RENDERED: APRIL 21, 2006; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-002390-WC

JAMES WALDEN — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-02-90811

COMMONWEALTH OF KENTUCKY,
DEPARTMENT OF AGRICULTURE;
HONORABLE DONNA TERRY,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: BARBER AND MINTON, JUDGES; HUDDLESTON, SENIOR JUDGE.[1]

MINTON, JUDGE: James Walden petitions for review of a decision of the Workers' Compensation Board affirming an ALJ's conclusion in a medical fee dispute that Walden's proposed neck surgery was

[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.

not covered by workers' compensation because it did not arise out of a work-related injury. We affirm.

Walden worked as an inspector for the Kentucky Department of Agriculture when he sustained a work-related injury to his neck in September 2001, for which he filed a claim for workers' compensation benefits. While that claim was pending, Walden underwent a cervical discectomy and fusion at the C4-5 and C5-6 vertebral levels. Following the surgery, Walden continued to complain of neck pain. And in late 2003, Dr. John Harping recommended that Walden have a second surgery, this time at the C3-4 level. Meanwhile, Walden settled his claim for benefits.

Sometime after the settlement, the Department of Agriculture filed a motion to reopen the claim based upon a medical fee dispute, arguing that the proposed second surgery was not related to Walden's 2001 injury at work. The ALJ allowed the reopening, and both sides submitted medical evidence. The ALJ ruled that the proposed surgery was unreasonable, unnecessary, and, furthermore, that Walden's vertebral problems at the C3-4 level were the effects of ongoing degenerative changes that did not stem from the effects of the work-related injury.

Walden appealed the ALJ's decision to the Board, arguing that the only issue properly before the ALJ was whether

problems at the C3-4 level were work-related. In addition, Walden contended that the evidence compelled a finding that the surgery was necessitated by the work-related injury. The Board found that the ALJ erred by addressing whether the surgery was reasonable or necessary, but that the ALJ properly found that the problems that necessitated the surgery were not work-related. Dissatisfied, Walden filed this petition for review.

Walden's petition for review argues the same issues he argued to the Board. Since the Department of Agriculture did not file a cross-petition, the Board's conclusion that the ALJ erred by discussing the reasonableness and necessity of the surgery is binding upon us. So the only question properly before us is whether the record supports the ALJ's conclusion that the surgery was not required by a work-related injury and, thus, not a medical expense claim covered by workers' compensation.

The ALJ and Board relied upon the findings of Dr. Russell Travis, a physician who conducted a utilization review of Walden's medical records, to support their findings that the proposed surgery is not work-related. Dr. Travis "express[ed] some doubt" that Walden's current problems were related to his earlier, undisputedly work-related injury. In addition, Dr. Travis found that Walden's "problem at that time [of the first surgery] was apparently C4-5 and C5-6 and this

lesion at C3-4 is [a] totally degenerative change, . . . and is likely a progression of the normal degenerative process and I would question its relationship to the October [sic] 2001 initial injury."

Conversely, Walden contends that his current difficulties were pre-existing and dormant until aroused to a symptomatic level by his work-related injury. Thus, according to Walden, since Dr. Travis's report does not expressly say that his current condition was not dormant until aroused by the work-related injury, Dr. Travis's report is "irrelevant towards the issue of work-relatedness." Rather, Walden argues, the ALJ was required to rely upon the allegedly uncontradicted opinion of Dr. Timothy Kriss, who found that Walden's current neck pain was work-related because he did not have symptoms of pain before the work-related injury.

We agree with Walden that disability resulting from the arousal of a previously dormant condition is compensable.[2] But we reject his contention that the uncontradicted evidence compels a finding that his current condition was aroused by his work-related injury. To the contrary, Dr. Travis expressly found that Walden's current condition was not related to his previous work-related injury, from which it may reasonably be

[2] McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001).

inferred that the work injury did not arouse a previously dormant condition. The ALJ is permitted to choose which evidence to believe and to draw all reasonable inferences from the evidence.[3] And the fact that Dr. Kriss's report disagrees with Dr. Travis's conclusions does not compel a finding in Walden's favor since an ALJ may properly choose which evidence to believe.[4] In the case at hand, the ALJ chose to believe Dr. Travis's opinion and to discount Dr. Kriss's opinion. Although reasonable minds could differ as to which report should be given more weight, we cannot say that the ALJ or the Board has committed an error in assessing the evidence so flagrant as to cause Walden a gross injustice.[5] Thus, we must affirm.

For the foregoing reasons, we must affirm the decision of the Workers' Compensation Board.

HUDDLESTON, SENIOR JUDGE, CONCURS.

BARBER, JUDGE, CONCURS IN RESULT ONLY AND FILES SEPARATE OPINION.

BARBER, JUDGE, CONCURRING IN RESULT ONLY. I concur with the majority that we may not substitute our judgment for that of the ALJ; but given the Appellees' initial burden of proof and the very equivocal testimony of Dr. Travis on "work

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[3] Miller v. East Kentucky Beverage/Pepsico., Inc., 951 S.W.2d 329, 331 (Ky. 1997).

[4] Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000).

[5] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992).

relatedness," I believe this is a very close case of the ALJ's committing an error in evaluating the evidence of work relatedness so flagrant as to cause gross injustice.

BRIEF FOR APPELLANT:

Jackson W. Watts
Versailles, Kentucky

BRIEF FOR APPELLEE COMMONWEALTH OF KENTUCKY, DEPARTMENT OF AGRICULTURE:

K. Lance Lucas
Edgewood, Kentucky