

RENDERED: JUNE 6, 2003; 2:00 P.M.
NOT TO BE PUBLISHED

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-002274-WC

FOSTER MITCHELL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-77866

F & G TRUCKING;
HON. JAMES KERR,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: BUCKINGHAM, McANULTY AND PAISLEY, JUDGES.

PAISLEY, JUDGE. This is a petition for review from an opinion entered by the Workers' Compensation Board affirming the decision of an administrative law judge (ALJ) that appellant Foster Mitchell is not entitled to benefits based on a psychiatric impairment. On appeal, Mitchell contends that the ALJ's decision denying benefits should be reversed because the

record compels a finding that he suffered a psychiatric injury and needs active psychiatric treatment as a result of a coal truck accident. Having carefully reviewed the record, we cannot say that the evidence compels a different result. Hence, we affirm.

The pertinent facts and the applicable case law are well stated in the opinion of the board, which reached the same conclusion as this court. Because no useful purpose would be served by restating those conclusions in another way, we elect to adopt the board's opinion by Board Chairman Dwight T. Lovan as our own, as follows:

Foster Mitchell ("Mitchell") appeals from the decision of Hon. James L. Kerr, Administrative Law Judge ("ALJ"), finding no psychiatric impairment as the result of a motor vehicle accident while employed by F & G Trucking ("F & G"), and finding contested medical expenses for the psychiatric condition noncompensable.

Mitchell was injured May 26, 2000 when a car ran underneath his truck, striking the back axle. Mitchell stated he saw the people in the other vehicle and saw the passenger who was killed in the accident. He declined treatment at the accident site but later that evening sought treatment at the McDowell Hospital. Mitchell testified he sustained injuries to his head, neck, shoulder, back, right arm and left leg in the accident. His treating physician for these injuries was Dr. Charles Arnett. Mitchell testified that soon after the accident he began having nightmares about the accident and developed a fear of riding in vehicles. He gets nervous in traffic and

does not drive very much. He sought treatment with Dr. Karen Pajari and others at Mountain Comprehensive Care. He testified his right arm and elbow problems prevent him from grasping objects. He also has problems with the left leg, tingling, numbness and pain, when his back becomes symptomatic.

Mitchell testified he was involved in an ATV accident on October 13, 2000. His brother had bothered him for two to three hours to get him to leave the house and go out on the ATV. Mitchell fractured his right ankle in the ATV accident. His nerves were not affected by this accident and he has been on the same medications and treatment before and after the accident. Mitchell testified he had a fear of losing his right leg as the result of the ATV accident.

Mitchell introduced a psychiatric evaluation report from Dr. Jay V. Narola. Dr. Narola received a history of the May 26, 2000 accident. Mitchell indicated the accident still frightened him and he still has nightmares of the wreck. He has difficulty sleeping and wakes up every hour or so. Mitchell related he has spells when he passes out and feels funny inside when driving a vehicle. He often relives the accident. Mitchell reported feeling down in the dumps and having frequent crying spells before receiving treatment. Dr. Narola received a history of the ATV accident with the resulting right ankle fracture but Mitchell told him the ATV accident did not bother him. Mitchell reportedly gained 60 pounds since the injury, being unable to do much physical activity. During the examination, Mitchell required assistance with the reading test and his verbal and nonverbal testing was invalid due to insufficient effort. Dr. Narola clinically did not find Mitchell to be malingering. He assessed a 35% total psychiatric impairment

indicating that possibly 5% of the impairment was secondary to ATV accident in October 2000 and 30% would be related to the motor vehicle accident of May 2000.

Mitchell introduced evidence from Dr. Pajari/Mountain Comprehensive Care. Mitchell was seen by Dr. Pajari and MCC from March of 2001 through December 2001. Dr. Pajari stated Mitchell had frequent panic attacks, was unable to sleep, had problems with concentration, was easily startled and unable to drive. She noted Mitchell cried easily, has nightmares and cannot tolerate riding in a vehicle because of the accident. Dr. Pajari indicated no testing was performed because Mitchell was illiterate by his statement and only able to read and write minimally. She attributed Mitchell's psychological complaints to the work-related injury and indicated he had no prior psychological impairment. Dr. Pajari did not believe Mitchell could return to the type of work performed at the time of the injury. She did not give an AMA impairment rating because she did not have the *AMA Guides*.

