

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-001979-WC

HERSCHEL AUSTIN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95021452

UNITED PARCEL SERVICES, INC.;
SPECIAL FUND; HONORABLE J.
OVERFIELD, ADMINISTRATIVE LAW
JUDGE AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: EMBERTON, GARDNER AND MILLER, JUDGES.

GARDNER, JUDGE: Herschel Austin (Austin) appeals from an opinion of the Workers' Compensation Board (the board) which affirmed an opinion of the Administrative Law Judge (ALJ). The ALJ determined that Austin's spinal surgery was not necessitated by a work injury sustained in the employ of United Parcel Services (UPS). We affirm the opinion of the board.

The facts are uncontroverted. On May 15, 1995, Austin, while on the job with UPS, fell while lifting a heavy box and struck his neck on a shelf in a delivery van. He received

treatment from Dr. Phillip Singer (Singer), who took Austin off work and prescribed physical therapy. Austin returned to work in December 1995.

Two months later, Austin experienced sharp pain in his upper back which was unlike the pain experienced in the fall. Singer referred Austin to Dr. Vaughan Allen (Allen), who recommended surgery. While at home, Austin fell and was rendered a quadriplegic. Emergency surgery was performed on February 20, 1996, to remove a collapsed vertebra and to perform a cervical fusion. The surgery restored Austin's motor function, but revealed the presence of a malignant tumor of the bone marrow. Austin has not returned to work.

Austin filed a claim alleging disability resulting from the May 15, 1995 injury. The matter proceeded before the ALJ, where proof was taken. UPS maintained that the May 1995 injury did not result in a functional impairment rating, and that Austin's subsequent occurrences resulting in the need for surgical intervention were directly related to the tumor on the cervical vertebra and were not caused by any work-related activity. The ALJ awarded temporary total occupational disability benefits and medical costs associated with the May 1995 injury, but dismissed Austin's claim for permanent occupational disability benefits. As a basis for the dismissal, the ALJ relied on medical evidence showing Austin to have "[n]o functional impairment, no residual problems and occupational disability. . ." resulting from the May 1995 injury. Though the ALJ found Austin to be an extremely credible witness, he

concluded that Austin's current inability to work resulted solely from the spinal tumor and its effects, and that said disability would have occurred even without the May 1995 injury. Austin appealed to the board which affirmed. This appeal followed.

Austin now argues that the ALJ improperly concluded that he was not entitled to permanent disability benefits. He maintains that the ALJ erred in ignoring the uncontroverted medical evidence that but for the May 1995 injury, the effects of the tumor would not have resulted in permanent disability. He argues that the overwhelming weight of the medical evidence reveals that the work-related injury produced an arousal of a nondisabling disease or condition into disabling reality. As such, he seeks to have the matter reversed and remanded for further proceedings.

The record contains extensive medical evidence relating to the cause and treatment of Austin's condition. This evidence has been adequately addressed by both the ALJ and the board, and need not be recited herein. For purposes of the instant appeal, however, it should be noted that the record contains conflicting evidence on the question of whether Austin's May 1995 injury was a contributory factor in his subsequent disability, or whether as the ALJ found and UPS now argues, Austin's underlying pathological condition (i.e., the tumor) would have manifested itself in disability irrespective of the work-related injury.

In considering this question, the board properly addressed Austin's burden of proof. It stated,

Since Austin, the party with the burden of proof, was unsuccessful in establishing work

relatedness of the surgery giving rise to the disability, the issue on appeal is whether the evidence is so overwhelming as to compel a finding in his favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Compelling evidence has been defined as evidence so persuasive that it is clearly unreasonable for the ALJ not to be convinced by it. Hudson v. Owens, Ky., 439 S.W.2d 565 (1969). Moreover, it is not enough for Austin to show that the record contains some evidence which would support a reversal of the ALJ's decision. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). So long as the ALJ's determination is supported by any evidence of substance, it cannot be said the evidence compels a different result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

Thus, the ALJ's findings must be sustained if any evidence of substance exists in the record to support his conclusion. Clearly, such evidence does exist. Dr. Allen stated quite clearly in deposition, for example, that he had not assigned any permanency to the May 1995 injury, and that the subsequent incidents (i.e., non-work-related incidents) caused the condition for which Austin underwent surgery. Similarly, Dr. Laughlin expressly stated that he believed the tumor was the cause of the vertebral collapse. These statements, taken alone, constitute sufficient evidence to sustain the conclusions of the ALJ. Special Fund v. Francis, supra. Accordingly, we cannot find that the board erred in affirming the opinion and order of the ALJ on this issue.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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