Hamilton v. Kentucky-West Virginia Gas Co.

2003 | Cited 0 times | Court of Appeals of Kentucky | August 8, 2003

NOT TO BE PUBLISHED

OPINION

AFFIRMING

Mark G. Hamilton appeals from a Workers' Compensation Board opinion affirming the decision of an Administrative Law Judge who denied his motion to reopen his claim against Kentucky-West Virginia Gas Company and the Special Fund because he "failed to prove that he is suffering a worsening of condition or increase in occupational disability pursuant to [Kentucky Revised Statutes] KRS 342.125 . . ." Hamilton also appeals from the denial of his petition for reconsideration in which he argued that the ALJ "erred as a matter of law by finding that [Hamilton] had a worsening of his condition at his lower back which warrants a lumbar fusion at L4-5 and L5-S1 without an increase in his occupational disability." According to Hamilton, the ALJ further erred by not bifurcating the case, "since he confirmed the need for the surgery, determining after the surgery, once Mark reached [Maximum Medical Improvement] MMI, the level of his occupational disability."

When reviewing decisions of the Board, our function is to correct the Board only where we perceive that it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice."[2] Because the Board thoroughly summarized the relevant facts, properly applied controlling precedent and did not commit an error in assessing the evidence, we adopt its opinion as our own:

Mark G. Hamilton [] appeals from an opinion and order rendered August 6, 2002, by Hon. Donald G. Smith, Administrative Law Judge ("ALJ"), dismissing on reopening his claim seeking total and permanent occupational disability benefits against the respondents, Kentucky-West Virginia Gas Company [] and the Special Fund. Hamilton also appeals from an order issued September 17, 2002, denying his petition for reconsideration.

On appeal, Hamilton appears to raise two issues. First, Hamilton argues that the more credible medical evidence should have compelled a finding by the ALJ in his favor. Specifically, Hamilton points to the fact that the ALJ, in addition to dismissing his claim for additional income benefits, approved his request for surgery. Hamilton maintains that since the surgery and corrective procedures were not required or even mentioned at the time of his original award, the ALJ's dismissal of his claim for increased disability benefits is incompatible with that ruling. Hamilton

contends, "It is impossible to not have a worsening of condition or increase in occupational disability" where surgery is required. Alternatively, Hamilton seeks to have the ALJ's decision regarding income benefits vacated and requests that his claim be remanded with instructions that the ALJ institute interlocutory relief in the form of temporary total disability ("TTD") benefits until the proposed surgery is performed and he reaches maximum medical improvement thereafter.

Hamilton suffered a work-related injury on December 6, 1991, while in Kentucky-West Virginia's employ. On that occasion, he injured his back while lifting a log at work. He subsequently filed an Application for Adjustment of Injury Claim with the Department of Workers' Claims, which was assigned to ALJ James L. Kerr for final adjudication. In addition to Hamilton's testimony by deposition and at final hearing, medical evidence was submitted from Dr. Ruben P. Singayao, Dr. Robert W. Lowe, Dr. Jose L. Rodriguez, Dr. Robert P. Goodman, and Dr. Joseph L. Zerga. Also submitted were psychological and/or psychiatric reports from Dr. Shelle Dietrich, Dr. Robert Granacher and Dr. William Weitzel. Because Hamilton's claim on reopening does not involve a psychological component, the testimony of Drs. Dietrich, Granacher, and Weitzel will not be summarized.

Dr. Singayao was Hamilton's original treating physician. He first saw Hamilton on December 9, 1991. At that time, Hamilton complained of back pain radiating into his right leg. The doctor noted swelling over Hamilton's low back from L2 through L5. Muscle spasm was also present in that region. A CT scan performed at the direction of Dr. Singayao revealed a small central and lateral bulge of the nucleus pulposus at L4-S1. An MRI also performed at that time, revealed evidence of a right lateral focal protrusion or herniation at L4-5 into the anterior spinal canal.

