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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002331-WC

RONALD MYERS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-79799

PRIVATE INVESTIGATIONS AND
COUNTER INTELLIGENCE, INC.;
HON. SHEILA C. LOWTHER,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Ronald Myers petitions for a review of a decision of the
Workers' Compensation Board (Board) which affirmed the administrative law

judge's (ALJ) order dismissing his claim for income and medical benefits against Private Investigations & Counter Intelligence, Inc. (Private Investigations). Myers argues that the ALJ erred in rejecting the opinion of the university evaluator, Dr. Michelle Mattingly, who attributed causation of Myers' psychological impairment to the work-related injury. Finding that there was substantial evidence supporting the ALJ's findings and conclusions, we affirm.

FACTS AND PROCEDURAL BACKGROUND

Myers was employed by Private Investigations as a scoop operator and worked as a leased employee at the Blue Diamond Mine #75. His employment at Private Investigations was from April through August 2004. On August 2, 2004, Myers sustained a work-related injury when he was struck on the head by the canopy on the scoop, which was not properly secured. Following the injury, Myers briefly lost consciousness and was taken to the Hazard Area Regional Hospital (Hazard ARH) emergency room and treated for a head injury. Since his release from the hospital, Myers has never returned to any form of gainful employment. Myers testified that he experiences daily, debilitating headaches and psychiatric symptoms caused by the injury. His claim for benefits was two-pronged, alleging permanent impairment as a result of traumatic brain injury and psychological impairment.

The ALJ's opinion was entered on April 9, 2007. Following the ALJ's denial of Myers' petition for reconsideration, the Board's decision, affirming the ALJ, was entered on November 2, 2007. This petition for review

followed. As noted above, the primary issue on appeal concerns ALJ's rejection of the opinion of the university evaluator, Dr. Michelle Mattingly. Dr. Mattingly is a psychologist who is board certified in Clinical Neuropsychology. Dr. Mattingly's evaluation of Myers, pursuant to Kentucky Revised Statutes (KRS) 342.315, attributed the causation of Myers' psychological impairment to the work-related injury. Yet, after the testimony of other medical experts, the ALJ dismissed Myers' claim for benefits in its entirety, and the Board upheld her decision.

First, before turning to the psychological impairment, the Court notes that with regards to the physical injury resulting from this work accident, although the evidence was mixed, the ALJ was more persuaded by the opinions of Dr. Travez Tucker, a neurologist and director of the University of Kentucky Headache and Pain Clinic (the KRS 342.315 evaluator); Dr. Kenneth Graulich, an examining neurologist, and Dr. Robert Granacher, a board certified psychiatrist and neurologist. The ALJ concluded, based on the aforementioned medical reports, that there was no evidence of traumatic brain injury. This portion of her decision has not been challenged on appeal.

With regard to both the physical and the psychological injury, we are attentive to the entry of the Hazard ARH treatment records, covering an extended period of time prior to the August 2004 work-related injury. Notably, the records show that Myers was seen there in 1994 after he was involved in a head-on motor vehicle accident and again in 1997 following another motor vehicle accident. After the 1997 incident, Myers complained of pain in the left temporal area of his

head as well as headaches. He believed his injuries were the result of a fight between himself and the other driver following the accident.

Myers, on appeal, is contesting the ALJ's decision with regards to the nexus between his head injury and his emotional, psychological, and psychiatric condition. The Board found that the medical evidence regarding this issue was accurately summarized by the ALJ. We will not repeat the ALJ's thorough and accurate summary in its entirety but note that the ALJ discussed at length the evaluation of three physicians: Dr. Mattingly, Dr. Granacher, and Dr. David Shraberg. At the request of Private Investigations, Dr. Shraberg performed a psychiatric evaluation of Myers on August 15, 2005. Dr. Shraberg's diagnosis was major depression with a recent overdose, a personality disorder with paranoid and narcissistic features, an intermittent explosive disorder, and apparent cervical sprain or strain with possible concussion or occipital neuralgia. Furthermore, he concluded that Myers was at maximum medical improvement physically and that the current psychiatric dysfunction was based on an underlying disorder. Significantly, Dr. Shraberg found no measurable psychiatric impairment attributable to the work-related injury.

On January 18, 2006, Dr. Mattingly evaluated Myers. In her report, Dr. Mattingly stated that Myers demonstrated extreme emotions during the evaluation ranging from uncontrollable crying to explosive anger. Based on this factor, she was unable to accurately determine his cognitive function. Furthermore, her report indicated that Myers denied any history of anxiety,

depression or violence. Thereafter, Dr. Mattingly attributed his current psychological symptoms to the work-related injury. Her diagnosis was major depression, single episode, severe.

On March 6, 2006, Dr. Granacher evaluated Myers at the request of Private Investigations. His conclusion was that there was no evidence of brain injury or neuropsychiatric disturbance resulting from the 2004 accident. Moreover, he found no impairment that would prevent Myers from returning to work.

