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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001550-WC

PAUL PUCKETT — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-87291

NEAL'S DELIVERY SERVICE, INC.;
HON. J. LANDON OVERFIELD, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, KELLER, AND LAMBERT, JUDGES.

LAMBERT, JUDGE: Paul Puckett appeals from a July 21, 2009, opinion by the Workers' Compensation Board affirming the denial of Puckett's motion to reopen his case against Neal's Delivery Service, Inc. After careful review, we affirm.

Puckett filed a claim for workers' compensation benefits on October 13, 2006, alleging an injury to his back on May 12, 2006, when he was loading furniture on a truck while working at Neal's Delivery Service, Inc. (hereinafter "Neal's"). Attached to Puckett's Form 101 was a letter/report dated October 9, 2006, addressed to Puckett's counsel from Dr. Jonathan E. Hodes, which details Puckett's injury. In response to specific questions posed by counsel, Dr. Hodes indicated that his diagnosis was a disc herniation at the L5-S1 resulting from a work-related injury. Ultimately, Dr. Hodes performed surgery on Puckett on August 14, 2006. Dr. Hodes indicated that at the time of the letter, Puckett had not fully recovered, and recovery would take six months to a year. An impairment rating could only be assigned one year from the surgery. Dr. Hodes anticipated that a permanent impairment rating would be in the range of twenty (20%) to twenty-three percent (23%) depending on whether the fusion surgery was successful. Dr. Hodes indicated that this was the type of injury that someone could sustain who lifts and moves furniture.

803 KAR 25:010 details the procedures that must be followed when introducing the direct testimony of physicians via a medical report. While Dr. Hodes' letter/report did comply with 803 KAR 25:010, Section 10 (3) in that it was signed by the physician making the report, the letter/report was non-compliant due to several factors. The letter/report submitted by Puckett was not a medical report as described in Section 10 (2) in that it was not a Form 107-I. The letter/report did not comply with Section 10 (4) in that it did not include within the body of the

report or as an attachment a statement of Dr. Hodes' qualifications. Additionally, and also pursuant to Section 10 (4), the letter/report did not state whether Dr. Hodes had been assigned a medical qualification index number, and reference was not made to his index number in lieu of attaching his qualifications. Further, this report was not introduced upon notice pursuant to Section 10 (6) whereby Neal's could object to this report. Since the medical report did not comply with the applicable provisions of 803 KAR 25:010, Section 10, it could not be admitted into evidence without an order by the ALJ and no such order was ever entered. *See* 803 KAR 25:010, Section 8 (4) (b).

The Commissioner entered a scheduling order requiring Puckett to submit proof by January 16, 2007. On December 14, 2006, after the Commissioner's scheduling order was issued, Puckett's counsel, Mr. Vandertoll, filed a motion to withdraw as Puckett's counsel. Puckett did not obtain new counsel, nor did he file for an extension of the discovery deadline. Puckett's deposition was scheduled for December 20, 2006, and his independent medical evaluation (IME) was scheduled with Dr. Timothy Kriss for February 19, 2007. Puckett did not attend his deposition or the scheduled IME. On February 13, 2007, Neal's filed a motion to dismiss, asserting that a scheduling order had been entered which required Puckett to submit proof by January 16, 2007. Neal's argued that Puckett did not request or receive an extension of this deadline and that Puckett had failed to submit any proof whatsoever in support of his injury claim during the allowable period. Finally, Neal's argued that Puckett had failed to present a *prima*

facie case. Puckett did not file a response to Neal's motion, and on March 7, 2007, ALJ Coleman entered an order dismissing Puckett's claim with prejudice for failure to "submit evidence establishing that the Plaintiff suffered an injury as defined by objective medical evidence." No appeal was taken from said order.

