, again, I can't tell you what the First, Second or Third Editions said, but the Fifth Edition specifically says that impairment is rated as showing the loss of function to do activities of daily living, exclusive of work.

Unfortunately, the ALJ merely cited Dr. Goldman's testimony concerning his theoretical impairment rating and

restrictions without discussing the contradiction between his conclusion and Dr. Goldman's indication that Napier had no pre-existing active disability even though he may have had an impairment because of the 1985 injury. Although the ALJ is not bound by the medical experts' characterization and continued employment does not preclude a finding of active disability, the ALJ's failure to explain his finding despite Dr. Goldman's recognition of the distinction between "impairment" and "disability" and explicit indication there was no pre-existing active disability, Napier's continued employment without being placed under restrictions by his treating physicians, and Dr. Harpring's opinion that there was no pre-existing active disability render the ALJ's finding subject to further scrutiny. The ALJ also failed to provide reasons for rejecting the opinion of Dr. Harpring, a university evaluator. See, e.g., Bright v. American Greetings Corp., Ky., 62 S.W.3d 381 (2001). We agree with the Board that the ALJ needs to provide additional explanation for his finding of a pre-existing active disability of 20%.

Alternatively, Cyprus contends that regardless of whether the 1985 injury could be considered "active" prior to the 1998 injury, the 1996 version of KRS 342.730(1)(a) requires any impairment due to the prior injury be excluded from determining whether Napier was totally disabled. It asserts

that the 1996 amendments created an exclusion for pre-existing conditions based exclusively on an impairment rating under the AMA Guides without regard to actual disability. This interpretation of KRS 342.730(1)(a), however, has been rejected by the Kentucky Supreme Court. In Ira A. Watson Department Store v. Hamilton, 34 S.W.3d at 52, the court held that under the 1996 amendments to KRS 342.730, determination of whether a worker's occupational disability is total or permanent is not limited solely to an impairment rating, but must also take into account the principles set forth in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), such as the worker's post-injury physical, emotional, intellectual, and vocational status; the likelihood a particular worker would be able to find work under normal employment conditions; the worker's ability to work dependably; and the effect of the worker's physical restrictions on his vocational capabilities. See also McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854, 859 (2001)(holding arousal of prior dormant condition by work-related injury remains compensable under 1996 Act); Hill v. Sextet, Ky., 65 S.W.3d 503, 508-09 (2001). The ALJ's opinion fails to discuss these various factors or account for the fact that Napier was not placed on any physical restrictions by his treating physicians and continued to otherwise function,

including working extensive hours in the same job, without limitations.

Cyprus also challenges the Board's remand for further findings on Napier's cervical condition. As with Napier's lumbar condition, the Board felt the ALJ's reliance on Dr. Goldman's opinion attributing Napier's neck problems to the natural aging process was insufficient without further explanation. In Commonwealth, Transportation Cabinet v. Guffey, Ky., 42 S.W.3d 618 (2001), the court held that even under the 1996 amendments, arousal of a prior, dormant condition by a work-related injury remains compensable even if that condition resulted from the natural aging process. See also McNutt Construction, 40 S.W.3d at 859 (distinguishing between condition resulting solely from natural aging and arousal of dormant degenerative condition by work-related trauma). The Board stated that Dr. Goldman failed to address whether Napier's cervical condition was a dormant condition aroused by the 1998 injury. It also referred to Dr. Harpring's opinion that the cervical condition was asymptomatic prior to the 1998 injury. The Board correctly found that the medical records showed that the ALJ's finding that Napier did not voice complaints of neck pain and headaches until several months after the 1998 incident was clearly erroneous.

In contradiction to its position that Napier's lumbar condition was "active," Cyprus asserts that Dr. Goldman's testimony that the lumbar spinal fusion constituted a pre-existing dormant condition aroused by the 1998 injury represented his opinion on Napier's cervical condition as well. Cyprus' assertion that the latter is a reasonable inference from the former is illogical and certainly does not support denial of benefits given the compensability of a degenerative condition aroused by a work-related injury. We note that Napier's claim with respect to his cervical condition appears to be limited to medical, as opposed to income, benefits. See, e.g., Cavin v. Lake Construction Co., Ky., 451 S.W.2d 159 (1970). We agree with the Board that the ALJ should provide additional findings and reasons for his position denying payment of medical expenses for Napier's cervical condition.

Finally, Cyprus maintains that the Board erred in holding that the evidence compelled an award of medical benefits for the psychological component of Napier's claim. It states that Dr. Shraberg's testimony represented substantial evidence supporting the ALJ's decision. The Board felt that even Dr. Shraberg's report indicated that Napier's depression is causally related to treatment of his physical complaints with the pain medication Oxycontin. Cyprus contends that it should not be liable for these medical expenses because it is responsible only

for medical expenses related to necessary treatment of a work-related injury. See, e.g., Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993); KRS 32.020(1). The employer, however, bears the burden of proving a treatment is unnecessary or unreasonable. Id. It appears that the question of necessity for the medical expenses associated with treatment of Napier's psychological condition was not properly preserved by Cyprus. It did not present this issue before the ALJ or the Board and raises it for the first time in this appeal. Failure to raise an issue at the administrative level generally precludes raising it in a judicial appeal. See Whittaker v. Hurst, Ky., 39 S.W.3d 819, 821-22 (2001); Yocum v. Conley, Ky. App., 554 S.W.2d 416, 417 (1977). Thus, Cyprus' failure to raise this issue earlier constituted a waiver.

In addition to the procedural barrier, Cyprus' argument on the psychological issue lacks substantive merit. Although Dr. Shraberg questioned the use of Oxycontin, he did diagnose Napier as having a passive/dependent personality, which renders him more susceptible to stress and depression, and a psychological adjustment disorder associated with his multiple surgeries. Dr. Shraberg recommended that Napier receive further counseling stressing physical rehabilitation and detoxification from Oxycontin. He stated:

A psychopharmacological evaluation may help deal with depression, hostility, and anxiety. A solution-focused therapy may be necessary to help him control his anxiety, anger and self-defeating thoughts. This individual is likely to have enduring, problematic characterological traits. It is not possible to eliminate these traits, so clinicians working with him will need to focus on how to manage these traits in the physical rehabilitation setting.

Despite his criticism of the use of Oxycontin and opinion that Napier had no current active psychiatric impairment, Dr. Shraberg recognized that Napier did experience psychological symptoms resulting from his physical condition that required treatment. The ALJ found Napier totally disabled as a result of the May 1998 injury with Cyprus liable for 80% of the income benefits. Unlike income benefits subject to apportionment, the current employer is responsible for payment of medical expenses related to treatment for a work-related injury. See, e.g., Derr Construction Co. v. Bennett, Ky., 873 S.W.2d 824 (1994); Robertson v. United Parcel Service, Ky., 64 S.W.3d 284 (2001). Dr. Shraberg questioned the use of high doses of Oxycontin but did not state all the expenses associated with treatment of Napier's psychological problems were unnecessary. We cannot say the Board erred in holding Cyprus was liable for payment of medical expenses related to Napier's psychological problems.

For the foregoing reasons, we affirm the opinion of
the Workers' Compensation Board.

ALL CONCUR.

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