

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2003-CA-000415-WC

DENNIS FARMER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-87-36987 & WC-98-59846

WORKERS' COMPENSATION BOARD;
PEABODY COAL COMPANY; DIRECTOR OF
SPECIAL FUND; AND ROGER RIGGS,
ADMINISTRATIVE LAW JUDGE

APPELLEES

OPINION

AFFIRMING

** ** *

BEFORE: EMBERTON, CHIEF JUDGE; BAKER AND JOHNSON, JUDGES.

BAKER, JUDGE. Dennis Farmer petitions us to review an opinion of the Workers' Compensation Board ("the Board") entered January 29, 2003. We affirm.

This action is the result of two consolidated workers' compensation claims. Appellant sought to reopen a 1987 low back injury and also sought benefits for a 1998 neck injury. The Administrative Law Judge (ALJ) found that appellant failed to prove a worsening of his condition and denied his motion to

reopen. The ALJ's decision was appealed to the Workers' Compensation Board, and the Board remanded to the ALJ for additional findings upon the reopening claim. The ALJ entered a second opinion which was again remanded by the Board, based upon its "determination that the ALJ had continued to address the issue in light of medical evidence from Dr. Eggers and Kerns, neither of whom addressed the low back condition." Upon remand, the ALJ entered a third opinion denying appellant's reopening claim, and the Board affirmed that opinion on January 29, 2003. This review follows.

Appellant contends that the ALJ erred by failing to find a worsening of his original back condition and by failing to conclude that he was totally disabled. As appellant bears the burden of proof, our review is whether the evidence is so overwhelming as to compel a finding in his favor. See Paramount Food, Inc. v. Burkhart, Ky., 395 S.W.2d 418 (1985). This we cannot say.

The ALJ specifically found:

When one considers the plaintiff's past experience at other job activities (which appear to be within his limitations); the fact that he actually continued to work for several years until a general mine layoff in December of 2000; the fact that the only physician who addressed his back problem would release him to return to work; that Mr. Farmer sought non mine related work after the layoff; that the physicians who addressed his cervical problems would allow

him to return to work; that since his prior surgeries in the Opinion & Award of May 14, 1991 he has had a good work record and successfully worked until a general mine shut down, it cannot be concluded under the guidelines of Osborne v Johnson, Ky., 432 S.W.2d 800 (1968) that the plaintiff is totally disabled.

Based upon the evidence referred to above by the ALJ, we are unable to conclude that the record compels a finding that appellant experienced a worsening of his back condition and that he is presently totally and permanently disabled. Upon the whole, we are of the opinion that the ALJ was not clearly erroneous in so concluding.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

EMBERTON, CHIEF JUDGE, CONCURS.

JUDGE, JOHNSON, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

William F. McGee, Jr.
Smithland, Kentucky

BRIEF FOR APPELLEE, PEABODY
COAL COMPANY:

Peter J. Glauber
Louisville, Kentucky

BRIEF FOR APPELLEE, WORKERS'
COMPENSATION BOARD:

David W. Barr
Frankfort, Kentucky