On January 13, 2009, Puckett filed a motion to reopen his case based on "mistake" under KRS 342.125. Puckett alleged that Neal's motion to dismiss incorrectly stated that Puckett had failed to submit any proof whatsoever in support of his occupational injury claim during the period of time allotted to him in the scheduling order. Puckett asserted that this was obviously a misstatement of fact because Dr. Hodes' medical report attached to the Form 101 gave a description of Puckett's injury and expressed the opinion that the injury was work-related and is the type one might expect in Puckett's line of work. Puckett argued that when Neal's filed its motion to dismiss before ALJ Coleman, it attached the Form 101 but failed to attach Dr. Hodes' letter/report. Accordingly, Puckett asserted that Neal's failure to include Dr. Hodes' report in its motion to dismiss was an obvious mistake which clearly lead the ALJ to erroneously conclude Puckett had introduced no objective medical proof establishing that he had suffered an injury as defined by KRS 342.011(1). Finally, Puckett argued that at the time Neal's motion to dismiss was filed, his attorney had already withdrawn, and that despite his best efforts to obtain new counsel, he was unable to do so and was unjustly forced to accept the dismissal of his claim.

In addition to attaching the letters from Dr. Hodes and a copy of Neal's February 13, 2007, motion to dismiss, Puckett also filed an affidavit with his motion to reopen. In his affidavit, Puckett asserted that when Vandertoll filed his motion to withdraw as Puckett's counsel, Vandertoll based his motion on the fact that Puckett had failed to return numerous communications from him. In his affidavit, Puckett asserted that this was incorrect and that he was unaware of any unsuccessful attempts by Vandertoll to contact him.

The affidavit further indicated that at the time Mr. Vandertoll filed his motion to withdraw, Puckett believed he was no longer represented, and Puckett sought to retain other counsel before Vandertoll had even been granted permission to withdraw. To his affidavit, Puckett attached a letter from Hughes and Coleman dated January 24, 2007, stating that the firm refused to accept Puckett's request for representation. The letter reflected that the firm had reviewed Puckett's medical records concerning his claim and concluded that "the records contain a history of low back pain that is, if not inconsistent, certainly incompatible with a May 2006 work related injury." The firm suggested that Puckett immediately seek the services of a qualified workers' compensation attorney.

Also in his affidavit, Puckett asserted that he had trouble finding representation prior to obtaining Vandertoll as counsel. Puckett noted that he had previously sought representation from Hon. John Doyle of Maury D. Kommor & Associates but received a June 13, 2006, letter in which Mr. Doyle refused to represent him and referred him to Hon. Robert Walker, a workers' compensation

attorney. Mr. Doyle's letter indicated that he had reviewed Puckett's file and an accompanying report from Dr. Goldman. Mr. Doyle indicated that because of the nature of Puckett's claim and the stance of Dr. Goldman and KESA, it was his firm's belief that Puckett needed to employ an attorney who specialized in workers' compensation claims. Mr. Doyle indicated that Mr. Walker, presumably of Walker, Vaughn, & Wallace, could best assist Puckett with the particular difficulties of his claim.

Puckett also attached a letter from Hon. Liddell Vaughn of Walker, Vaughn & Wallace dated July 3, 2006, who also declined to represent him. The letter noted that the attached report from Dr. James Swift stated that the incident of May 12, 2006, cannot be considered work-related. Although Mr. Vaughn disagreed with Dr. Swift's statement, Mr. Vaughn felt it would be very difficult to overcome Dr. Swift's opinion. Mr. Vaughn declined to represent Puckett and advised him of the strict time limitation he was under and instructed him to contact another attorney immediately if he wished to pursue the matter.

In light of the chain of refusals, Puckett stated in his affidavit that following the withdrawal of Vandertoll and the refusal by Hughes and Coleman to accept his case, he felt it was useless to attempt once again to retain counsel, and thus he did not proceed with his claim.

On February 11, 2009, ALJ Overfield denied Puckett's motion to reopen, finding that Puckett failed to make a *prima facie* case for reopening. Puckett filed a motion for reconsideration, and ALJ Overfield denied that motion

by order dated March 13, 2009. Puckett then appealed to the Workers' Compensation Board (hereinafter "Board"). On July 21, 2009, the Board affirmed the conclusions of the ALJ, concluding that: 1) Puckett had not demonstrated any fraud or mistake sufficient to justify reopening his claim; 2) Puckett failed to make a *prima facie* showing of the possibility of prevailing on the merits; 3) Puckett failed to submit medical proof to support his claim prior to dismissal; 4) Puckett could not establish a mistake of law or fact founded upon ignorance; and 5) Puckett effectively abandoned his claims. Puckett now appeals.

