

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-000510-WC

THOMAS EARL LEE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-94-37358

H.E. NEUMAN COMPANY;
DIRECTOR OF SPECIAL FUND;
and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: COMBS, JOHNSON, and KNOPF, Judges.

COMBS, JUDGE: Thomas Earl Lee (Lee) appeals from the opinion and order of the Workers' Compensation Board (Board) affirming the decision of the Administrative Law Judge (ALJ), which had dismissed his occupational injury claim.

On September 30, 1991, Lee went to work for the H.E. Neumann Company (Neumann) as part of a crew hired to flush contaminants out of steel pipes. On October 1, 1991, he suffered a heart attack while on the job. The issue is whether Lee's heart attack was "merely coincidental with" or "legally caused

by" his work on that occasion. Hudson v. Owens, Ky., 439 S.W.2d 565, 570 (1969).

The process of flushing out the pipes primarily involved the use of a 100-pound pump hooked by hose to a 55-gallon drum of the cleaning solvent "Naphtha." The procedure was conducted in a large building with high ceilings; many of the pipes, however, were located in a lower room measuring approximately 19.6 feet by 34 feet in dimension. Apparently, the Naphtha emitted fumes. Lee testified that he was responsible for flushing 20-foot sections of 4-inch steel pipes that were not yet installed for their primary purpose. He and another employee would lift the pipe sections--each weighing approximately 216 pounds--onto jacks, and then they would flush the sections until they were clean.

After the first few hours of his shift on October 1, 1991, Lee began to experience a number of difficulties--including dizziness, throat irritation, and jaw pain. By the afternoon, Lee felt as if he were "smothering" and was forced to stop working and go outside. The difficulties became so severe that Lee's foreman had to drive him home at the end of the day. After arriving home, Lee was taken to the hospital, where it was determined that he had suffered a heart attack.

On September 9, 1994, Lee filed an application for compensation alleging that the heart attack was work-related. This claim was assigned to the Honorable Roger D. Riggs (the ALJ). The ALJ originally dismissed the claim--finding that it had not been timely filed within the applicable statute of

limitations. The Board reversed that dismissal; both this court and the Supreme Court affirmed the Board. The claim was then remanded for further review and a decision on the merits.

Among the items of evidence presented before the ALJ, we have concentrated on the depositions and testimony of Lee and the depositions of Jack Schellenburg, Dr. Fred Gott, Dr. Morris Weiss, Dr. Joseph Bates, and Dr. James Gwinn as most relevant to the issues before us. Schellenburg testified that he had been a pipe fitter and a supervisor with Neumann since 1984. He also stated that at the time Lee was working, the pipes being flushed had already been installed (directly contrary to Lee's testimony) and that Lee was required to do virtually no lifting (again in contrast to Lee's assertions in his deposition). Schellenburg also testified that Lee was working with 10-foot sections of 2-inch pipes--not 20-foot sections of 4-inch pipes as Lee had alleged. Moreover, Schellenburg indicated that the type of work in which Lee was involved was not what he would consider to be "strenuous activity."

Dr. Gott, a board-certified cardiologist, performed an independent medical evaluation of Lee on April 6, 1995. Lee apparently had advised the doctor that he was involved in "arduous physical activity" at the job site when his problems began. Based on the examination and Lee's account of his activities on October 1, 1991, Dr. Gott concluded that there was a reasonable probability that Lee's inhalation of the Naphtha and his physical activity aroused a dormant arteriosclerotic heart disease into disabling reality--thus contributing to the onset of

the heart attack. However, Dr. Gott admitted that he did not know the rate at which Lee was lifting pipes nor the amount of Naphtha inhaled on the day in question. He also testified that he had limited knowledge of any medically established links between Naphtha and cardiological problems.

Dr. Weiss, a board-certified cardiologist, performed an independent medical evaluation of Lee on April 17, 1995, having received a similar account of Lee's activities on October 1, 1991. He also concluded that Lee's work had contributed to arousing into disabling reality his dormant arteriosclerotic heart disease. Dr. Weiss testified that the primary cause was Lee's lifting of the 200-pound sections of pipe; however, he also described the Naphtha as an "added insult" that could have hastened the heart attack. Dr. Weiss qualified his statement by noting that he did not know how much Naphtha was in the air, and he indicated that his opinion as to the effects of Naphtha was "purely speculative."

