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NOT TO BE PUBLISHED OPINION

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RENDERED: OCTOBER 23, 2014
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2013-SC-000390-WC

FOX KNOB COAL COMPANY, INC. — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2012-CA-001359-WC
WORKERS' COMPENSATION NO. 09-89842

MICHAEL C. GARRETT;
DR. JOSE MANUEL ECHEVARRIA;
ARH MEDICAL ASSOCIATES;
HARLAN APPALACHIAN REGIONAL HOSPITAL;
MOUNTAIN MEDICAL ENTERPRISES;
DR. SYED M. RAZA; CUMBERLAND
RIVER REGIONAL MEDICAL HOSPITAL;
HONORABLE JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant, Fox Knob Coal Company, Inc., appeals from a Court of Appeals decision which affirmed a workers' compensation award entered in favor of Appellee, Michael C. Garrett. Fox Knob argues on appeal that: 1) the Administrative Law Judge's ("ALJ") finding that Garrett suffered a work-related injury was based upon a misunderstanding of precedent and was erroneous as a matter of law; 2) the ALJ erred as a matter of law by relying upon the opinion of Dr. Phillip Tibbs, in regard to causation, because there is no evidence he was

aware of Garrett's pre-injury medical condition; and 3) the ALJ erred by not apportioning some of Garrett's impairment to his pre-existing active medical condition. For the reasons set forth below, we affirm the Court of Appeals.

Garrett began working for Fox Knob's predecessor in 1993. He sustained a lower back injury in 1995, but did not file a workers' compensation claim. Garrett underwent surgery, and returned to work eight weeks later. After returning to work, Garrett's job duties included lifting buckets of drill bits and parts which weighed approximately thirty to forty pounds. Garrett eventually became a blaster, which required him to lift blasting material weighing up to fifty pounds.

Garrett admitted that he had flare-ups of back pain after his 1995 injury. In 2008, Garrett received lumbar injections due to low back pain and took pain medications. A MRI scan performed on October 24, 2008, revealed chronic disc disease at the lumbosacral junction and L4-L5 with associated disc herniation, a fair degree of extrinsic pressure over the thecal sac, the thecal sac was narrowed and could be symptomatic, and bulging disc at L3-L4. Despite the discomfort, Garrett's supervisor, Russell Miniard, stated that Garrett did not miss any work and was a satisfactory employee. Fox Knob notes that Garrett visited doctors several times for low back pain in the months leading up to his injury.

On May 4, 2009, while working as a blaster, Garrett experienced an acute onset of low back pain as he twisted to turn while lifting a box of blasting caps. He fell to the ground and was unable to continue working. Garrett was

taken to the hospital by ambulance and was treated. He underwent low back surgery performed by Dr. Tibbs in September 2009. Unfortunately, Garrett has not improved since the surgery and he has not worked since May 4, 2009. Garrett filed a Form 101 seeking workers' compensation.

After a review of the evidence presented, the ALJ found that Garrett suffered a work-related injury on May 4, 2009, and awarded him permanent total disability benefits. She found that Garrett suffered an injury as defined under our Workers' Compensation Act and cited to the case of *Koroluk v. United Parcel Service*, 2006-SC-000946-WC (Ky. 2007) for support. *Koroluk* held that a worker sustains an injury under KRS 342.0011(1) when work-related trauma causes temporary symptoms requiring medical treatment. Thus, the ALJ reasoned that since Garrett had to be taken to the hospital after the May 4, 2009, incident, he suffered an injury. The ALJ then found that a causal relationship existed between the injury Garrett suffered on May 4, 2009, and his current condition based on Dr. Tibbs's medical opinion.

The ALJ also held that Garrett did not suffer from a pre-existing active disability. She found the case of *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181 (Ky. 2003), to be dispositive. *Robinson* held that if an individual is working without restrictions at the time a work-related injury occurs, the existence of a pre-existing impairment does not compel a finding of pre-existing disability. Thus, since Garrett was working without restrictions on the date of his injury, the ALJ reasoned there was no pre-existing active disability.

Fox Knob filed a petition for reconsideration which the ALJ denied, except to correct a typographical error. However, the ALJ did provide the following additional support for her holding that Garrett suffered a work-related injury:

> [i]n *Gibbs v. Premier Scale Co./Indiana Scale Co.*, 50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court, in addressing the issue of whether a plaintiff had sustained an injury as defined by the Act stated that 'objective medical findings' are not limited to findings obtained by diagnostic tools such as an x-ray, CAT scan, and MRI. The Court further instructed 'a diagnosis based upon a workers' complaints of symptoms but not supported by objective medical findings is insufficient to prove an 'injury' for the purposes of Chapter 342.'
> In the case at bar the undersigned reviewed the evidence and facts surrounding the accident and also noted that the plaintiff was taken to the hospital by ambulance from the injury site. He was working full time at the time of this injury and was unable to return to work after the injury. Additionally, Dr. Tibbs (as the treating neurosurgeon) addressed the issue of an 'injury' as defined by the Act and the existence of a permanent impairment stemming from the May 4, 2009, work injury. There was no evidence submitted by the defendant that convinced the undersigned that Dr. Tibbs relied on an incorrect history when offering his diagnosis and opinions which included an addendum report.

Subsequent petitions for reconsideration were also denied. The Board affirmed Griffith's award, but agreed with Fox Knob that the ALJ should not have relied on *Koroluk*. However, the Board believed that even though the ALJ's reliance on *Koroluk* was misplaced, her finding that Garrett suffered a work-related injury was supported by "objective medical findings." The Court of Appeals also affirmed and this appeal followed.

