RENDERED: FEBRUARY 21, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001897-WC

CHARLES S. HENSON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-96643

TERMINEX/SERVICE MASTER; WORKERS' COMPENSATION BOARD, HON. ROGER RIGGS, ADMINISTRATIVE LAW JUDGE — APPELLEES

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

BEFORE: GUIDUGLI, JOHNSON, KNOPF, JUDGES.

KNOPF, JUDGE: Charles S. Henson petitions for review from an opinion of the Workers' Compensation Board, which affirmed the opinion of the Administrative Law Judge limiting an award of income benefits to temporary total disability and denying a claim for permanent occupational disability benefits resulting from an injury Henson received on February 19, 2001, while working for Terminex/Service Master (Terminex).

When reviewing decisions of the Workers' Compensation Board, this court "is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). After careful review, we affirm.

On February 19, 2001, Henson slipped on icy steps while working for Terminex. He worked half of the day and then reported the incident to his employer. He then returned home, rested and applied heat to his back. The next day he saw his family doctor and was advised to return to work with limitations. On February 22, 2001, he slipped on ice again and although he didn't fall, he testified that this incident aggravated the pain in his back. Henson testified that he then tripped on an electric cord on February 23, 2001. Again, he stumbled but did not fall. He completed work that day but did not return to work thereafter. Temporary total disability benefits were paid at the rate of $331.13 from February 26, 2001, through May 28, 2001, for a total of $4,304.68. Henson filed an Application for Resolution of Injury Claim on August 24, 2001. In the application Henson stated that he had filed a previous Workers' Compensation claim for a back injury in 1984 while employed by a different employer. He testified in his deposition and at the benefit hearing that, in the earlier

claim, it was determined that he had a permanent 25% occupational disability due to a low back impairment.[1]

The record reflects that Terminex requested consolidation of the 1984 claim and introduction of transcripts from the prior claim into evidence, at the Benefit Review Conference on January 11, 2002. There is nothing in the record to indicate the specific rulings on these requests. However, at the hearing on the claim on January 25, 2002, the ALJ ruled that the decision in the previous case was admissible. On January 31, 2002, Henson filed a motion to strike the transcripts of evidence from the 1984 claim, arguing that the hearing had taken place on January 25, 2002, but that he had not received the transcripts until Saturday, January 26, 2002. In response, Terminex argued that they had no obligation to provide Henson with the records, although they did, in that it was Henson's own prior claim and he should be estopped from claiming prejudice. In an order dated February 13, 2002, the ALJ ordered the transcripts of evidence from the 1984 claim stricken from the record, citing Terminex's lack of diligence in presenting the transcripts until after the hearing.

On March 21, 2002, the ALJ entered an Opinion and Award, awarding Henson temporary total disability benefits but denying his claim for permanent occupational benefits. On April

[1] The record does not contain a copy of the 1987 Opinion and Award.

1, 2002, Henson filed a Petition for Reconsideration. While the ALJ denied Henson's Petition for Reconsideration, he did strike any reference to prior impairment ratings, which were taken from the stricken transcripts, stating, "This does not, however, change the remainder of the findings, nor does it support a different decision than that set out in the Opinion of March 21." Henson then appealed to the Workers' Compensation Board. The Board affirmed the Opinion and Award.

Henson presents four issues for our review: 1) that the issues of res judicata and judicial notice are unpreserved; 2) that the testimony of Dr. Richard Sheridan is unsupported in that his report was not based on any standard, specifically within the realm of medical probability; 3) that the ALJ and Workers' Compensation Board ignored his claim for total disability; and 4) that the 1984 decision was based upon the old definition of occupational disability.

Henson's argument that the issues of res judicata and judicial notice are unpreserved by Terminex is somewhat confusing, since these issues were decided in favor of Terminex. If unpreserved, then Terminex receives the benefit. The ALJ specifically stated in his Opinion and Award, "it is res judicata that prior to the work related injury the plaintiff had a 25% permanent partial occupational disability." Further, the

ALJ specifically ruled at the hearing that the 1984 Opinion and Award was a previous judicial determination and was, therefore, part of the record. When Henson objected to reference to the previous award the ALJ stated that it was, "a judicial determination by this Department of the Workers' Compensation Board at the time by an Administrative Law Judge as to his disability. And that has already been decided and is part of the record." Henson objected, arguing that the opinion of the ALJ summarized medical evidence and that because he could not cross-examine those doctors, he would be prejudiced. In response, the ALJ stated that, "Mr. Henson had to have an attorney at the time, and cross-examination was done at the time the decision was made, so I think that is part of the record."

We believe that Henson's argument is premised on a confusion between the effect of the ALJ striking the transcripts of evidence[2] from the 1984 claim and the effect of the Opinion and Award in that case on the ALJ's determination in this case.