Records from Mountain Comprehensive Care indicated Mitchell had a 9th grade education and was dyslexic. An April 2001 note suggested Mitchell was oversedated. In December 2001, the records stated Mitchell was able to drive a little and was less depressed.

Mitchell introduced the deposition of Dr. Charles Arnett, his primary family physician. Dr. Arnett prescribed Ambien and Buspar for Mitchell's psychological problems on June 1, 2000. These medications did not help so he prescribed Zoloft. Dr. Arnett indicated Mitchell was taking Skelaxin, Celebrex, Effexor, Ultram, Talacen, Clonnapin, Protonix, Zyprexa and Trazadone related to the May 26, 2000 accident. He acknowledged Mitchell did not start taking

Zypreza [sic] until after the ATV accident. Dr. Arnett current [sic] sees Mitchell every two to three months.

On cross-examination, Dr. Arnett stated that the fact that Mitchell's son has dyslexia, his wife had been in a motor vehicle accident, he had marital problems and his daughter had a handicap would all be stress factors for Mitchell.

F & G submitted the report of Dr. Daniel Shraberg, who performed an independent psychiatric evaluation of Mitchell on October 18, 2001. Dr. Shraberg administered the MMPI-2 by audiocassette due to Mitchell's reading difficulty. Mitchell completed the test in the usual amount of time and his resulting profile was valid with some symptom exaggeration. Dr. Shraberg noted individuals with similar profiles had numerous, vague physical complaints or extreme pain. Their concerns are likely to be numerous and vague. They have strong needs for attention, affection, sympathy and support. They are likely to engage in behavior that illicit [sic] nurturance [sic] from others. Dr. Shraberg also administered the Battery for Health Improvement ("BHI"), which is a self-report, multiple choice instrument designed to identify factors which may interfere with a person's recovery following injury. Mitchell had a high score on the symptom dependency scale. This score suggests he may be using his symptoms to get attention or affection. He may be using his medical symptoms to justify dependency needs and to control others. Dr. Shraberg noted some individuals might consciously or unconsciously resist getting better because it would mean relinquishing their power. Dr. Shraberg stated Mitchell deals with psychological stress in a rather avoidant and histrionic manner. He noted that when Mitchell worked in the mines and was involved in a rock fall he decided he would

never return to the mines. After the May 26, 2000 accident, Mitchell now states he will never return to truck driving. Dr. Shraberg noted that it was only after the recreational ATV accident of October 13, 2000 that Mitchell began to attend the Mountain Comprehensive Care Center for symptoms of post-traumatic stress disorder. He suspected that with the stresses in Mitchell's life he reached a point where he felt overwhelmed and that after injuring his leg Mitchell became aware he probably would not be able to return to his usual and customary jobs operating heavy equipment or truck driving. Dr. Shraberg stated Mitchell's symptoms are more due to multiple situational stressors in life, including his wife's broken back, marital distress, his daughter's crippling illness, his son's dyslexia and his broken ankle. Dr. Shraberg noted the time frame and chronology of Mitchell's treatment is not consistent with chronic post-traumatic stress symptomatology in that Mitchell went to Mountain Comprehensive Care Center after the ATV accident rather than the motor vehicle accident. Dr. Shraberg opined Mitchell had a 0% permanent psychiatric impairment based on history, chronology and present symptomatology as well as psychological testing. He diagnosed probable acute post-traumatic stress disorder, resolved, and adjustment disorder of adult life associated with Mitchell's wife's injuries and illnesses, his son's and daughter's illnesses and chronic pain and complications from the ATV injury. He also noted there was no documentation in the records of Dr. Markowitz that Mitchell might lose his leg. He suspected this was part of the underlying histrionic personality pattern.

A February 21, 2002 report indicated Dr. Shraberg had an opportunity to review further treatment records from Dr. Arnett and Mountain Comprehensive Care Center. There was no evidence whatsoever of any

permanent residual problems related to the motor vehicle accident. Dr. Shraberg noted the more current and even more emotionally traumatic events due to their uncertainty and immediate impact on Mitchell's life were the cause of the present discomfort, which included the ATV accident and the multiple physical injuries resulting therefrom as well as his wife's illness, his daughter's illness, his son's dyslexia and his present marital stress.