Dr. Robert Lowe performed an independent medical evaluation of Hamilton on April 13, 1992. Range of motion on that occasion was limited. Hamilton exhibited a subtle decreased sensation to his right foot on the side of the great toe when compared to the lateral side. A CT scan dated December 10, 1991, interpreted by Dr. Lowe, revealed a central bulge at L5-S1. An MRI dated December 27, 1991, indicated a central bulging disc at L4-5 causing indention in the dura. Dr. Lowe recommended that Hamilton undergo percutaneous discectomy surgery as a result of his findings.

Dr. Rodriguez performed an examination of Hamilton on January 14, 1992. At that time, Hamilton exhibited mild sensory deficits of the right leg. Straight leg raising tests on the right produced back pain with minimal radicular symptoms. Dr. Rodriguez also reviewed the MRI and CT scan previously referenced as demonstrating evidence of a disc herniation at L4-5 centrally. Dr. Rodriguez also recommended Hamilton undergo a percutaneous discectomy and recommended restrictions of no lifting, bending, stooping or kneeling.

Dr. Goodman initially performed an independent medical evaluation of Hamilton on March 26, 1993. At that time, Hamilton's chief complaint was pain in his back and legs, greater in the right leg as compared to the left. Upon examination, Hamilton's range of motion was limited. Straight leg raising

produced low back pain. Dr. Goodman noted that Hamilton had diminished sensation at L5-S1 bilaterally. After reviewing the CT scan, MRI, and x rays, Dr. Goodman diagnosed pre-existing degenerative changes with injury. Dr. Goodman stated that Hamilton was at maximum medical improvement and would not require surgery. He assessed a 5% to 6% impairment apportioned equally between the injury and the arousal of a pre-existing dormant degenerative condition. Dr. Goodman recommended that Hamilton engage in no lifting in excess of twenty pounds on a frequent basis, or thirty-five pounds occasionally. Dr. Goodman further noted that Hamilton should not return to his former employment without conditioning, but opined that he could occasionally climb, bend, stoop, kneel, crouch or crawl at that time.

Dr. Zerga initially performed an independent medical evaluation of Hamilton on April 10, 1993. At that time, Hamilton complained of low back soreness and muscle tightness radiating into his right leg posteriorly, and his left leg on occasion. Dr. Zerga's physical examination was deemed normal except for straight leg raising producing tenderness in the back, maximal on the right side with no radicular pain. Range of motion was found to be limited. EMG and NCV studies conducted at the time of Dr. Zerga's initial evaluation were determined to be normal. Dr. Zerga assessed an 8% impairment under the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"), but indicated that 3% of the impairment could be resolved with increased activity. Dr. Zerga further stated that Hamilton could lift twenty pounds at maximum with no repetitive bending or stooping.

At the time of his original claim, Hamilton described experiencing sharp pains in his low back radiating into both legs as a result of his injury. He testified that his pain was irritated by sitting or standing, and indicated that at times he was forced to lay on the floor for relief. He further described difficulty sleeping, anxiety, and depression.

In an opinion and award rendered March 31, 1994, ALJ Kerr dismissed that portion of Hamilton's claim alleging secondary psychological overlay. As to Hamilton's physical complaints, however, ALJ Kerr found those to be credible. In so ruling, ALJ Kerr specifically decided as follows:

12. The Administrative Law Judge finds that the plaintiff clearly sustained an injury of appreciable proportions on December 6, 1991 which will affect his ability to compete for the type of work he is customarily able to perform. Careful consideration of both the lay and medical testimony as well as plaintiff's age, education and work experience lead to the conclusion that the plaintiff has sustained an occupational disability of 60%, with 30% to the Special Fund as a result of the activation of a pre-existing dormant non disabling condition into disabling reality as result of the accident. In determining that the plaintiff has a 60% occupational disability, the Administrative Law Judge notes that the only physical restrictions contained in the file of recent vintage are those presented by the defendant-employer. While Dr. Rodriguez did state that the plaintiff cannot lift, bend, kneel or stoop, he noted that the plaintiff was not at maximum medical improvement. The Administrative Law Judge notes that Dr. Zerga's restrictions are most credible and he restricts the plaintiff to lifting

twenty pounds at a maximum with no repetitive bending or stooping. In determining that the plaintiff has 60% occupational disability, the Administrative Law Judge notes that the plaintiff has an average IQ and adequate academic skills. Thus, the plaintiff is capable of being retrained to the extent that his physical restrictions and mental condition allow him to perform work.