On appeal, Puckett argues that ALJ Overfield erroneously overruled his motion to reopen and that the Board erred in affirming Overfield's order. Puckett argues that Overfield misinterpreted KRS 342.125 and claims that ALJ Overfield's order denying the motion to reopen was a "denial of fundamental fairness." Puckett also argues that ALJ Overfield erroneously failed to give ALJ Coleman the opportunity to correct an injustice.

The crux of Puckett's argument on appeal is that a mistake occurred when ALJ Coleman dismissed his case for failure to provide any evidence establishing that he had suffered an injury. ALJ Coleman's order dismissing Puckett's case states: "Plaintiff's claim is hereby dismissed with prejudice for failure to submit evidence establishing that the Plaintiff suffered an injury as defined by objective medical evidence." Puckett claims that the October 3, 2006, letter written by neurosurgeon Dr. Hodes constitutes objective medical evidence

and should have prevented ALJ Coleman from dismissing Puckett's case with prejudice.

Puckett cites *Wheatley v. Bryant Auto Service*, 860 S.W.2d 767 (Ky. 1993) in support of his argument that ALJ Overfield is clearly authorized to reopen a case in order to correct a mistake. Puckett also relies on *Durham v. Copley*, 818 S.W.2d 610 (Ky. 1991) for the proposition that the court is permitted to reopen on the ground of mistake in order to prevent what would be considered a manifest injustice. Alternatively, Puckett asserts that the ALJ also has the authority on his own motion to correct errors of law and fact, and ALJ Coleman should be given the opportunity to correct such an error.

In response, Neal's asserts that at the time its motion was filed, Puckett's counsel had already withdrawn, and Puckett filed no response, nor did he contact Neal's counsel or the ALJ regarding the motion to dismiss. Puckett filed no proof to support his claim, failed to attend his deposition scheduled by his attorney, and failed to attend the IME. Neal's also attached a bill from the IME physician, reflecting that Neal's counsel was charged a "no show" fee for Puckett's failure to attend the IME.

Because we agree with the Board that ALJ Overfield did not commit error in overruling Puckett's motion to reopen, we affirm. "In order to reverse the findings of the Board unfavorable to a claimant, the evidence must be so overwhelming as to compel a finding in his favor . . . ." *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985) (citing *Howard D. Sturgill & Sons v.*

Fairchild, 647 S.W.2d 796 (Ky. 1983)); *Wagoner v. Smith*, 530 S.W.2d 368 (Ky. 1975). This Court's function when reviewing a decision made by the Board "is to correct the Board only where the [sic] 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). Thus, the "standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law." *McNutt Construction/First General Services v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001) (citing *American Beauty Homes v. Louisville & Jefferson County Planning and Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964)).

Puckett filed his initial motion to reopen on grounds of mistake of fact, per KRS 342.125, which permits the reopening and reconsideration of a dismissed claim if a party later demonstrates a decision resulted from fraud or mistake or produces evidence which could not have been discovered with the exercise of due diligence in the proceeding. *See Slone v. R & S Mining, Inc.*, 74 S.W.3d 259, 262 (Ky. 2002). However, a motion to reopen cannot be based upon a condition known to the claimant during the pendency of the original claim but which he did not present. *Slone v. Jason Coal Co.*, 902 S.W.2d 820, 822 (Ky. 1995).

In *Slone v. Jason Coal*, the claimant knew she had a psychological condition resulting from an injury but did not assert it in her original claim. *Id.* at

822. Here, we think the logic is the same. Obviously, Puckett believed he had an injury claim, but because he could not obtain counsel to represent him, he chose not to litigate it. Further, the first step in the process to reopen a claim requires that the movant make a *prima facie* showing of the possibility of prevailing on the merits. *See AAA Mine Services v. Wooten*, 959 S.W.2d 440, 441 (Ky. 1998). Only if the movant satisfies that requirement "will the adversary be put to the expense of relitigation or will the taking of further proof be authorized." *Id.* at 441-442.