Judicial notice applies to facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." KRE[3] 201 (b)(2). The rule mandates that a court take judicial notice if requested by

[2] Specifically, the ALJ struck the depositions of Dr. L.B. Payne, Dr. O.M. Patrick, Dr. Michael O'Brien, John Nester, Dr. Steven S. Wunder, Dr. John P. Schmitz and Charles Henson.

[3] Kentucky Rules of Evidence.

a party and supplied with the necessary information. KRE 201 (d). Even had Terminex not requested consolidation, the rule provides that a court may take judicial notice, "whether requested or not." KRE 201 (c). However, even without application of the rule, Henson himself was the source of the information as to the previous determination of a 25% occupational disability. Henson testified in both his deposition and at the hearing as to the prior adjudication.

In any event, we agree with the Board "that any references made by the ALJ to any facts not testified to by Henson regarding the effects of his 1984 injury and subsequent award constitutes nothing more than harmless error." Dr. Richard Sheridan, whose opinion the ALJ found most persuasive, assigned a 0% whole person impairment, with no work restrictions, and specifically indicated that Henson was physically capable of returning to the type of employment he was engaged in at the time of the injury. As will be discussed below, this is substantial evidence supporting the Opinion and Award, even without reference to the prior impairment ratings.

Henson next argues that Dr. Sheridan's opinion is not substantial evidence upon which the ALJ could rely. Substantial evidence is evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky.,

474 S.W.2d 367, 369 (1971). As to Henson's claim that Dr. Sheridan's testimony was unsupported, we adopt the opinion of the Board affirming the ALJ as follows:

> In the case sub judice, we readily acknowledge that the evidence on the issue of active disability is conflicting and that other expert witnesses disagree with the medical conclusions reached by Dr. Sheridan. Even so, we find no legal fault in the ALJ's reliance upon the medical opinions of Dr. Sheridan as the basis for his dismissal of Henson's claim for permanent partial disability benefits.
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> Although Henson is correct that Dr. Sheridan's report could be interpreted as somewhat internally conflicting on the question of proximate cause and the extent of the petitioner's pre-existing active impairment, he nonetheless unequivocally states in his report that none of Henson's current physical condition is medically causally related to the 2001 workplace injury at Terminex. Dr. Sheridan characterizes that injury as producing nothing more than an acute lumbar strain that was at best temporary in its influence. Moreover, Dr. Sheridan places no restrictions on Henson's functional ability with regard to "any noted residuals" from the 2001 work-related traumatic event. Furthermore, Dr. Sheridan indicates that at least some, if not all of Henson's current complaints are the result of the petitioner's 1984 back injury and sequelae. He declines to state how much, however, acknowledging that he did not have an opportunity to examine Henson prior to his most recent injury.
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> As the parties are no doubt aware, the ALJ, as fact-finder, has the authority to determine the quality, character, and substance of the evidence. Square D Co. v.

> Tipton, Ky., 862 S.W.2d 308 (1993); Paramount Foods Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Similarly, the ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico., Inc.,, Ky., 951 S.W.2d 329 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334 (1995). He may also reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. Magic Coal v. Fox, Ky., 19 S.W.3d 88 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999); Hall's Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000). Moreover, mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Whittaker v. Rowland, Id.
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> Here, although we acknowledge that the record contains conflicting evidence and that had the ALJ so elected, he could have reached an opposite result, in light of the above expert medical testimony from Sheridan, as a matter of law, we do not believe the record compels such a finding. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). Here, the ALJ found Dr. Sheridan's opinion most credible that Henson's 2001 accident in and of itself produced no permanent injury.

The Board particularly noted the following determination of the ALJ:

> Dr. Sheridan, however, took a complete medical history and reviewed prior medical records in arriving at his assessment. For this reason the Administrative Law Judge finds that the assessment given by Dr. Sheridan with relation to Mr. Henson's physical condition to be the most convincing. The Administrative Law Judge, in this case, is not convinced by the

> opinions of Dr. Parsons as to the extent of Mr. Henson's disability. Likewise, he assesses a 3% impairment due to chronic pain syndrome. The Administrative Law Judge accepts the theory when one has chronic back difficulties he will have some degree of emotional stress[.] [H]owever, the Administrative Law Judge has already concluded that, based upon the opinion of Dr. Sheridan, the plaintiff's injury of February 20, 2001 caused the plaintiff a period of temporary total disability which would be assignable [sic] to the present employer; however, the evidence does not establish that the plaintiff has suffered from any permanent impairment as a result of the more recent injury nor greater disability than that which he had from his prior injury.

