

RENDERED: December 31, 2003; 2:00 p.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2003-CA-001272-WC

DOUGLAS E. WILLIAMS JR.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 99-WC-90561

NORTH AMERICAN REFRACTORIES COMPANY;
HON. J. KEVIN KING,
ADMINISTRATIVE LAW JUDGE;
AND
WORKERS' COMPENSATION BOARD

APPELLEE

OPINION

AFFIRMING

** ** * * *

BEFORE: EMBERTON, CHIEF JUDGE; BARBER AND BUCKINGHAM,
JUDGES.

BUCKINGHAM, JUDGE. Douglas E. Williams Jr. petitions for review of an opinion of the Kentucky Workers' Compensation Board which affirmed the opinion and order of an administrative law judge dismissing Williams' claim for benefits relating to back pain he alleges stemmed from a workplace altercation that occurred in 1999 when he was employed by North American Refractories Company. We affirm.

Williams had been employed by North American as a process operator since 1995. On February 22, 1999, he was involved in a fight with a co-worker. The co-worker struck Williams several times with a broom handle and with his fists, knocked him to the floor, kicked him in the head, side, neck, and back, and attempted to choke him. Williams consulted a chiropractor, Dr. Shannon Johnson, for neck, arm, and back pain that he experienced following the fight. His treatments with Dr. Johnson continued until May or July 1999.

Meanwhile, after a thirty-day suspension, Williams returned to work. His duties included lifting bags and buckets weighing between fifty and one hundred pounds. He testified that he lifted a total of approximately three thousand pounds per shift.

On August 4, 2000, about seventeen months after the fight, Williams reported to a hospital emergency room complaining of acute back pain. The hospital record described his condition as "acute lumbar strain." He stopped working a few days later and applied for short-term disability benefits through North American. On the application form, he indicated that he had suffered a non-work related injury and that he would not be filing a workers' compensation claim. Included with the application form was a report from Dr. Johnson stating that Williams had suffered neck, upper back, and lower back pain in February 1999, but that this had "resolved" by July 30, 1999.

Williams received short-term disability benefits from North American for one year.

Then, on January 16, 2001, Williams filed an application for workers' compensation benefits, claiming that his severe back pain was work-related because it was triggered by the fight with his co-worker in February 1999. Following a hearing, the ALJ dismissed his claim in an opinion and order. The ruling was largely based on a determination that Williams' current medical condition is not related to the injuries he sustained in the fight at work. The ALJ concluded in part as follows:

[T]he Administrative Law Judge initially believed that Williams' current and ongoing complaints/symptoms were related to the February 1999 altercation. However, now that the picture is complete, the Administrative Law Judge must find otherwise. In doing so, the Administrative Law Judge notes that Williams showed no reluctance to seek medical care in the three to four months following the altercation; however, he did not seek any medical care in the year before he stopped working. This supports Dr. Johnson's statement in August of 2000 that Williams had recovered from the effects of the altercation rather than Williams' testimony that he had ongoing complaints/symptoms. The absence of ongoing complaints/symptoms in the year before Williams last worked is also supported by the emergency room record that indicates an acute onset of symptoms, not an exacerbation of an ongoing condition. Furthermore, the

Administrative Law Judge notes the statements by both Williams and Dr. Johnson in support of Williams' application for short term disability benefits. These statements, made contemporaneously with the application, belie the current statements from Williams and Dr. Johnson that Williams' condition has been ongoing and is related to the February 1999 altercation.

The Board affirmed the ALJ's ruling.

Williams argues that the ALJ and the Board relied on insufficient or incorrect findings of fact in dismissing his claim. "When there is conflicting evidence regarding questions of fact, the ALJ's determination cannot be disturbed." Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 423 (1997). This court may only reverse a decision of the Board if the appellant demonstrates that the Board has "committed an error in assessing the evidence so flagrant as to cause gross injustice." Neace v. Adena Processing, Ky. App., 7 S.W.3d 382, 385 (1999), quoting Western Baptist Hosp. v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

The controversy at the heart of this case was aptly summarized by the ALJ: "this claim boils down to whether Williams has continued to suffer from the effects of the February 1999 altercation at work or whether he suffered a non-work related injury in August of 2000 [when he checked into the hospital emergency room]."

Williams' first argument concerns an erroneous date which was given for an automobile accident in which he was involved as a passenger. The accident took place on June 21, 2001. In his deposition, however, Williams mistakenly agreed with North American's counsel that the accident occurred on June 21, 2000. This incorrect date was cited by both the ALJ and the Board in their opinions.

Williams claims that one of North American's medical experts, Dr. Malcolm A. Meyn, relied on this incorrect date and changed his opinion regarding the cause of Williams' back pain solely based on the mistaken assumption that the car accident had triggered the injury leading to Williams' hospital visit on August 4, 2000. In other words, Williams asserts that the introduction of the incorrect date caused Dr. Meyn to decide that his back condition must have been caused by the car accident rather than by the February 1999 fight. Williams further maintains that this incorrect date constituted an error so flagrant that it meets the gross injustice standard of Western Baptist Hospital and requires this court to reverse the Board's decision.

KRS¹ 342.281 requires an aggrieved party to file a petition for rehearing to request correction of an error patently appearing on the face of the opinion. It must be filed within fourteen days from the date of the ALJ's decision and "shall clearly set out the errors relied upon

¹ Kentucky Revised Statutes.

with the reasons and argument for reconsideration[.]” KRS 342.281. Williams failed to make such a petition to correct the date in the ALJ’s opinion.