As an initial matter, we note that the ALJ is the finder of fact and "has the sole authority to determine the quality, character, and substance of the evidence." *Square D. Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citations

omitted). Causation and the work-relatedness of a condition are factual questions to be determined by the ALJ and she is vested with broad authority to decide such matters. *Dravo Lime Co., Inc. v. Eakins*, 156 S.W.3d 283, 289 (Ky. 2005). Further, "[w]hen the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Though a party may point to evidence in the record that could support a different outcome, such proof is not an adequate basis for reversal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974).

I. GARRETT SUFFERED A WORK-RELATED INJURY

Fox Knob's first argument is that the ALJ erred by finding that Garrett suffered a work-related injury as defined under the Workers' Compensation Act. The ALJ's original opinion stated that she believed Garrett suffered an injury because he was taken to the hospital in an ambulance and subsequently was unable to work again. Fox Knob contends that those facts do not provide objective medical findings which must be present before the ALJ can find that Garrett suffered an injury. Fox Knob also disputes the ALJ's use of Dr. Tibbs's medical opinion as support for her finding that an injury occurred because the record does not expressly state what he based his conclusions upon. Finally, Fox Knob contends that the ALJ's holding is erroneously based on the

unpublished case of *Koroluk*. We agree that the ALJ should not have relied on *Koroluk*, but also find that her conclusions are supported by the record.

KRS 342.0011(1) defines injury as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by *objective medical findings*." (emphasis added). "Objective medical findings" are "information gained through direct observation and testing of the patient applying objective or standardized methods." KRS 342.0011(33). Admittedly, based on these definitions, the ALJ's original reasoning as to why Garrett suffered an injury is lacking. Neither the fact that he was taken to a hospital, nor the fact that he was unable to work after the event are objective medical findings. However, in her order on the petition for reconsideration, the ALJ specifically cited to Dr. Tibbs's report as support for her conclusion that Garrett suffered an injury. Dr. Tibbs's opinion was based on direct observation and test results—not only on Garrett's complaints.[1] Dr. Tibbs's opinion provides objective medical findings to show the existence of a work-related injury. The ALJ's finding was supported by sufficient evidence.

[1] Dr. Tibbs's records state that Garrett "had had a lifting injury with low back pain radiating into the right leg." Additionally, Dr. Tibbs or his affiliates saw Garrett multiple times between August 2009 and March 2010. Finally, as the ALJ noted in her opinion and award and the Board noted in its opinion, Dr. Tibbs stated that Garrett had disc herniations at L4-5 and L5-S1 with radiculopathy and that those findings were related to Garrett's work-related injuries of May 4, 2009.

II. ALJ DID NOT ABUSE HER DISCRETION BY RELYING ON DR. TIBBS'S OPINION REGARDING CAUSATION

Fox Knob next argues that the ALJ erred by relying on Dr. Tibbs's opinion regarding the causation of Garrett's current condition. Fox Knob contends that there is no evidence Dr. Tibbs knew of Garrett's previous low back surgery and trauma or that Garrett was experiencing pain in his back prior to the May 4, 2009 incident. Accordingly, Fox Knob argues that *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004), should apply. *Cepero* stated that "where it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence. Medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable." *Id.* at 842.

A review of the record refutes Fox Knob's argument. Dr. Tibbs's records indicate he knew that Garrett underwent low back surgery in 1995.[2] The records also show that Dr. Tibbs was aware Garrett had a family history of significant back problems. Accordingly, it is not *irrefutable* that Dr. Tibbs was unaware of Garrett's personal medical history or that his records were substantially inaccurate or largely incomplete. Fox Knob failed to establish whether his opinion was based on an erroneous medical history and the ALJ did not abuse her discretion in relying on Dr. Tibbs's report on causation.

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[2] Dr. Tibbs's records state that Garrett "is a 34-year-old white male who had a lumbar microdiskectomy in 1995, by Dr. Byron Young."

III. THE ALJ DID NOT MISAPPLY THE LAW REGARDING APPORTIONMENT OF A DISABILITY AWARD

Fox Knob last argues that the ALJ erred by failing to apportion some of his current impairment to his pre-existing disability. Specifically, Fox Knob argues that the ALJ misapplied *Robinson*, 113 S.W.3d 181. In *Robinson* the Court of Appeals held that:

> [i]mpairment and disability are not synonymous. . . . an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from partial disability award must be based upon pre-existing impairment. If an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to a total disability award. KRS 342.730(1)(a).

Fox Knob argues that the ALJ must have believed that since Garrett was working without restrictions prior to the May 4, 2009 incident, *Robinson* compelled a holding that he did not suffer from a pre-existing disability. Fox Knob argues that the ALJ should have applied *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000), which held that it should be determined whether the claimant had any loss of earning capacity to find whether a permanent total disability existed prior to the incident.

However, the ALJ in this matter properly analyzed whether Garrett's pre-existing condition caused a pre-existing disability. For there to be an exclusion from a total disability award under *Robinson*, it must be established that the pre-existing condition was symptomatic, restrictive, and affected Garrett's ability to work at his job immediately prior to the accident. 113 S.W.3d 183. While the record indicates that Garrett was receiving treatment for low back

pain prior to the May 4, 2009 incident, the ALJ found the testimony of Garrett's supervisor, Miniard, persuasive. This testimony stated that Garrett had not missed any work due to his back, that his work performance was satisfactory, and that he was able to perform his job without limitation. The ALJ did not abuse her discretion by so holding.

For the above stated reasons, we affirm the decision of the Court of Appeals.

All sitting. All concur.

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