

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000809-WC

SIDNEY COAL COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-01295

PAUL KIRK; HON. LAWRENCE F. SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: THOMPSON, VANMETER, AND WINE, JUDGES.

THOMPSON, JUDGE: Sidney Coal Company, Inc. appeals a decision of the Kentucky's Workers' Compensation Board affirming the Administrative Law Judge's (ALJ) ruling on Paul Kirk's physical impairment and hearing loss award and modifying the ALJ's benefit award. For the reasons stated, we affirm.

On October 6, 2008, Kirk filed four workers' compensation claims for incidents in which he alleged that he was injured at work. In his first claim, he alleged that he was injured when his vehicle ran out of control and crashed, resulting in an injury to his neck, head, right clavicle, left shoulder, thoracic spine, pelvis, bilateral hips, lower back, right leg, and right toes on April 7, 2006. In his second claim, he alleged that he sustained an injury when he strained himself while carrying a large water line, resulting in an injury to his right leg on May 1, 2006.

In his third claim, he alleged that he was injured when he lifted parking grates and developed immediate pain on October 28, 2006. He claimed that he injured his lower back and right leg. In his fourth claim, he alleged that he was disabled due to occupational hearing loss caused by work. He alleged that he became aware of this condition on August 19, 2008. However, he contended that the disabling effect from his occupational hearing loss occurred on May 1, 2006. Subsequently, Kirk was permitted to amend his hearing loss claim to state a last date of exposure of October 28, 2006, and his claims were consolidated.

At the evidentiary hearing, Kirk testified that his first injury occurred on April 7, 2006, when he was hauling material on two flat cars. At some point, he lost control, crashed, and was knocked unconscious. After visiting the emergency room, Kirk returned to work the next day on light-duty because his supervisor did not want a "lost time accident." After working light duty for about three weeks, he returned to regular duty working underground. However, Kirk testified that the injury caused pain in his back and neck and caused headaches.

According to Kirk's testimony, he was again injured when he slipped and fell while carrying a long, large water line on May 1, 2006. As a result of this injury, Kirk was paid temporary total disability benefits from May 1, 2006, to June 25, 2006. After physical therapy, Kirk returned to work but his lower back pain and right leg pain increased. On October 28, 2006, Kirk slipped in mud while at work and sustained an injury, which caused numbness in his right arm and his lower back and worsened his neck condition.

Kirk further testified that he incurred hearing loss because he was exposed to loud noise while working underground for his employer and was exposed to loud noise while working his regular job outside in close proximity to diesel equipment. Kirk testified that he was being treated by Dr. Lon Lafferty, who he sees monthly if financing is available, and that he has not returned to work since his last injury on October 28, 2006.

Dr. Lafferty, a general practitioner, testified that he first treated Kirk for chronic anxiety disorder and gastroesophageal reflux disease on February 2, 2006. On April 24, 2006, Dr. Lafferty treated Kirk for nervousness, anxiety, sinus infection, sore throat, and coughing. At that time, Kirk informed him that he had been injured one month earlier and complained of pressure between his shoulders. Further, Kirk's pain was isolated in his shoulders and did not radiate through his body. Kirk did not complain of any other orthopedic problem and was not restricted from going back to work.

On May 2, 2006, Dr. Lafferty was informed that Kirk had been injured while carrying a water line. After Kirk complained of the sudden onset of lower back pain which radiated to his toes, Dr. Lafferty diagnosed Kirk with an acute lumbar strain and referred him for an MRI scan. The MRI occurred on May 8, 2006, and revealed a protruded disc at the L4-L5 level and degenerative disc disease at L3-L4. During a later visit, Dr. Lafferty noted Kirk's neck and back pain complaints, which Kirk believed were caused by his injury on May 1, 2006. After the visit, he prohibited Kirk from working and referred him for physical therapy but permitted an improved Kirk to return to work a month later.

On October 30, 2006, Kirk was seen by Dr. Lafferty and complained of lower back pain from a work injury two days earlier. Kirk received a steroid injection and was restricted from weight-bearing work, which prevented him from returning to work. Further, Dr. Lafferty opined that Kirk's last injury caused permanent restrictions. Ultimately, Dr. Lafferty opined that Kirk's impairment and restrictions were related to his injuries on May 1, 2006, and October 28, 2006.

