

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000435-WC

RINKERS MATERIALS CORPORATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-01875

WILLIAM BRATCHER; HON. LAWRENCE SMITH,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,¹ SENIOR JUDGE.

ROSENBLUM, SENIOR JUDGE: Rinkers Materials Corporation petitions for review of an opinion of the Workers' Compensation Board which affirmed an administrative law judge's (ALJ) award of total permanent disability benefits to William Bratcher. Rinkers argues that the ALJ failed to give presumptive weight to the opinion of the university medical evaluator as required under Kentucky Revised Statutes (KRS) 342.315, and that

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

he erred in relying on Bratcher's own testimony in determining that he is permanently totally disabled. We affirm.

William Bratcher was employed by Rinkers and its predecessors from 1968 until 2004, as a pit loader/operator. He worked in a quarry where he was exposed daily to rock dust and lime dust. In the 1980s, he began to experience breathing problems and was diagnosed with asthma by Dr. William O'Bryan. He eventually began treatment with a pulmonary specialist, Dr. Thomas Gallo, in 2003. He resigned from Rinkers in February 2004, at which time he filed a claim for workers' compensation benefits. He claimed that he had contracted industrial bronchitis or occupational asthma as a result of his lengthy exposure to dust at the workplace. Dr. Gallo opined, based on his clinical experience and an article entitled "Occupational Asthma," that rock dust can cause industrial bronchitis or occupational asthma, and he concluded that the exposure to dust had been a substantial factor in Bratcher's contraction of the illness. The university evaluator, Dr. Steve Kraman, opined on the basis of his review of medical journal articles and studies, that rock dust has not been shown to cause occupational asthma. Therefore, although Dr. Kraman did diagnose Bratcher as suffering from asthma, he found it to be unrelated to his employment.

The ALJ found Dr. Gallo's diagnosis to be more persuasive, and held that Bratcher's pulmonary disability was work-related. Although neither Dr. Gallo nor Dr. Kraman found that Bratcher was totally impaired, the ALJ found that he was totally occupationally disabled. In arriving at this conclusion, the ALJ relied in large part on

Bratcher's own testimony, and on a consideration of his advanced age and limited education. Rinkers appealed to the Workers' Compensation Board, which affirmed the ALJ's opinion. This petition followed.

Our standard of review requires that we show deference to the rulings of the Board. We "correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

The first issue on appeal concerns the ALJ's reliance on the opinion of Dr. Gallo, the pulmonary specialist who treated Bratcher, rather than on that of Dr. Kraman, the university evaluator, in determining whether Bratcher's disability was work-related. Rinker argues that the ALJ failed to accord Dr. Kraman's opinion presumptive weight as required under KRS 342.315(2), and that the reasons the ALJ provided for failing to do so are either illogical, irrelevant, or do not comport with the evidence presented. KRS 342.315(2) provides in relevant part that

. . . the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

The Kentucky Supreme Court has explained that this provision

does not restrict the ALJ's authority to weigh conflicting medical evidence and to choose which evidence to believe. . . . [A]n ALJ could choose to disregard the clinical findings and opinions of the university evaluator but must state a reasonable basis for doing so.

Bright v. American Greetings Corp., 62 S.W.3d 381, 383 (Ky. 2001) *citing Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000).

The ALJ complied fully with the statutory requirement by specifically stating his reasons for rejecting Dr. Kraman's diagnosis in favor of Dr. Gallo's. He focused on three areas in particular: the physicians' qualifications and experience, their use of scholarly literature on the subject of pulmonary disease, and their interpretation of Bratcher's lack of medical improvement since he stopped working. The ALJ's opinion states in pertinent part:

This Administrative Law Judge is presented with the opposing opinions of two very highly trained and well respected pulmonary experts. On one hand, Dr. Kraman is a medical school professor with impressive and extensive credentials. On the other hand, Dr. Gallo is a practicing physician who has been treating patients for over 32 years [at the] Trover Clinic. This Administrative Law judge, after a thorough review of reports and deposition testimony of each, is more persuaded by the opinions of Dr. Gallo on this issue. My reasons include that Dr. Gallo has over 32 years experience in treating patients with these types of medical issues. In addition, he has been treating this specific patient for three years and has had the opportunity of following this patient's progress and problems during the course of that time. In addition, Dr. Gallo supported his conclusions with citations to scholarly articles in medical periodicals. More specifically, the article [entitled] "Occupational Asthma" that Dr. Gallo cited during his January 12, 2006 deposition appears to clearly contradict Dr. Kraman's position that the plaintiff's asthma could or would not be caused by the

plaintiff continuing exposure to dust in the workplace. Also, I note that Dr. Kraman did agree that inorganic rock dust, while not causing asthma, could make asthma worse, it can make COPD [chronic obstructive pulmonary disease] worse as well.