We have nonetheless reviewed Dr. Meyn’s testimony and cannot agree with Williams’ interpretation. Dr. Meyn stated that the fact that Williams was able to return to work after the fight and resume a job requiring heavy lifting for seventeen months meant that some intervening event must have caused him to experience severe lumbar strain in August 2000. There was no indication in Dr. Meyn’s testimony that he believed this “event” to be the automobile accident.

Similarly, neither the ALJ nor the Board explicitly stated or even implied that the automobile accident was the event which triggered Williams’ visit to the emergency room. In his reference to the accident, the ALJ merely noted that it had resulted in an increase in Williams’ lower back pain. Moreover, although the ALJ’s opinion does cite the wrong date for the accident at one point, the correct date is provided in his summary of the testimony of Williams’ medical expert, Dr. Ahmet Ozturk.

Dr. Ozturk first saw Williams on June 29, 2001. Williams told Dr. Ozturk that he was injured on February 22, 1999 as a result of an altercation with a co-worker. Williams also told Dr. Ozturk that he had been involved in a motor vehicle accident on June 22, 2001. Williams related his low back pain to the February 22, 1999 work injury and his neck pain to the June of 2001 motor vehicle accident.

In short, we can find no indication that the erroneous date influenced the testimony of Dr. Meyn or the decisions of the ALJ and the Board in such a way as to cause gross injustice to Williams.

Williams' second argument concerns the statements he made on his application for short-term disability benefits in August 2000. On that form he indicated that his back injury was not work-related and that he was not planning to apply for workers' compensation benefits. He now claims that these statements may not have been true but that he was forced to make them because he needed money and North American was unwilling to give him workers' compensation benefits. He also argues that because he is not a physician he was unable to determine with any medical certainty if his August injury was related to the workplace fight or not.

It was well within the ALJ's discretion, however, to find that the untruthful statements on the application form (coupled with Dr. Johnson's report that the pain from the fight had "resolved" by July 1999) cast serious doubt on Williams' later claim that his back pain was caused by the fight. "[T]he fact-finder, rather than the reviewing court, has the sole discretion to determine the quality, character, and substance of evidence." Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002).

Furthermore, "an ALJ, as fact-finder, may reject any

testimony and believe or disbelieve various parts of the evidence." Id.

Williams also alludes to a two-month error in the ALJ's computation of the amount of time which passed between the treatment he received for the fight in 1999 and his hospital visit in August 2000. The considerable length of time which elapsed between these two events was one of the factors which led the ALJ to conclude that Williams' current back problem is not related to the fight. At one point in the opinion, the ALJ states that Williams' treatment with Dr. Johnson continued until July 30, 1999, whereas he later states that there was a gap in the treatment from May 1999 to August 9, 2000.

Upon reviewing Dr. Johnson's records, we find that Williams' last visit was on April 27, 1999, at which time he was referred to Dr. Philip T. Shields for a neurosurgical examination. Dr. Shields examined Williams on May 18, 1999. Johnson's record of his treatment of Williams does not resume again until August 9, 2000. The July date mentioned by the ALJ is found on the form Dr. Johnson attached to Williams' disability benefits form in August 2000. The record contains no other evidence that Dr. Johnson saw Williams in July 1999. In any event, the difference between these two dates is not so great as to require reversal since, at the very least, one year elapsed between the end of Johnson's treatment of Williams for the February 1999 fight and the resumption of treatment in August 2000.

Williams' next argument concerns the emergency room records, which state that he arrived suffering from lower back pain and "acute lumbar strain." Williams maintains that these statements do not prove that there was a "second injury." The emergency room records were only one piece of evidence, however, which combined with the medical testimony, led the ALJ to conclude that the back pain Williams is currently experiencing was not caused by the fight in February 1999.

Williams also insists that the ALJ did not provide sufficient facts to destroy his credibility, citing again the error in the date of his automobile accident and his prior argument regarding the emergency room records. The ALJ's determination that the hospital visit was not connected to the fight injuries is amply supported by the medical testimony. Furthermore, Williams' credibility was damaged far more by his admission that he may have lied on the application form for disability benefits than by the error in the date of his automobile accident.

Williams' final argument concerns the testimony of North American's medical expert, Dr. Philip Tibbs. Dr. Tibbs agreed with the other medical experts that Williams suffers from spondylolisthesis, a congenital spinal condition which may never manifest itself. Dr. Tibbs acknowledged, under questioning by Williams' attorney, that the spondylolisthesis could have been brought "into disabling reality by the work injury [in February 1999]."

Williams insists that this portion of Dr. Tibbs' testimony was never controverted or explained and was thus an error meriting reversal.

Dr. Tibbs also testified, however, that it was highly unlikely that an event in February 1999 could have caused the delayed pain Williams experienced in August of 2000. Furthermore, he stated that, in his opinion, Williams' spondylolisthesis was "very, very chronic;" that is, it was the product of long-term degenerative change rather than the result of some particular injury. Dr. Tibbs' testimony that it was possible that Williams' condition was exacerbated by the fight was not "so overwhelming as to compel a finding in [Williams'] favor." Mosely v. Ford Motor Co., Ky. App., 968 S.W.2d 675, 678 (1998). Furthermore, "[a]llthough a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal." Burton at 929.

For the foregoing reasons, the Board's opinion is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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