13. The Administrative Law Judge finds that the plaintiff cannot return to any of his former occupations and thus may benefit from rehabilitation pursuant to KRS 342.710.

Consequently, ALJ Kerr approved an award of benefits based upon a 60% occupational disability.

Subsequently, on August 31, 1998, Hamilton filed a motion to reopen pursuant to KRS 342.125, seeking an increase in occupational disability benefits. In that motion, Hamilton alleged that his physical condition had worsened since the March 1994 award, and further verified that he had since come under the care of Dr. Harry Lockstadt who had recommended surgery. By order issued October 23, 1998, Hamilton's motion to reopen was sustained to the extent that his case was ordered assigned to an Arbitrator for purposes of binding mediation.

Following the issuance of a benefit review determination by the Arbitrator, Hamilton then sought de novo review before an Administrative Law Judge. By order of the Commissioner issued March 1, 1999, Hamilton's claim was assigned to ALJ Smith for purposes of further adjudication.

On April 8, 1999, Hamilton filed a motion to place his reopening in abeyance. As grounds, Hamilton indicated he had been scheduled for surgery by Dr. Lockstadt, however, no date for surgery was provided. What is more, Hamilton did not seek interlocutory relief in the form of TTD benefits or that medical costs associated with the surgery be paid by Kentucky-West Virginia.

Hamilton's motion was sustained by ALJ Smith and his claim was placed in abeyance by order issued April 23, 1999. Following the ALJ's order, up to and including the present, surgery has not yet been performed. According to Hamilton, this was due to the fact that Kentucky-West Virginia declined payment for that medical procedure. Nevertheless, Hamilton still did not seek interlocutory relief, and his claim remained in abeyance until its removal by order of ALJ Smith issued April 25, 2000.

Hamilton's claim then proceeded to a decision on its merits. Delays occurred, however, due to several missed independent medical evaluations and numerous requests for extensions of proof time by the parties. By the end of the protracted discovery process, in addition to Hamilton's testimony by deposition and at final hearing, medical evidence submitted for ALJ Smith's consideration on reopening consisted of medical records, reports, and/or depositions from Drs. Lockstadt, Goodman, and Zerga.

On reopening, Hamilton maintains that his back pain is now "more severe, sharper pain" than at the time of his original claim. He also testified that the radicular pain in his left leg is now constant and

far worse. Hamilton indicates that since 1994, the amount of medication he takes has been increased. Hamilton further testified that his ability to engage in physical activities has less[e]ned in recent years. He stated he now sleeps less than in 1994 and that he cannot walk as far or sit as long as at the time of his original award. He rated his pain in 1994 as seven or eight on a scale of ten, whereas it now averages nine or ten.

Hamilton testified he last saw Dr. Lockstadt in March of 2000. Since that time, he has sought treatment from Dr. Ira Potter and Dr. Anthony Stugan. He has not returned to work since the date of his original award and was awarded Social Security disability benefits prior to his original decision.

Based upon an examination that occurred August 15, 1997, Dr. Lockstadt assessed Hamilton as suffering from a DRE Category IV pursuant to the AMA Guides, producing a 25% whole person impairment. It was Dr. Lockstadt's opinion that Hamilton is basically unemployable due to his symptoms and, at best, could work at nothing more than "very light sedentary type work where he would be allowed to sit at a desk, do some work for a few hours during the day and then be allowed to move about."

In a letter dated May 1, 1998, Dr. Lockstadt opined that Hamilton's condition had deteriorated since the time of his 1991 injury. Dr. Lockstadt stated that at the time of the injury, Hamilton only complained of single leg pain. Over the preceding year, however, Hamilton reported increasing pain in his back and left lower extremity. Dr. Lockstadt stated he thought it was clear Hamilton had shown progressive deterioration in his function, as well as increased pain and symptoms.

