

RENDERED: NOVEMBER 2, 2007; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000345-WC

LOWE'S HOME CENTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-02143

WILBUR D. PASSMORE; HONORABLE R. SCOTT
BORDERS, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION REVERSING

** ** * * * **

BEFORE: MOORE AND THOMPSON, JUDGES; GRAVES,¹ SENIOR JUDGE.

MOORE, JUDGE: This is an appeal by Lowe's Home Center from an order of the Workers' Compensation Board, vacating the Administrative Law Judge's opinion and remanding for further findings of fact. Upon review of the record, we reverse.

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

I. FACTUAL AND PROCEDURAL BACKGROUND

Wilbur D. Passmore, since beginning employment at Lowe's Home Center in March 2001, claimed work-related injuries on three separate occasions. The first injury occurred in November 2001, when Passmore wrecked a forklift injuring his neck. The second injury occurred in September 2002, when he was lifting a refrigerator from a trailer and injured his lower back. The third injury occurred in July 2003, when he was pulling, tugging, and pushing a large appliance once again injuring his lower back.

Passmore brought a workers' compensation claim against Lowe's. The Administrative Law Judge (ALJ) determined that the injury of November 2001 was not work related and, therefore, that claim for benefits was dismissed. The injury of July 2003 was an exacerbation of the earlier injury. The ALJ, thus, held that any impairment was due solely to the first accident, and no apportionment should be made regarding the July 2003 incident. Finally, the ALJ determined that Passmore did not prove in fact that he was totally disabled, but granted him a permanent partial disability award. As stated by the Workers' Compensation Board, the ALJ thoroughly and for the most part accurately summarized the lay and medical testimony when reaching the conclusion that Passmore should receive a permanent partial disability award. The ALJ stated:

The Plaintiff argues as a result of his work-related injury he is permanently and totally disabled. KRS 342.0011(11)(c) defines permanent total disability as “the condition of an employee, who due to an injury has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury.”

Further, in *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3rd. [sic] 48 (Ky. 2000), the Supreme Court stated some of the principles set forth in *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968) must be weighed in determining if the Plaintiff fits within the above definitions. The factors to be considered include the Plaintiff's post injury physical, emotional, intellectual, and vocational status, as well as, the likelihood the claimant will be notified [sic] be able to return to work under normal employment conditions.

Drs. Kriss and El-Kalliny [sic] both assessed functional impairment rating translate[s] to permanent disability. Both physicians have opined the Plaintiff cannot return to his former job at Lowe's. The Plaintiff's vocational expert, Dr. Lane, felt the claimant was totally disabled and the Defendant employer's expert, Dr. Crystal, did not believe the Plaintiff is totally disabled.

While the Plaintiff presented credible testimony and he does lack in academic ability, the Administrative Law Judge does not believe when you apply his medical [and] vocational situations to the principles announced by the Supreme Court in *Osborne v. Johnson*, [s]upra, he has met his burden of proving he is in fact totally disabled. The Plaintiff even admitted he felt he could work in a job where he could alternate sitting and standing and not have to do excessive lifting.

Passmore appealed to the Board and the Board vacated in part and remanded, holding that the ALJ must provide further findings as to the extent of Passmore's disability. At issue were the ALJ's determinations that Passmore did not file for social security, that Passmore allegedly admitted he could work if his job allowed him to alternate sitting and standing, and that Dr. El-Kalliny revised his lifting restrictions based on Passmore's subjective complaints. Petition for review of the decision of the Board was then brought to this Court by Lowe's.

II. STANDARD OF REVIEW

When reviewing the Board's decisions, we reverse only when the Board has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that its decision has resulted in a gross injustice. *Daniel v. Armco Steel Company*, 913 S.W.2d 797, 798 (Ky. App. 1995); *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-688 (Ky. 1992). To properly review the Board's decision, we must ultimately consider the ALJ's underlying decision. If the ALJ has found against the claimant, who has the burden of proof, the Board should have determined whether the evidence compelled a finding in the claimant's favor. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). *See also Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. 1984). "Compelling evidence" is evidence so overwhelming that no reasonable person could reach the same conclusion as the fact finder. *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985). The ALJ, as fact finder, has the sole discretion to determine the quality, character, and substance of the evidence. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999) (quoting *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1987)); *see also Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Not only does the ALJ weigh the evidence, he may also choose to believe or disbelieve any part of the evidence, regardless of its source. *Whittaker*, 998 S.W.2d at 481 (quoting *Caudill v. Malony's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977)). We may not substitute our judgment for that of the ALJ. *Wolf Creek Collieries*, 673 S.W.2d at 736. The case law dealing with administrative bodies clearly requires basic facts to be clearly

set out supporting the ultimate conclusions. *Shields v. Pittsburgh and Midway Coal Mining Co.*, 634 S.W.2d 440 (Ky. App. 1982); *Caller v. Ison*, 508 S.W.2d 776 (Ky. 1974); *Marshall County v. South Central Bell Tel. Co.*, 519 S.W.2d 616 (Ky. 1975); *Energy Regulation Commission of Kentucky v. Kentucky Power Co.*, 605 S.W.2d 46 (Ky. App. 1980); *Pearl v. Marshall*, 491 S.W.2d 837 (Ky. 1973).

