

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001996-WC

LESLIE CLINE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NOS. WC-04-94923 & WC-04-01321

LEECO, INC; BOONE MOUNTAIN
SERVICES, INC., HON. A THOMAS
DAVIS, ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: GUIDUGLI AND TAYLOR, JUDGES; EMBERTON, SENIOR JUDGE.¹

EMBERTON, SENIOR JUDGE: The single question in this appeal is whether the evidence before the Administrative Law Judge compelled a finding of compensability on appellant's claim for benefits stemming from a back injury sustained in the course of his employment with appellee Leeco, Inc. and cumulative trauma allegedly incurred while working for appellee Boone Mountain

¹ Senior Judge Thomas D. Emberton sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Services, Inc., as well as on his claim for a related psychiatric condition. Because a review of the evidence convinces us that the Workers' Compensation Board has not "overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice,"² we affirm its decision.

After awarding permanent partial benefits for a knee injury sustained while working for Leeco, the ALJ dismissed the back injury component of the claim on the basis that appellant had a pre-existing, active condition prior to his December 2002 injury at Leeco, and that he had failed to demonstrate any increase in his functional impairment due to his employment with Boone Mountain. The ALJ also concluded that appellant's psychological condition was not work-related. In a thorough and well-reasoned opinion, the Workers' Compensation Board affirmed the decision of the ALJ. Appellant now advances in this appeal the same arguments he pressed before the Board: 1) whether the ALJ erred in finding he had a preexisting active disability; 2) whether he was entitled to an application of the multipliers provided in KRS 342.730(1)(c); 3) whether the ALJ misstated the law concerning cumulative trauma; and 4) whether the ALJ erred in dismissing his psychiatric claim. Because we are convinced that we can add little, if anything, to the Board's well-

² Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

reasoned analysis of these issues, we affirm its decision and adopt the following portions of its opinion as our own:

Cline, born May 9, 1955, has a twelfth grade education. He has earned both electrician's and foreman's papers for underground coal mining. Cline filed claims for injuries to his low back and right knee occurring in two separate incidents while working as an electrician for Leeco. He also filed a claim against Boone Mountain for cumulative trauma to his low back. Cline worked as a mechanic and electrician for Leeco from November 1, 2002 through June 14, 2003. He was employed by H & D Mining Co. through Boone Mountain from June 15, 2003 through December 15, 2003.

Cline's medical history is significant. He sustained multiple work-related injuries to his back in 1976, 1987, and 1989. He sustained an injury to his neck and back on October 15, 1990. Cline testified that following each of these injuries he was off work for a minimal period of time, if at all, and returned to his job without difficulty. Significantly, Cline underwent an MRI scan of his lumbar spine on June 25, 2002, prior to his first work injury with Leeco on December 26, 2002. The MRI was interpreted by Dr. Mahender Pampati as follows:

There is evidence of disc herniation at the level of L4-5 and L3-4 levels. Grade 12-2 spondylolisthesis of L5 over S1. There is also suggestion of moderate degenerative changes of the lumbar spine at the level of L4-5 and L5-S1. Please note, there is a slightly lateralization of the disc herniation at the level of L3-4 and L4-5 towards the right. Correlate clinically.

On July 8, 2002, Cline received the following assessment of his condition by Dr. Jaya Pampati:

1. Degenerative arthritis of the lumbar spine with symptoms suggestive of spinal stenosis and lumbosacral radiculopathy.
2. Due to history of diffuse arthralgias, fatigue, associated with recent shortness of breath and questionable history of Raynaud phenomena, connective tissue disease is a consideration.

Cline testified he was prying up on a slate bar trying to remove a piece of belt structure when his feet slipped, causing him to twist his back. He testified that as he fell his chin hit the belt structure, which bent him backwards, and he landed face down in the mud. Cline continued to work following the incident and sought medical attention on January 28, 2003, with reported symptoms of stiffness and low back pain resulting from the injury.

Cline sustained a second work injury on June 9, 2003, when he slipped and fell twisting his right knee. Cline's knee injury is not at issue on appeal.³

Cline claims a cumulative trauma injury against Boone Mountain premised on approximately twenty-seven years of working in and around coal mines. He listed December 15, 2003, his last date of working for Boone Mountain, as the date his cumulative trauma became manifest.

