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Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001584-MR

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET,
DEPARTMENT OF HIGHWAYS — APPELLANT

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 08-73335

STEPHEN WILLIAMS;
HON. J. LANDON OVERFIELD, Administrative
Law Judge; and WORKERS' COMPENSATION
BOARD — APPELLEES

AND
NO. 2010-CA-001711-MR

STEPHEN WILLIAMS — CROSS-APPELLANT

CROSS-PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 08-73335

COMMONWEALTH OF KENTUCKY,
TRANSPORTATION CABINET;
HON. J. LANDON OVERFIELD, Administrative

Law Judge; and WORKERS' COMPENSATION BOARD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND VANMETER, JUDGES; SHAKE[1], SENIOR JUDGE.

SHAKE, SENIOR JUDGE: The Commonwealth of Kentucky, Transportation Cabinet, Department of Highways ("Cabinet") petitions for review of the July 29, 2010, opinion of the Workers' Compensation Board ("Board"). That opinion affirmed in part, vacated in part, and remanded the order of reconsideration of Administrative Law Judge ("ALJ") Hon. J. Landon Overfield, regarding the workers' compensation claims made by Stephen Williams. Williams also cross-petitions for review of the Board's order. Because we find no errors with the Board's opinion, we affirm.

Williams was an employee of the Kentucky Department of Highways when on May 27, 2008, he slipped while climbing into a truck and suffered an injury to his right knee. Williams sought medical attention at the hospital emergency room and then followed up with Dr. M.A. Quader on May 30, 2008. Dr. Quader noted edema in both of Williams' lower legs, recommended no treatment, and consented to Williams return to full duty work.

Prior to the May 27, 2008, injury, Williams was successful in obtaining workers' compensation benefits, based on a fifteen percent occupational

[1] Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

disability, for work-related injuries sustained by his right knee and lower back on October 8, 1990. After that claim and before the claim currently before this Court, Williams had been seen by Dr. T. Paul Wilder on various occasions, from 1996 until 2008, complaining of intermittent pain and swelling in both his left and right knees. The most recent of these visits was on May 8, 2008. Williams had also been seen in the hospital emergency room for left knee pain in 1997. Williams testified that he did not recall reporting right knee pain to Dr. Wilder.

After the May 27, 2008, injury, Williams saw Dr. Wilder on June 2, 2008, again complaining of right knee pain. Williams then saw Dr. Timothy Hamby, who ordered an MRI of Williams' right knee. The MRI revealed a tear in the posterior horn and body of the medial meniscus, mild edema consistent with a grade one sprain, and tricompartment osteoarthritis. Williams underwent physical therapy, at the recommendation of Dr. Hamby, who then recommended three more weeks of physical therapy. After continuing to experience pain, Williams underwent arthroscopic surgery to repair the medial meniscus tear. Notes from Dr. Hamby indicate that Williams had been advised that the surgery would not alleviate any type of arthritic pain. Williams returned to Dr. Hamby multiple times between the surgery and December 9, 2008, complaining of pain in his right knee. Williams requested knee replacement surgery and Dr, Hamby, after several attempts to dissuade Williams from the surgery, referred Williams to Dr. Michael B. Boyd.

Dr. Boyd began seeing Williams on January 20, 2009, and total knee replacement surgery was performed on March 4, 2009. After following-up with Dr. Boyd, whose notes indicate that Williams knee looked "great," Williams was referred again to physical therapy. Dr. Boyd opined that the May 27, 2008, injury aggravated arthritis in Williams' knee and also that the injury was a considerable causative factor in the need for knee replacement surgery. Dr. Boyd assigned a twenty percent whole person impairment relating to Williams' knee replacement.

Williams sought workers' compensation benefits in June of 2009. In conjunction with his benefits claim, Williams was evaluated by Dr. Thomas M. Loeb on December 9, 2009. Dr. Loeb reviewed the records of Dr. Quader, Dr. Wilder, Dr. Hamby, and Dr. Boyd, and performed a physical examination on Williams, including x-rays of each knee. Dr. Loeb diagnosed Williams with posterior horn tear of the medical meniscus of the right knee, caused by the May 27, 2008, injury. Dr. Loeb was of the opinion that there was no causal relationship between Williams' total knee replacement and the work injury. Dr. Loeb also indicated that Williams would not have been in need of total knee replacement absent long-standing pre-existing osteoarthritis, which Dr. Loeb considered an inherited genetic pattern exhibited in both of Williams' knees. Dr. Loeb assigned a one percent whole body impairment to the meniscus repair surgery as work related and indicated that the repair produced no restrictions.

