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NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

# Court of Appeals

NO. 2005-CA-000348-WC

JOHN MILLER — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD CLAIM NO. WC-02-61637

PEABODY COAL COMPANY;
HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: TACKETT AND TAYLOR, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

HUDDLESTON, SENIOR JUDGE: John Miller has petitioned this Court for review of an opinion of the Workers' Compensation Board that affirmed a decision of an Administrative Law Judge, awarding him permanent partial disability benefits. Miller maintains that he is entitled to permanent total disability benefits. He

[1] Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

contends that the ALJ rejected uncontradicted medical testimony in arriving at his determination of Miller's level of disability. We affirm.

Miller, who was born in 1954, has a ninth grade education, and has obtained a GED. He started working as a mechanic in the underground coal mines of Peabody Coal Company in 1975 after completing three years of service in the United States Army. Miller was injured on several occasions while employed by Peabody Coal, but returned to work after each injury. From 2000 until November 2002, he was laid off. In order to earn a living during this period, he obtained his commercial driver's license and drove tractor trailers.

On December 18, 2002, shortly after he was called back to work at Peabody Coal, Miller hurt his back while changing the oil filters in a continuous miner. He lifted a heavy "rub rail" and felt a sharp pain that started in his lower back and extended down his left leg. Since then, he has experienced severe, continuous back pain, and accompanying depression.

Miller filed an Application for Resolution of Injury Claim with the Department of Workers' Claims on October 31, 2003. Miller and Peabody each introduced extensive medical records into evidence. The primary issue on appeal concerns the ALJ's interpretation of a disability examination that was performed on Miller, and the analyses of that examination

provided by Dr. Michael Best, Dr. James Donley, and by Miller himself in his deposition testimony.

Dr. Best is an orthopedic surgeon and certified disability examiner. He provided a functional capacity evaluation ("FCE") of Miller at the request of Peabody Coal's insurance carrier. The FCE includes measurements of hand grip strength, maximum voluntary effort, rapid exchange grip, arm, shoulder and torso lift, and lifting capacity. According to the technician who administered the evaluation, all the tests except for the rapid exchange grip indicated inconsistent or submaximal effort on Miller's part. The examination was not completed because Miller complained of pain.

Dr. Best found that Miller had a pre-existing impairment due to a work injury prior to December 18, 2002. He concluded that Miller did not have an impairment rating due to the December 18, 2002, injury. In Dr. Best's opinion, Miller would have no work restrictions, and he also stated that Miller demonstrated inconsistent effort and perhaps symptom magnification during the test.

According to Miller, however, the results of the test were unreliable because he had taken pain pills before and during the two-hour drive to the test site, and because he was not informed that he had to put forth maximum effort during the course of the test.

In one of his depositions, Miller testified about the circumstances of the test:

> [W]hen the assistant took me in there to perform these tests [the FCE], she told me what was expected of me, and I told her that we had just come from Louisville. My wife had drove me up there, and riding in a vehicle, I get in a lot of pain riding or sitting or anything like that, and I was in a lot of pain, and I done took one pain pill before I left that morning, like I always do in the morning. After I get up and eat breakfast, I'll take a pain pill, and I had to take another one on the way because of that long ride,[from his home] and I explained to her that I didn't really feel like doing this test. And she said, that's okay, just put forth the effort. Said if it hurts you, [she] said, just stop doing it; and so that's what I did.

Dr. Donley, an orthopedic surgeon whose report was submitted on Miller's behalf, provided the following remarks regarding the FCE:

> I think there was some discrepancy in the report [of the FCE], and the patient filed, basically, a complaint with me to correct the medical record because of the fact that it stated he was symptom magnifying because he gave submaximal efforts, and his notation was that the doctor told him to do the best he could. He took two pain pills, and it basically caused pain, so he did not put any effort into it. He was not told to work as hard as he possibly could, even though he was in discomfort; therefore, that would invalidate the test.

Dr. Donley concluded that Miller has degenerative disc disease at three levels and would ultimately need a fusion

procedure. He stated that Miller has a 10% chance of returning to gainful employment, and assessed a 20% to 23% impairment rating pursuant to the AMA Guides.

On appeal, Miller insists that "[t]he uncontradicted evidence in the record reflects both Dr. James Donley and John Miller took issue and contradicted the conclusions drawn by Dr. Best in his report regarding asymptomatic and submaximal effort." Miller argues that this "uncontradicted evidence" was completely ignored by the ALJ when he concluded that "Dr. Donley did not disagree with the functional capacity evaluation of Dr. Best which demonstrated inconsistent efforts and perhaps symptomagnification." Miller maintains that reversal is therefore warranted under Collins v. Castleton Farms Inc.,[2] in which this Court held that it is reversible error for the fact finder to fail to state the reason for rejecting uncontradicted evidence.[3]

We must determine, therefore, whether the Board erred in rejecting Miller's contention that Dr. Donley's and his own deposition testimony constituted uncontradicted medical evidence that was improperly rejected by the ALJ.

