

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002013-WC

CONCRETE MATERIALS

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-00-55792

HUBERT COLE; SHEILA LOWTHER,
Chief Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, PAISLEY and TACKETT, Judges.

HUDDLESTON, Judge: Concrete Materials appeals from a Workers' Compensation Board opinion affirming a decision and order on petition for reconsideration of an administrative law judge awarding Hubert Cole total permanent disability benefits for a

work-related cervical injury and closed head injury with psychiatric sequela.

Cole is currently sixty-one years of age and is a high school graduate with vocational training as a pipefitter. He has an extensive work history including factory employment, farming and working as a pipefitter for the Blue Grass Army Depot for many years. Upon retiring from the latter position in 1994, Cole began working for Concrete Materials as a concrete truck driver.

On November 8, 2000, Cole was injured when he slipped from the platform on the back of his truck and fell head first approximately twenty feet, landing on concrete. Cole sustained a significant laceration as well as a fracture at the base of his skull and a fracture of the left frontal lobe with an epidural hematoma. He was treated at a hospital emergency room in Irvine, Kentucky, and then transported by helicopter to the University of Kentucky Medical Center where he spent two days in the critical care unit before being released. After developing an infection at the wound site, Cole had to be hospitalized at St. Joseph's Hospital. He has not returned to any type of employment since the injury, and is presently receiving Social Security disability benefits.

On July 3, 2001, Cole filed an application for resolution of injury claim, alleging a head, neck and back

injury as a result of the accident. At the hearing on this claim, the only contested issues were the extent and duration of any permanent disability and whether there was objective evidence of the head injury. According to Cole's testimony, he experienced pain in his neck, lower back and left shoulder at the time of the accident and still suffers from severe head and neck pain. He further complained of difficulty in turning his head which interferes with his ability to drive. Cole also continues to experience dizziness, forgetfulness, impaired concentration and nervousness. Due to these difficulties, Cole does not believe that he is capable of returning to work.

Although Cole is still able to work around his house doing chores such as mowing and gardening, he is easily fatigued by these activities. Cole's wife confirmed that he was very active prior to the injury and regularly worked overtime. In contrast, she characterized her husband as limited in his ability to assist on their small farm since the injury and also explained that he is noticeably forgetful and more fearful with respect to hobbies such as horseback riding. As summarized by the Board, the medical evidence in this case consists of the following:

The medical evidence in this claim comes by way of the medical records of the University of Kentucky Hospital and the reports and/or depositions

of Dr. James R. Bean, Dr. Arnold M. Ludwig, Dr. David Shraberg, Dr. Joseph Zerga, and Allie Hendricks, a certified psychologist.¹ The University of Kentucky Hospital records established that Cole was surgically treated for a large scalp laceration, which was closed without difficulty by the plastic surgery service. The final diagnosis was left epidural hematoma with skull fracture and scalp laceration. Cole was discharged on November 10, 2000, in good condition and with instructions to return for follow-up to evaluate the hematoma.

Dr. Bean examined Cole on May 1, 2001 and received an appropriate history of the injury. Dr. Bean diagnosed residual mild encephalopathic head trauma and ordered a CT Scan and x-ray of the cervical spine to rule out anatomic residuals. According to Dr. Bean, the CT Scan proved normal while x-rays of the cervical spine showed degenerative disc changes at C5-6 and C4-5. Dr. Bean assigned a 5% impairment rating.

¹ Hendricks evaluated Cole for the Social Security Administration in conjunction with his disability claim.

Dr. Zerga evaluated Cole on August 23, 2001, and testified that Cole had an entirely normal neurological examination with no evidence of closed head trauma or brain injury and no impairment as a result of the head injury. Dr. Zerga believed Cole's chief complaints involved the neck and assessed a 5% functional impairment rating for the injury to the cervical spine. He believed minimal work restrictions were in order.

Allie Hendricks performed a consultative neuropsychological evaluation for the Kentucky Division for Disability Determinations. Ms. Hendricks administered a battery of psychological testing and diagnosed a cognitive impairment due to the work-related head injury.

