

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001426-WC

GARY ONEY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-95626

MOUNTAIN SOURCE ENERGY;
HON. CAROLINE PITT CLARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE, CAPERTON, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Gary Oney appeals from an opinion of the Workers' Compensation Board which affirmed the ALJ's opinion, order, and award dismissing his claim for permanent disability benefits. Oney alleges that the Board erred when it affirmed the ALJ because the ALJ rejected Dr. Lowe's testimony

and relied on the testimony of Dr. Richard Sheridan and Dr. Russell Travis, neither having assessed an impairment rating.

Oney's employment history has been in coal-related industrial work and, in June 2007, he began working for Mountain Source Energy LLC. On Wednesday, January 30, 2008, he sustained a work-related back injury. The following Monday, he visited Dr. Stamper complaining of pain in his beltline area radiating into his leg with tingling in his feet and toes. Dr. Stamper referred him for an MRI and X-rays and prescribed pain medication. Oney has not been employed since his injury.

Because Oney's challenge is to the ALJ's reliance on the testimony of Dr. Sheridan and Dr. Travis and the rejection of that offered by Dr. Lowe, we limit further recitation of the facts to their testimony.

Dr. Lowe conducted an independent medical evaluation on July 8, 2008, and compared Oney's 2008 MRI with that obtained in 2004, following an earlier work-related injury. Dr. Lowe testified that he conducted an independent medical evaluation following Oney's 2004 injury and, at that time, diagnosed status post lumbar sprain with a possible discogenic component and assessed an eight percent whole body impairment. As a result of the 2008 injury, his current diagnosis was a lumbosacral sprain and small herniated nucleus pulposus at L5-S1 centrally. He testified that based on the 5th Edition of the *AMA Guides to Permanent Impairment (Guides)* range of motion model, Oney had a nine percent whole body impairment as a result of the 2008 injury. The figure was calculated

by subtracting Oney's current impairment rating as a result of the range of motion model from the impairment rating generated by the 2004 injury. Using the DRE model, Dr. Lowe placed Oney in a DRE Category III, which translated into a thirteen percent whole body impairment. Subtracting the prior eight percent impairment rating assessed for the 2004 injury, he assessed a five percent impairment attributable to the 2008 injury.

Dr. Richard Sheridan conducted an independent medical evaluation on April 13, 2008. He reviewed the MRI dated February 18, 2008, which revealed a small disc bulge at L4-S1 and opined that Oney's current complaints and diagnosis were not related to his 2008 work injury. He attributed his current condition to the aging process. Dr. Sheridan diagnosed a resolved acute lumbar sprain, imposed no restrictions on Oney's activities, and assessed a zero percent impairment pursuant to a DRE Category I of the *Guides*. He opined that Oney would not require future medical treatment or medications as a result of the 2008 injury.

Dr. Russell Travis conducted an independent medical examination on October 8, 2008, and also reviewed the February 2008 MRI. He observed desiccation of L5 with a small hyperintensity zone with minimal degenerative bulge and at L5-S1, a small central bulge. He opined that Oney's complaints were of undetermined etiology. Dr. Travis opined that the MRI was normal for Oney's age and that Oney had a zero percent impairment rating according to the *Guides*.

The ALJ concluded that Oney sustained a work-related injury on January 30, 2008. However, based on the opinions of Drs. Sheridan and Travis, she found that Oney has a zero percent impairment rating and denied his claim for permanent partial disability benefits.

The focus of Oney's appeal is the ALJ's reliance on Drs. Sheridan's and Travis' testimony. He points out that Dr. Lowe was the only independent medical evaluator to review both the 2004 and 2008 MRI scans and that Dr. Lowe's impairment rating was in compliance with the *Guides*, which assigns a five percent impairment rating if objective medical evidence demonstrates a herniated disc. Citing *Caldwell Tanks v. Roark*, 104 S.W.3d 753 (Ky. 2003) and *Knott County Nursing Home v. Wallen*, 74 S.W.3d 706 (Ky. 2002), he emphasizes that Dr. Travis acknowledged a bulge, but failed to assign any impairment rating and, therefore, his opinion was unreliable.

Because Oney had the burden of proof before the ALJ to establish that he sustained a work-related injury that resulted in a permanent impairment and was unsuccessful, the question on appeal is whether the evidence compels a different result. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). Compelling evidence is so overwhelming that no reasonable person could reach a different result. *Greene v. Paschall Truck Lines*, 239 S.W.3d 94 (Ky.App. 2007).

When requested to review the ALJ's factual findings, we adhere to the rule of deference to the ALJ. The ALJ has the sole authority to determine the quality, character, and substance of the evidence. *Square D Company v. Tipton*,

862 S.W.2d 308 (Ky. 1993). Likewise, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence. *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky.App. 1995). If the evidence is conflicting, the ALJ may reject any testimony and believe or disbelieve various parts of the evidence regardless of its origin. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000).

Oney's allegations of error are factual and, therefore, are subject to the standards set forth above. Although he attempts to persuade this Court that our Supreme Court in *Caldwell Tanks* and *Knott County Nursing Home* altered our standard of review, his interpretation is unsupported. In *Tanks*, the medical evidence was uncontradicted that the claimant suffered an increased hearing impairment requiring the ALJ to convert the evidence of hearing impairment to a whole-body impairment.

In Oney's case, the medical evidence was conflicting. In *Knott County Nursing Home*, the Court merely reaffirmed that psychological injuries were compensable and the ALJ's authority to assess a mental impairment into a percentage of impairment for the purpose of awarding income benefits. *Id.* at 710.

Although Oney disagrees with the ALJ's interpretation of the evidence, it was within his discretion to find Dr Sheridan's and Dr. Travis's testimony more credible than Dr. Lowe's testimony. We cannot say that the evidence compelled a finding in Oney's favor or that the ALJ's factual findings were unreasonable.

Based on the foregoing, the opinion of the Workers' Compensation

Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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