The duty of this Court is to correct the Board only where it has overlooked or misconstrued controlling statutes or

[2] 560 S.W.2d 830 (Ky. App. 1977).

[3] Id. at 831.

precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.[4]

We do not agree with Miller's fundamental premise that Dr. Donley's remarks constituted uncontradicted evidence that was ignored by the ALJ. As the Board aptly explained in its opinion,

> Miller is correct that Kentucky law unequivocally provides that an ALJ is not at liberty to disregard uncontradicted expert medical proof where the issue is one properly within the province of the testifying expert. Nonetheless, it is also well settled that the ALJ, as fact finder, has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence.[5] Furthermore, the ALJ is authorized to choose to believe part of the evidence and disbelieve other portions of the evidence, whether the evidence came from the same witness or the same party's total proof.[6]
>
> Dr. Donley's opinion is not uncontradicted. In fact, the observation made by the ALJ is entirely correct. Dr. Donley did not disagree that the FCE yielded inconsistent effort, but instead offered an explanation, based on Miller's complaints, for the inconsistent or submaximal effort. Here, Dr. Donley's and Dr. Best's opinions constitute conflicting evidence. Although another fact finder may have come to a different conclusion, we cannot say the ALJ erred as a matter of law.

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[4] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687 (Ky. 1992); Whittaker v. Rowland, 998 S.W.2d 479, 482 (Ky. 1999).

[5] Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

[6] Brockway v. Rockwell International, 907 S.W.2d 166 (Ky.App. 1995).

Thus, because the Board has neither misconstrued controlling precedent on this issue nor committed an error in assessing the evidence, we affirm this portion of its opinion.

Miller has further argued that the ALJ's assessment of the extent of his impairment was grossly unfair and unreasonable.

In Ira A. Watson Dept. Store v. Hamilton,[7] the Supreme Court held that, in determining what a worker is or is not able to do after recovering from a work injury, the ALJ must consider the worker's post-injury physical, emotional, intellectual and vocational status; the likelihood that the particular worker will be able to find work consistently under normal employment conditions; whether the individual will be able to work dependably; and whether the worker's physical restrictions will interfere with vocational capabilities.[8]

Miller contends that the following evidence supports a finding of total permanent disability under the Watson factors: his AMA impairment ratings ranged from 5% to 23% for his back condition and 20% for his depression; the fact he always returned to work after prior injuries demonstrates his credibility; he has limited education and few skills; his back condition means he cannot resume employment as a long haul truck

[7] 34 S.W.3d 48 (Ky. 2000).

[8] Id. at 51.

driver; he has chronic pain that limits his everyday activities and affects his ability to sleep; and he takes seven different medications daily in order to survive.

"KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact."[9] "Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal."[10] "The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law."[11]

In its review of the ALJ's opinion, the Board stated that

> the ALJ was satisfied, based on the totality of the evidence, [that] Miller could not return to his pre-injury employment and awarded benefits accordingly. He was also persuaded by Dr. Cooley that Miller's work-related psychological condition would not interfere with his ability to engage in labor. Furthermore, the ALJ was convinced that Miller's age was not a significant obstacle to re-entering the work force. He further noted Miller had obtained a GED as well as a commercial driver's license. The ALJ was further convinced Miller could engage in at least sedentary employment

[9] Id. at 52.

[10] Id., citing McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

[11] Id., citing Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

> within the restrictions imposed by Dr. Wolens. We are satisfied the ALJ was convinced that even though Miller complained of continuous mechanical low back pain, he was still capable of work. The ALJ accepted Dr. Wolens' functional impairment rating of 8% and, given the wide discretion afforded a fact finder in translating a functional impairment into occupational disability within the confines of a claim for total disability we are unable to identify any reversible error.

Although Miller has cited evidence that casts doubt on the determinations made by the ALJ, the evidence is simply not sufficient to demonstrate that the ALJ's finding of permanent partial disability was so unreasonable that it must be viewed as erroneous as a matter of law.

In view of our resolution of the evidentiary issues raised in Miller's brief, we find it unnecessary to address his final argument regarding the admissibility of evidence of a Social Security disability award in the event of a remand.

For the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

| BRIEF FOR APPELLANT: | BRIEF FOR APPELLEE: |
| --- | --- |
| Dick Adams<br>Madisonville, Kentucky | Peter J. Glauber<br>Louisville, Kentucky |