Ultimately, the ALJ found the opinions of Drs. Shraberg and Granacher more persuasive and rejected Dr. Mattingly's opinion. Her reasons are explained in her decision:

Mr. Myers is also asserting that he has a psychiatric impairment. Dr. Shraberg and Dr. Granacher concluded that there was no such impairment as the result of the 2004 accident. However, Dr. Mattingly testified that this accident represented a "life changing" event, which gave rise to a serious and disabling psychiatric condition. The ALJ has reviewed her report and deposition. She is clearly well-qualified. However, the undersigned feels compelled to reject her findings and any presumptive weight to which they might otherwise be entitled. Dr. Mattingly received a history from the plaintiff and his girl friend of a marked change in his behavior following the accident, and essentially concluded that there was no explanation for this change other than the 2004 event. In contrast, Dr. Shraberg concluded that the plaintiff's behavior arises from a fairly severe personality disorder of a lifetime nature. Like Dr. Mattingly, Dr. Granacher was unable to obtain reliable cognitive test results. The VSVT suggested that the plaintiff deliberately chose incorrect responses. The MMPI-2 suggested exaggeration of his problems. In

light of this evidence from Dr. Shraberg and Dr. Granacher, the undersigned rejects Dr. Mattingly's conclusions and finds that Mr. Myers has failed to prove the existence of a psychiatric impairment attributable to the work-related accident.

Opinion at p. 16.

Based on her analysis, the ALJ dismissed Myers' claim for income and medical benefits. We now examine the legal issues surrounding this dispute.

STANDARD OF REVIEW

When reviewing Board decisions, this Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). To review the Board's decision, we must first study the ALJ's decision because the ALJ, as the fact finder, 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 418-19 (Ky. 1985). Additionally, it is important to be aware that Myers bears the burden of proof with respect to every element of the case. *See Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977).

ANALYSIS

KRS 342.315(2) provides in relevant part:

[T]he clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the

clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

Myers relies heavily on *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000) to support his argument that the ALJ erred and did not give presumptive weight, as required under KRS 342.315(2), to the reports prepared by the university evaluator, Dr. Mattingly. But we believe he misconstrues the statutory requirements. In essence, he argues that the ALJ is precluded from rejecting Dr. Mattingly's report that he sustained significant work-related psychological impairment unless overcome by "clear and convincing" evidence.

Myers' discussion of the "clear and convincing" evidentiary standard observes that this standard is required in termination of parental rights and right to die cases, but he never provides statutory or case law mandating the "clear and convincing" standard application to a decision by an ALJ who rejects the recommendation of a university evaluator. Moreover, an examination of *Magic Coal* specifically rejects the "clear and convincing" evidence standard in such cases:

The clear and convincing evidence standard is not found in Chapter 342, and we have been directed to no judicial decision which has employed that standard with regard to the essential facts of a workers' compensation claim. In view of the foregoing, we are persuaded that had the legislature intended for the presumption created by KRS 342.315(2) to be overcome only by clear and convincing evidence, it would have so declared.

Id. at 95.

At this point, Myers reiterates the evidence, and claims that Dr. Mattingly's statements are not rebutted by the testimony of the other physicians. Additionally, the other physicians' opinions, according to Myers, sharply differ. He asserts that the ALJ's opinion is deficient because she did not resolve their differences. In addition, Myers broadly claims that Dr. Mattingly's testimony withstood cross-examination and no other evidence on the record rises to the level of "clear and convincing." Therefore, Myers believes the evidence supports a finding of psychiatric impairment and an award of medical and income benefits.

Having now addressed his incorrect assertion that the "clear and convincing" standard applies in such cases, we return to *Magic Coal* for the Court's explanation of the evidentiary requirements of KRS 342.315(2). Under the requisites of the statute, the Court concludes that the procedural effect of the presumption created by the statute is governed by Kentucky Rules of Evidence (KRE) 301, and further, does not shift the burden of persuasion. *Id.*

Furthermore, the Court instructs to overcome the presumptive weight afforded the university evaluator's opinion, the ALJ must provide a reasonable basis for doing so. *Id.* at 97. As later explained by the Kentucky Supreme Court, this provision does not restrict the ALJ's authority to weigh conflicting medical evidence and to choose which evidence to believe. Indeed, an ALJ may choose to disregard the clinical findings and opinions of the university evaluator if a reasonable basis for doing so is provided. [*Bright v. American Greetings Corp.*, 62 S.W.3d 381, 383 \(Ky. 2001\)](#) citing [*Magic Coal*, 19 S.W.3d at 88](#). In fact, contrary

to the opinion's language cited above explaining the ALJ's reasons for rejecting the university evaluator's opinion, Myers still opines in his brief that the ALJ failed to set forth specific reasons for rejecting Dr. Mattingly's evaluation.

The Board noted in its opinion that, while Dr. Mattingly steadfastly maintained that the work-related injury caused the psychiatric impairment, she also conceded that Myers presentation was consistent with malingering and that his daily use of marijuana could also affect him. And as noted by the ALJ in the opinion, Dr. Shraberg recognized Myers' psychological impairment but believed it was unconnected to physical injury and related to emergent personality dysfunction. Dr. Granacher, like Dr. Mattingly, identified marijuana and alcohol abuse in his diagnosis but found no neuropsychiatric disturbance as result of the work-related accident. And he pointed out test results that were consistent with intentional choice of incorrect responses.

Therefore, in her evaluation of the conflicting testimony, the ALJ determined that Myers' condition was not caused by the work-related accident. The rationale provide in her decision is reasonable, specific, and comports with the dictates of KRS 342.315(2) as interpreted in *Magic Coal*.

CONCLUSION

We are persuaded that the ALJ stated a reasonable basis for choosing to rely on Drs. Shraberg and Granacher's medical conclusions. It is axiomatic that an award of income or medical benefits is not compelled for a non-work-related condition. The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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