Dr. Lockstadt testified that in 1991, Hamilton had undergone an MRI exam which revealed degenerative disc disease and a disc herniation at L4-5, causing some nerve root irritation. A subsequent MRI scan was performed in 1997, which demonstrated that Hamilton's L4-5 disc was then completely collapsed. This was objective documentation of Hamilton's worsened condition according to Dr. Lockstadt. The doctor further opined that Hamilton exhibited decreased conduction of his sciatic nerve, probably resulting from "some form of a nerve compression." Dr. Lockstadt recommended a series of cortisone injections into Hamilton's low back, followed by either decompression surgery in the form of a laminectomy or discectomy, or a complete fusion. Dr. Lockstadt indicated that Hamilton's prognosis without surgery was poor. Dr. Lockstadt testified he had only seen Hamilton twice in 1997, once in 1999, and once in 2000.

Dr. Goodman saw Hamilton for a second independent medical evaluation on October 26, 1998. On this occasion, physical examination showed Hamilton to be in no distress, and his dorso-lumbar spine revealed no evidence of tenderness or spasm. Range of motion was subjectively restricted. However, Hamilton's lower extremities produced negative results upon straight leg raising. There was also no evidence of motor, sensory, reflex or atrophy. During the examination, Hamilton declined to walk on his heels and toes or to squat, allegedly due to pain. X-rays performed at the time of Dr. Goodman's second evaluation, revealed narrowing of the L4-5 and L5-S1 disc spaces, as well as

the presence of a Schmorl's node. The doctor indicated that these findings were identical to those reported by him in 1993. Consequently, Dr. Goodman once more diagnosed Hamilton as suffering from pre-existing degenerative changes of the lumbar spine with arousal. Based upon the AMA Guides, Dr. Goodman again assessed Hamilton as suffering from a 5% whole body impairment. He further stated he found no evidence of worsening and this time specified that Hamilton retained the physical capacity to return to the type of work he performed in 1991.

With regard to restrictions, Dr. Goodman recommended that Hamilton lift maximally no more than sixty to seventy pounds. The doctor stated that after almost seven years following Hamilton's original injury, there remained no wholly objective medical findings sufficient to support Hamilton's subjective complaints. Consequently, Dr. Goodman concluded that he could not demonstrate any objective change since Hamilton's previous examination in 1993.

Dr. Goodman performed a third and final independent medical evaluation of Hamilton on April 10, 2001. At that time, he again noted that Hamilton had never returned to work, had suffered no further injury, and had been recently seen by Dr. Lockstadt who recommended a surgical fusion not yet performed. He recorded that Hamilton did not wear a brace, but had a TENS unit at home and had received some "injections" at the pain clinic at St. Joseph's Hospital with no relief. Dr. Goodman also documented that Hamilton performed no yard work, and reported staying in the house watching television or talking on his CB radio. Hamilton further conveyed that he could walk about a block, drive locally, and engage in some fishing.

At the time of Dr. Goodman's third evaluation, Hamilton again presented with complaints of pain in his low back when sitting, standing or riding. Physical examination once more revealed Hamilton to be in no distress. His dorso-lumbar spine again demonstrated no tenderness or spasm. Range of motion of the lumbar spine was positive, however, straight leg raising for both lower extremities was negative. The doctor found no evidence of motor sensory or reflex changes. He did, however, note on this occasion that Hamilton's left calf was approximately one inch smaller than his right. Hamilton again refused to attempt to walk on his toes and heels because of pain and could not squat for the same reason.

Following the 2001 evaluation, Dr. Goodman once more diagnosed Hamilton as suffering from pre-existing degenerative changes of the lumbar spine with arousal. The doctor at this juncture indicated he did not believe Hamilton's increased complaints were related to his 1991 injury, but to aging and deconditioning.

Based upon the AMA Guides, Dr. Goodman again assessed Hamilton as exhibit[ing] a 5% whole person impairment. It was Dr. Goodman's opinion following his 2001 examination that Hamilton should not lift in excess of seventy-five pounds. No other restrictions were recommended and the doctor reaffirmed his 1998 opinion that Hamilton retained the physical capacity to return to the type of work he performed at the time of his injury.