On May 15, 2008, Dr. Joseph H. Rapier, Jr., a board certified orthopedic surgeon, conducted an independent medical evaluation of Kirk's records. He noted that Kirk had sustained a cervical spine strain on April 7, 2006, and October 28, 2006. Although he could not find definite radiculopathy, Dr. Rapier noted that Kirk's MRI revealed an aggravation of a pre-existing dormant degenerative disc disease. He further noted that Kirk suffered from two lumbar strains, which aggravated his pre-existing dormant degenerative disc disease

without radiculopathy. He opined that, within a reasonable medical probability, Kirk's injury was the cause of his complaints.

Dr. Rapier observed that Kirk had suffered two significant injuries to the same areas of his spine. Under the range of motion model, he assessed Kirk as having a sixteen percent whole body impairment relating to his lower back and an eight percent whole body impairment relating to his cervical spine pursuant to the criteria set forth in the American Medical Association's *Guides to the Evaluation of Permanent Impairment* ("AMA Guides"). He opined that Kirk did not retain the physical capacity to return to the type of work he performed at the time of injury.

When asked what records he had received, Dr. Rapier testified that he received a history of Kirk's injuries for April 7, 2006, and October 28, 2006. However, he testified that he did not receive a history of Kirk's injury that occurred on May 1, 2006. While acknowledging that Kirk's complaints of lower back and neck pain continued beyond April 7, 2006, Dr. Rapier testified that he could not opine that Kirk's entire impairment was from this injury. Rather, he opined that he would equally apportion Kirk's impairment to his three injuries. He stated that this distribution resulted from him not having adequate data, including a range of motion test after each of Kirk's three injuries.

Dr. Rapier further testified that Dr. Lafferty's May 2, 2006, progress note indicating that Kirk was prohibited from working due to the May 1, 2006, injury, not the injury of April 7, 2006, was significant. He opined that Dr. Lafferty

would be in the best position to determine matters regarding causation because Dr. Lafferty treated Kirk for each of his three injuries.

The evidentiary hearing also included testimony and other evidence regarding Kirk's hearing loss impairment claim. Drs. Raleigh Jones and Jennifer Shinn opined that Kirk's hearing loss exhibited a pattern consistent with hearing loss cause by exposure to hazardous noise. Dr. Jones assessed Kirk with a twenty-three percent whole person impairment. Further, Dr. Charles J. Hieronymus performed an independent medical evaluation and assessed Kirk as having a twenty-five percent whole body impairment. He opined that Kirk's hearing loss was caused from his occupational exposure to hazardous noise, was progressive, and would worsen with continued exposure to hazardous noise.

After conducting a hearing, the ALJ issued an order finding that Kirk had a twenty-four percent whole body impairment and that Kirk's hearing loss constituted a twenty-three percent whole body impairment. Based on Kirk's hearing impairment, the ALJ found that Kirk's impairment was subject to the 3.2 multiplier because he lacked a high school diploma and was incapable of returning to his prior type of work. Kirk was awarded \$473.22 per week in benefits. On reconsideration, the ALJ apportioned Kirk's impairment equally between his injury in May 2006 and October 2006. In relevant part, the Board upheld the impairment assessments but modified his award of benefits to \$631.22 per week.

Sidney contends that the ALJ erred by allocating Kirk's impairment rating between two of his injuries rather than among all three of his injuries.

Because the ALJ prominently relied on the medical opinions of Dr. Rapier, Sidney contends that the ALJ was required to adopt Dr. Rapier's conclusion that Kirk's three work-related injuries equally caused his impairment. Further, Sidney argues that Kirk's testimony attributed his impairment to all three of his injuries. Thus, Sidney contends that Kirk's benefit award must be reduced.

On appellate review of an ALJ's findings of fact, we are required to provide these findings considerable deference and cannot set them aside unless evidence compels a contrary finding. *Mosely v. Ford Motor Co.*, 968 S.W.2d 675, 678 (Ky.App. 1998). If an ALJ's findings of fact are supported by substantial evidence, a contrary finding against the ALJ's findings cannot be sustained. *AK Steel Corp. v. Adkins*, 253 S.W.3d 59, 64 (Ky. 2008). We review the Board's application of law *de novo* and, thus, provide no deference to its application of the law. *Newberg v. Thomas Industries*, 852 S.W.2d 339, 340 (Ky.App. 1993).

In this case, Kirk sustained three physical workplace injuries but his first injury claim was ruled to be outside the statute of limitations. Thus, Kirk is ineligible to be compensated for any injury related to his April 7, 2006, injury. However, the ALJ found that Kirk's physical impairment was related to his latter two injuries, excluding any causal link to his earlier statutorily barred injury. In its order, the ALJ noted that Dr. Rapier assessed Kirk with a twenty-four percent impairment and that he was basing his findings on Dr. Rapier's opinions. The ALJ, however, rejected his opinion regarding Kirk's impairment apportionment.

