

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001376-WC

HENRY A. DONATHAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-72851

QUALITY CABINETS;
HON. J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: GUIDUGLI AND HENRY, JUDGES; POTTER, SENIOR JUDGE.¹

HENRY, JUDGE: Henry A. Donathan (Donathan) has petitioned for review of an opinion of the Workers' Compensation Board (Board) entered on May 27, 2005, that affirmed an opinion and order of the administrative law judge (ALJ) rendered January 19, 2005, dismissing Donathan's claim against Quality Cabinets (Quality) upon factual findings that Donathan 1) failed to sustain his

¹ Senior Judge John W. Potter sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

burden of proof of a work-related injury and, alternatively, 2) failed to give due and timely notice of his claimed injury.

Before us, Donathan argues that the Board erred in affirming the ALJ's opinion and order, asserting that the ALJ's findings were not supported by substantial evidence. We disagree, and affirm.

Donathan completed high school and worked in various jobs including as a farmer, janitor, and maintenance technician until beginning employment in September, 1998, at the age of thirty-nine, with Quality, a kitchen cabinet manufacturer. Donathan worked as a clamp operator, which required him to place five to fifteen pound glued cabinet frames into a clamp, align them with a rubber mallet, and staple them using an air powered staple gun. While evidence from both sides agreed that the movement to accomplish this task was repetitive, there was a conflict as to the force required: Donathan testified that using the mallet required extensive hammering with his right hand, while his supervisor testified that the hammering involved only "tapping."

In June, 2000, Donathan was moved from the position of clamp operator to that of framer. While both parties agreed that the change was made to alleviate Donathan's shoulder pain, there was a conflict as to whether the pain was work-related. Donathan testified that the change was due to his report of a

stinging pain in his right shoulder that occurred while hammering; his supervisor and the human resource manager testified that Donathan did not report the pain as work-related; further, that an employee could change functions within the same job in order to put less stress on, for example, a shoulder; and it also served the dual purpose of training new clamp operators, including Donathan's son, with whom he had voiced a desire to work.

Donathan continued to work for a year without further complaints or missing work due to shoulder pain. In the course of that year, during September and October, 2000, and March, 2001, Donathan saw his family physician for several complaints, including pain in both shoulders. Absent from the doctor's notes is any history or indication that the right shoulder pain was work-related. Donathan was referred to an orthopedic surgeon in April, 2001, for the right shoulder pain, had an MRI and was enrolled in physical therapy. The notes from this surgeon indicate that Donathan denied any injury as the cause of the pain, instead specifically reporting right shoulder pain for a year with no specific injury.

The first of seven surgeries on his right shoulder was performed on June 27, 2001. In preparation for this surgery, Donathan completed a Family Medical Leave Act benefits form, in

which he stated that his condition had commenced in April, 2000, (two months before he changed positions from clamp operator to framer). At the same time he also completed a form to claim short-term disability benefits, specifically checking that the benefits were *not* due to a work-related injury and leaving blank questions as to whether the claim was related to his occupation. Out of all the medical notes from his physicians, the sole reference to the pain being work-related appeared in an operative report following this surgery.

According to Quality, the first notice that the right shoulder pain was work-related occurred on September 28, 2001, when Donathan completed a first report of injury for workers' compensation benefits, listing the date of disability as June 25, 2001, and the date of the injury as unknown, summer of 2000. In support, he relied on the one comment in the June 27, 2001, operative report from the first surgery, which was the sole reference in the medical documentation to the pain being work-related. Quality denied the claim on the basis that Donathan's condition was not work-related and, alternatively, because he had failed to give due and timely notice.

From November 7, 2001, until May 20, 2004, Donathan had six more surgeries on his right shoulder. The only other mention to the pain being work-related appears in medical

records from the Cincinnati Sportsmedicine and Orthopaedic Center, after Quality's denial of workers compensation benefits, noting that Donathan reported that the onset of right shoulder pain occurred while he was working at Quality.

In the meantime, two independent medical examinations from two different doctors resulted in findings that the shoulder pain was not work-related.