Compared to his previous examination, Dr. Goodman conceded that Hamilton showed a slight subjective loss of motion in the lumbar spine and that his left calf is also now one-half inch smaller than at the time of Dr. Goodman's earlier examination. However, the doctor explained that because Hamilton is right-handed, he did not see any significance with regard to this second finding. After reviewing the reports of Drs. Zerga and Dr. Lockstadt, Dr. Goodman once more opined that he was unable to document "any objective worsening" in Hamilton's condition. The doctor yet again identified there was no evidence of radiculopathy instability to support an increase in Hamilton's impairment, or any need for surgical intervention. He further could not justify any change in restrictions since the date of his original evaluation.

Dr. Zerga performed a second independent medical evaluation of Hamilton on December 9, 1998. At that time, Hamilton continued to complain of low back pain with radiation into his legs. Peripheral neurological examination was normal for strength, coordination, reflexes, cerebellar testing, sensory exam, and gait. Nevertheless, Dr. Zerga noted that Hamilton walked "very funny," was stiff legged, and tended to externally rotate his right leg. Straight leg raising was tight on the right side, but did not reproduce definite radicular pain. Hamilton also exhibited significant decreased flexion of the lumbosacral spine, but could come within approximately fifteen inches of touching the floor. Dr. Zerga recorded that Hamilton sat during the examination without difficulty. Rotation, lateral bending, and extension were normal. Examination of Hamilton's back revealed a normal lordotic curve and no evidence of spasm or trigger points. Nerve conduction studies were also once again normal. However, on this occasion, Hamilton refused an EMG study.

Following his second evaluation, Dr. Zerga indicated he found no qualitative difference in Hamilton's condition since the time of his 1993 examination. Hamilton, on both occasions exhibited persistent symptoms but no documented radiculopathy, either by exam or objective testing. Nevertheless, on the date of his second examination Dr. Zerga opined that Hamilton qualified as a DRE Category II under the AMA Guides and assessed a 5% functional impairment to his body as a whole, 3% less than in 1991. Dr. Zerga further opined that the primary problem with Hamilton was that he did not seem motivated to pursue anything that might make him better. Although subjectively Dr. Zerga indicated Hamilton would have work restrictions, it was hard to determine how much of that might be dependent upon effort.

Dr. Zerga performed a third and final evaluation of Hamilton on February 27, 2001. At that time, Hamilton continued to complain of severe low back pain. Again, Dr. Zerga's peripheral neurological examination was normal for strength, coordination, reflexes, cerebellar testing, sensory exam, and gait. The doctor recorded that during the examination, Hamilton sat comfortably and gestured comfortably. Straight leg raising was negative on this third occasion. Upon range of motion testing, Dr. Zerga noted that Hamilton made minimal effort during flexion of his lumbosacral spine. Rotation, lateral bending, and extension, however, were not limited. There was again no evidence of scoliosis, spasm, tenderness or other abnormalities. Based upon his third examination, Dr. Zerga once more concluded that Hamilton had a "non-specific exam without any signs on examination to

suggest radiculopathy." The doctor again stressed Hamilton's inactivity, noting he was now on stronger narcotic pain medication. Consequently, the doctor yet again questioned Hamilton's motivation for return to work. Dr. Zerga recorded that Hamilton had undergone a subsequent MRI scan in 1997 or 1998, which he had not seen. He, therefore, declined at the time of his third evaluation to address whether there had been any change in condition since his previous examination until he could review the MRI scan.

As previously noted, by opinion and order rendered August 6, 2002, ALJ Smith dismissed Hamilton's claim on reopening for increased occupational disability benefits. However, the ALJ found compensable and ordered Kentucky-West Virginia to pay for ongoing medical expenses, including the surgery recommended by Dr. Lockstadt. In so ruling, the ALJ specifically stated as follows:

The first issue to be addressed is whether the Plaintiff has shown a worsening of condition or increase in disability pursuant to KRS 342.125. Plaintiff contends that he is totally disabled and unable to perform any work. The medical evidence is conflicting. Dr. Lockstadt indicates that the Plaintiff's condition has in fact worsened and placed restrictions on the Plaintiff's activities. Dr. Goodman indicated that the Plaintiff's condition has not worsened. The Administrative Law Judge is bound by the finding of 60% occupational disability at the time of his Opinion and Award on March 31, 1994. The Plaintiff's testimony was credible regarding the severity of his pain and his limited activities. Although the Plaintiff describes these as being worse now than at the time of the last reopening, they appear basically the same as his complaints at that prior time. Dr. Goodman is found to be credible regarding his finding of no worsening of condition due to the work injury at this time. Therefore the Plaintiff is not entitled to any additional income benefits at this time based upon any worsening of condition or increase in disability pursuant to KRS 342.125.

