

Commonwealth of Kentucky
Court of Appeals

NO. 2007- CA-002511-WC

GLENN SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-93904

TOYOTA MOTOR MANUFACTURING
OF KENTUCKY; HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: COMBS, CHIEF JUDGE; STUMBO, JUDGE; KNOPF,¹ SENIOR
JUDGE.

KNOPF, SENIOR JUDGE: Glenn Smith petitions for review from an order of the
Workers' Compensation Board (Board) affirming the opinion of the administrative
law Judge (ALJ). The ALJ dismissed Glenn Smith's workers' compensation claim

¹ Senior Judge William L. Knopf presiding as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and KRS 21.580.

against Toyota Motor Manufacturing (Toyota) for an injury that allegedly occurred in 2005. As a reviewing Court, we must decide, in light of the record, whether the evidence is “so overwhelming as to compel a finding in favor of” the appellant. *Wolf Creek Collieries v. Crum*, 673 S.W. 2d 735 (Ky. App. 1984). The evidence in the case at hand does not meet such a high standard. Therefore, we must affirm the Board’s decision.

Glenn Smith began working at Toyota in 1991. In December 2000, while Smith was at work, a fork truck backed over his left foot. Due to his injury, Smith was unable to work for seven months and began medical treatment for his injuries. Smith received treatment from two physicians, Dr. J. Richard Johnson at Toyota’s Industrial Health Services and Dr. Vincent J. Sammarco, an orthopedic surgeon.

Smith was diagnosed with reflex sympathetic dystrophy (RSD), otherwise known as complex regional pain syndrome (CRPS). RSD occurs when the sympathetic nervous system is disrupted creating the increased blood flow to an extremity. The increased blood flow causes the brain to perceive information incorrectly. Someone who suffers from RSD often feels a burning sensation and severe pain in an extremity when there is only slight stimulation of the nerves in that extremity. With treatment, however, some physicians believe patients with RSD can recover from the condition within a year.

Smith returned to work at Toyota in August 2001. Dr. Sammarco released Smith to return to his regular job duties without restriction, but Smith was

placed on “light duty.” According to Dr. Johnson, when Smith returned to work in 2001, he had no ratable functional impairment. Smith purportedly had occasional pain and walked with a slight limp. He did not file a workers’ compensation claim for that injury and discontinued medical treatment, only using ibuprofen for occasional pain.

In September of 2002, Smith visited Dr. Sammarco for a follow-up exam. Dr. Sammarco was pleased with Smith’s progress. Although Smith continued to experience slight pain, Dr. Sammarco did not think that the RSD had reoccurred. Rather, he believed the pain to be mechanical foot pain.

In November 2004, Smith was transferred to the assembly shop. The new position required Smith to do more walking and climbing than required by his previous job assignment. According to Smith, he developed a severe limp and increased foot pain, causing him to take maximum doses of ibuprofen. Although his pain dramatically increased, he did not report pain to his supervisor at Toyota until July 26, 2005. Smith was referred back to Dr. Sammarco and once again started medical treatment. In August 2005, Glenn Smith quit work.

Thereafter, in June 2006, Smith filed a claim for workers’ compensation benefits. Smith asserted that the change in duties created an additional injury to his left foot, a theory which is supported by the medical diagnosis of Dr. Sammarco. After examining Smith and evaluating his condition, Dr. Sammarco concluded that the RSD from the initial injury went into remission

until his work duties changed. Dr. Sammarco concluded that the RSD re-developed, after the transition, as a result of the strenuous activity.

After Smith filed for workers' compensation benefits he was examined by a variety of physicians: Drs. Randolph, Schiller, Vascello, Zerga, Conte, and Lee. The majority of the evidence in the record consists of their opinions, as well as the testimony of Smith's supervisor and a private investigator who secretly filmed Smith performing daily tasks. Most of the medical opinions appear to turn on whether or not the physician had viewed the surveillance tape.

After reviewing Smith's medical records and conducting a physical examination, Dr. Randolph, an occupational medicine specialist, concluded that Smith suffered from a crushed foot, RSD and neuralgia. Dr. Randolph found that Smith had 20% whole person impairment pursuant to the American Medical Association, *Guides to the Evaluation of Permanent Impairment*, ("Guides"), secondary to the 2005 injury. Randolph, however, did not view the surveillance footage.

Similarly, Dr. Vascello, an anesthesiologist, examined Smith and diagnosed him with CPRS I, pain improved, possible capsulitis/metatarsalgia, and possible plantar neuroma. Like Dr. Randolph, Dr. Vascello did not view the surveillance video.

