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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-001898-WC

JACK ROBERSON — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-74900

NACCO MATERIALS HANDLING GROUP, INC.; HON. MARCEL SMITH, ADMINISTRATIVE LAW JUDGE; WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: DIXON, STUMBO AND WINE, JUDGES.

WINE, JUDGE: Jack Roberson (Roberson) appeals from an August 23, 2007, opinion of the Workers' Compensation Board (Board) which affirmed the administrative law judge's (ALJ) award of permanent partial occupational disability benefits based on a 5% impairment rating. Roberson argues the ALJ erred in adopting the 5% impairment rating assessed by the employer's expert over the 25% impairment rating assessed by his treating surgeon. We agree with Roberson that the medical report of the employer's

expert was too equivocal on the issue of causation to support the ALJ's adoption of the lower impairment rating. Hence, we reverse and remand for entry of a new award.

Roberson began working for NACCO Materials Handling Group, Inc. (NACCO) in 1994. He sustained a work-related cervical injury when he fell during the course of his employment on June 22, 2004. Roberson testified he was retrieving materials from a rack which was about ten feet in height. When he stepped back onto his cart, some of the materials shifted and he fell approximately six feet, first hitting his head on an upright support. According to Roberson, he felt immediate pain and numbness in his neck. He was taken to the Berea Hospital emergency room, where the laceration on his head was sutured and his neck x-rayed.

Roberson first treated with Dr. Klemek who ordered an MRI. Thereafter, he came under the care of Dr. Thomas Menke, who he first saw on August 30, 2004. Dr. Menke told him he was not a candidate for surgery and referred him to physical therapy. Dr. Menke prescribed a home traction unit to be used twice a day. On October 5, 2004, Dr. Menke declared him at maximum medical improvement (MMI) and returned him to work with a 30-pound lifting restriction. During this time Roberson was taking medication for a non-work-related low back condition.

After returning to work, Roberson states that his condition began to worsen. He lost strength in his hands and had numbness in his arms. According to Roberson, the symptoms were very similar to those experienced immediately after the injury. He returned to see Dr. Menke on June 20, 2005. Upon reviewing Roberson's follow-up

MRI, Dr. Menke concluded that Roberson was now a candidate for surgery. He underwent a cervical diskectomy and fusion on August 9, 2005.

Roberson returned to work on September 26, 2005. He testified he has continued to work on a regular full-time basis and has lost no time. His current position primarily involves entering information into a computer and he is earning less than at the time of his injury. However, the parties agree that the change in position and decrease in pay is due to a workforce reduction and not Roberson's injury.

In support of his claim, Roberson relied on Dr. Menke's medical records and deposition. Dr Menke stated that Roberson's initial MRI, taken August 18, 2004, showed a large combination of broad-based disc protrusion at C6-7 as well as a somewhat spondylitic bar causing moderately severe central stenosis and encroaching both neuroforamina. At C5-6 there was also a moderate protrusion with some spondylosis. Dr. Menke's impression was cervical disc herniation and he believed the C6-7 was the symptomatic level. After Roberson showed improvement with medication and physical therapy, Dr. Menke believed that he was at MMI as of October 5, 2004.

But when he next saw Dr. Menke on June 20, 2005, Roberson reported increasing neck stiffness and numbness in the left arm over the past couple of months. He also complained of pain between the shoulder blades and behind the left shoulder. Dr. Menke's impression was cervical spondylosis, combination soft and hard disc most prominent at C6-7 and somewhat more mild at C5-6 from the old MRI. A follow-up MRI taken on July 27, 2005, revealed that the spondylitic bar and protrusion at C6-7 was more

localized on the left than in the prior MRI. Roberson made considerable progress after the cervical fusion, and Dr. Menke released him to work with the same restrictions as before the surgery.

Post-surgery, Dr. Menke diagnosed soft disc protrusion at C6-7 on top of spondylitic changes including a spondylitic bar at C6-7. He said the cause was underlying degenerative changes which were part of age, wear and tear, but added that Roberson's symptoms and the soft disc protrusion were caused by the work injury of June 22, 2004. Dr. Menke further stated that the surgery was necessary due to the work injury, and he assessed a 25% impairment rating for a DRE cervical category four.

NACCO relied on a medical report from Dr. Henry Tutt, who evaluated Roberson on July 31, 2006. He agreed with Dr. Menke that Roberson suffered a cervical strain/sprain on June 22, 2004. However, he concluded that Roberson reached MMI from these injuries by October 5, 2004. Dr. Tutt opined that Roberson's later symptoms reflected a progression of his long-standing degenerative osteoarthritic cervical spondylitic disease. Consequently, he stated, "It is not clear that the injury described as occurring on 06/22/04 played a direct role in the eventual need for surgery performed on 08/09/05." Dr. Tutt assessed a 25% impairment to the body as a whole due to a DRE cervical category four. But since he concluded that the later-developing symptoms were not caused by the work injury, Dr. Tutt assessed a 5% impairment rating for a DRE cervical category two based on Roberson reaching MMI as of October 5, 2004.

