

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-000503-WC

KEVIN O'BRYAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-97218

UNITED PARCEL SERVICE,
ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND,
HONORABLE RONALD W. MAY
ADMINISTRATIVE LAW JUDGE, and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: GUDGEL, Chief Judge, BUCKINGHAM and McANULTY, Judges.

BUCKINGHAM, JUDGE: Kevin O'Bryan petitions for review of an opinion by the Workers' Compensation Board (Board) which affirmed a decision by an administrative law judge (ALJ). The issues involved temporary total disability (TTD) benefits and vocational rehabilitation benefits. We conclude the Board correctly affirmed the decision of the ALJ and thus affirm the Board.

O'Bryan was employed by United Parcel Service (UPS) for approximately four years from 1982 to 1986. During that time he

unsuccessfully attempted to volunteer for the Army, and he learned at that time that he had spondylolisthesis. After working for UPS in 1986, O'Bryan began working with his mother who was a realtor. He eventually obtained his realtor's license. O'Bryan then worked as a sales representative selling electro-mechanical product assembly equipment. He then worked as a route driver for Swiss Cleaners for about one year before returning to UPS in 1992.

In the last part of 1996, O'Bryan claimed to feel pain in his groin-waist area on his right side. On November 13, 1996, he experienced pain in his waist while loading packages onto an airplane. He reported the incident to his supervisor and saw a physician the following Monday. O'Bryan then worked at light duty for two months.

Thereafter, O'Bryan visited many physicians for treatment of his injury. Unfortunately, the physicians experienced difficulty in diagnosing his problem and in providing relief. On December 12, 1998, UPS put O'Bryan on unpaid medical leave. Finally, it was determined that he needed a spinal fusion from L4 to S1. He underwent that surgical procedure on November 18, 1999.

O'Bryan's claim for benefits was filed on September 2, 1998. When the claim was finally submitted to the ALJ for decision, the ALJ determined O'Bryan's injury to be compensable. The ALJ found that "the injury of November 13, 1996 was a significant injury in that it exacerbated the pre-existing dormant spondylolisthesis to a far greater degree than previously

and produced an instability of the lumbar spine". The ALJ awarded O'Bryan benefits based on a twenty-five percent permanent partial disability. The ALJ also determined O'Bryan's entitlement to TTD benefits from January 20, 1997, through March 27, 1997, and from May 16, 1997, through May 27, 1997, and from September 3, 1997, through April 14, 1998, and from May 17, 1999, through April 18, 2000. Following the ALJ's denial of O'Bryan's petition for reconsideration, O'Bryan appealed to the Board. The Board affirmed the ALJ, and this petition for review by O'Bryan followed.

O'Bryan's first argument is that the ALJ erred in failing to award additional TTD benefits for the period before May 17, 1999, and the period after April 18, 2000. As we have stated, the last period for which the ALJ awarded TTD benefits was from May 17, 1999, to April 18, 2000. As for the period before May 17, 1999, O'Bryan apparently argues that he should have been awarded TTD benefits commencing on December 12, 1998, the date UPS put him on unpaid medical leave.

We agree with the Board's rationale in rejecting O'Bryan's argument that he should have been awarded TTD benefits from December 12, 1998. The Board held:

In the instant case, we have found no error. As noted above, the ALJ gave no explanation for the starting date of TTD on May 17, 1999. This date is significant for two reasons. First, it is the date O'Bryan was initially seen by Dr. Rague. Second, in his brief before the ALJ, O'Bryan requested an award of TTD benefits "[e]ffective the date that they were last terminated, or in no event later than the date that he began seeing Dr. Glassman and Dr. Rague". O'Bryan was awarded TTD for the following periods:

January 20, 1997 - March 27, 1997
May 16, 1997 - May 27, 1997
September 3, 1997 - April 14, 1998
May 17, 1999 - April 18, 2000

If TTD benefits had been awarded from the date they were last terminated, April 14, 1998, and an award of benefits commenced on that date, it would have constituted clear error as O'Bryan continued to work from April 14, 1998 until December 12, 1998. Thus, the only other appropriate date urged by O'Bryan was May 17, 1999, which the ALJ adopted as the commencement date for the last period of TTD.

Unfortunately for O'Bryan, there is simply no testimony, other than his own, regarding an appropriate period of TTD. Generally, it has been held that the testimony of the claimant is competent and probative regarding the extent and duration of his occupational disability. See Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). While O'Bryan now believes December 12, 1998 to be the more appropriate date, the ALJ was not compelled to so find. In fact, the ALJ specifically found there was persuasive evidence that O'Bryan had exaggerated the effects of his injury. The ALJ was not required to believe that TTD should begin on December 12, 1998 simply because O'Bryan testified he was unable to work after that date. Coupled with the fact that O'Bryan in his brief before the ALJ directed the ALJ to May 17, 1999 as the appropriate date for the commencement of TTD, and there being no cross-appeal on this particular issue, we cannot say that the ALJ erred. See generally W.L. Harper Construction Co. v. Baker, Ky. App., 858 S.W.2d 202 (1993).

O'Bryan also argues that the ALJ erred in determining that his entitlement to TTD benefits ended on April 18, 2000. He asserts that he was not released to return to work until August 8, 2000, and that the ALJ did not rely on medical evidence to determine when the recovery process was over and when O'Bryan was no longer entitled to TTD benefits. See Halls Hardwood Floor Co.

v. Stapleton, Ky. App., 16 S.W.3d 327, 329 (2000). He maintains that the date determined by the ALJ for TTD benefits to end was based entirely on speculation. We agree with the Board's analysis of this issue:

O'Bryan next complains that the ALJ erred in terminating TTD on April 18, 2000. This date of course was based upon O'Bryan's testimony that he expected that Dr. Glassman would release him to return to work sometime between March 2000 and May 2000. While O'Bryan argues that Dr. Glassman did not in fact release him to return to work until August 8, 2000, he admits that this medical testimony is not contained within the record. There being substantial evidence upon which the ALJ could and did rely, we are compelled to affirm on this issue. Special Fund v. Francis, supra.

O'Bryan's second argument is that the ALJ erred by not awarding vocational rehabilitation benefits pursuant to KRS¹ 342.710. KRS 342.710(3) provides in pertinent part that "[w]hen as a result of the injury he is unable to perform work for which he has previous training or experience, he shall be entitled to such vocational rehabilitation services, including retraining and job placement, as may be reasonably necessary to restore him to suitable employment".² O'Bryan did not raise the issue of vocational rehabilitation benefits as a contested issue to be determined by the ALJ. Rather, he first raised the issue in his petition for reconsideration. KRS 342.281 limits an ALJ's review of a decision pursuant to a petition for reconsideration "to the correction of errors patently appearing upon the face of the

¹ Kentucky Revised Statutes.

² All references in this opinion to the statutes will be to the statutes as they existed prior to the 2000 amendments.

award, order, or decision[.]” Because the issue of vocational rehabilitation benefits was not initially before the ALJ, the ALJ denied the petition for reconsideration since it did not address a patent error appearing on the face of the initial award.

O’Bryan argues that KRS 342.710 should have been automatically applied by the ALJ and that it was not necessary to make vocational rehabilitation an issue in his claim. He cites no authority to support his argument, however. In light of KRS 342.281, we agree with the Board that there was no error in the ALJ’s refusal to address the issue of vocational rehabilitation.

The Board’s opinion is affirmed.

ALL CONCUR.

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