Finally, I consider Dr. Gallo's statement that the plaintiff's FEV1 studies showed very little movement in the last two years, giving an indication that he is getting no better. Dr. Kraman had opined that dust at the workplace would only cause temporary exacerbation of any underlying breathing problem.

Rinker argues that the ALJ erred in implying that Dr. Gallo was more credible because he actively treats patients for pulmonary problems, while inferring that Dr. Kraman is merely a professor, albeit a highly qualified one. Rinker points out that, far from being an isolated academic, Dr. Kraman testified that he conducts an asthma clinic twice per week. Although we agree that Dr. Kraman undoubtedly has considerable experience in treating patients with asthma and has also engaged in an extensive study of other pulmonary diseases, Dr. Gallo testified that a significant portion of his thirty-two years at the Trover Clinic was spent treating patients with **occupational** lung diseases. This evidence of Dr. Gallo's highly specialized experience provides a reasonable basis for the ALJ's decision to give more weight to his opinion, particularly when coupled with the fact that Dr. Gallo had treated Bratcher for three years.

The next point of contention is Dr. Kraman's conclusion that Bratcher's asthmatic condition was not related to his work exposure. Dr. Kraman explained that he had reviewed many case studies, and had never seen a case where rock dust had caused asthma. He agreed that rock dust could be a temporary irritant but saw no evidence that

Bratcher's exposure to the dust had caused his pulmonary impairment. Rinkers criticizes Dr. Gallo's reliance on an article entitled "Occupational Asthma" in which the authors draw a direct link between exposure to various types of dust in the workplace and the development of chronic pulmonary diseases. Rinkers points out that the article never names rock or lime dust specifically as substances which can trigger occupational asthma. As Rinkers has acknowledged, however, the article states that "[a]gents that cause OA (Occupational Asthma) with latency encompass **more than 300** natural and synthetic chemicals." (Emphasis supplied). The article then lists several of the most common agents, while explaining that "OA can be caused by agents that are not found on existing lists and databases." In other words, the article does not purport to provide an exhaustive list of causal agents. Indeed, the authors of the article stress that new agents are constantly being discovered. Because rock and lime dust are not specifically included does not mean that they have been excluded as agents of occupational asthma.

Rinkers has also questioned the ALJ's reliance on Dr. Gallo's statement that Bratcher's condition has showed very little improvement since he stopped working as supporting the diagnosis of occupational asthma. We agree it does not prove that his condition was caused by exposure to rock and lime dust at work. It does, however, support the conclusion that his condition is permanent. In our view, Dr. Gallo's specialized experience and the findings in the article "Occupational Asthma" provided sufficient grounds for the ALJ to disregard Dr. Kraman's findings.

Rinker argues that the ALJ further erred in failing to give presumptive weight to the opinion of Dr. Kraman as to the extent and duration of Bratcher's impairment, and in also rejecting the opinion of Dr. Gallo, who assigned only a partial permanent disability rating. Dr. Kraman found that Bratcher is not totally disabled, and is capable of performing his prior employment with no restrictions from a pulmonary standpoint. Dr. Gallo diagnosed Bratcher with a 26% permanent impairment, and recommended that Bratcher avoid employment in an environment that had extremes of temperature, noxious fumes or dust, and that involved hurrying, climbing or heavy lifting.

The ALJ relied heavily on Bratcher's own testimony, and his educational background, in arriving at his determination of the extent of the disability. Bratcher testified that he gets out of breath when he walks approximately two hundred feet to get to his mailbox. He has coughing problems and uses inhalers four times per day to help him breathe. He testified that he does not believe that he could perform the full range of duties required of him in the past. As to his educational background, Bratcher testified that he did not complete the fourth grade, cannot read and understand a newspaper, and could not fill out an employment application.

It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability. Although the ALJ must necessarily consider the worker's medical condition when determining the extent of his occupational disability at a particular point in time, the ALJ is not required to rely upon the vocational opinions of either the medical experts or the vocational experts. . . . A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured.

Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 51 -52 (Ky. 2000) *citing Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979).

The ALJ noted Bratcher's age (he was 56 years of age at the time of the hearing) and his limited education, and concluded that the only jobs available to him would be those requiring intensive labor. The ALJ concluded that due to Bratcher's severe breathing problems he would, in all probability, not be able adequately to perform such labor. We agree with the Board that the ALJ provided a reasonable basis for rejecting Dr. Kraman's opinion, and that substantial evidence exists to support his finding that Bratcher is totally occupationally disabled.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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