After reviewing the evidence, the ALJ was more persuaded by Dr. Tutt's opinion that the need for surgery was not related to the work injury of June 22, 2004. Likewise, the ALJ adopted Dr. Tutt's position that Roberson's later-developing symptoms were caused by his pre-existing degenerative cervical conditions. Consequently, the ALJ adopted the 5% impairment rating assessed by Dr. Tutt, and awarded benefits accordingly.

On appeal to the Board, Roberson argued that the evidence compelled a finding of a 25% impairment rating. A majority of the Board disagreed, finding that Dr. Tutt's opinion constituted substantial evidence, and Dr. Menke's opinion did not compel a contrary result. The dissenting member pointed out that Dr. Tutt's medical report was equivocal on whether the work injury played a direct role in the need for surgery. The dissent also noted that there was no evidence of any intervening event to cause the need for the surgery. The dissent concluded that Dr. Tutt's medical reports and opinion did not constitute substantial evidence upon which to base an award of a 5% impairment rating, and that the evidence compelled a finding of the 25% impairment rating assessed by Dr. Menke. This petition for review followed.

Since Roberson, the party with the burden of proof before the ALJ, was unsuccessful, the issue on appeal is whether the evidence compels a different conclusion. *Wolf Creek Collieries v. Crum,* 673 S.W.2d 735, 736 (Ky.App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky.

App. 1985). The ALJ has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Where the evidence is conflicting, the ALJ has the sole authority to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). So long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). The function of this Court's review of the Board is to correct the Board only where the Court perceives that 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, 687-88 (Ky. 1992).

There is no question that Dr. Tutt's opinion would support the ALJ's finding and award. The only dispute is whether his opinion constitutes substantial evidence. Roberson again focuses on Dr. Tutt's equivocal statements regarding causation for the surgery, as well as the absence of any intervening event between the work injury and the surgery. Furthermore, Roberson points out that both Dr. Menke and Dr. Tutt assessed a 25% impairment rating following the cervical fusion. Given this evidence, Roberson maintains that the ALJ clearly erred in relying on Dr. Tutt's opinion regarding causation over the unequivocal testimony of his treating physician, Dr. Menke.

We agree. Dr. Tutt noted that Roberson had a pre-existing lumbar condition and degenerative cervical osteoarthritic changes. He also focused on Dr. Menke's initial conclusion that Roberson reached MMI on October 5, 2004, and that most of his symptoms had resolved by that point. Given this improvement, Dr. Tutt was not convinced that the later-developing symptoms and the surgery were causally related to the work injury. Rather, Dr. Tutt inferred that the deterioration in Roberson's condition after October 5, 2004, must be attributable to the pre-existing condition. Since the effects of the natural aging process are not considered to be an injury, KRS 342.0011(1), Dr. Tutt concluded that Roberson's impairment which developed after MMI was not compensable.

However, a "work-related arousal of a pre-existing dormant condition into disabling reality is compensable." *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky.App. 2007). And "where the trauma *or* the underlying pre-existing defect exacerbated by the trauma results in a permanent impairment rating post-injury, even though secondary to surgery or other medical treatment, the totality of the effects of the employee's condition must be judged compensable as a matter of law." *Id.* Finally, "[i]f the pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary." *Id. See also McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854 (Ky. 2001). Here, there was no evidence that Roberson's cervical condition was symptomatic prior to the work injury and Dr. Tutt agreed that the pre-existing condition was aroused into disabling reality by the work injury of June 22, 2004.

In an addendum to his report, Dr. Tutt compared the MRI scans performed on August 16, 2004, and July 27, 2005, and concluded that Roberson's additional impairment was caused by conditions developing after Dr. Menke declared Roberson to be at MMI following the work injury. From this evidence, NAACO suggests that the natural aging process was the intervening cause of the deterioration in Roberson's condition after October 5, 2004. But while Roberson may have reached MMI as of that date, his condition did not completely revert to its pre-injury dormant state. Thus, the work-related arousal of the condition was still active.

We agree with NAACO that not all age-related deterioration following a work injury is compensable. Where the impairment from the work injury returns to dormancy, there is a considerable lapse of time between MMI and the subsequent deterioration, or there is an intervening trauma, a fact-finder could reasonably infer that the chain of causation between the work injury and the later-developing condition has been broken. But given the continuing active impairment, the short time period over which Roberson's cervical condition deteriorated after MMI, and the absence of any specific intervening event, there was no substantial evidence to support Dr. Tutt's inference that the need for surgery was unrelated to the June 2004 work injury. In fact, Dr. Tutt's equivocal statements about causation reflect on the tenuousness of such an inference in this case.

Consequently, we agree with the dissenting Board member that Dr. Tutt's report did not constitute substantial evidence to support the ALJ's decision to base an

award on a 5% impairment rating. Based on Dr. Menke's unequivocal reports and testimony, the evidence compelled a finding of a 25% impairment rating due to the June 22, 2004, work injury. Therefore, the ALJ clearly erred by adopting the lower impairment rating.

Accordingly, the August 23, 2007, opinion of the Board is reversed, and the ALJ's opinion and award is vacated and remanded for entry of a new award as set forth in this opinion.

ALL CONCUR.

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