In dismissing Donathan's claim, the ALJ found Donathan's testimony not credible on the basis that he failed to report a work injury to Quality until September, 2001; that he saw two doctors for multiple visits between September 14, 2000, and September of 2001, and never mentioned a work-related injury or any relationship between his work activity and the right shoulder condition; and that he affirmed in his application for short-term benefits that the condition was not work-related. The ALJ therefore concluded a failure of proof of a work-related injury and, although mooted by the first conclusion, also found a failure of due and timely notice of the claimed injury.

Before the Board, Donathan contended that the ALJ erred in concluding that he did not suffer a work-related injury and that he did not give timely notice, asserting that the ALJ failed to note compelling evidence otherwise. In affirming the ALJ's opinion and order, the Board stated:

After reviewing the ALJ's decision and the record in this matter, we believe the ALJ thoroughly reviewed the relevant evidence and reached conclusions that are supported by substantial evidence. It is not enough for Donathan to point to evidence that could have supported a more favorable result. REO Mechanical v. Barnes(, 691 S.W. 2d 224 (Ky.App. 1985)). A good deal of Donathan's argument on appeal is simply a re-argument of the merits of the claim and is focused on the ALJ's interpretation of the evidence or the weight the ALJ assigned to the evidence. Such matters are solely within the authority of the ALJ. We are without authority to reweigh the evidence and reach a conclusion contrary to that reached by the ALJ.

The record does not compel a finding in favor of Donathan on the issues of work-related injury and causation. The ALJ simply did not find Donathan credible regarding the occurrence of an injury and its connection with Donathan's work. The ALJ found it significant that there was no mention of work relatedness in any of the doctors' reports for approximately one year following the injury. Dr. Chattha only expressed that the condition was work related in his operative note and did not explain the basis for that opinion at that time. The ALJ noted this singular entry stood in stark contrast to the wealth of medical records documenting office visits which recorded no mention of work-relatedness.

The September 14, 2000 note from Dr. McGinnis indicated Donathan was seen for complaints of shoulder pain, especially in the right shoulder. Medical records establish that the left shoulder problems were similar to those in the right but not as severe. Donathan acknowledges that the left shoulder is not work related. Our attention is directed to nothing in the

record to clarify how the left shoulder condition arose. It would not have been unreasonable for the ALJ to question why the similar condition in the right shoulder would have a cause different from the problems in the left shoulder, especially since they were both symptomatic at the same time.

The ALJ was clearly not persuaded that any doctor offering an opinion that the condition was work related had a sufficient basis to form that opinion. As noted by the ALJ, Dr. Chattha completed an attending physician's statement for Donathan's application for short-term disability benefits and did not indicate the condition was due to an injury or sickness arising out of Donathan's employment. It was only after the short-term disability benefits were expiring that Dr. Chattha noted in the operative report that the condition was work related. In rejecting Dr. Chattha's opinion on work relatedness, the ALJ stated that the medical evidence is only as credible as Donathan's testimony and the history Donathan gave to the medical experts. The ALJ may reject medical opinion if it (is) based only upon the history the doctor receives. If the opinion is based on an inaccurate history or information, the ALJ may choose to reject it. The ALJ clearly stated he did not find Donathan credible regarding the onset of his problem.

We note, also, that Dr. Gladstein, in his deposition, clearly stated that the pain Donathan experienced was not the result of any injury that he sustained to his shoulder. Dr. Gladstein further stated that he saw no objective medical evidence of a harmful change to Donathan's shoulder as a result of his work activities. Dr. Gladstein's opinions are substantial evidence that would support a finding that the condition was not work related. The presence of this evidence alone would

indicate the evidence does not compel a finding of work relatedness.