Dr. Gwinn, a cardiologist, performed an independent medical evaluation of Lee on July 26, 1995. He testified that Naphtha had no relation to cardiological problems. However, he also relied on Lee's statements as to the strenuous degree of his physical activity on October 1, 1991, in reaching a conclusion that it was likely that this activity precipitated his heart attack.

Dr. Bates, a board-certified specialist in internal medicine, testified that he did not believe that Naphtha contributed in any way to Lee's heart attack as there is no

medically-established link between that chemical compound and cardiological disease. He further stated that he did not believe that Lee had been exposed to a large amount of Naphtha since he did not appear to have suffered any oxygen deprivation or inflammation in his lungs--common results from overexposure to Naphtha. Dr. Bates gave no opinion as to whether Lee's activity on October 1, 1991, contributed to his heart attack.

ALJ Riggs rendered an opinion and order on August 13, 1999, dismissing Lee's claim for benefits. In this opinion, the ALJ stated that he was convinced that Lee's exposure to Naphtha did not contribute to his heart attack because the concentration was not sufficient to cause lung inflammation (much less the more severe consequence of cardiac arrest) and because there was no scientifically-established link between Naphtha and heart attacks. ALJ Riggs also concluded that Lee's work activities on October 1, 1991, had not contributed to his heart attack and subsequent disability. The ALJ based the reasoning behind this conclusion on the striking conflicts and glaring contradictions in Lee's testimony as to his work activity and in the medical history he gave his doctors:

In light of Mr. Lee's admissions as to the limited lifting activity even with the four inch pipe (which Mr. Schellenburg stated did not occur), the histories from which the physicians gave their opinions as to strenuous work activity leading to a heart attack cause the validity those opinions [sic] to come into significant doubt. If one reviews the testimony of Mr. Lee both on deposition and at hearing and compares it to what the physicians understood his work activity to be, a significant cloud shadows their opinions as to the precipitating cause of his heart attack. Examples of this include the statement from

Dr. Gott that Mr. Lee had reported on April 6, 1996 a history of lifting 200 pound pipes continuously throughout the morning of October 1, 1991 compared to Mr. Lee's testimony that on the first day with Neumann he did no lifting of pipes and on the second day he had two occasions when he lifted a 200 pound pipe with the assistance of another employee. The history given to Dr. Gwinn left the impression that Mr. Lee was engaged in strenuous lifting activities which was not born out by Mr. Lee's testimony. (Emphasis added.)

Subsequently, Lee filed a petition for reconsideration, taking issue with a number of the ALJ's factual findings and legal conclusions. The ALJ issued an order correcting some of the findings of fact but otherwise denying the petition. On appeal, the Board affirmed. This appeal followed.

Lee argues that the ALJ: 1) ignored uncontradicted medical evidence regarding causation; 2) did not decide the issue of causation in light of the "totality of the circumstances" surrounding petitioner's heart attack; and 3) demonstrated bias in favor of Lee's employer in reaching his findings and conclusions. These are the identical arguments raised before the Board, and we cannot say that in addressing these issues the Board "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, Ky., 827 S.W.2d 685, 687-688 (1992). After a thorough review, we adopt the well-reasoned opinion of the Board authored by Board Member Stanley as our own:

It is well established that if medical testimony adduced on behalf of an injured worker adequately establishes that an injury is work connected, and there is no evidence to

the contrary, the ALJ has no legal basis to deny the employee's claim. Young v. Eastern Coal Corp., Ky., 408 S.W.2d 464 (1966). However, contrary to the assertions of the petitioner, medical evidence is not absolutely binding on the ALJ concerning the issue of causation. Hudson v. Owens, supra. Physicians' opinions do not compel a finding of work-related injury where the physicians' conclusions are based upon a history elicited from the claimant and the claimant's history is sufficiently impeached. Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991). When a physician's conclusions are based upon second hand knowledge (i.e. a patient's statements), or when a medical opinion is based solely upon history, the trier of fact is not constricted to a myopic view focusing only on the physician's testimony. Id. at 646-647. Other testimony bearing on the accuracy of the history as told to the physician by the claimant may be considered. Id. at 647. The recitation of a claimant's alleged history of injury or accident by a physician does not render it unassailable. If a claimant's history is sufficiently impeached, the ALJ may disregard those opinions based on it. Id. at 647.