A hearing was held on February 22, 2010, and on April 19, 2010 the ALJ issued his opinion and award. The ALJ found a lack of pre-existing active

impairment and also found the total knee replacement to be work related. Benefits were awarded based on twenty percent impairment and then enhanced by a factor of 3.0, pursuant to KRS[2] 342.730(1)(c). The Cabinet filed a petition for reconsideration, which was subsequently denied. The cabinet then filed an appeal with the Board. On July 29, 2010, the Board issued its opinion, in which it affirmed the award of benefits based on twenty percent impairment, but vacated and remanded for new analysis regarding the enhancement of benefits. The Board further instructed that should the ALJ determine that Williams is entitled to enhanced benefits, then the proper multiplier would be 3.2, as opposed to 3.0. This appeal followed.

On direct petition for review, the Cabinet makes the following arguments: 1) the Board misapplied the law when it affirmed the ALJ's finding of no pre-existing active impairment; 2) the testimony of Dr. Boyd was insufficient as a matter of law to support the award of benefits made; 3) the Board erred as a matter of law when it remanded for a determination of entitlement to enhanced benefits; and 4) the Board does not have the authority to direct the enhancement of benefits when the issue was not raised before the ALJ nor the Board. On cross-petition for review, Williams argues that the Board erred when it remanded for further determination regarding enhancement.

An ALJ's decision is "conclusive and binding as to all questions of fact" and the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.285. The review by the Court

[2] Kentucky Revised Statutes.

of Appeals is limited to that of the Board and also to errors of law arising before the Board. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999); KRS 342.290. Hence, our review "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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

We first address the Cabinet's argument that the Board misapplied the law when it affirmed the ALJ's finding of no pre-existing active impairment. "The burden of proving the existence of a pre-existing condition falls upon the employer." *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky. App. 2007). "To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury." *Id.* The Cabinet argues that the evidence indicates that both of Williams' knees were symptomatic and impairment ratable prior to the May 27, 2008, injury. While we agree that the evidence indicates that Williams had previously complained of right knee symptoms, we do not agree that the Cabinet presented evidence that Williams was symptomatic immediately prior to his work-related injury. Furthermore, the Cabinet has failed to produce evidence that Williams' right knee was impairment ratable prior to the work-related injury. The Cabinet argues that x-rays submitted by Dr. Boyd and Dr. Loeb indicated that Williams' knee was impairment ratable prior to his work-related injury. However, those x-rays were taken after Williams' May 28, 2007,

injury. Based on those x-rays, any argument that Williams' right knee was impairment ratable prior to the work-related injury is mere speculation. Accordingly, the Cabinet has failed to show that Williams' right knee condition was symptomatic and impairment ratable immediately prior to his work-related injury and the Board's same conclusion is without error.

The Cabinet next argues that the testimony of Dr. Boyd, that the work-related injury was a significant causative factor in Williams' total knee replacement surgery, was insufficient as a matter of law, in the context of this case, to support the award of benefits made. The Board suggests that a general statement made by a physician is not always automatically adequate to support an award. "[T]he ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. East Kentucky Beverage/Pepsico, Inc.,* 951 S.W.2d 329, 331 (Ky. 1997). An ALJ's decision is "conclusive and binding as to all questions of fact" and the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.285. "Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal." *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). The ALJ stated clearly that he believed Dr. Boyd's opinions to be the most credible. As the Board correctly concluded, it does not have the authority to substitute its own actual conclusions for those of the ALJ. Accordingly, the Cabinet's argument is without merit.

The Cabinet's next argument is that the Board erred as a matter of law when it remanded for a determination of entitlement to enhanced benefits. Enhancement of benefits is governed by KRS 342.730(1)(c), which provides, in relevant part:

> 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or
> 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

The Board held that the ALJ provided only minimal analysis when he concluded that Williams was unable to perform the work he had originally performed at the time of his work-related injury, and in awarding him the three (3) multiplier of KRS 342.730(1)(c)1. When making this determination, the Board noted that Williams had previously returned to work, was off for his knee replacement surgery, returned again, and then was off again after suffering a heart attack. Unable to resolve Williams' initial return to work with the ALJ's finding that he could not return to work, the Board concluded that the ALJ had not applied the proper analysis, as required under *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), when determining that Williams was entitled to the enhancement of

subsection 1, three (3) times, as opposed to subsection 2, two (2) times. The issue was vacated and remanded for further analysis under *Fawbush* to determine which multiplier Williams was entitled to under KRS 342.730(1)(c)1 or 2. Furthermore, the Board noted that, in the event the ALJ determined that Williams was not entitled to the three (3) multiplier of KRS 342.730(1)(c)1, the ALJ was then required to provide analysis pursuant to *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009), reh'g denied (June 25, 2009)[3], to determine whether he was entitled to the two multiplier of KRS 342.730(1)(c) 2.

