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Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-001520-WC

RICK D. RIDENER — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-07-99273

SOUTH KY RURAL ELECTRIC COOPERATIVE CORP.;
WORKERS' COMPENSATION BOARD;
AND JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; HENRY,[1] SENIOR JUDGE.

KELLER, JUDGE: Rick D. Ridener (Ridener) appeals from the opinion of the Workers' Compensation Board (the Board) affirming the Administrative Law

[1] Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Judge's (ALJ) opinion and award finding Ridener only partially disabled. Ridener argues that when South Ky Rural Electric Cooperative Corp. (the Electric Cooperative) filed notice that he had been approved for long-term disability benefits, it admitted that he is totally disabled. In the alternative, Ridener argues that the evidence compelled a finding of permanent total disability. For the following reasons, we affirm.

FACTS

On November 6, 2006, Ridener injured his back when he fell, landing on the bumper of a truck. At the time of his injury, Ridener was 49 years of age. He has a high school education and has worked as a lineman for the Electric Cooperative, several construction companies, and a telephone company; as a laborer for several coal mining companies; as a laborer for a railroad; and for a tire company. As described by Ridener, all of his jobs required medium to heavy manual labor. Following his injury, Ridener returned to work in a light-duty job but only performed that job for a week and a half. He has not worked since then. Ridener was treated by several physicians for his injury, including Drs. El-Kalinny and Brooks. Their records, along with the records and reports of evaluating physicians and vocational experts, are summarized below.

Ridener filed the May 22, 2007, Form 107 of Dr. Hoskins. Following his review of Ridener's treatment history and examination, Dr. Hoskins made diagnoses of a disc herniation at L3-4, disc bulging at L4-5, lumbar strain/sprain, and right lumbosacral radiculitis. He assigned Ridener an eight percent

impairment rating and stated that Ridener should avoid lifting more than twenty pounds, ten pounds below waist level; sitting for more than sixty minutes; standing/walking for more than forty-five minutes; prolonged or repetitive stooping or crouching; and prolonged or repetitive use of vibratory equipment. In an addendum, Dr. Hoskins noted that Dr. El-Kalliny had requested a follow-up evaluation that had not occurred. Therefore, Dr. Hoskins stated that Ridener had not technically reached maximum medical improvement and his impairment rating was provisional.

Ridener filed the Form 107 of Dr. Johnson. Following his review of the medical records and examination, Dr. Johnson made a diagnosis of arthrosis of the lumbosacral spine aggravated by the work injury. He assigned Ridener a 6% impairment rating and stated that Ridener should avoid lifting more than twenty pounds, five pounds frequently, climbing ladders, bending, crawling, pulling, pushing, shoveling, and work in hazardous surroundings. Dr. Johnson concluded that "it would be most unlikely that [Ridener] could function in any position of employment with any regularity."

Ridener filed the vocational evaluation report of William Ellis. Mr. Ellis reported that Ridener reads and performs arithmetic at the fourth grade level and is below to well below average on all dexterity measures. Based on these findings and his review of the medical records, Mr. Ellis opined that Ridener is totally disabled.

The Electric Cooperative filed the January 17, 2007, report of Dr. El-Kalliny. In his report, Dr. El-Kalliny noted that Ridener's MRI showed evidence of degenerative changes from L2 through S1, but no apparent disc herniation or nerve root compression. In terms of treatment, Dr. El-Kalliny recommended physical therapy and took Ridener off work.

The Electric Cooperative also filed the March 5 and July 26, 2007, reports/office notes of Dr. Brooks. In March, Dr. Brooks made a diagnosis of lumbosacral strain and recommended medication and additional physical therapy. In July, Dr. Brooks changed his diagnosis to chronic musculoligamentous strain and noted that Ridener "remain[ed] incapacitated . . . concerning his pain and ability to work."

The Electric Cooperative filed the March 19 and November 8, 2007, reports of Dr. Vaughan. In his March 19 report, Dr. Vaughan stated that Ridener complained of low back pain and indicated he had received little, if any, relief from physical therapy. Following his examination, Dr. Vaughan made a diagnosis of chronic lumbar strain and lumbar spondylosis and assigned Ridener a five percent impairment rating. Dr. Vaughan stated that Ridener should avoid lifting more than 40 pounds as well as avoiding work involving pole climbing or from a "bucket." In his November 8 report, Dr. Vaughan stated that he had reviewed additional records, which had no impact on his initial diagnosis, impairment rating, or restrictions.

The Electric Cooperative filed the November 9, 2007, vocational report of Betty Lindsey Hale. Ridener reported to Ms. Hale that he has difficulty sitting for more than fifteen minutes, stooping, lifting, kneeling, crouching, and performing overhead work. Ms. Hale's testing revealed that Ridener reads at the fifth grade level, performs arithmetic at the sixth grade level, and functions intellectually in the average to below average range. Based on her evaluation and the restrictions imposed by the various physicians, Ms. Hale concluded that Ridener could perform unskilled work in the sedentary to medium categories.

At the hearing, the Electric Cooperative offered into evidence correspondence from its benefits coordinator showing Ridener was approved for long-term disability benefits on August 8, 2007, with an onset date of March 13, 2007. The letter also stated that Ridener received short-term disability benefits from December 22, 2006, through April 6, 2007.

The Electric Cooperative attached a copy of the long-term disability plan as an exhibit to the hearing transcript. In pertinent part, the plan defines disability as the inability to perform "one or more of the Essential Duties of Your Occupation."