III. ANALYSIS

Lowe's petitions this Court for review of the Board's decision, based on its arguments that the Board misconstrued the law concerning sufficiency of findings of fact. Lowe's contends that the evidence was not so overwhelming as to compel a finding in Passmore's favor and therefore, it is not sufficient to support the decision to vacate and remand. It further submits that the ALJ relied upon evidence supporting his findings and that the compelling standard need not be applied to vacate and remand for further findings of fact.

The Board summarized its findings by saying that an award of total occupational disability is not compelled, however, further findings of fact are warranted to assure that the ALJ's opinion is accurate as to the evidence and that it clearly supports the ultimate conclusion.

In his opinion, the ALJ determined, in June 2006, that Passmore had not applied for social security benefits. The ALJ never again mentioned the filing for social security throughout his entire opinion. In July 2005, Passmore testified he had not applied for social security benefits. However, by April 2006, Passmore testified he had

applied for social security. The Board asserts that the discrepancy between the ALJ's findings and Passmore's testimony should have been explained or addressed by the ALJ when Passmore made his request for reconsideration. Lowe's, in contending that the ALJ need not give additional statements, points only to the July 2005 testimony and submits that it is clear from the record that Passmore did not file for social security benefits. In failing to consider the testimony given in April 2006, Lowe's mistakenly interprets the evidence.

Despite the fact that Lowe's ignores Passmore's later testimony, as a practical matter, whether an injured worker has filed for or has received a favorable social security decision is not binding in a workers' compensation case and, for the most part, is largely irrelevant. *See Kington v. Zeigler Coal Co.*, 639 S.W.2d 560 (Ky. App. 1982). Because whether or not Passmore filed for social security disability benefits is largely irrelevant, the ALJ's erroneous finding of fact does not compel a result in favor of the claimant. *See Kington*, 639 S.W.2d at 562. The ALJ's inclusion of this erroneous finding does not take away from the substantial evidence that supported the ALJ's conclusion that Passmore was permanently partially disabled. The Board should not have vacated the ALJ's opinion on the issue of Passmore's filing for social security benefits.

Lowe's asserts that the evidence presented regarding Passmore's ability to return to work is more than sufficient to support the ultimate conclusion reached by the ALJ. Directly following the ALJ's conclusion that Passmore did not meet his burden of proving total disability, the ALJ stated, “[t]he Plaintiff even admitted he felt he could

work in a job where he could alternate sitting and standing and not have to do excessive lifting.” This statement spurred Passmore's contention to the Board that the ALJ misinterpreted the evidence. Lowe's submits that the ALJ's interpretation of Passmore's testimony as an admission of being able to work is reasonable.

Although there is ample evidence in the record that could lead the ALJ to determine Passmore admitted to being able to work, the ALJ cited to none of it. The Transcript of the Final Hearing provided the following discourse which is at issue:²

Passmore's Attorney: All right, Do you believe that you could go back to work at Lowe's at anything that they have, there, at the company?

Passmore: I wouldn't know what, but, you know, if they got something that you can, like, sit down and get up, sit, you know, when you need to, you know, I don't care to try to it. I don't care, you know. But, honestly, I don't know of nothing. But, I mean, you know, if they have anything, I don't care a bit to try it.

Passmore's Attorney: Okay. Do you believe you could do it?

Passmore: I don't know till I try. I mean, honestly, I can't just say I could or say I couldn't.

* * *

Lowe's Attorney: Mr. Passmore, if I understand correctly, you're willing to try a job which would allow you to alternate sitting and standing and walking, is that correct, sir?

Passmore: Yeah, if I could stand it, I don't care to do it, you know.

* * *

² Grammatical errors in original.

Lowe's Attorney: But, essentially again, if that job could be done where you could alternate positions, you feel, yourself, capable of doing that based on your experience?

Passmore: I guess. I don't know. I mean, you know, I done it for eight hours there. As long as I didn't have to - - you know, if I had to stand eight hours.

* * *

Lowe's Attorney: But, if you could sit alternately with standing and walking--

Passmore: Yeah, when I can get up and down. I mean, I do it at home - -

Lowe's Attorney: Yeah.

Passmore: - - so why couldn't I do it there?

The rule is that the fact-finder is required to support his conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision. *Shields*, 634 S.W.2d at 444. However, it is not the intention of the Court to place an impossible burden on the administrative body. *Id.* When the findings of fact are sufficient to enable a meaningful review, it is inappropriate for the Board to remand to the ALJ for more specific findings. *Carnes v. Parton Bros. Contracting, Inc.*, 171 S.W.3d 60, 69 (Ky. App. 2005).