In short, the ALJ, as affirmed by the Board, simply found Dr. Sheridan's opinion the most convincing. As cited by the ALJ, Dr. Sheridan formed his opinion based on a complete medical history and review of prior medical records. The record establishes that Dr. Sheridan took a complete medical history, wherein Henson discussed his previous and current injuries. He also performed a physical examination of the lumbar spine and lower extremities. Dr. Sheridan relied upon a review of Henson's medical records going back to 1984 and a review of Henson's work history, present complaints, and medications. He reviewed x-rays, an MRI from March 26, 2001, physical therapy reports, reports from Henson's chiropractic treatment, reports from the doctors treating Henson for the February 19, 2001 injury, the lumbar epidural steroid injection reports of Dr.

John Kelly, the reports of Dr. L.B. Payne who treated Henson for the 1984 injury, an EMG and Nerve Conduction Study report dated 7/23/89, a lumbar myelogram report dated 1/32/86, and a CT examination of 12/23/85. Dr. Sheridan also reviewed the Opinion and Award from Henson's previous claim. He then concluded that Henson's injury of February 2001 was an acute lumbar strain, which was resolved, and that he could return to his previous work without restrictions. This was clearly evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people.

Henson also claims that Dr. Sheridan's report was not substantial evidence because he did not couch his opinion in the terms of "reasonable medical probability." We find this argument without merit, in that this court specifically rejected the necessity of using the "magic words" reasonable medical probability in a medical expert opinion. Sakler v. Anesthesiology Associates, P.S.C., Ky.App., 50 S.W.3d 210 (2001).

Henson next argues that the Board and the ALJ totally ignored his claim for total disability. Henson believes that McNutt Construction Co. v. Scott, Ky., 40 S.W.3d 854 (2001), compels a reversal. Henson argues that the ALJ erred in his findings, in that he did not make an individualized determination of what Henson is and is not able to do after

recovering from the work injury. The Board determined that, although the ALJ did not specifically reject Henson's claim for total and permanent disability benefits, that "is due in large part to the fact-finder's conviction that none of the petitioner's current complaints are related to events at Terminex."

McNutt requires that, when determining whether a worker's occupational disability is partial or total, the ALJ must analyze the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) and make an individualized determination of what the worker is and is not able to do after recovering from the work injury. Id. At 860. The McNutt factors are predicated upon a finding of permanent disability, in a determination of whether that permanent disability is partial or total. As stated above, the ALJ based the Opinion and Award on his reliance on Dr. Sheridan's testimony that Henson's injury was resolved. If Henson suffers no permanent impairment as a result of the workplace injury, it is unnecessary for the ALJ to consider the McNutt factors. The ALJ specifically stated that "the evidence does not establish that the plaintiff has suffered from any permanent impairment as a result of the more recent injury nor greater disability than that which he had from his prior injury." As such, the ALJ was not required to make a determination of whether the disability was partial or total.

Henson's final argument is that the 1984 decision is based upon the old definition of occupational disability and not the current definitions. Henson again seems to be attacking the probative value of Dr. Sheridan's opinion, specifically asking ". . . where does he state in his opinion that any specific active impairment rating exists?" Henson quotes Dr. Sheridan's opinion several times in his brief, claiming that Dr. Sheridan states that it is "impossible for him to extrapolate what active impairment existed." We believe that Henson has misquoted and misconstrued Dr. Sheridan's testimony. We have conducted a careful review of Dr. Sheridan's report, which clearly states that, based on his examination and thorough review of the records, in his opinion, the most pre-existing active impairment Henson could have had from the previous injury was an 8% whole-man impairment. Dr. Sheridan then concludes that Henson's "current physical condition is not medically causally related to his alleged 2/19/01 workplace injury, because I believe that diagnosis, which is an acute lumbar strain, has resolved. I think his current physical conditions are a result of a pre-existing impairment, which resulted from his 1984 and 1988 back injuries." Consulting the guidelines, Dr. Sheridan unequivocally allocated a 0%, DRE I for the current injury and placed no restrictions on Henson's functional ability. He also concluded that Henson is "physically capable of returning to the

type of employment he was engaged in at the time of his alleged injury." While Henson continues to argue that his medical experts' opinions were uncontroverted, the ALJ determined that Dr. Sheridan performed the most thorough evaluation, and therefore, found his opinion the most believable. It can hardly be said then, that the other doctor's opinions were uncontroverted.

Henson also claims that the ALJ completely ignored the opinion of Dr. George E. Parsons, a vocational expert. First, we note that "uncontradicted opinions by vocational experts is not such evidence as compels any specific findings by the ALJ." Eaton Axle at 337. Second, our review establishes, as stated previously, that the ALJ considered all the evidence but simply found Dr. Sheridan's opinion the most convincing. The Opinion and Award clearly establishes that the ALJ considered Dr. Parson's opinion but was not convinced by it.

Having determined that the Board has not overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice, we affirm the opinion of the Board.

ALL CONCUR.

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