The parties have also raised an issue regarding the compensability of medical expenses, including the denial of the surgery recommended by Dr. Lockstadt. KRS 342.020 requires the Defendant-Employer to be responsible for any and all medical expenses which are reasonable and necessary for the cure or relief of a work-related injury. The only real contest on this issue appears to be whether the Plaintiff is in need of the fusion surgery recommended by Dr. Lockstadt. He recommended the fusion surgery as a last alternative if conservative treatment failed. Apparently the Plaintiff did have additional problems as shown by diagnostic studies on the latest MRI and Plaintiff's symptomotology may be some worse. Dr. Lockstadt further testified that this surgery would be performed in order to help the Plaintiff control his pain, although it would not alleviate it. Dr. Goodman did not recommend the surgery. Plaintiff's testimony appears to have changed over time. Although he did not initially want the surgery, he now indicates in this latest reopening that he is willing to undergo the surgery in order to deal with his pain. The Administrative Law Judge finds this to be reasonable. Based upon the credible testimony of both the Plaintiff and Dr. Lockstadt, the Administrative Law Judge will order that the Defendant-Employer cover the cost of the recommended surgery by Dr. Lockstadt pursuant to KRS 342.020. This would also include any other reasonable and necessary medical treatment for the Plaintiff's back injury.

It is from the above language that Hamilton now appeals.

On review, we begin by noting that Hamilton's assertion that surgery was never mentioned at the time of his original proceeding, is a misstatement. Both Dr. Rodriguez and Dr. Lowe recommended percutaneous discectomy surgery as early as 1992. We also find that the initial argument raised by Hamilton that the evidence on reopening consequently compels a finding he is totally and permanently disabled is simply a reargument of his case on reopening before ALJ Smith. In general, Hamilton charges that ALJ Smith should have believed the opinions of Dr. Lockstadt over those expressed by Drs. Goodman and Zerga. As such, Hamilton impermissibly requests this Board to substitute its judgment as to the weight and credibility of the evidence for that of the finder of fact. As we admonish so frequently, this is not the Board's function.[3]

Certain basic principles exist in a reopening. First, the burden of proof falls upon the party seeking reopening.[4] Here, that party was Hamilton. Consequently, pursuant to KRS 342.125(1), it was Hamilton's burden to prove not only a deterioration of his medical condition, but also some occupational transformation in his condition.[5] In ascertaining whether there has been a change, it was the ALJ's obligation to analyze not only the proof presented at the time of reopening, but also that evidence considered in the original claim.[6] ALJ Smith obviously fulfilled this duty in the case sub judice.

Where the decision of the fact-finder is in opposition to the party with the burden of proof, that party bears the additional burden on appeal of showing that the evidence below was so overwhelming it compelled a finding in his favor and that no reasonable person could have failed to be persuaded by it. [7] As fact-finder, ALJ Smith had the authority to determine the quality, character, and substance of the evidence.[8] Similarly, ALJ Smith had the sole authority to determine the weight and inferences to be drawn from the evidence.[9] What is more, ALJ Smith had the authority to reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof.[10] Mere evidence contrary to ALJ Smith's decision is not adequate to require reversal on appeal.[11] In order to reverse the decision of the ALJ, Hamilton must show there was no substantial evidence of probative value to support his decision.[12]

In the case sub judice, we find more than ample evidence of substantial probative value to support ALJ Smith's ultimate determination. Contrary to Hamilton's assertions, the fact that surgery was recommended by Dr. Lockstadt does not compel an opposite result. As noted above, Dr. Lockstadt recommended three possible courses of treatment, the second of which was decompression surgery in the form of a discectomy. This is the same course of treatment recommended by Drs. Lowe and Rodriguez at the time of Hamilton's original proceeding. Hence, in picking and choosing from the evidence, the ALJ was well within his authority to conclude that the proposed surgery now required by Hamilton has remained unchanged since the time of his original proceeding.