The ALJ did not refer to the record, did not mention any particular testimony, and did not provide a basis for his determination that Passmore admitted to being able to work in a particular setting. However, Passmore's admitting to being able to work is a factual finding, and the ALJ is the sole fact finder. *Whittaker*, 998 S.W.2d at

481. The ultimate conclusion of the ALJ was that Passmore was permanently partially disabled, and the ALJ did set forth sufficient evidence to support this ultimate conclusion. The ALJ referred to Passmore's physical complaints; medical history; vocational, emotional, and intellectual status; and likelihood of returning to work. The ALJ also set forth the opinions of the several doctors who examined Passmore. The proof regarding Passmore's status in addition to the medical opinions referenced by the ALJ constituted substantial evidence. This substantial evidence permitted the ALJ to reasonably conclude that Passmore was permanently partially disabled. The ALJ also supported his conclusion of permanent partial disability with the fact that Passmore admitted to being able to work, and both sides were properly apprised that this fact was one of the bases for the ALJ's determination. Despite the ALJ's failure to elaborate regarding Passmore's alleged admission, we find that the ALJ set forth sufficient evidence enabling the Board to meaningfully review the ALJ's opinion. Therefore, it was inappropriate for the Board to vacate the ALJ's opinion regarding this issue. *Carnes*, 171 S.W.3d at 69.

In asserting that the evidence does not compel altering the ALJ's determination, Lowe's submits that Dr. El-Kalliny tried to change his testimony, regarding Passmore's lifting restriction, when matters he thought were true were proved or suggested to be inaccurate. Lowe's contends that Dr. El-Kalliny attributed the change in the lifting restriction to the MRI because Dr. El-Kalliny became uncertain, during his deposition, whether Passmore ever returned to work. Passmore contends that the ALJ

misconstrued or misinterpreted the medical opinion of Dr. El-Kalliny in holding that the change of restriction was based on Passmore's subjective complaints.

The deposition of Dr. El-Kalliny provides the following discourse:³

Lowe's Attorney: Okay you don't know really, okay. Now is this restriction that changed from the 30 to 10 pounds based partly on what he says he can and cannot do?

Dr. El-Kalliny: The reason why I changed the restriction is because when I looked to his MRI, the last MRI, and I found this extent of the disc protrusions in the lower back I think that this patient is not going to be able to do this type of work, the 30 pounds restriction.

Lowe's Attorney: Okay.

Dr. El-Kalliny: Now I did that on his continuation of complaining of bad back pain really and the second on the findings on the MRI of the thoracic and lumbar spine.

Without mentioning any of the testimony directly, the ALJ summarized the evidence as follows, “[Dr. El-Kalliny] admitted he initially released the Plaintiff to return to work in January 2005 with a 30-pound lifting restriction. He later changed this to a 10-pound lifting restriction based on the Plaintiff's complaint that he cannot lift 30 pounds.” The Board stated, “[t]hough it is unclear what, if any, weight the ALJ placed on the physical restrictions assigned by the various physicians, it appears the ALJ oversimplified Dr. El-Kalliny's testimony.”

From the record, it is clear that Dr. El-Kalliny claimed his change of the restriction was due to both the MRI and Passmore's complaints. The ALJ clearly believed it was Passmore's complaints that effectuated the change. The ALJ, as fact

³ Grammatical errors in original.

finder, has sole discretion to determine the quality, character, and substance of the evidence. *Whittaker*, 998 S.W.2d at 481. Not only does the ALJ weigh the evidence, he may also choose to believe or disbelieve any part of the evidence, regardless of its source. *Id.* Although the ALJ did not make any reference to Dr. El-Kalliny's testimony that the weight restriction was altered due to the most recent MRI, it is apparent that the ALJ was persuaded that the restriction was altered based on Passmore's subjective complaints, and chose to believe that part of Dr. El-Kalliny's testimony, which was within the ALJ's discretion. Although any insight into what evidence persuaded the ALJ to come to this finding of fact would certainly have been helpful, the parties were apprised of what finding of fact the ALJ considered in his conclusion that Passmore is permanently partially disabled. *See generally, Shields*, 634 S.W.2d at 444. The Board misconstrued the law by substituting its own judgment for that of the ALJ's. *Wolf Creek Collieries*, 673 S.W.2d at 736. The Board should not have vacated on this issue.

IV. Conclusion

As this Court has set forth the relevant evidence neglected by the ALJ, it is apparent that the ALJ's findings of fact were supported by the evidence in the record. The ALJ's findings of fact are specific enough so that the parties may be properly apprised upon what basis the conclusion of permanent partial disability is made. The evidence this Court has cited further substantiates those findings of fact. It is our opinion that the ALJ performed the absolute minimum of acceptable fact-finding. He merely stated his findings in a haphazard manner and made no mention to particular evidence

from which facts were drawn, forcing this Court to properly establish those findings for him. Despite this, ultimately, the conclusion of the ALJ was proper. Because of this, the Board misconstrued the law in vacating the ALJ's opinion; thus, the opinion of the Board is reversed.

ALL CONCUR.

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