

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-002512-WC

BIG FIST COAL COMPANY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 93-WC-21986

FERRELL O'QUINN;
DIVISION OF WORKERS'
COMPENSATION FUNDS,
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, McANULTY and PAISLEY, JUDGES.

BUCKINGHAM, JUDGE: Big Fist Coal Company petitions for review of an opinion by the Workers' Compensation Board (Board) affirming an opinion and award by an administrative law judge (ALJ) that awarded benefits to Ferrell O'Quinn based on a finding that he was permanently and totally occupationally disabled. We affirm.

On January 23, 1988, O'Quinn injured his low back while in the course and scope of his employment with Big Fist.

In an opinion and award rendered on April 18, 1989, O'Quinn was awarded benefits based on a 60% permanent partial disability. Liability was equally apportioned between Big Fist and the Special Fund (now Workers' Compensation Funds).

O'Quinn reentered the work force with Eastern Coal Company as a shuttle car operator in January 1991. In the course and scope of his employment with Eastern, he suffered exacerbations of his previous back injury, first on September 7, 1991, and again on August 23, 1992. O'Quinn was still temporarily totally disabled as a result of the last exacerbation when Eastern shut down its operation and laid off its employees in January 1993.

O'Quinn filed a consolidated claim for benefits against Eastern as a result of the September 1991 and August 1992 injuries and joined that claim with a reopening of his 1988 claim against Big Fist. In a decision rendered September 30, 1994, by an ALJ, it was found that the September 1991 and August 1992 incidents at Eastern produced no permanent injury or impairment but merely exacerbated O'Quinn's pre-existing back condition attributable to the 1988 injury with Big Fist. It was further found that O'Quinn had not experienced a worsening of condition or increase in occupational disability from the date of the opinion issued in the original claim for injury against Big Fist. Thus, O'Quinn was awarded temporary total disability

benefits related to the exacerbations, but the remainder of his claim was dismissed.

O'Quinn was never able to return to the work force for any extended period of time after the August 1992 exacerbation and permanent lay off from Eastern. However, he did work on a temporary basis at different times doing light carpentry and electrical work. O'Quinn last worked in 1996, and he received a Social Security disability award in 1998 that was backdated to August 1, 1996. He has not looked for employment since that time. In addition to a worsening of his low back pain and increase of symptoms in his lower extremities, O'Quinn also experienced psychiatric problems. He stated that these problems came on subsequent to the August 1992 injury and his realization that he would be unable to perform the kind of work he had done in the past and that his family would suffer financially.

In addition to the work injuries, O'Quinn suffered an acute exacerbation of his low back pain in 1998 while helping his wife plant flowers. An MRI performed on September 3, 1998, showed a large herniated disc at L5-S1 on the right.

On January 24, 2001, O'Quinn was permitted to reopen his claim for purposes of securing an increase in income benefits. The case was assigned to an ALJ for the taking of proof, and a hearing was held on March 4, 2002. O'Quinn testified by deposition and at the final hearing, and the

parties submitted medical proof in the form of records from the VA Hospital and reports from Dr. Michael Lyons, Dr. K. D. Gibson, Dr. Joseph Rapier, Dr. O.M. Patrick, Dr. Robert Goodman, and Dr. Richard Sheridan. Further, reports from Phil Pack, a psychologist, from Dr. David Shraberg, a neuropsychiatrist, and from Dr. Ralph Crystal, a vocational evaluator, were submitted.

The ALJ issued an opinion and award on May 3, 2002, awarding O'Quinn benefits based on a finding that he was permanently and totally occupationally disabled. The ALJ recognized that there was a question "as to whether the camel's back being broken is attributable to his original work-related injury or the incident, which occurred at home being an entirely new injury." The ALJ found as follows:

The plaintiff has already shown a history of tendency toward exacerbations of his prior work injury as is indicated in the Opinion in the prior re-opening. Here, Dr. Rapier and Dr. Lyons both attribute the plaintiff's current condition to the original injury. I believe this testimony is also supported by the testimony of Dr. Patrick wherein he indicates that the plaintiff's condition is a recurrence of the original disc bulging. I further find that plaintiff to be credible wherein he testified that he is in severe pain and that his pain has increased since that time and find his testimony to be supported by the evidence offered from Dr. Rapier indicating an increase in impairment and increase in lifting restrictions to a maximum occasional lifting of ten pounds. I further find plaintiff's testimony in regards to an onset of depression and anxiety to be credible and note that he is

indeed been treated for same through the use of zoloft and buspar. When I consider the plaintiff's current advancing age, injury, impairment, medical restrictions, prior training and experience, along with the area where he resides, I find that he now is indeed permanently and totally occupationally disabled under the principles set forth in Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968), and further find that he has developed symptoms of depression and anxiety related to his increase in pain and shall be entitled to reasonable and necessary medical care for that condition. Pursuant to the original Opinion and Award, the benefits payable for this permanent total occupational disability shall be shared equally between the defendant-employer and the defendant Special Fund.