In that the ALJ, as fact finder, has sole authority to determine the quality, character, and substance of the evidence in a workers' compensation proceeding, we find no error in the ALJ's election to believe Schellenburg's account of the claimant's physical activities on October 1, 1991 rather than the claimant's own account. Square D Co. v. Tipton, Ky., 862 S.W.2d 308 (1993). Furthermore, once Schellenburg's version of events was determined to be fact by the fact finder, then the ALJ was clearly within his authority to discount the opinions of Drs. Gott, Weiss, and Gwinn as to any role the alleged physical stress may have played in triggering Lee's heart attack. Medical evidence, although relevant and material, is to be considered, not as determinative, but as part of the totality of circumstances upon which the ALJ must make his factual determination. Hudson v. Owens, supra. Since the ALJ determined that Schellenburg's testimony was more credible, we believe he acted within his authority in concluding that Lee's heart attack was merely coincidental to his work

rather than traceable to the performance of his work. Id. at 569-570.

We remind the petitioner that he had the burden of proof before the ALJ and on appeal must establish that the evidence with regard to work relatedness and causation compelled a contrary result. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). Compelling evidence is evidence that is so overwhelming no reasonable person could fail to be persuaded by it. REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). When the evidence presented to the ALJ is conflicting and creates an issue of credibility, it is for the ALJ, and the ALJ alone, to resolve those conflicts to determine whom and what to believe. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). In resolving those conflicts, the ALJ has the authority to rely upon certain portions of a given witness' [sic] testimony while disbelieving other persons. Codell Constr. Co. v. Dixon, Ky., 478 S.W.2d 703 (1972). While Lee has identified evidence that might support an alternative result, that is not grounds for reversing the ALJ's factual finding since there is evidence of record that supports that finding. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). Where there is substantial evidence to support an ALJ's conclusions, it cannot be said that the evidence compels a contrary result. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). Unfortunately for Lee, we believe the record contains sufficient evidence upon which the ALJ could reasonably conclude that petitioner's heart attack was not the result of physical stress at work on October 1, 1991. Furthermore, Drs. Gwinn and Bates provided sufficient testimony for the ALJ to conclude that the inhalation of Naphtha played absolutely no role in Lee's myocardial infarction. Since the ALJ is empowered to draw all reasonable inferences from the evidence, we find that, given the above, ALJ Riggs acted clearly within his discretion and without abuse of that discretion in dismissing this claim. Jackson v. General Refractories Company, Ky., 581 S.W.2d 10 (1979). The Act clearly states that this Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded

the evidence in questions of fact. KRS 342.285(2).

That having been said, we also find no reasonable basis for Lee's charge of bias by the ALJ in this action. Bias or prejudice of a judge must be based on more than mere conclusionary allegations, and subjective conclusions or opinions that bias or appearance of impropriety may exist are ordinarily insufficient to require a judge's disqualification. It is actual evidence of prejudice on the part of the judge, not mere apprehension of it by a party, that disqualifies. Howerton v. Price, Ky., 449 S.W.2d 746 (1970). The fact that the ALJ initially recorded in his original opinion that Lee suffered from high blood pressure and was taking medicine for high cholesterol before his heart attack does not meet the above standard. Furthermore, the facts to which the petitioner referred, allegedly "parroted" from the employer's pleadings in his decision and revision on petition for reconsideration, in our opinion, merely constitute harmless error. As set out above, Schellenburg's testimony regarding the physical stress exerted by Lee on the date of his heart attack, in addition to the testimony of Drs. Gwinn and Bates regarding the lack of cardiological significance of Naphtha, constitute more than sufficient evidence to justify the conclusions reached by the ALJ herein.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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