

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-002122-WC

EASTER SEALS WEST KY., INC.,
p/k/a WEST KY. EASTER SEALS CENTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 97-WC-070666

HUBERT WRIGHT;
HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: COMBS, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE. Easter Seals petitions for a review of a decision of the Workers' Compensation Board which affirmed an award of total permanent disability for a knee injury to a fifty-seven-year-old college graduate with thirty years of management experience. Easter Seals contends the Administrative Law Judge (ALJ) and the Board flagrantly erred in assessing the

evidence so as to cause a gross injustice. We disagree and hence affirm.

Hubert Wright worked for Easter Seals as a supervisor/manager of Production Services, for approximately twenty-eight years. Wright did hands-on production work, which included contract procurement, seeing that a job was bid out, and basically anything that needed to be done on the floor. A large portion of his work was manual labor, climbing on and off equipment such as forklifts, and walking on concrete floors. Prior to working for Easter Seals, Wright worked for Brown Shoe Company for about a year as a packing room foreman supervising approximately sixty-five people with the assistance of one assistant foreman. Wright was fifty-seven years old at the time of injury and possessed a BS in Industrial Arts with a minor in Management.

On July 10, 1997, Wright received a knee injury at work which wound up requiring a total knee replacement which was performed on October 19, 2000. After undergoing his knee replacement, Wright contacted Easter Seals about returning to work but was informed that his job had been eliminated and he was offered a fifteen-hour week job at \$135.00 per week. Subsequently, he filed a claim for total permanent disability.

Hubert Wright testified that he had the qualifications to fill a light-duty position offered but did not believe he

could physically do the job due to the walking he would have to do. He does not believe he picked up any transferable skills from Easter Seals and he still has knee pain. He testified he is able to travel but cannot sit for a long while because his knee gets stiff and he has to loosen it up. Wright testified that with his knee's present condition, he cannot work even six hours a day. Although he says he can do light vehicle and house maintenance, he claims he is unable to do the type of work he previously did.

There was much medical evidence introduced into the record. Dr. BeBoer performed the left knee total arthroplasty and recommended¹ Wright "not perform an excess of continuous lifting or carrying objects no greater than twenty five to thirty pounds, intermittent lifting up to forty pounds, sitting for a maximum of eight hours, continuous standing for thirty minutes, continuous walking a maximum of fifteen to twenty minutes during a four hour period, and no climbing, kneeling, bending, stooping, twisting, pushing, or pulling."

Dr. Gaw conducted a physical examination and agreed with the treating physician that Wright should do no repetitive squatting, climbing, lifting, twisting, jumping, etc. Dr. Gaw assessed a 20% functional impairment to the body as a whole.

¹ Per Board's opinion rendered April 25, 2002.

Dr. Goldman performed a physical examination on and reviewed the medical records of Hubert Wright. Dr. Goldman opined that at the time of his examination (January 14, 2002), Wright had reached his maximum medical improvement and suffered a 20% permanent partial impairment rating to the body as a whole. He recommended sedentary work but allowed for a job that required Wright to walk from place to place as long as walking and standing were not an integral part of the job.

The ALJ considered the 20% functional impairment to the body as a whole, as well as the extensive medical restrictions on performing any job. The ALJ believed the claimant's testimony and considered further limitations or "other factors" in arriving at a permanent total disability rating. Under Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48, 51-52 (2000), the fact finder can consider these "other factors" in converting the functional limitations to the body as a whole into vocational disability. The Board reviewed, and although it made other changes, affirmed the finding of permanent and total disability.

The function of the Court of Appeals in reviewing a decision of the Workers' Compensation Board is to correct the Board only where the Court perceives the Board has overlooked or misconstrued statutes, precedent or has flagrantly erred in assessing the evidence so as to cause a gross injustice.

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

The function of the Workers' Compensation Board "[i]s to decide whether the evidence is sufficient to support a particular finding made by the ALJ, or whether such evidence as there was before the ALJ should be viewed as uncontradicted and compelling a different result." Id. at 687. KRS 342.285(3) limits the Board's review of an ALJ's decision, and where the initial award is in the claimant's favor, the standard of review is whether the initial determination is supported by substantial evidence of probative value. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Id. Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977); Pruitt, 547 S.W.2d 123. Furthermore, the Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact. KRS 342.285(2).

The issue on appeal in this case relates to a finding of fact. In our review of the record, we opine the evidence

does not compel a finding in favor of Easter Seals. The evidence is conflicting, but the evidence is not so overwhelming as to compel a finding in its favor. Paramount Foods, Inc., 695 S.W.2d 418. Compelling evidence has been defined as evidence so persuasive that it was clearly unreasonable for the ALJ not to be convinced by it. Hudson v. Owens, Ky., 439 S.W.2d 565 (1969). We must also be mindful that it is not enough for Easter Seals to show that the record contains some evidence which might support a reversal of the ALJ's decision. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's determination is supported by any evidence of substance, it cannot be said that the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

For the foregoing reasons, we do not believe the ALJ and the Board were clearly erroneous and therefore we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, HUBERT
WRIGHT:

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