The Cabinet argues that Williams was not entitled to enhancement under either subsection 1 or 2 of KRS 342.730(1)(c), as evidenced by releases for full work duty provided by Williams' physicians. Therefore, it argues, the remand was not appropriate, because the Board should have found an enhancement of benefits to be erroneous as a matter of law. We do not agree. As we have already summarized, the ALJ has the discretion to judge weight, credibility, and inferences to be drawn from the record, including the testimony of any witnesses. *See Miller v. East Kentucky Beverage/Pepsico, Inc.,supra.* When awarding an enhancement of benefits to Williams, the ALJ noted that he was largely persuaded by Williams' testimony that his injury has rendered him incapable of performing the same type of work he was doing prior to his injury. Such a finding is within the discretion of the ALJ. Because we find no abuse of discretion in the ALJ's finding, it will not

[3] The Kentucky Supreme Court held that the language of KRS 342.730(1)(c) 2, regarding employment cessation "for any reason with or without cause" required that the employee's employment termination be related to the disabling work-related injury. *Chrysalis House, Inc. v. Tackett*, 283 S.W.3d 671 (Ky. 2009).

be disturbed by this Court. The Board's remand to the ALJ is not based on any alleged error in his factual findings, but merely a lack of legal analysis regarding the appropriate enhancement to be applied. Accordingly, we find no error in the Board's decision to vacate the enhancement and remand for more thorough analysis.

On cross-petition for review, Williams also argues that the Board erred when it remanded for further determination regarding enhancement. Williams argues that *Fawbush* is not relevant to the case *sub judice* because, unlike the employee in *Fawbush*, Williams was not working for his employer at the date of the hearing, and therefore not earning the same or greater wage. However, we think it relevant that Williams admitted that he was not working at the time of the hearing due to a heart attack. The language makes it clear that the benefit enhancement under subsection 1 is only applicable if an employee does not return to the type of work that they performed at the time of injury, "*due to an injury*." KRS 342.730(1)(c)1 (emphasis added). The enhancements offered under KRS 342.730(1)(c) are only available to a claimant if he or she is prevented from further comparable employment due to the injury which serves as the basis of the workers' compensation claim, not a different, non-work related, injury. *See, e.g., Chrysalis House, Inc. v. Tackett, supra.* Because Williams is mistaken in assuming that he would be entitled to enhanced benefits under subsection 1 for being unemployed due to reasons unrelated to his work injury, his argument is without merit.

The Cabinet's final argument on appeal is that the Board does not have the authority to direct the enhancement of benefits when the issue was not raised before the ALJ or the Board. The Cabinet references the Board's direction to enhance Williams' benefits based on KRS 342.730(1)(C)3, which states:

> Recognizing that limited education and advancing age impact an employee's post-injury earning capacity, an education and age factor, when applicable, shall be added to the income benefit multiplier set forth in paragraph (c)1. of this subsection. If at the time of injury, the employee had less than eight (8) years of formal education, the multiplier shall be increased by four-tenths (0.4); if the employee had less than twelve (12) years of education or a high school General Educational Development diploma, the multiplier shall be increased by two-tenths (0.2); if the employee was age sixty (60) or older, the multiplier shall be increased by six-tenths (0.6); if the employee was age fifty-five (55) or older, the multiplier shall be increased by four-tenths (0.4); or if the employee was age fifty (50) or older, the multiplier shall be increased by two-tenths (0.2).

The portion of the Board's opinion and order, to which the Cabinet refers, states:

> Finally, KRS 342.285(2)(c) provides generally that the Board may determine on appeal whether an order, decision or award is in conformity to the provisions of Chapter 342. What is more, KRS 342.285(3) provides that the Board may "in its discretion" remand a claim to an ALJ "for further proceedings in conformity with the direction of the board." When read in conjunction, we interpret these provisions to signify that should we so choose, the Board may *sua sponte* reach issues even if unpreserved in order to warrant proper application of the law. George Humfleet Mobile Homes v. Cristman, 125 S.W.3d 288, 294 (Ky. 2004).
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> Williams was 54 years of age on May 27, 2008. Based upon the procedural facts of this case, we *sua sponte* determine that if 342.730(1)(c)1 is applicable to this claim, the ALJ should have applied the 3.2 multiplier pursuant to 342.730(1)(c)3. If applicable, the appropriate weekly rate should have been $241.31 rather than the $226.23 which was awarded.

Because we find no error in the Board's legal analysis, the Cabinet's final argument fails.

For the foregoing reasons, the July 29, 2010, opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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