Dr. Ludwig performed an independent medical/psychiatric evaluation on August 29, 2001. Dr. Ludwig received an appropriate history of the injury and administered a full battery of psychiatric testing. Dr. Ludwig believed Cole showed no evidence of malingering or poor effort on cognitive testing and no evidence of malingering or exaggeration of symptoms overall. Dr. Ludwig diagnosed cognitive disorder (post-concussive syndrome), and mild mood disorder due

to the head injury. Dr. Ludwig assessed neuropsychiatric impairments pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment (Guides), Fifth Edition, of a Class I neurological impairment of 10% and a Class I psychiatric impairment of 5%, for a combined whole body impairment of 15%. Dr. Ludwig specifically stated that Cole had reached maximum medical improvement, but that because of mild short-term memory difficulties, occasional problems with sustained attention and a likely decrease in reflex time, Cole would be at greater risk if he were to return to truck driving.

Dr. Shraberg examined Cole on October 11, 2001. After receiving an appropriate medical history, Dr. Shraberg administered the Battery for Health Improvement (BHI), which he described as "a self-report, multiple-choice instrument that is designed to identify a wide range of factors which may interfere with a person's recovery following injury." Dr. Shraberg stated that Cole sustained a concussion and demonstrated post-concussion symptomatology. However, he believed Cole suffered from no permanent impairment and assessed a Class I level with 0% permanent

neuropsychiatric impairment related to the November 8, 2000 injury.

In an opinion and award rendered on March 18, 2002, the ALJ found that Cole had "sustained his burden of demonstrating the occurrence of a work-related injury which is the proximate cause of the harmful change to the human organism, and which is demonstrated by objective medical evidence." Further, the ALJ was persuaded that Cole had suffered a closed head injury, which "causes a cognitive impairment characterized by problems with memory and concentration." In reaching this conclusion, the ALJ relied upon the evidence from Dr. Ludwig and Ms. Hendricks, "both of whom interviewed [Cole] and administered various tests." With respect to the cervical injury, the ALJ considered the impairment ratings of Dr. Bean and Dr. Zerga, the recommendations of Dr. Ludwig and Ms. Hendricks, and Cole's age, education and vocational history in determining that he is totally and permanently disabled as the result of the November 8, 2000, injury.

Concrete Materials filed a petition for reconsideration requesting that the ALJ make more specific findings of fact regarding Cole's head injury. On April 30, 2002, the ALJ provided the following explanation in denying the petition:

The record contained reports from both of these medical providers. Ms. Hendricks evaluated Mr. Cole at the request of the Social Security Administration. She administered various tests, including the WAIS.^[2] Based on the results of these tests, she concluded that there was evidence of a cognitive impairment and spotty deterioration in functioning. Dr. Ludwig, a [p]sychiatrist, also evaluated [Cole]. He administered a wide range of achievement tests, an MMPI^[3] and global assessment of functioning. Based upon these, and the remainder of his evaluation, he concluded that Mr. Cole suffered from a cognitive disorder and mood disorder caused by the head injury. The [ALJ] found this evidence to be credible and persuasive, and relied upon it in reaching the conclusion that [Cole] is permanently and totally occupationally disabled.

On appeal to the Board, Concrete Materials argued that Cole had failed to meet his burden of proving that he sustained a permanent injury as a result of the trauma to his head, emphasizing that all of the neurological testing and diagnostic

² Wechsler Adult Intelligence Scale

³ Minnesota Multiphasic Personality Inventory

studies, including CT scans, yielded normal results. Concrete Materials also questioned the substantive value of the opinions provided by Dr. Ludwig and Ms. Hendricks, arguing that Dr. Ludwig's report does not clarify whether his diagnosis of post-concussive syndrome is premised upon the psychological testing he administered. Further, Concrete Materials argued that the ALJ erred in rejecting objective medical findings in favor of subjective test results and complaints. Citing Gibbs v. Premier Scale Co./Indiana Scale Co.⁴ and Staples, Inc., v. Konvelski,⁵ the Board affirmed the decision of the ALJ, explicitly agreeing with the ALJ's interpretation and application of these dispositive cases. Concrete Materials appeals from the Board's opinion, echoing its arguments below.

In a workers' compensation claim, the claimant bears the burden of proving each of the essential elements of his claim.⁶ As the fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence as well as the inferences to be drawn from it.⁷ In so doing, the ALJ may choose to believe or disbelieve various parts of the

⁴ Ky., 50 S.W.3d 754 (2001).

⁵ Ky., 56 S.W.3d 412 (2001).

⁶ Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000).

