RENDERED: MAY 9, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2002-CA-002451-WC

BARLOW HOMES — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-98397

BOYD COLLINS; HON. DONNA H. TERRY, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION

AFFIRMING

** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND PAISLEY, JUDGES.

McANULTY, JUDGE. Barlow Homes petitions this Court for review of a decision of the Workers' Compensation Board affirming an opinion of the Administrative Law Judge (ALJ), awarding Boyd Collins (Collins) total disability benefits. The issues to be resolved are whether the ALJ erred in considering Collins' age and education level in finding total disability and whether the evidence supported a finding of total disability. We affirm.

While working with his crew on a Barlow Homes project, Collins suffered a low back injury while lifting a scaffolding board. When conservative treatment failed to alleviate his low back pain, his family physician referred him to Bluegrass Orthopedics where he was treated by Drs. Frank Burke and Howard Markowitz. Despite pain and anti-inflammatory medication, Collins' back and right leg pain did not resolve. Dr. Markowitz subsequently performed a posterior laminectomy and fusion from L3 to L5 on June 25, 2001. When Collins experienced recurring symptoms, Dr. Markowitz advised that only a more extensive fusion could offer any chance of effective relief. Dr. Markowitz released Collins to light duty as supervisor of the masonry crew on September 15, 2002, with restrictions against lifting more than 10 pounds, climbing, stooping, crouching, kneeling, crawling or bending. Unable to perform even the light duty, Collins eventually sold the business to his son.

Collins filed an Application for Resolution of Injury. At the final hearing, the evidence consisted of Collins' deposition and live testimony. The medical evidence consisted of the reports of Drs. Burke and Markowitz; a report from Dr. Robert B. Nickerson, a specialist in physical medicine; and a report from Dr. Daniel D. Primm, Jr., an orthopedic surgeon who performed an independent medical examination. After

considering Collins' testimony and the doctors' reports, the ALJ concluded as follows:

> Collins presented credible complaints of debilitating back and right leg pain and his testimony, when coupled with the severe work restrictions imposed by Drs. Nickerson and Markowitz, lead the Administrative Law Judge to conclude that Collins is unable to resume work in a competitive economy. In reaching this conclusion, I have carefully considered Collins' relatively advanced working age, his illiteracy and lack of formal education, and his dearth of transferable skills. There is simply no way that this gentleman, despite his long working career and period of business ownership, can compete for work in a competitive economy. Therefore, he is permanently and totally disabled pursuant to KRS 342.0011(11)(c).

The ALJ specifically relied upon the holdings of Ira A. Watson Department Store v. Hamilton, Ky., 34 S.W.3d 48 (2000) and Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968) as follows:

> In determining whether a worker is totally disabled, an Administrative Law Judge must consider several factors including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions.

Barlow Homes filed a Petition for Reconsideration, which was overruled by the ALJ. Barlow Homes then appealed to the Workers' Compensation Board, which affirmed the decision of the ALJ.

Our standard of review of a decision of the Workers' Compensation Board is to determine whether 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." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

Barlow Homes first argues that the ALJ was precluded from considering age and education in a determination of total disability. The basis of this argument is that in enacting KRS 342.730(1)(c)3, the Legislature intended that age and education no longer play a role in determining permanent total disability.

KRS 342.730(1)(c)3 provides:

> Recognizing that limited education and advancing age impact an employee's post-injury earning capacity, an education and age factor, when applicable, shall be added to the income benefit multiplier set forth in paragraph (c)1. of this subsection. If at the time of injury, the employee had less than eight (8) years of formal education, the multiplier shall be increased by four-tenths (0.4); if the employee had less than twelve (12) years of education or a high school General Educational Development diploma, the multiplier shall be increased by two-tenths (0.2); if the employee was age sixty (60) or older, the multiplier shall be increased by six-tenths (0.6); if the employee was age fifty-five (55) or older, the multiplier shall be increased by four-tenths (0.4); or if the employee was age fifty (50) or older, the multiplier shall be increased by two-tenths (0.2).

The Board first noted that the provision is contained within the sections of the statute that address permanent partial disability and the calculation of those benefits. It

then concluded that, “The legislature did nothing more than recognize that in permanent partial disability claims advanced age and limited education present obstacles to maximal earnings post-injury. For that reason, the benefits were skewed upward.” The Board reasoned correctly that, “It defies logic to argue age and education no longer play a role in permanent total disability. It is precisely those factors that form insurmountable barriers to many an injured claimant’s return to ‘work’.”

Where the words of a statute are clear and unambiguous and express the legislative intent, there is no room for construction or interpretation and the statute must be given its effect as written. Griffin v. City of Bowling Green, Ky., 458 S.W.2d 456 (1970). The statute in question is clear and unambiguous and only pertains to the calculation of permanent partial disability awards. We agree with the Board that “The interpretation forwarded by Barlow Homes would lead to incongruous results, relegating aged and illiterate claimants to second class status in total disability claims – the very situation remedied by KRS 342.730(1)(c)3 in permanent partial disability claims.”

In McNutt Construction/First General Services v. Scott, Ky., 40 S.W.3d 854 (2001), the Supreme Court confirmed the holding in Ira A. Watson consistent with Osborne as follows:

> An 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 dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities.

Id. at 860.

If the legislature intends to depart from existing statutory interpretation, they must use "plain and unmistakable language" which leaves no doubt that a departure from the prior interpretation is intended. White v. Commonwealth, Ky., 32 S.W.3d 83, 86, citing Long v. Smith, 281 Ky. 512, 136 S.W.2d 789 (1940). The Board correctly concluded that, “If the 2000 legislature had intended to remove age and limited education from consideration and further limit the efficacy of Osborne[1], it could have easily done so by inclusion of appropriate language in one or more of those sections of the statute addressing and/or defining total disability.” We adopt the Board’s

[1] Ky., 432 S.W.2d 800 (1968).

conclusion that "in those claims where extent and duration are at issue, the ALJ is required to weigh all relevant factors including age and education, both of which truly impact totally disabled as well as partially disabled workers."

Barlow Homes next argues that there is no credible evidence of record demonstrating Collins is totally disabled. Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48, 52 (2000), citing Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Collins is 55 years old. He has a third-grade education and has received no vocational or other specialized training. He is illiterate and his work history consists of heavy manual labor jobs. At the time of the injury he owned his own masonry business for which his wife did the required paperwork.

Barlow Homes focuses on the fact that Collins testified that he supervised and directed the work of his crew. It argues that an employee must show that he is unable to perform any type of work as a result of a work injury, citing Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001) and that Collins could resume running his business and supervising his

work crews. This argument completely ignores Collins' testimony that he could not make a living doing solely supervisory work. Collins testified that his work required his being able to lay brick and work alongside his crew. In addition, Dr. Nickerson was of the opinion that Collins could not return to his usual and customary work and that Collins was not a good candidate for vocational rehabilitation based upon his age, education and medical condition. The ALJ relied upon the reports of Drs. Nickerson and Markowitz and the severe physical restrictions imposed on Collins, which precluded a return to manual labor. The ALJ then considered Collins' advanced working age, illiteracy, lack of formal education and "dearth of transferable skills" in finding that he was permanently and totally disabled. Clearly, substantial evidence supported a finding of total disability.

Because the Board did not misconstrue controlling statutes or precedent and there is substantial evidence to support the award, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
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