Since the ALJ could reasonably conclude that causation or work relatedness of the injury were shown to his satisfaction, questions concerning notice are moot. Nevertheless, we note the ALJ could reasonably conclude that due and timely notice was not given. The ALJ carefully considered the testimony of the witnesses concerning the event and did not find Donathan to be credible. He accepted the testimony of (the supervisor) that Donathan informed her in June of 2000 that his shoulder was hurting but he did not inform her it was related to his work. The ALJ also accepted (the supervisor's) testimony that Donathan was moved to another job and did not miss any time from work due to shoulder problems until he took off in June of 2001 for surgery. The ALJ observed that the claim began as a claim for an acute injury on June 1, 2000 and then morphed into a claim for cumulative trauma. On appeal, Donathan argues both acute injury and cumulative trauma at various points. He argues that he gave notice on June 1, 2000 of a work-related injury and that he told doctors at that time his condition was work related. He then argues that his injury is a result of cumulative trauma and he was not required to give notice until such time as he was so informed by a doctor. The evidence does not compel a finding that Donathan sustained an acute injury at work on June 1, 2000 and gave notice at that time or as soon as practicable thereafter. The record does not compel a finding that Donathan sustained cumulative trauma and gave due and timely notice following the manifestation of his disability.

Our standard of review of a decision of the Board "is to correct the Board only where the Court perceives the Board

has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). Having reviewed the Board's application of the law and the evidence, we conclude that the Board committed no error.

With regard to Donathan's first issue, while conceding that the ALJ has the sole discretion to weigh credibility, he argues that the ALJ cannot ignore "compelling evidence" of work-relatedness that he was moved to a position requiring less overhead, repetitive work upon his report of shoulder pain to his supervisor on June 1, 2000. As stated in the Board's opinion, in dismissing Donathan's claim the ALJ relied on evidence that Donathan first reported to his family doctor for a similar pain in both shoulders; that he acknowledged that the left shoulder pain was not work-related; and that he failed to initially mention work relatedness to his supervisor, the human resources manager, or his treating physicians, as the lack of mention in medical reports for approximately one year following the onset of the shoulder pain so demonstrate. As the Board noted, besides Donathan's testimony that he told all these individuals that the pain was work-related, the sole mention that the pain was work-related appears in a doctor's operative

report, without further explanation. It is within the ALJ's discretion to believe or disbelieve any portion of the evidence. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). Having reviewed the record, we cannot agree with Donathan that the evidence was compelling in his favor or unsupported by substantial evidence so as to find that the Board "committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital, *supra*. See generally Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986); REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky.App. 1985).

Furthermore, we see no error by the Board in affirming the ALJ's assessment of evidence relating to notice, which included employer testimony that Donathan did not initially associate his shoulder pain with work when he complained of shoulder pain in June, 2000, and changed positions; employer testimony that Donathan did not miss any work due to shoulder pain until he took off in June, 2001, for surgery; and evidence from the independent medical examinations that there was no objective evidence of a harmful change to Donathan's shoulder as a result of work. We thus agree with the Board that there was no compelling evidence that Donathan gave timely notice of either an acute injury or cumulative trauma.

We note that as to this last issue, Quality argued to both the Board and this Court that Donathan did not file a petition for reconsideration with the ALJ, thus failing to preserve the matter for appellate review, relying on Halls Hardwood Floor Company v. Stapleton, 16 S.W.3d 327 (Ky.App. 2000) and Eaton Axle Corporation v. Nally, 688 S.W.2d 334 (Ky. 1985). Both are factually distinguishable, however, from the case at bar. In Eaton Axle the fact finder failed to make any factual findings. The Supreme Court therefore held that the failure of the fact finder to make statutorily required findings of fact was a patent error that was required, pursuant to Kentucky Revised Statutes (KRS) 342.281, to be addressed to the fact finder in a petition for reconsideration before being argued on appeal. Unlike Eaton Axle, in the case at bar the ALJ, as fact finder, made specific findings of fact. In Halls Hardwood Floor Company the issue concerned an erroneous computation of weekly benefits, which is not at issue herein. In both of the above cases a petition for reconsideration was required to bring a "patent error" to the attention of the fact finder. As the ALJ herein rendered factual findings, and there was no issue as to computation, there was no patent error that needed to be brought before the ALJ before bringing the matter

on appeal. Addressing the issue on the merits, therefore, we find that the Board did not err.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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