In the instant case, we agree with the Board that ALJ Overfield correctly concluded that Puckett did not make a *prima facie* showing of the possibility of prevailing on the merits. The Board considered the letters from three attorneys attached to Puckett's motion to reopen and noted that these letters reflected, at best, that Puckett would have difficulty prevailing on his claim. Clearly, those letters do not constitute a *prima facie* showing of the possibility of prevailing on the merits. On the contrary, they clearly establish Puckett could not make a *prima facie* showing of a possibility of prevailing on the merits.

Furthermore, we also agree with the Board that 803 KAR 25:010 directs that all medical reports filed with Forms 101 shall be admitted into evidence without further order only if: 1) an objection is not filed prior to or with the filing of the Form 111; and 2) the medical report complies with Section 10 of this administrative regulation. As previously pointed out herein, although the medical report was signed by Dr. Hodes, the physician making the report, the medical report did not include Dr. Hodes' qualifications or the medical

qualifications index number of the physician as required by Section 10 (4). Therefore, because the medical report did not comply with the applicable provisions of Section 10 of 803 KAR 25:010, it could not be submitted into evidence without an order as mandated by 803 KAR 25:010 Section 8 (4) (b).

Further, the facts in this case do not establish a mistake as contemplated by the statute and defined by case law. A mistake of law or fact "must be founded upon ignorance before relief may be granted on account of it." *Uninsured Employer's Fund v. Fox*, 862 S.W.2d 902, 904 (Ky. App. 1993). Certainly, Puckett was not ignorant of the facts and was aware that he must go forward with his claim, and all facts were known to Puckett during the proceedings up to the point his claim was dismissed. In *O'Keefe v. OK Precision Tool and Dye*, 566 S.W.2d 804, 806 (Ky. App. 1978), a panel of this Court stated:

> Workmen's compensation statutes have allowed some relief from the finality of judgments, just as Civil Rule 60.02 has allowed relief to any civil litigant.
> . . .
>
> The only difference between CR 60.02 and this statute is the Board's authority to change its final award based upon a "change of condition" of the claimant. This provision conforms with the social policy behind workers' compensation legislation, but is not applicable to the present case.
> . . .
>
> However, the authority to reopen an award for a mistake is not without limit. In *Wells v. Fox Ridge Mining Co.*, 243 S.W.2d 676 (Ky. 1951), the court held that a 'mistake' either of law or fact must be based upon ignorance or a misapprehension. It was further held that a mistake of counsel in failing to produce available

> evidence does not constitute a 'mistake' within the meaning of KRS 342.125.

The above language is applicable to the instant case. Puckett has not demonstrated a change in the facts or that he was unaware of previously unknown germane facts which have now come to light between the time the ALJ's order was entered dismissing his claim and the time he filed his motion to reopen. Puckett does not deny that he got the motion from his attorney moving to withdraw. Significantly, Puckett does not allege that at the time his claim was dismissed, he was unaware of any fact which would constitute "ignorance or a misapprehension." Instead, in the course of pursuing his claim, Puckett did not properly introduce or submit a medical report which complied with 803 KAR 25:010, Section 10, and he chose not to introduce any proof during the time allotted by the scheduling order. Puckett did not request an extension of time during which he had no counsel to submit evidence in his case or to obtain new counsel. Neal's argued in its motion to dismiss that Puckett had the burden of proving his injury based on objective medical findings and that his failure to do so warranted dismissal. Puckett did not respond to Neal's motion. Almost twenty-two (22) months later, with the benefit of no new facts, Puckett filed a motion to reopen. These facts simply do not establish a mistake as contemplated by KRS 342.125(1).

With respect to Puckett's claim that ALJ Coleman mistakenly did not consider Dr. Hodes' letter/report when he dismissed Puckett's case, we agree with

the Board that it appears that the letter/report was not in compliance with applicable regulations, and consequently could only be admitted into evidence by an order of the ALJ. ALJ Coleman issued no such order, and Puckett made no arguments to ALJ Coleman regarding this evidence, nor did Puckett appeal ALJ Coleman's order dismissing his case.