Having reviewed the record, we conclude that the ALJ's decision to not attribute any portion of Kirk's impairment to his first injury was proper. While Dr. Rapier opined that he would equally apportion Kirk's impairment among his three injuries, he also testified that Dr. Lafferty was in the best position to decide the proper apportionment because he treated Kirk for all three of his injuries. Dr. Lafferty testified that Kirk's first, statutorily barred injury was not the cause of his current condition rather it was his injuries on May 1, 2006, and October 28, 2006.

Moreover, the ALJ, as finder of fact, has "the authority to determine the quality, character and substance of the evidence" presented and not a reviewing court. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Further, a fact finder is authorized to "believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party's total proof." *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). It was within the ALJ's discretion to believe only some of Dr. Rapier's opinions. Ultimately, the ALJ's findings regarding apportionment aligned with the opinions of Dr. Lafferty who Dr. Rapier opined was in the best position to determine apportionment. Accordingly, we conclude that the ALJ's findings were supported by substantial evidence.

Sidney contends that the ALJ's increase of Kirk's weekly benefit award for his hearing loss by the 3.2 multiplier was erroneous. It argues that the evidence unequivocally demonstrates that Kirk did not claim his hearing loss constituted any portion of his decision to stop working.

KRS 342.730(1)(c)1 provides that the permanent partial disability benefit for injured employees who do not retain the physical capacity to return to the type of work that he performed at the time of his injury shall be multiplied by a factor of three. KRS 342.730(1)(c)3 provides that an education and age factor shall be added to the income benefit multiplier set forth in paragraph (c)1 of its subsection if the employee had less than twelve (12) years of education or a GED at the time of injury, which multiplier shall be two-tenths (0.2). Thus, the total combined multiplier for both criteria would be 3.2.

The ALJ found that Kirk was physically incapable to return to his previous type of work at the time of his injury. Both parties stipulated that Kirk's highest educational attainment was the eleventh grade. While Sidney contends that there was insufficient evidence to find that Kirk's disabling impairment was related to his hearing loss, Dr. Hieronymus noted that Kirk had suffered significant hearing loss and that the loss would be progressive with further exposure. He further opined that future exposure to loud noise might present a safety hazard. Accordingly, we conclude that the ALJ's finding of fact regarding the validity of Kirk's hearing impairment was supported by substantial evidence.

Sidney contends that the Board erred by *sua sponte* correcting the ALJ's calculation of Kirk's benefits. It argues that Kirk did not file a motion for reconsideration on this issue and should not have been provided unrequested relief. Sidney further argues that KRS 342.285(1) prohibits any such action by the Board.

KRS 342.285(1) provides as follows:

An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award.

While Sidney cites KRS 342.285(1) to contend that the Board erred by *sua sponte* recalculating Kirk's award, its argument is misplaced because the statute in question relates to questions of fact, not questions of law. The statute states that all "questions of fact" are binding if a petition for reconsideration is not filed. However, calculating a benefits award, which is controlled by statute, is a question of law and can be decided by the Board on its own initiative. *Whittaker v. Reeder*, 30 S.W.3d 138, 144 (Ky. 2000). The Board is authorized to modify an award to ensure that it is in compliance with the provisions of Chapter 342. *Id.*

In this case, the Board noted KRS 342.730(1)(d) which provides, in pertinent part, the following:

Benefits payable for permanent partial disability shall not exceed ninety-nine percent (99%) of sixty-six and two-thirds percent (66-2/3%) of the employee's average weekly wage as determined under KRS 342.740 and shall not exceed seventy-five percent (75%) of the state average weekly wage, except for benefits payable pursuant to paragraph (c)1. of this subsection, which shall not exceed one hundred percent (100%) of the state average weekly wage

Based on stipulated facts, ninety-nine percent of sixty-six and two-thirds of Kirk's average weekly wage was \$775.27. However, based on the ALJ's finding that

Kirk did not retain the capacity to return to his previous type of work pursuant to paragraph (c)1, one hundred percent of the state average weekly wage for 2006 was \$631.22. Accordingly, because Kirk was entitled to the lesser of the two amounts pursuant to KRS 342.730(1)(d), the Board properly awarded Kirk a total weekly benefit award of \$631.22.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

A. Stuart Bennett
Lexington, Kentucky

BRIEF FOR APPELLEES:

John Earl Hunt
Stanville, Kentucky