

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001688-WC

CHAS COAL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-91549

JOHN NEAL; J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** *

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

ROSENBLUM, SENIOR JUDGE: Chas Coal (Chas) petitions for the review of an opinion of the Workers' Compensation Board (Board), entered July 13, 2007, affirming the decision of an Administrative Law Judge (ALJ) awarding John Neal permanent total occupational disability benefits on reopening. We affirm.

Neal, while employed by Chas, sustained a work-related injury on March 4, 2002, while performing heavy lifting. In his application for adjustment of claim Neal

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

sought benefits for a ruptured disc, right leg and foot pain, and severe depression. Neal settled his claim for a lump sum based on a 13% impairment rating and the agreement was approved by an ALJ on January 22, 2004. The agreement provided that

[f]or the sum of \$77,000 [Neal] has settled his right to all past, present and future income benefits. Said figure is based upon weekly payments of \$154 per month considered paid over his life expectancy of 500 months for the sum of \$600. [Neal] agrees to limit his medical treatment for the psychiatric portion of his claim to office visits and medications to and by his designated 113 physician. Other medicals to remain open pursuant to KRS 342. Parties understand that as a part of this settlement [Neal] has waived his right to future psychiatric benefits except as set out above. [Neal] retains the right to reopen for his injury claim for any increase in disability pursuant to statute.

Neal filed a motion to reopen on June 12, 2006, alleging a worsening of condition and increased impairment. In an order rendered July 19, 2006, it was determined that Neal made a prima facie case for reopening and the matter was assigned to another ALJ for adjudication.

Following Neal's work injury, he was diagnosed with a herniated disc and surgery was recommended but Neal decided against it. Neal took pain medication and, according to his testimony, lived with the severe pain. Neal testified that he could only sit or stand for ten minutes at a time and did not believe he could return to any type of work. Neal also receives social security disability benefits. Prior to his settlement, Neal relied on a medical report of Kenneth Starkey, psychologist, who had evaluated Neal for the social security determination. Dr. Starkey indicated Neal had the functional capacity to

engage in daily living activities. Neal also submitted evidence from Drs. John Vaughan and William Brooks. Dr. Vaughan diagnosed a herniated disc at L4-5, causing L5 radiculopathy and recommended surgery. Dr. Brooks felt that surgery was a possibility, but assigned a 13% impairment rating.

On reopening, Neal testified by deposition and at his hearing. Neal testified he had not worked since the time of settlement. Neal described ongoing depression and severe pain for which he took medication and used a TENS unit. Neal testified that the pain had increased. Neal also presented the medical report and deposition of Dr. David Muffly, who had evaluated Neal on April 13, 2006, upon his attorney's request. Dr. Muffly reviewed multiple MRI films that revealed a right side lateral disc herniation at L4-5, which was now producing severe neuroforaminal encroachment, whereas the 2002 MRI showed a lesser encroachment. Dr. Muffly's diagnosis was that Neal's condition had worsened when compared to the review of his previous treatment records. Dr. Muffly assessed a 16% impairment to the body as a whole, apportioning 13% for a DRE lumbar Category III. Dr. Muffly also apportioned 3% for pain, based upon Neal's subjective complaints. Dr. Muffly opined that Neal was totally disabled from any type of work.

Chas countered with the medical report of Dr. Henry Tutt, who had evaluated Neal in the original claim. Dr. Tutt stated that there was no evidence that Neal was any worse than at the time of the 2002 evaluation. Dr. Tutt stated that Neal continued to correlate with a DRE Category III, yielding an impairment rating of 13%. However, Dr. Tutt disagreed with Dr. Muffly's assessment of a 3% impairment for pain

because DRE category III accounts for pain with the range of 13%. Dr. Tutt stated that Neal was incapable of activities requiring excessive bending or stooping and lifting greater than thirty pounds on a repetitive basis.

After reviewing the evidence, the ALJ was convinced that Neal had more pain and dysfunction on reopening than at the time of settlement. The ALJ also found convincing the report and testimony of Dr. Muffly that Neal had suffered increased symptomatology and dysfunction. The ALJ stated that despite Dr. Muffly's concession that the 3% functional impairment rating for pain was based on subjective complaints, he felt it obvious that Dr. Muffly's opinion, based on the 2005 MRI, was evidence of significant worsening of Neal's low back condition caused by the work-related injury. The ALJ stated that he found Dr. Muffly's opinions more credible and convincing than those of Dr. Tutt. The ALJ stated he was :

also convinced that [Neal], through his testimony and the opinions of Dr. Muffly, as shown by objective medical findings, that he had sustained a post settlement worsening in impairment when the impairment is considered not as 'an impairment rating' but as a demonstration of [Neal's] loss of use or derangement of body organ systems. The ALJ is convinced, based on the totality of the evidence, that because of his increased pain and dysfunction and the change in his objective findings as documented by Dr. Muffly, [Neal] is now, because of a permanent disability rating, completely and permanently unable to perform any type of work as that term is defined by the [Kentucky Workers' Compensation Act].

Chas filed a Petition for Reconsideration that was denied on March 19, 2007.

Following the denial, Chas filed a timely appeal with the Board. On July 13, 2007, the

Board affirmed the decision of the ALJ. This appeal followed.

Chas argues that the ALJ erred when he found Neal to be totally occupationally disabled. We disagree.

KRS² 342.125(1)(d) provides as follows:

Upon motion by any party or upon an administrative law judge's own motion, an administrative law judge may reopen and review any award or order on any of the following grounds:

. . . .

Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury since the date of the award or order.

The claimant's burden on the merits at reopening is to prove by objective medical evidence that he sustained a post-settlement worsening of impairment from the injury, to prove that the change was permanent, and to prove that it caused him to be totally and permanently disabled under the standard described in *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). See *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 219 (Ky. 2006). As further discussed below, Neal met his burden in the present case.

It is well settled that “the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record.” *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). Where the medical

² Kentucky Revised Statutes.

evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. *See Square D. Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993) (citing *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977)). Moreover, if the ALJ finds in favor of the employee, who has the burden of proof, then we must determine whether the ALJ's findings were supported by substantial evidence. *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).

Here, there was conflicting evidence upon Neal's disability rating, and the ALJ chose to accept the medical evidence presented by Dr. Muffly. Further, Dr. Muffly's medical evidence is substantial evidence supporting the ALJ's determination of total and permanent disability. As such, we will not disturb the finding of the ALJ that Neal is completely and permanently disabled and unable to perform any type of work.

The July 13, 2007, decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Melanie Brooke Gabbard
Lexington, Kentucky

BRIEF FOR APPELLEES:

Susan Turner Landis
Johnnie L. Turner
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