On the other hand, Dr. Lee, an orthopedic surgeon, examined the appellant, reviewed his prior medical history, and reviewed the surveillance tape showing Smith perform mundane activities, such as fishing, carrying out trash,

driving, filling a gas can at a gas station, and various other ordinary activities. Dr. Lee testified that the video portrayed Smith completing these tasks with little to no pain. Dr. Lee noted that even when Smith walked on uneven surfaces, such as a creek bank, he did so without the assistance of a cane.

Likewise, Dr. Zerga's opinion was also influenced by the surveillance footage. Upon initial observation Dr. Zerga, a neurologist, found Smith did have an impairment and mild gait derangement. He concluded that Smith's injuries were caused by "prolonged weight bearing activities with his new job duties" rather than as a result of the initial injury. When Dr. Zerga diagnosed Smith, however, he had not viewed the surveillance tape. After watching the surveillance tape, Dr. Zerga testified that he changed some of his earlier conclusions. He did not think that Smith would have any practical limitations. He also concluded Smith's pain was a result of the initial injury.

Dr. Schiller also found that Smith's symptoms were a result of his initial injury. Dr. Schiller opined that RSD does not come and go. Instead, "once it is gone it is gone, and if it stays it never goes away." And after watching the video, he further distrusted the information that Mr. Smith gave him. In a supplemental report prepared after watching the surveillance video, Dr. Schiller wrote, "the patient deceived me during the examination. I cannot come up with a conclusion that in fact he does not have currently the diagnosis of chronic regional pain syndrome."

After considering the evidence, the ALJ based her opinion on the testimonies of those doctors who had opportunity to view the surveillance tape. The ALJ denied the Smith's claim, finding that Smith's injuries were strictly related to the initial injury rather than the 2004 change of duties.

Smith unsuccessfully appealed his claim to the Board, where, as in this petition, he contended that the ALJ's decision was clearly erroneous. In particular, Smith claimed that the ALJ put too much weight on the surveillance video. He argues that the video is an inaccurate representation of his condition because it only represents three hours of his life.

Whether the video surveillance is an accurate representation of Smith's life, or whether Dr. Sammarco was more reliable than other testifying physicians, are not issues to be decided by this court. When an appellate court reviews a claim for workers' compensation benefits, it can not weigh the evidence because that task lies solely in the hands of the ALJ. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). The ALJ has the role of weighing the evidence, drawing inferences, and making determinations of credibility. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. App. 2000).

Instead we must only ask whether, in light of the record in its entirety, the evidence compels a finding in favor of the appellant, *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). The evidence must be such that no reasonable person could have made the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W. 2d 224 (Ky. App. 1985). If the ALJ's opinion is

supported by substantive evidence in the record, the decision must be upheld.

Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

The mere fact that there is testimony that conflicts with the ALJ's findings does not give automatic grounds for reversal. *Whittaker v. Rowland*, Ky., 998 S.W.2d 479 (1999). The ALJ has the sole discretion to judge the weight, credibility, inference, and substance of the evidence, *Paramount Foods v. Burkhardt*, Ky., 695 S.W. 2d 418 (1985). In order to successfully contest an ALJ's findings, an appellant must show that the ALJ's opinion was based on no evidence of probative value. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

Smith claims that the video surveillance was not an accurate representation of his daily life and activities. He argues that Drs. Johnson and Sammarco are the most reliable authorities because they treated him over a long period of time. Further, he argues that the physicians who viewed the surveillance tape have unreasonable opinions based on the tape. Smith argues that the tape has no probative value and is not credible.

After reviewing the tape, the ALJ and the Board concluded that the footage was not misleading. Instead, the Board concluded, "after viewing the videotape we are in agreement with the ALJ that it tends to corroborate rather than impeach Dr. Lee's conclusions. Because Dr. Lee is a medical expert and his medical opinions constitute substantial evidence, we may not disturb the ALJ's decision on appeal." Like the Board, we cannot find that the ALJ erred by placing substantial weight on the surveillance tape.

Rather, the ALJ acted within her discretion to make conclusions of evidence credibility and inferences. The ALJ clearly explains that she found the testimony of those physicians who had viewed the surveillance tape more credible than the testimony of those physicians who did not have the opportunity. Although there was conflicting testimony, the conflict was directly correlated to which physicians viewed the tape.

Because Smith failed to satisfy his burden of showing that the ALJ findings were unreasonable and not based on the evidence, we affirm the order of the Workers' Compensation Board.

ALL CONCUR.

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