

RENDERED: November 21, 1997; 10:00 a.m.
NOT TO BE PUBLISHED

NO. 97-CA-0041-WC

KNOX COUNTY BOARD OF
EDUCATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
 OF THE WORKERS' COMPENSATION BOARD
 NO. WC-94-040871

RONNIE MILLS;
SPECIAL FUND;
HON. DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: DYCHE, GARDNER and GUIDUGLI, Judges.

GUIDUGLI, JUDGE. The Knox County Board of Education appeals from an opinion entered by the Workers' Compensation Board (the Board) on December 9, 1996, affirming an opinion and award entered by the Administrative Law Judge (the ALJ) on June 24, 1996. We affirm.

Ronnie Mills (Mills) was employed by Knox County Board of Education as a school bus driver. According to the evidence contained in the record, Mills began having psychiatric problems at the beginning of the 1993 school year when he found a dead body lying by the side of the road while driving his regular

school bus route. His psychological condition worsened following the deaths of his mother in December 1994 and a brother in February 1994, which culminated in a visit to Dr. Delapena on February 16, 1994. Mills told Dr. Delapena that he had been depressed in the summer and then for the last month and a half. Mills further told Dr. Delapena that he had not been working and could not return to work. Dr. Delapena diagnosed anxiety and depression and prescribed Zoloft. On a return visit on February 21, 1994, Dr. Delapena prescribed Restoril for sleeplessness.

Although the record is unclear, Mills apparently missed some work following the death of his brother because of his psychiatric condition, although the record is unclear as to how much time was missed. Mills testified that he exhausted his accumulated sick days and had to return to work. Because he was unable to drive a school bus due to the medication he was on, he was assigned to work in the garage. Mills did not seek benefits for his psychiatric problems.

Mills worked in the garage until June 8, 1994, when he suffered a back injury while changing the brakes on a school bus. Medical records from Dr. Russell, Dr. Muffly, and Dr. Dubin indicate that Mills has a herniated nucleus pulposus at L5-S1 and degenerative disc disease. All three doctors assessed a functional impairment rating of 7% with 3.5% attributed to the injury of June 8, 1994 and 3.5% attributed to the arousal of a pre-existing condition.

Dr. Dane and Dr. Shraberg offered testimony regarding Mills' psychiatric condition. Dr. Dane diagnosed a dysthymic disorder of moderate severity which he indicated was causally related to the back injury. Dr. Dane gave Mills a functional impairment rating of 25% for his psychological problems. Although Dr. Shraberg indicated that Mills had a functional impairment of 5%, he stated that Mills' psychiatric problems would resolve upon completion of litigation.

The ALJ held that based upon the entirety of the evidence contained in the record, Mills was 100% occupationally disabled with 25% apportioned to the physical injury and 75% apportioned to the psychiatric injury. The ALJ found that Mills had no pre-existing back problems based solely on Mills' testimony. As to Mills' psychiatric problems, the ALJ held that one-third of the psychiatric impairment was active prior to the injury of June 8, 1994, and that two-thirds was directly attributable to the work-related injury. Knox County Board of Education was directed to pay \$71.96 per week for 50% of a 75% occupational disability award, the Special Fund was directed to pay \$71.96 per week for the remaining 50%.

Both Knox County Board of Education and the Special Fund filed petitions for reconsideration alleging that the benefits were incorrectly calculated and that Mills' benefits should be limited to 425 weeks. On reconsideration, the ALJ reduced the weekly benefits payable by Knox County Board of Education and the Special Fund to \$53.97. As to the argument

that Mills was only entitled to permanent partial disability, the ALJ held:

Although a portion of the Plaintiff's psychiatric condition was active at the time of his injury, the active disability itself can also be traced to events that occurred at work and was work-related.

The Board affirmed the ALJ's opinion and award, and this appeal followed.

Knox County Board of Education argues that the ALJ erred in finding Mills to be 100% occupationally disabled and in awarding lifetime benefits. In support of its argument, Knox County Board of Education relies on Kentucky Revised Statutes (KRS) 342.730(1)(a), which states:

For total disability due to work-related injury or occupational disease, sixty-six and two-thirds percent (66 2/3%) of the employee's weekly wage but not more than one hundred percent (100%) of the state average weekly wage and not less than twenty percent (20%) of the state average weekly wage as determined in KRS 342.740 during that disability. Non-work related disability shall not be considered in determining whether the employee is totally disabled for purposes of this subsection. (emphasis added).

Knox County Board of Education argues that the ALJ erred in merely reducing the 100% occupational disability award by the 25% of Mills' psychological condition which was found to be pre-existing and active. Knox County Board of Education contends that "[d]ue to the fact that [25%] of Mr. Mills' [75%] occupational disability is due to his psychological injury and that it was prior active and non-work related, it is clear that

the award of [100%] total occupational disability, lifetime benefits is completely in error. Due to the fact that the [ALJ] did make the finding that [1/3] of the psychiatric (sic) impairment was active prior to the work-related injury, then Mr. Mills has only truly suffered a [75%] occupational disability."

If Mills' preexisting psychological condition had been found to be nonwork-related by the ALJ, then Knox County Board of Education's argument would be correct. However, Knox County Board of Education conveniently overlooks the fact that the ALJ specifically found the pre-existing psychological condition to be work-related in his order partially overruling the motions for reconsideration. This finding is further supported by evidence in the record which shows that Mills' psychological problems started the day he found the dead body while driving the school bus. Thus, the ALJ did not err in finding that Mills was 100% occupationally disabled despite the fact that the award was reduced by 25% to compensate for a pre-existing condition which was work-related. We particularly agree with the Board's statement that "pre-existing, active work-related disability, even if noncompensable because no claim was filed for it, may still be used by an ALJ in his ultimate finding; whether that pre-existing, active disability is work-related or nonwork-related, is a factual finding that must be based upon the evidence presented. So long as there is evidence to support the ALJ's conclusion, which there was herein, it may not be disturbed on appeal."

Knox County Board of Education also contends that the ALJ erred in apportioning prior active disability in regard to Mills' psychiatric condition. Following our review of the record, we are unable to find that the evidence compels a different result. While the evidence before the ALJ may, in fact, support a different result in regard to apportionment, we agree with the Board that the evidence does support the ALJ's findings as to apportionment. Special Fund v. Francis, Ky., 708 S.W.2d 641, 644 (1986).

Having considered the parties' arguments on appeal, the opinion of the Board is affirmed.

ALL CONCUR.

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