Moreover, although Hamilton's complaints may be genuine and could have been interpreted as

sufficient to demonstrate a deterioration in his condition, Hamilton's testimony on reopening, in and of itself, does not, as a matter of law, require any particular result.[13] As pointed out by ALJ Smith, Hamilton's current complaints could reasonably be interpreted as "similar," if not identical, to those he expressed at the time of his original proceeding from an occupational standpoint. This is especially true in light of the fact the petitioner has not returned to work anywhere since 1991. While an increase in symptomotology may be a basis for reopening, it does not necessarily mandate a finding of increased occupational disability.[14]

Likewise, the medical evidence from Dr. Lockstadt does not compel any particular result. As previously stated, the ALJ was well within his discretion to reject Dr. Lockstadt's expert medical views in favor of the medical conclusions expressed by Drs. Goodman and Zerga. Dr. Goodman, who originally examined Hamilton in 1993, unequivocally stated that in his expert medical opinion, Hamilton objectively demonstrated no worsening of condition in either 1998 or 2001. This reflects the same conclusion expressed by Dr. Zerga at the time of his 1998 examination, and to a lesser extent also in 2001. As a matter of law, it was within the authority of ALJ Smith to single out and rely on as most credible the evidence from these two latter medical experts.[15]

In sum, we concede there was sufficient evidence on reopening that, had it been found credible by ALJ Smith, could have easily supported the relief now requested by Hamilton. Nevertheless, the record overall is conflicting. Accordingly, the evidence from Dr. Lockstadt in the instant reopening falls far short of compelling a decision in Hamilton's favor. We, therefore, affirm the decision rendered by ALJ Smith in toto.

As to Hamilton's alternate request that ALJ Smith's decision be vacated and, in light of his need for surgery, remanded with instructions that TTD benefits be instituted until surgery is performed and he reaches maximum medical improvement from that procedure, we are without authority to grant that remedy given the procedural history of this claim. As pointed out by Kentucky-West Virginia, such relief is interlocutory and should have been requested and/or raised as an issue prior to a decision by ALJ Smith on the merits of this reopening. Since it was not, the ALJ was under no obligation to grant that relief upon petition for reconsideration. What is more, because the issue of interlocutory relief was not properly sought or preserved as an issue before the ALJ, we cannot now order it as remedy on review.

Accordingly, the decision rendered August 6, 2002, by Hon. Donald G. Smith, Administrative Law Judge, is hereby AFFIRMED, and the appeal by Mark G. Hamilton is DISMISSED.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

1. Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section

110(5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

2. Western Baptist Hospital v. Kelly, Ky. 827 S.W.2d 685, 687 (1992).

3. See Ky. Rev. Stat. (KRS) 342.285 and Paramount Foods Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

4. Stambaugh v. Cedar Creek Mining Co., Ky., 488 S.W.2d 681 (1972); Griffith v. Blair, Ky., 430 S.W.2d 337 (1968); Jude v. Cubbage, Ky., 251 S.W.2d 584 (1952).

5. See KRS 342.125.

6. W. E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453 (1946).

7. Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675 (1998).

8. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993).

9. Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329 (1997); Luttrell v. Cardinal Aluminum Co., Ky. App., 909 S.W.2d 334 (1995).

10. Magic Coal v. Fox, Ky., 19 S.W.3d 88 (2000); Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999); Hall's Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327 (2000).

11. Whittaker v. Rowland, id. at 482.

12. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986).

13. Gro-Green Chemical Co. v. Allen, Ky. App., 746 S.W.2d 69 (1987).

14. Beale v. Rolley, Ky., 777 S.W.2d 921 (1989).

15. Republic Steel Corporation v. Justice, Ky., 464 S.W.2d 267 (1971).