Cline testified both by deposition and at the hearing. He explained his change of employment from Leeco to Boone Mountain. According to Cline, he could no longer perform the heavy labor required of an electrician in low coal at Leeco. At Boone Mountain he hoped to be a superintendent,

³ The appeal referenced is that from the Administrative Law Judge to the Workers' Compensation Board.

thinking the work would be easier on his back. As it turned out, Cline ended up working as an electrician for Boone Mountain, in addition to his supervisory duties. He testified the work turned out to be too much for him and he stopped working in December 2003. At his hearing, Cline testified he is in a lot of pain and also suffers from high blood pressure. He testified his back is a lot more problematic than his knee and he could work if his condition was limited to the knee. Cline stated that when he first quit his job, he was given job offers and he told them all he was not able to work. He further testified that none of his previous back injuries prevented him from working.

* * *

The ALJ reviewed the lay and medical testimony in the record in considerable detail. He framed the issue as whether Cline's injury was an exacerbation of a preexisting active condition or a new injury, possibly a reawakening of a dormant condition. The ALJ relied on the evidence that Cline had an active painful back condition prior to the December 2002 injury and his condition necessitated an MRI of his lumbar spine in June 2002. The ALJ was persuaded by Dr. Wagner's opinion that Cline had a 7% whole person impairment due to spondylolisthesis, a developmental defect which preexisted his employment in coal mines; Dr. Graulich's assessment a 7% impairment due to the spondylolisthesis unrelated to work injuries; and Dr. Goldman's finding of no work-related impairment. The ALJ further relied on evidence that Cline did not miss any work following the work injury and he returned to his regular duties until he sustained a knee injury. The ALJ therefore dismissed Cline's claim based on the December 2002 injury.

Concerning the cumulative trauma claim against Boone Mountain, the ALJ was

persuaded by Dr. Templin's opinion that Cline's back problems were documented prior to his hire date with Boone Mountain. Dr. Templin agreed that subsequent back studies did not show any evidence of new injury, and Cline's functional impairment rating was not increased in any way by his employment with Boone Mountain. The ALJ determined Cline suffered a series of 'maxi-traumas' to his back and not mini-traumas.

Concerning Cline's psychiatric condition, the ALJ stated:

The ALJ determines that the Plaintiff's psychological condition is primarily a non-work-related impairment. . . .

Mr. Cline has psychological problems related to his whole life situation. Not just employment related problems. Dr. Shraberg's report outlines the extraneous psychological stressors.

At the hearing Mr. Cline certainly did not have the appearance, demeanor, articulateness or the actions of someone with a present 43 GAF score as put forth by Dr. Allen.

The ALJ determined Cline had a 4% impairment rating due to his knee injury and awarded benefits based thereon.

* * *

On appeal, Cline argues 1) there was no preexisting active disability; 2) he is entitled to application of the three multiplier contained in KRS 342.730(1)(c); 3) he sustained a cumulative trauma injury; and, 4) his psychiatric condition is compensable.

Since Cline, the party with the burden of proof, was unsuccessful on the issue of

work causation, the issue on appeal is whether the evidence on which he relies is so compelling as to require the result he seeks as a matter of law. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979), Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Furthermore, the ALJ has the absolute right to believe part of the evidence and disbelieve other parts, whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). It is not enough to show that there is some evidence which would support a contrary conclusion. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). So long as the ALJ's opinion is supported by any evidence of substance, ordinarily we may not reverse. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Cline first argues the ALJ erred in determining his prior back problems were preexisting and active. He submits his conditions were not active enough to prevent him from earning \$65,000 to \$75,000 per year. He likens his situation to that of the claimant in McNutt Construction/First General Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001), and argues his fall at work on December 26, 2002 constitutes an injury as defined by law.

The Kentucky Supreme Court, in Roberts Brothers Coal v. Robinson, 113 S.W.3d 181 (Ky. 2003), addressed the issue of active disability pursuant to the 1996 Workers' Compensation Act. In terms of permanent partial occupational disability awards, the court explained that impairment and disability are not synonymous. Whether a claimant has a preexisting 'impairment' requiring an exclusion from a permanent partial disability award must be determined

in accordance with the American Medical Association, Guides to the Evaluation of Permanent Impairment ('Guides'). Any measurable impairment existing prior to a work-related injury to the same body part is non-compensable, regardless of whether the impairment is vocationally limiting. If there is a measurable preexisting impairment, it cannot be viewed as being proximately caused by the subsequent injury.

