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Commonwealth Of Kentucky

Court of Appeals

NO. 2007-CA-001573-WC
AND
NO. 2007-CA-001804-WC

PEDIATRIC DENTISTRY, P.S.C. APPELLANT/CROSS-APPELLEE

v. PETITION AND CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-00231

ESTUS KENDALL ROY APPELLEE/CROSS-APELLANT

HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD APPELLEES/CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL, THOMPSON, AND VANMETER, JUDGES.

VANMETER, JUDGE: Pediatric Dentistry PSC petitions for the review of the Workers' Compensation Board's (Board's) opinion affirming in part, and reversing and remanding in part, an Administrative Law Judge's (ALJ's) opinion awarding Estus Kendall Roy permanent partial disability benefits for injuries

caused by cumulative trauma to his neck and back. Roy petitions for cross-review from the same opinion. For the following reasons, we affirm on petition for review. We further affirm on Roy's petition for cross-review.

After Roy graduated from dental school and completed his residency, he established Pediatric Dentistry in 1973. Following some 32 years of treating patients, which Roy described as being physically stressful, he filed an application for resolution of injury claim alleging that he injured his neck and back on August 16, 2005, due to cumulative wear and tear. The parties submitted proof, including medical records from several physicians. The ALJ found that Roy was permanently, partially disabled and awarded him benefits accordingly. The Board affirmed in part, and reversed and remanded in part. The instant petitions for review and cross-review followed.

Petition for Review

The ALJ found that the medical evidence made clear that Roy had "age-related degenerative changes in his cervical and lumbar spine." However, no expert explicitly addressed whether Roy's employment "helped cause those degenerative changes" or "aroused those conditions into symptomatic reality." Still, the ALJ opined that the evidence permitted an inference in favor of either Roy's position that his age-related degenerative changes were aroused by his employment, or Pediatric Dentistry's position that Roy's symptoms were due solely to the effects of the natural aging process. Ultimately,

the ALJ was persuaded by Dr. Phillip Tibbs' assessment that "the repetitive movements and prolonged sitting and bending required of [Roy] throughout the course of his employment were substantial causative factors in [Roy's] neck and lower back problems. As such, both conditions are compensable."

As for the extent of Roy's impairment, the ALJ also agreed with Dr. Tibbs that in 2005, Roy had an 8% impairment rating for his neck and a 12% impairment rating for his lower back. Further, in 2002, Roy would have warranted a 5% impairment rating for his neck and a 10% impairment rating for his lower back. Since Roy alleged an injury date of August 16, 2005, the ALJ carved the 2002 impairment ratings from the 2005 impairment ratings, resulting in an award based upon a 3% neck impairment and a 2% lower back impairment. The Board reversed and remanded, holding that the ALJ erred by carving out a "pre-existing, active impairment from Roy's total impairment rating" because the ALJ relied upon Dr. Tibbs' opinion that Roy's entire 19% whole body impairment was the result of work-related cumulative trauma. Pediatric Dentistry argues on petition for review that the Board erred by reversing the ALJ's decision and that we should reinstate the ALJ's decision. We disagree.

An ALJ has the sole authority to judge the weight, credibility, and inferences to be drawn from the evidence. *Miller v. East Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). He also has the sole discretion to determine the quality, character, and substance of the evidence. *Square D Co.*

v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993). And he is free to reject any testimony, and to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

> On appeal, the Board shall not
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> substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, its review being limited to determining whether or not:
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> (a) The administrative law judge acted without or in excess of his powers;
> (b) The order, decision, or award was procured by fraud;
> (c) The order, decision, or award is not in conformity to the provisions of this chapter;
> (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or
> (e) The order, decision, or award is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

KRS 342.285(2). On appeal to this court, we will correct the Board only when it "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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

Here, we agree with the Board's assessment. Once the ALJ found that Roy's neck and lower back problems were work-

related, the ALJ erred by carving out any 2002 impairment rating. Roy alleged an injury caused by cumulative trauma, and Pediatric Dentistry did not prove that Roy had a pre-existing, active impairment. Nor did the employer prove that Roy untimely filed his application for resolution of injury claim.

Petition for Cross-Review

The ALJ found that Roy was permanently partially disabled, as opposed to permanently totally disabled, as follows:

> Based on the opinions of [Roy's] physicians as well as those of Dr. Guarnaschelli, the [ALJ] agrees [Roy] does not retain the physical ability to return to the regular dentist duties he performed at the time of his injury . . . . However, [Roy] is an exceptionally educated, articulate and capable individual. He started and grew his own dentistry practice. He has bought and sold real estate from which he has derived income. He has served on various boards and committees. Given [Roy's] qualifications, the [ALJ] believes [Roy] is not precluded from returning to regular and sustained employment in a competitive economy within the restrictions assigned by Dr. Guarnaschelli. As such, [Roy] is not totally disabled. Instead, [Roy] is permanently, partially disabled[.]

The Board affirmed. On petition for cross-review, Roy argues that the Board erred by affirming the ALJ's decision in this regard. We disagree.

An employee is permanently, totally disabled when, "due to an injury, [he] has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury[.]" KRS 342.0011(11)(c). "Work" is defined at KRS 342.0011(34) as "providing services to another

in return for remuneration on a regular and sustained basis in a competitive economy[.]" We note that a workers' compensation claimant bears the burden of proving his claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). Since Roy did not persuade the ALJ below that he was permanently totally disabled, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor." *Id.* Compelling evidence is that which is so overwhelming that no reasonable person could reach the same conclusion as the ALJ. *Neace v. Adena Processing*, 7 S.W.3d 382, 385 (Ky.App. 1999).

Here, both Dr. Tibbs and Dr. Charles Rhodes opined that Roy was permanently totally disabled. However, Dr. Gregory Snider opined that Roy was physically capable of performing other work, i.e., as a full-time manager, supervisor or instructor. Moreover, as set forth above, the ALJ explicitly held that Roy could find work within the confines of Dr. John Guarnaschelli's restrictions. Simply put, the mere fact that evidence exists which supports a conclusion contrary to the ALJ's decision is not enough to warrant reversal in Roy's favor. *See Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

Further, when determining the extent of a workers' compensation claimant's occupational disability, an 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.

Id. (internal citations omitted). Here, although Roy may have testified that he is not familiar with operating computers, cannot sit for extended periods of time, and takes pain medication daily, as set forth above the ALJ inferred from Roy's testimony that he was "exceptionally educated, articulate and capable[.]" Based upon these inferences and the opinions of Dr. Snider and Dr. Guarnaschelli, we hold that the Board did not err by affirming the ALJ's decision that Roy was permanently partially disabled, as the evidence did not compel a finding in Roy's favor.

The Board's opinion is affirmed.

ALL CONCUR.

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