Finally, the Electric Cooperative filed the transcript of the deposition of private investigator William Medford. Mr. Medford testified that, on October 1, 2007, he saw Ridener walk from the woods, put something in the back of his truck, get into his truck, and leave.[2]

[2] We note that the parties filed additional evidence related to a medical fee dispute. That issue has not been raised on appeal; therefore, we have not summarized it herein.

After the hearing, the ALJ issued an Opinion and Award, finding that Ridener is not totally disabled. In doing so, the ALJ noted Ridener's age and education and found that Ridener could perform light and sedentary work. The ALJ awarded Ridener permanent partial disability benefits based on Dr. Johnson's six percent impairment rating and determined that Ridener could not return to the type of work he performed at the time of his injury. Therefore, the ALJ increased Ridener's benefits by a factor of three pursuant to Kentucky Revised Statute (KRS) 342.730(1)(c)1. The parties filed petitions for reconsiderations, which the ALJ denied and both parties appealed to the Board.

Before the Board, Ridener argued, as he does here, that the ALJ erred by not making a finding of permanent total disability.[3] The Board affirmed the ALJ, finding that evidence of entitlement to long-term disability did not amount to an admission by the Electric Cooperative and sufficient evidence supported the ALJ's findings of partial disability.

STANDARD OF REVIEW

The ALJ has the sole discretion to determine the quality, character, and substance of the evidence and may reject any testimony and believe or disbelieve various parts of the evidence regardless of whether it comes from the same witness or the same party's total proof. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), and *Caudill v. Maloney's Discount Stores*, 560

[3] The Electric Cooperative argued before the Board that the ALJ erred in determining its entitlement to a credit for disability benefit payments. That issue is not before us; therefore, we will not address it.

S.W.2d 15, 16 (Ky. 1977). If the party with the burden of proof fails to convince the ALJ, that party must establish on appeal that the evidence was so overwhelming as to compel a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). When reviewing one of the Board's 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). When there are mixed questions of fact and law, we have greater latitude in determining if the underlying decision is supported by probative evidence. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). With the preceding standards in mind, we will address the issue raised by Ridener in the order listed above.

ANALYSIS

Ridener argues the Electric Cooperative made a judicial admission that he is totally disabled when it introduced into evidence documentation verifying his entitlement to long-term disability benefits. According to Ridener, the Electric Cooperative is bound by that admission and the ALJ was required to find him permanently and totally disabled. Ridener's argument is not persuasive because the definition of disability under the long-term disability policy is significantly different from and far less restrictive than the definition of permanent total disability under KRS Chapter 342. As noted above, in order to be entitled to

long-term disability benefits, Ridener was only required to prove that he is unable to perform one or more of the essential duties of his job. However, to be entitled to a permanent total disability award under KRS Chapter 342, Ridener was required to prove he "has a complete and permanent inability to perform *any type of work* as a result of an injury." KRS 342.0011 (Emphasis added). Therefore, proof of entitlement to long-term disability benefits has little or no bearing on entitlement to permanent total disability benefits.

Furthermore, we note that the Supreme Court of Kentucky has held that an ALJ is not bound by a finding of disability by the Social Security Administration, even though the Administration's definition of disability more nearly matches that found in KRS Chapter 342. *Kington v. Zeigler Coal Co.*, 639 S.W.2d 560, 562 (Ky. App. 1982). If an ALJ cannot be bound by a finding of the Social Security Administration, he cannot be bound by a finding of a long-term disability carrier, whose definition of disability only vaguely resembles the definition of permanent total disability in KRS Chapter 342.

Finally, we note that

> [w]hile judicial admissions are not to be taken lightly, they 'should be narrowly construed.' In order for trial testimony to rise to the level of a judicial admission it must be 'deliberate and unequivocal and unexplained or uncontradicted.' The conclusiveness of a judicial admission should be determined 'in the light of all the conditions and circumstances proven in the case.' (Internal citations and footnotes omitted.)

Reece v. Dixie Warehouse and Cartage Co., 188 S.W.3d 440, 448 (Ky. App. 2006). Therefore, even if we accept the proposition that evidence of the determination of disability under the long-term disability policy amounts to a judicial admission, any such admission simply proves that Ridener is not able to return to the work he performed for the Electric Cooperative. It does not prove that Ridener is totally disabled under KRS Chapter 342. Therefore, this argument by Ridener, although somewhat novel, is not persuasive.

Ridener next argues that, setting aside any judicial admission by the Electric Cooperative, the evidence compelled a finding that he is totally disabled. As noted above, total disability is defined as the inability to perform any type of work. In determining if an injured worker is totally disabled, the ALJ must consider "the worker's post-injury physical, emotional, intellectual, and vocational status[,] . . . how those factors interact[, and] . . . the likelihood that the particular worker would be able to find work consistently under normal employment conditions." *Transportation Cabinet v. Poe,* 69 S.W.3d 60, 63 (Ky. 2001).

The record contains limitations from Drs. Hoskins and Johnson that might have supported a finding that Ridener is totally disabled. However, the ALJ, as is his prerogative, found the restrictions from Dr. Vaughan to be the most persuasive. Those restrictions, coupled with Ridener's age of 49, high school education, and work experience, do not compel a finding of permanent total disability. Therefore, we cannot disturb the ALJ's findings on appeal.

CONCLUSION

For the foregoing reasons, we hold that any judicial admission by the Electric Cooperative was not conclusive evidence of permanent total disability under KRS Chapter 342, and the evidence did not compel a finding of permanent total disability. Therefore, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

H. Brett Stonecipher
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