⁷ Id.; Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

evidence, regardless of whether it comes from the same witness or the same party's total proof.⁸

When the decision of the fact-finder is in favor of the party with the burden of proof (Cole), the question on appeal is whether the ALJ's decision is supported by substantial evidence.⁹ Substantial evidence is evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable people.¹⁰ Consequently, a party challenging the factual findings of the ALJ must do more than present evidence supporting a contrary conclusion to justify reversal.¹¹

In reviewing decisions of the Board, our function is to correct the Board only where we perceive that the Board "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."¹² In the instant case, the Board engaged in a thorough legal analysis and properly applied governing

⁸ Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977); Magic Coal Co., supra, n. 6, at 96.

⁹ Magic Coal Co., supra, n. 6, at 96; Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

¹⁰ Id.

¹¹ Ira A. Watson Dep't Stores v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000).

¹² Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992).

precedent to the facts presented. Accordingly, we adopt the following portion of its opinion as our own:

[Kentucky Revised Statutes (KRS)]
342.0011(1) defines "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." Concrete Materials contends there are no objective findings evidencing a permanent traumatic head injury and relies heavily on the fact that Dr. Ludwig did not address the most recent CT Scan, which demonstrated the epidural hematoma had resolved. In addressing this argument, we are not without significant guidance from the Kentucky Supreme Court, which both parties recognize and have cited.

In Gibbs v. Premier Scale Co.,^[13] the court determined that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) if it is based upon symptoms of a harmful change that are documented by means of direct observation and testing

¹³ Supra, n. 4.

of the patient, applying objective or standardized methods.¹⁴

In Gibbs, the worker was diagnosed with post-concussive syndrome based upon the worker's self-reported symptoms. The court stressed that such a diagnosis, while it may be valid, does not necessarily render the condition compensable, and is not compensable unless the diagnosis is supported by objective medical findings. Those findings, as pointed out by the court, are not necessarily made or measured by sophisticated diagnostic tools, which can be seen, studied or interpreted by a physician, e.g., x-ray, CT Scan or MRI. Unfortunately, Gibbs'[s] claim failed for want of proof. In significant dicta, the court stated that a claim such as Gibbs'[s] might have been successful if his subjective complaints had been supported by "standardized methods of testing to confirm the existence and severity of a number of the reported symptoms and also to assess the likely extent of symptom magnification and malingering."^{15]}

¹⁴ See also Ky. Rev. Stat. (KRS) 342.0011(33).

¹⁵ Gibbs, supra, n. 4, at 762.

In Staples v. Konvelski,^[16] the court again addressed the type of evidence that would support a finding that a condition came within the statutory definition of injury. In that case, the employer appealed asserting the existence of thoracic outlet compression and depression was not established by objective findings and there was no basis for the medical conclusion that a psychological condition was the direct result of the physical injury. Psychiatric testimony was attacked by the employer on the basis that the physician failed to perform certain standardized tests to confirm this diagnosis. The court noted that the physician's diagnosis was based on testing consistent with standardized methods and further noted that the physician had made direct observations of the claimant, in addition to testing supportive of the psychological component of the claim.

In the current case, we believe the CALJ's determination is consistent with the [S]upreme [C]ourt's holdings set out above. Here, Dr. Ludwig had the opportunity, both during the interview phase

¹⁶ Supra, n. 5.

and during testing, to observe Cole and assess his condition. Unlike the scenario in Gibbs, Dr. Ludwig administered a complete battery of psychological testing, which formed a basis for his diagnosis, and further identified no symptom magnification or malingering on the part of Cole, lending credence to Cole's subjective complaints as well as the validity of the overall testing and diagnoses. There was no question as to Dr. Ludwig's qualifications to render the opinion that Cole's diagnosed conditions were causally related to the work injury and constitutes evidence of a substantial nature having the fitness to induce conviction in the minds of "reasonable men."^[17] The fact that Dr. Ludwig did not address or acknowledge the results of a specific diagnostic neurological test does not, standing alone, render his report non-probative as a matter of law. While Concrete Materials would have rather the CALJ rely on the reports of Drs. Zerga and Shraberg, the ability to point to conflicting evidence is largely irrelevant in our review.^[18] The CALJ was well within her

¹⁷ Union Underwear Co. v. Searce, Ky., 896 S.W.2d 7 (1995).

¹⁸ KRS 342.285(1).

authority, given the permanent impairment rating, medical diagnoses and restrictions, Cole's testimony as to his inability to engage in labor after the accident, and further considering his age, education and work history, to conclude Cole was totally and permanently occupationally disabled.[¹⁹]

Consistent with the foregoing, the Board's opinion is affirmed.

ALL CONCUR.

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¹⁹ See Ira A. Watson Department Store v. Hamilton, supra, n. 11.