Puckett cites to *Wheatley v. Bryant Auto Services, supra*, and *Whitaker v. Hall*, 132 S.W.3d 816 (Ky. 2004) for the proposition that a mistake occurred in this case. We find these cases to be distinguishable from the facts of the case at bar. In *Wheatley*, the ALJ found the claimant to be permanently occupationally disabled but erroneously granted benefits for a period not to exceed 425 weeks. The Supreme Court found the ALJ was not acting properly and in the interest of justice, could avail himself of the statutory authority set out in KRS 342.125 to correct the acknowledged mistake regarding the duration of the benefits award. In the instant case, there was no such mistake, as the ALJ found there was no objectively reasonable evidence of an injury and made no erroneous award.

Puckett claims *Whitaker* held that one of the permissible grounds for reopening is mistake and argues that under the circumstances, it is hard to envision a more certain case of mistake than in the case at bar. A review of the decision in *Whitaker* does not support Puckett's position. Although the Supreme Court acknowledged that in KRS 342.125(1) (c), one of the permissible grounds for reopening is mistake, the Court went on to hold that "reopening is only permitted to address a mutual mistake of fact or a misconception of the cause, nature or

extent of disability at the time the award is rendered." *Whitaker*, 132 S.W.3d at 819.

In the instant case, there was no mutual mistake of fact, misconception of the cause, nature or extent of disability when the award was rendered, nor was there a mistake of law in the award. At best, there was a mistake of fact in that the ALJ might not have been aware of Dr. Hodes' report. However, since the report did not comply with the applicable regulations relative to medical reports, a question arises as to whether there was even a mistake committed by the ALJ. That said, Puckett should have called that fact to the attention of the ALJ by filing a petition for reconsideration or a notice of appeal. He chose to do neither and admittedly abandoned the claim.

In summation, the order of ALJ Overfield entered on March 7, 2009, was a dismissal of Puckett's claim on the merits. After his attorney withdrew, Puckett did not move forward with his claim. Further, ALJ Coleman's order was entered after Puckett's time to submit proof expired. Puckett did not seek any redress from that order in the form of a motion to reconsider or an appeal, and cannot now use a motion to reopen as a substitute for appropriately invoking the appellate process in a timely manner. Based on the record and the facts presented, we agree with the Board that ALJ Overfield committed no error in overruling Puckett's motion to reopen. Accordingly, the opinion of the Board affirming the denial of Puckett's motion to reopen and his petition for reconsideration is hereby affirmed.

KELLER, JUDGE, CONCURS.

ACREE, JUDGE DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent. While I cannot find fault with the analysis in the majority opinion, I believe it exalts form over substance. I am compelled to agree with Judge Cowden who dissented from the Board's opinion affirming ALJ Overfield's determination. Judge Cowden said

> the ALJ [Coleman] was under the mistaken impression that Puckett had not filed any medical proof to support his claim when in reality pursuant to 803 KAR 25:010 Sec. 8 (4), Dr. Hodes' report attached to the Form 101 was evidence in support of Puckett's claim [and] a]though the medical report did not contain a medical qualification index number, reference to the Department of Workers' Claims web page indicates the Dr. Hodes' medical qualification index number is 3083.

As Judge Cowden further notes, no objection was raised to Dr. Hodes' report at the time. Furthermore, while the regulation requires that a medical report include "a statement of qualifications of the person making the report[,]" the phrase "statement of qualifications is not defined." True, Dr. Hodes failed to include his medical qualification number, but he did sign the report noting that he is a medical doctor and, specifically, a neurosurgeon.

I also agree with Judge Cowden that "if this is not the type of mistake as contemplated by KRS 342.125(1)(c) . . . it ought to be." Consequently, I would reverse and allow the reopening of Puckett's case to permit adjudication of all contested issues.

For these reasons, I respectfully dissent.

BRIEF FOR APPELLANT:

James D. Howes
Louisville, Kentucky

BRIEF FOR APPELLEE:

Mark E. Hammond
Joshua W. Davis
Louisville, Kentucky