After summarizing the evidence, the ALJ stated he was not convinced Mitchell's psychological problems were the result of the May 26, 2001 injury. In reaching this conclusion, the ALJ stated:

. . . As the defendant-employer points out, plaintiff testified as to problems driving or riding in a car but he was willing to ride on a four-wheeler on October 13, 2000 with negative consequences. Further, the Administrative Law Judge notes that plaintiff sought no treatment for psychological problems until March 2001, almost one year after the accident and certainly subsequent to the ATV accident. Wherefore, when the Administrative Law Judge considers the issue of the work-relatedness of plaintiff's psychiatric complaints to the injury of May 26, 2000, the Administrative Law Judge accepts the testimony of Dr. Shraberg that the plaintiff has no psychiatric impairment and no restrictions as a result of the May 26, 2000 incident.

Having concluded Mitchell's psychological condition was not work-related, the ALJ found the medical expenses related to the psychological problems noncompensable.

Mitchell filed a petition for reconsideration arguing the ALJ erred in stating

Mitchell sought no treatment for his psychological problems until March 2001. Mitchell points out he had sought treatment from Dr. Arnett for psychological problems on June 1, 2000, which was well before the ATV accident. Mitchell therefore asked the ALJ to reconsider his Opinion that he did not suffer a compensable psychiatric impairment as a result of the post-traumatic stress disorder diagnosed by Dr. Pajari. Mitchell also argued that Dr. Arnett's testimony made it clear he needed active psychiatric treatment as the result of post-traumatic stress. Mitchell further pointed out he received psychiatric medication long before the ATV accident.

By order dated July 1, 2002, the ALJ overruled Mitchell's petition for reconsideration. The ALJ's order provided as follows:

This matter comes before the undersigned Administrative Law Judge upon the petition for reconsideration filed by the plaintiff. It is hereby acknowledged that the plaintiff discussed psychological considerations with Dr. Arnett on June 1, 2000, well before the ATV accident on October 13, 2000. Review of Dr. Arnett's deposition indicates that plaintiff complained of difficulty sleeping, worrying about the accident and flashbacks. Various medications were taken, including Buspar and Zoloft. Nonetheless, the Administrative Law Judge's opinion is not changed by the reconsidered testimony of Dr. Arnett. The Administrative Law Judge considers Dr. Shraberg the most credible physician testifying regarding plaintiff's psychiatric condition and Dr. Shraberg testified that plaintiff had no impairment from a psychiatric standpoint.

On appeal, Mitchell argues the evidence compels a finding that he sustained a psychiatric injury as a result of the May 26, 2000 coal truck accident. Mitchell contends his testimony at the hearing shows he experienced a severely traumatic event which caused him immediate psychological problems. Dr. Arnett's testimony confirms Mitchell sought psychiatric treatment well before the ATV accident. He was prescribed medication and referred to Mountain Comprehensive Care before the ATV accident. In Mitchell's opinion, the denial by the ALJ is not based on substantial evidence. Mitchell contends the evidence from Dr. Shraberg cannot be considered substantial evidence because of inaccuracies and the misstatement of the history of his condition and treatment. Mitchell particularly takes issue with Dr. Shraberg's statement that he did not suffer any symptoms until after the October 2000 ATV accident. Mitchell states it is obvious the ALJ relied on the inaccurate history in Dr. Shraberg's report. Since the evidence from Dr. Shraberg is not substantial evidence, medical evidence from Dr. Arnett, the report of Dr. Pajari and the IME of Dr. Narola compel a finding of a psychiatric component.

Additionally, Mitchell argues the medical evidence compels a finding of compensability for psychiatric treatment. He notes the psychiatric expenses were paid by F & G until receipt of Dr. Shraberg's report with the inaccurate history. Mitchell contends the medical evidence from Dr. Arnett, Dr. Pajari and Dr. Narola compel a finding of compensability and the treatment was reasonable and necessary. Mitchell again contends the evidence from Dr. Shraberg is grossly misleading and his history so inaccurate that it cannot form the basis of substantial evidence denying compensability of medical treatment.

Finally, Mitchell argues the ALJ's findings regarding the basis for the denial of the psychiatric component is [sic] inadequate and the ALJ failed to adequately explain why he rejected Mitchell's evidence.