Here, there was considerable evidence that Cline sustained numerous injuries to his back prior to commencing employment with Leeco. In fact, an MRI performed in June 2002 revealed degenerative changes with herniated discs. Both Dr. Wagner and Dr. Graulich assessed a 7% impairment rating due to spondylolisthesis, a preexisting condition unrelated to Cline's work injuries. Further, Dr. Goldman indicated there was no work-related impairment. It is true that an injury which arouses a preexisting, dormant, non-disabling condition remains compensable. McNutt, supra. Here, however, there was substantial evidence to suggest Cline's impairment preexisted his latest injuries at Leeco and Boone Mountain. Cline next argues the ALJ erred with regard to the application of the multipliers pursuant to KRS 342.730(1)(c). Cline contends the ALJ erred in determining he could return to his usual work and his findings are not in conformity with the supreme court's holding in Fawbush v. Gwinn, 103 S.W.3d 5 (Ky. 2003). He also cites Adkins v. Pike County Board of Education, 141 S.W.3d 387, 390 (Ky. App. 2004) as authority for the proposition that 'in determining whether a claimant could continue to earn an equal or greater wage the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job.' He requests remand for further findings.

Cline was awarded benefits only for his knee injury. To be entitled to the three multiplier, the lack of the 'physical

capacity to return to the type of work that the employee performed at the time of injury' must be 'due to' that injury. (Emphasis added.) KRS 342.730(1)(c)1. In other words, the injury must be the reason why Cline can't return to the type of work he was performing at the time of injury. Since the ALJ dismissed Cline's low back injury claim, it cannot form the basis for an award of enhanced benefits. Cline would only have been entitled to the three multiplier if the knee injury prevented him from returning to his pre-injury work. The Form 107 of Dr. Kibler indicates Cline retained no restrictions on his ability to work due to that injury. This evidence, as well as Cline's own testimony addressing his ability to work if his knee only was involved, constitutes substantial evidence upon which the ALJ could rely.

Cline next argues the ALJ misstated the law with regard to cumulative trauma in dismissing his claim against Boone Mountain. In essence, Cline argues the fact that he had preexisting arthritis should not preclude a finding of compensability when an injury arouses that preexisting arthritis into active impairment sooner than otherwise would have been the case. Cline contends the ALJ's determination that he did not sustain an increase in functional impairment rating due [to] his employment with Boone Mountain is not in conformity with the law. He also argues the ALJ rendered a medical conclusion when he determined Cline suffered a series of 'maxi-traumas' as opposed the mini-traumas.

As set out in the discussion of active disability, the ALJ determined Cline's back condition was active and in existence prior to his injury with Leeco. As previously discussed, Drs. Wagner and Graulich both assessed a 7% impairment for Cline's spondylolisthesis which was in existence prior to his employment with Leeco or Boone Mountain. In fact, Dr. Templin, Cline's examining physician, acknowledged the

diagnosis of chronic low back pain syndrome predated Cline's hire date with Boone Mountain. Dr. Templin's testimony further established Cline's functional impairment rating had not increased in any way by his employment with Boone Mountain. Dr. Graulich was of the opinion that no cumulative trauma injury resulted from Cline's last employment. All of this evidence is substantial in nature, precluding the Board's intervention on appeal. KRS 342.285(2). Special Fund v. Francis, supra.

Lastly, Cline takes issue with the ALJ's dismissal of his psychiatric claim, arguing 'The substantial contributing factor has always been the law of Kentucky. Deutsch v. Shein, Ky., 597 S.W.2d 141 (1980). The work related events need not be the sole cause of psychological impairment.' (Emphasis original.)

Cline takes issue with the ALJ's conclusions: 1) 'Mr. Cline has psychological problems related to his whole life situation. Not just employment related physical problems. Dr. Shraberg's report outlines the extraneous psychological stressors[,] and 2) his 'psychological condition is primarily a non-work-related impairment.' In the absence of a petition for reconsideration, the only issue is whether the ALJ's dismissal of Cline's psychiatric claim is supported by substantial evidence. Hall's Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000); Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Dr. Shraberg concluded Cline had recovered from an adjustment disorder following his December 2002 work accident and the residual anxiety and depression were associated with aging and a cardiac condition. Dr. Shraberg determined Cline had a 0% work-related psychiatric impairment. Absent a showing that the ALJ's finding was so unreasonable under the evidence that it must be rejected as a matter of law, this

Board is required to affirm. Ira A. Watson
Department Store v. Hamilton, 34 S.W.3d 48
(Ky. 2000).

Accordingly, the opinion of the Workers' Compensation
Board is in all respects affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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