

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001899-WC

MANALAPAN MINING CO., INC.,
AS AN INSURED OF AMERICAN
MINING INSURANCE COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-96-90775 and WC-99-79243

WILLIE KENNETH LAWSON; MANALAPAN MINING
COMPANY, INC., AS A SELF-INSURED ENTITY;
SPECIAL FUND; HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BUCKINGHAM AND PAISLEY, JUDGES.

PAISLEY, JUDGE: This is a petition for review from an opinion of the Workers' Compensation Board affirming an opinion and order of an Administrative Law Judge (ALJ) awarding permanent total disability benefits to Willie Kenneth Lawson. For the reasons stated hereafter, we affirm.

Lawson worked as an underground coal miner for more than twenty-eight years, the last eighteen of which were spent

in the employment of Manalapan Mining Co., Inc. In 1996 he suffered a work-related injury when a rock which he was pulling broke loose and caused him to fall backward across a cable, injuring his back. Although Lawson returned to work after several months, he testified that he continued to suffer pain in his back and left leg. Lawson suffered another work-related injury in 1999, when he turned while moving a rock and felt pain down his left leg and, ultimately, in his right leg. He did not return to work after the 1999 injury.

Lawson filed a claim for benefits in November 1999. Based on the evidence, the ALJ determined that the combination of the 1996 and the 1999 injuries resulted in a permanent and total occupational disability. More specifically, the ALJ found that the 1999 event resulted in an injury as defined by KRS 342.0011(1), as well as depression stemming from the injury. Relying on the opinion of Dr. Robert Goodman, the ALJ assigned a 5% functional impairment rating to the two injuries, with one-half assigned to each of the injurious events and arousals. Then, taking into consideration the opinion of Dr. James Bean as well as the evidence regarding Lawson's age, education, and work experience, and noting the type of work Lawson customarily performed, the ALJ multiplied the 1996 impairment rating by a factor of 2, thereby finding that a 5% permanent occupational disability resulted from the 1996 injury. Liability for the

1996 injury was equally divided between the Special Fund and Manalapan as a self-insured entity. Liability for the remainder of the award of permanent total occupational disability was assigned to Manalapan as an insured of American Mining Insurance Co. (appellant). The board affirmed the opinion and award on appeal, and this petition for review followed.

Appellant first contends that the ALJ erred by finding that Lawson suffered an injury in 1999. However, our review of the record clearly shows that the evidence supports the ALJ's finding. KRS 342.0011(1) defines an injury as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." Appellant asserts that Dr. Goodman relied on Lawson's subjective complaints in reaching his opinion even though diagnostic tests did not show any worsening of Lawson's condition after 1996. However, relying on Gibbs v. Premier Scale Co./Indiana Scale Co., Ky., 50 S.W.3d 754 (2000), and Staples, Inc. v. Konvelski, Ky., 56 S.W.3d 412 (2001), the board correctly resolved this issue in favor of Lawson by concluding that although

the statute requires objective medical findings to establish the existence of an injury, there is no requirement that this can only be accomplished by specialized or

sophisticated testing. As recounted in the medical evidence summarized above, after the 1999 event Lawson demonstrated a decrease in the ability to perform straight leg raising, palpable muscle spasm, radiculopathy and pain in both legs, as well as loss of reflex in the knees and ankles bilaterally. These opinions were made based on direct observation and physical examination by the individual physicians and constitute objective medical findings necessary to establish the existence of an injury.

Moreover, although appellant argues that the 1999 event could not have caused the work injury since Lawson was also injured in 1996, we agree with the board that this issue was settled in McNutt Construction Co./First General Services v. Scott, Ky., 40 S.W.3d 854, 859 (2001), which held that “[w]here work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury.”

(Footnote omitted.) Having reviewed the record, we cannot say that the board has “overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice.” Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 798 (1995). Appellant therefore is not entitled to relief on this ground.

Next, appellant contends that substantial evidence did not support the ALJ’s and the board’s finding that 2.5% functional impairment was attributable to the 1999 accident, as

an apportionment of 2.5% is not in accordance with the AMA "Guides to the Evaluation of Permanent Impairment." However, this argument lacks merit since the record shows that Dr. Goodman in fact found there was a 5% impairment under the Guides. The 2.5% figure simply resulted from an apportionment of the impairment between the two injuries.

Next, appellant argues that substantial evidence did not support the ALJ's finding of a psychological or psychiatric overlay. We disagree.

The medical evidence included the report of a psychiatrist, Dr. David Shraberg, and the report and supplement of a Master's level psychologist, Reba Moore. Shraberg diagnosed Lawson's condition as involving an adjustment disorder of adult life with depressed mood resolved, and he did not assign any permanent functional impairment rating relating to the 1999 injury. Moore, by contrast, diagnosed Lawson's condition as including a depressive disorder, as well as a reading and phonological disorder, and she assigned a 30% functional impairment to the 1999 injury. Additionally, Lawson testified regarding his symptoms of depression and stated that he had been prescribed Prozac by his treating physician.

Contrary to appellant's assertion that Moore failed to address whether the diagnosed depression directly resulted from a work-related accident, the record shows that Moore's report

clearly stated her opinion that Lawson's depression resulted from the 1999 injury. Moreover, the ALJ's opinion and award clearly showed that he considered both Moore's and Lawson's testimony in concluding that Lawson suffered from depression as a result of the 1999 injury. As stated by the board,

[o]nce evidence is properly admitted, it becomes a question of weight and credibility for the ALJ. While American would rather the ALJ relied on Dr. Shraberg, it is clear that this is a question of nothing more than conflicting testimony and the ALJ is permitted wide discretion in choosing whom and what to believe.

See Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Having reviewed the record, we conclude that the ALJ did not abuse his discretion when making his findings regarding Lawson's psychological condition.

Finally, appellant asserts that the ALJ erred by assigning it liability for permanent total disability as defined in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968). We disagree.

The supreme court recently confirmed the validity of the Osborne definition of permanent total disability by holding in Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48, 51 (2000), that

[a]n analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a

consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

Thus, the board did not err below when it found, based on Watson, that

[t]he ALJ was well within his authority, based on Lawson's functional illiteracy, work history, his testimony of his ability to engage in labor after 1996 and his inability to labor after 1999, vocational testimony from the physicians, as well as the significant medical restrictions imposed, to determine Lawson was totally and occupationally disabled.

We conclude that appellant is not entitled to relief on this ground.

The board's opinion is affirmed.

ALL CONCUR.

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