

**Commonwealth Of Kentucky  
Court of Appeals**

NO. 2003-CA-000542-WC

MALCOLM MOORE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-01-76669

MARTIN COUNTY COAL CORPORATION;  
HON. IRENE STEEN, ADMINISTRATIVE  
LAW JUDGE; AND WORKERS' COMPENSATION  
BOARD

APPELLEE

OPINION

AFFIRMING

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BEFORE: BAKER, COMBS, AND SCHRODER, JUDGES.

BAKER, JUDGE. Malcolm Moore seeks review of an opinion of the Workers' Compensation Board ("Board") on February 26, 2003, affirming the Administrative Law Judge's ("ALJ") October 28, 2002, dismissal of Moore's workers' compensation claim, alleging a total and permanent physical and mental disability from an August 2001 work-related injury. We affirm.

Moore began working for the Martin Coal Company in 1973 as a heavy machinery operator and continued with this

company until 2001. On August 21, 2001, while driving a bulldozer for the Martin County Coal Company, Moore backed over a large rock jarring the bulldozer and resulting in injury to Moore's back, neck, stomach and arms. Moore had been treated over the previous ten years by Dr. Lon Lafferty on multiple occasions for low back and neck complaints, including a work injury to his back in 1996. This claim was never filed as a workers' compensation claim.

Moore presented medical evidence and testimony from Dr. Lafferty regarding his physical condition after the 2001 work-related accident. Dr. Lafferty concluded that Moore had a whole body impairment of thirty-three (33) percent. He attributed half of the impairment to the August 2001 injury and half to pre-existing degenerative changes, which were asymptomatic until the time of the 2001 injury. Dr. Lafferty believed that Moore was physically unable to return to work as a heavy machinery operator.

Moore also presented medical evidence and testimony from Dr. Lafferty and from Dr. David Forester regarding his psychiatric condition. Dr. Lafferty treated Moore for major depression and assessed a one hundred (100) percent impairment as to Moore's psychological ability to return to work. Dr. Forester diagnosed a major depressive episode, which he believed

was caused by the August 2001 injury, and he assessed a forty (40) percent impairment rating.

Martin County Coal Company introduced medical evidence from Dr. Timothy Wagner regarding Moore's physical condition after the August 2001 accident. Dr. Wagner concluded that Moore had no permanent impairment from the August 2001 injury and that he had reached maximum medical improvement. The company also introduced medical evidence and testimony from Dr. David Shraberg regarding Moore's psychiatric condition. Dr. Shraberg diagnosed Moore with a passive-dependent personality and concluded that Moore had no psychological impairment. The ALJ relied on the opinions of Drs. Wagner and Shraberg and dismissed Moore's claim. The Workers' Compensation Board affirmed the dismissal. This review follows.

Moore's first argument is impermissibly based on an unpublished case. Even if this Court could apply the unpublished case to Moore's circumstances, the reasoning of the case would be inapplicable. It may well be that prior injuries suffered by a claimant, even though time-barred, may be used to determine the extent of occupational disability when an ALJ concludes that the claimant's most recent injury was compensable. However, the ALJ in Moore's case concluded that Moore's most recent injury, the August 21, 2001 injury, resulted in no occupational impairment.

Moore's second argument is similar to the first, and statement of the law is correct. Specifically, that is that a prior work-related injury may be considered in the determination of total disability even if that prior injury did not result in compensation. See Kern's Bakery v. Tackett, Ky. App., 964 S.W.2d 815 (1998). However, he defeats his own argument in his citation to Hill v. Sextet Mining Corp., Ky., 65 S.W.3d 503 (2001). Moore asserts that Hill held "that a worker who has sustained both compensable and non-compensable disability is entitled to receive benefits for the full extent of which the more recent event causes his inability to work." (Moore Petition for Review at 13). The ALJ found that Moore's most recent injury resulted in no disability. Thus, the ALJ had no duty to analyze any earlier injuries suffered by Moore.

Finally, Moore argues that the ALJ erred in failing to find that any impairment resulted from the August 21, 2001, accident. The standard of review when the party that bears the burden of proof is unsuccessful before the ALJ is whether the evidence compels a different result. Id. It is of no avail to show that there was some evidence of substance that would have justified a finding in the party's favor. The party must show that the evidence was such that the finding against it was unreasonable. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). We further note that the ALJ, not the reviewing court,

has sole discretion to determine the quality, character, and substance of the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). While the medical testimony presented by each party was in opposition, Moore fails to establish that the ALJ's acceptance of the evidence presented by Martin County Coal Company was unreasonable.

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

SCHRODER, JUDGE, CONCURS.

COMBS, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

COMBS, JUDGE, DISSENTING: I must dissent. The evidence of some injury (either physical or psychological or a combination of both) in this case is overwhelming and in my opinion compels a result other than dismissal *in toto*. Even in light of the tough standard of review imposed by Western Baptist v. Kelley, Ky., 827 S.W.2d 685 (1992), I believe that a different outcome is both warranted and required.

BRIEF FOR APPELLANT:

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