The claimant in a workers' compensation claim bears the burden of proving each of the essential elements of his claim. Snawder vs. Stice, Ky. App., 576 S.W.2d 276 (1979). Mitchell was unsuccessful in persuading the ALJ that his psychological complaints were the result of a work-related accident. Where the party that bears the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries vs. Crum, Ky. App., 673 S.W.2d 735 (1984). Compelling evidence is defined as evidence which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. Reo Mechanical vs. Barnes, Ky. App., 691 S.W.2d 224 (1985). It is not sufficient for Mitchell to show there is merely some evidence which would support a contrary conclusion. McCloud vs. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's Opinion is supported by any evidence of substance, it cannot be said the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc. vs. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt vs. 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 vs. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). The ALJ is not obligated to give greater weight to the testimony of a treating physician. Yocom vs. Emerson Electric, Ky. App., 584 S.W.2d 744 (1979). This Board may not substitute its judgment for that of the ALJ in matters involving the weight to be accorded the evidence in questions of fact. KRS 342.285(2).

Here, Dr. Shraberg was not convinced Mitchell continues to suffer from post-traumatic disorder. Rather, it was Dr. Shraberg's belief Mitchell's current problems were the result of the residuals from the ATV accident and multiple stressors unrelated to the motor vehicle accident. He felt that if Mitchell had post-traumatic stress disorder it had resolved. As of his independent medical evaluation, Dr. Shraberg reviewed records from Mountain Comprehensive Care, McDowell Appalachian Regional Hospital, Dr. Arnett and Dr. Christopher Stevens. Additionally, Dr. Shraberg took a history from Mitchell. It does appear Dr. Shraberg had a complete history of Mitchell's condition and treatment. To some degree, Mitchell misrepresents Dr. Shraberg's opinion. In his brief, Mitchell stated Dr. Shraberg, on page 9 of his report, incorrectly stated that Mitchell did not suffer any symptoms until after the October 2000 ATV accident. Dr. Shraberg's actual statement was "it was only after the recreational ATV accident of October 13, 2000, that he then began to attend the Comprehensive Care Center for symptoms of PTSD." Later on that same page, Dr. Shraberg stated "Mr. Mitchell may very well have [had] acute post-traumatic stress disorder after the injury of May 26, 2000. He did not receive any treatment either by Dr. Arnett or anyone else." In the context of the complete report, a reasonable interpretation of his report would be that he was referring to psychiatric treatment. Certainly, the record reflects Mitchell received Zoloft, an anti-depressant, and Buspar, an anti-anxiety drug, prior to the ATV accident. Dr. Shraberg found it significant that Mitchell did not treat with a psychologist or psychiatrist until March 2001. Likewise, the ALJ was entitled to attach some significance to this fact. Additionally, the testing conducted by Dr. Shraberg provides some basis for Dr. Shraberg and the ALJ to conclude Mitchell's current condition is not related to the work injury. Contrary to Mitchell's assertions, we believe Dr. Shraberg's opinion is substantial evidence supporting the ALJ's conclusion. Upon reconsideration of the

evidence, the ALJ corrected his misstatement that Mitchell had not discussed his psychological condition prior to the ATV accident but remained unpersuaded the condition was work-related. He again found Dr. Shraberg the more credible physician testifying regarding the psychiatric condition and Dr. Shraberg's testimony that Mitchell had no impairment from a psychiatric standpoint.

Having found that the evidence from Dr. Shraberg is substantial evidence that supports the ALJ's finding, we thus affirm. The ALJ was faced with conflicting medical opinions regarding whether the current psychological problems were related to the motor vehicle accident or not. The ALJ, as was his right, found Dr. Shraberg more convincing and we are without authority to conclude otherwise. Likewise, we believe there was substantial evidence upon which the ALJ could conclude the medical treatment was noncompensable.

Accordingly, the decision of Hon. James L. Kerr, Administrative Law Judge, is hereby **AFFIRMED** and this appeal is **DISMISSED**.

As noted by the board, the conflicting evidence which was adduced below was not so overwhelming as to compel a different conclusion by the ALJ. It follows, therefore, that the board correctly determined that it was without authority to substitute its judgment for that of the ALJ.

The board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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