Following a ruling by the ALJ on Big Fist's petition for reconsideration, Big Fist petitioned this court for review.

Big Fist argues that the ALJ's finding of a worsened condition and increase in occupational disability causally related to the original compensable injury was not supported by substantial evidence and was clearly erroneous. As O'Quinn was successful before the ALJ, the question on appeal is whether there was substantial evidence of probative value to support the ALJ's conclusions. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984). Substantial evidence is defined as evidence of relevant consequence, having fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chem. Co., Ky., 474 S.W.2d 367, 369 (1971). As fact-finder, the ALJ has the authority to determine the quality,

character, and substance of the evidence. Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993).

First, Big Fist attacks the ALJ's reliance on testimony from Dr. Rapier, Dr. Lyons, and Dr. Patrick. In support of his decision, the ALJ stated that both Dr. Rapier and Dr. Lyons attributed O'Quinn's current condition to the original injury. Further, the ALJ stated that their testimony was supported by the testimony of Dr. Patrick when he indicated that O'Quinn's condition was a recurrence of the original disc bulging.

Big Fist notes that neither the report from Dr. Rapier nor the report from Dr. Lyons mentioned the 1998 injury to O'Quinn's back that occurred while he was planting flowers in his yard. Big Fist asserts that it is apparent O'Quinn did not relate the history of the 1998 injury to either Dr. Rapier or Dr. Lyons. Big Fist thus maintains that the opinions of those doctors should be disregarded. On the other hand, O'Quinn stated in his testimony before the ALJ that he did not know why there was no reference to the 1998 injury in the reports of Dr. Rapier and Dr. Lyons, and he further stated that he "would have told them all the same" as he told Dr. Patrick, who did receive and note a history of that injury.

We agree with the Board's reasoning in rejecting this argument. The Board noted that it was not necessary for the ALJ

to mention in his decision the lack of any reference to the 1998 incident in the reports of Dr. Rapier and Dr. Lyons. As the Board stated, "it is not necessary for the ALJ to summarize the evidence considered by him line-by-line, nor is he required to detail the entirety of his reasoning for accepting the opinion of one doctor over another." See Big Sandy Community Action Program v. Chaffins, Ky., 502 S.W.2d 526, 531 (1973). Further, the Board noted that based on O'Quinn's testimony that he would have given all doctors the same history, including Dr. Rapier and Dr. Lyons as well as Dr. Patrick, "it was not unreasonable for the ALJ to infer that Drs. Rapier and Lyons . . . were advised of the 1998 incident and, for whatever reason, chose not to mention it in their reports."

Big Fist also argues that the ALJ must not have fully considered Dr. Patrick's testimony. As we have noted, the ALJ stated that the reports of Dr. Rapier and Dr. Lyons were supported by the report of Dr. Patrick "wherein he indicates that the plaintiff's condition is a recurrence of the original disc bulging." Big Fist maintains that Dr. Patrick did not conclude that the subsequent injuries in 1991, 1992, and 1998 were recurrences of the original injury. Rather, Big Fist notes that Dr. Patrick definitely stated that any worsening of the condition was the result of the 1998 incident.

Dr. Patrick offered one opinion in his report and a different opinion during his deposition. The ALJ acknowledged this fact in his decision, and as the Board stated, "it may not be said that the ALJ overlooked that testimony or failed to take it into consideration." Again, we agree with the Board's reasoning when it noted that the ALJ was free to pick and choose among the evidence. Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Bros., Ky., 547 S.W.2d 123, 124 (1977). Further, 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, 16 (1977).

Big Fist also argues that there was no evidence that the original injury in 1988 resulted in disc bulging at the level of L5-S1. Dr. Patrick stated in his report that Dr. Gibson had performed an MRI in 1991 which showed a bulging disc. The Board held that "[i]t was not unreasonable for the ALJ to deduce that the January 23, 1988 injury produced the bulging disc documented no later than 1991 and to rely on that finding in part to support the award on reopening." We agree.

Finally, Big Fist challenges the portion of the award which imposes liability for psychiatric treatment. It points to O'Quinn's testimony that after the 1992 injury he knew he could

not continue as an underground coal miner. Big Fist also points to the testimony of the vocational evaluator, Phil Pack.

The Board noted that Pack attributed O'Quinn's psychiatric condition to his "work-related injuries" and not to the 1992 injury alone as Big Fist suggested. Further, the Board noted that the 1991 and 1992 injuries were deemed to be mere exacerbations of O'Quinn's back condition resulting from the 1988 injury with Big Fist, "a finding that has the force of *res judicata*." Finally the Board stated, "[i]t was entirely reasonable for the ALJ in the case *sub judice* to conclude that the January 23, 1988 injury with Big Fist contributed to the later onset of his psychiatric illness, which is sufficient to impose liability to psychiatric treatment." We agree.

The Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE, FERRELL
O'QUINN:

Miller Kent Carter
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