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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002401-WC

PEPSI COLA GENERAL BOTTLERS, INC. APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-93535

JEFFREY LEON BUTLER;
HOWARD E. FRASIER, JR., ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; KELLER, JUDGE; BUCKINGHAM,[1] SENIOR JUDGE.

KELLER, JUDGE: On reopening, the Administrative Law Judge (ALJ) awarded Jeffrey Leon Butler additional income benefits based on a worsening of his physical condition and income and medical expense benefits based on a psychological condition. The

[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 11-(5)(b) of the Kentucky Constitution and KRS 21.580.

Workers' Compensation Board (Board) affirmed the ALJ. As it did before the ALJ and the Board, Pepsi argues that there was insufficient evidence to support the award of additional income benefits and that Butler did not timely file a claim for benefits based on his psychological condition. For the reasons set forth below, we affirm.

FACTS

Butler suffered an injury to his coccyx on February 9, 2000. He filed his Application for Resolution of Injury Claim ("Form 101") on June 1, 2001, alleging only the coccyx injury and related physical complaints. Butler did not allege a psychological injury. Butler returned to work for Pepsi on January 7, 2001, and continued to work until July 21, 2004.

The parties settled Butler's claim on October 8, 2001. As part of the settlement, Pepsi agreed to pay Butler $15,000 in permanent partial disability benefits based on a 7.7% impairment rating. The parties indicated that there were two impairment ratings of record, 5% from Dr. Goldman and 8% from Dr. Whobrey. We note that the settlement agreement, like the Form 101, lists fractured coccyx as the injury subject to the settlement. The settlement agreement did not list a psychological injury.

On March 3, 2005, Butler filed a motion to reopen, claiming that his condition had deteriorated to the point that he was totally disabled. In his affidavit in support of the motion to reopen, Butler stated that he had developed depression because of his severe, chronic pain. In support of his motion, Butler attached two reports from Dr. Petruska, one assigning a 12% impairment rating and the other assigning an 8%

impairment rating. The Chief ALJ granted Butler's motion to reopen on April 11, 2005, and assigned it to an ALJ for further adjudication.

For the sake of clarity, we will separately summarize the evidence filed in the initial litigation of Butler's claim and then summarize the evidence filed in the reopening litigation.

EVIDENCE IN INITIAL PROCEEDING

Butler attached a number of medical records to his Form 101. The vast majority of those records appear to be related to physical therapy. Other, more pertinent records reveal that Butler suffered a heart attack on October 6, 2002, after which he underwent angioplasty and cardiac rehabilitation. Butler's treating cardiologist, Dr. Sadlo, released Butler to return to work with no "heavy or extremely physical stressful activities" on February 1, 2001. The records also indicate that Dr. Petruska performed a number of diagnostic tests and treated Butler with epidural injections. On January 29, 2001, Dr. Petruska released Butler to return to work as a "PX Merchandiser."

Pepsi filed the November 29, 2000, report of Bart J. Goldman, M.D. In his report, Dr. Goldman noted Butler's injury, his heart attack, and his subsequent treatment for each condition. Following his examination of Butler and review of the medical records, Dr. Goldman made a diagnosis of “presumptive coccygeal fracture” and assigned Butler a 5% impairment rating using the DRE method. Furthermore, Dr. Goldman stated that Butler could return to work with no lifting of more than 50 pounds, 25 pounds repetitively.

Butler testified by way of deposition that he graduated from high school and has additional training in computer software applications. On February 9, 2000, Butler fell from his delivery truck, injuring his "tailbone." Following the injury, Butler underwent diagnostic testing, physical therapy, and injection therapy. In addition to his pain medication, Butler received a prescription from Dr. Petruska for "nerve pills" because he was depressed. Butler attributed his depression to not being able to work and provide for his family. Although the parties stipulated to a different date, Butler testified that he returned to work for Pepsi in February of 2001, as a merchandiser. Butler described this as a less strenuous job than his job as a route salesman.

At the time of this deposition, Butler continued to experience pain in his tailbone with sitting, bending, twisting, and lifting. In addition to his pain, Butler stated that he was experiencing anxiety and depression because of his pain and inability to do what he once did.

Butler testified that, on October 6, 2000, he suffered a heart attack. Following the heart attack, Butler underwent an angioplasty and received a stint. He last treated with his cardiologist in June of 2001 and was not having any heart-related symptoms when deposed in July of 2001.

Butler filed the July 10, 2001, report of Vickie Whobrey, M.D. Butler described his pain as a six on a scale of ten and noted that activity caused an increase in pain. Following her examination of Butler and review of the medical records, Dr. Whobrey assigned Butler an 8% impairment rating and restricted him from heavy lifting.

EVIDENCE ON REOPENING

Butler testified by way of deposition and live at the hearing. He last worked on July 21, 2004, as a sales support supervisor for Pepsi because he could not continue to work due to increased back pain and fatigue. Dr. Sadlo, Butler's cardiologist, had restricted Butler to working only 40 hours per week and Pepsi did not have any jobs available within that restriction. Butler did not look elsewhere for work.

In addition to treating with Dr. Sadlo for his heart condition, Butler returned to Dr. Petruska in August of 2004 for treatment of his back condition. Butler testified that he had not received any treatment for his back between the time of his settlement in 2001 and August of 2004. In addition to treating for his heart and back, Butler began receiving treatment for depression in 2004 from his primary care physician, Dr. Law, and with a psychologist, Dr. Uri, in 2005. Butler could not remember seeing any physicians specifically for depression prior to 2004 and, although he testified in his prior deposition that he took anti-depressant medication, Butler testified that he could not remember doing so. Furthermore, Butler testified that he could not remember testifying in 2001 that he suffered from anxiety and depression. Butler described his symptoms as depression with sleep disturbance, back pain with radiation into his legs and up to his mid-back, and a lack of desire to do anything.

Butler filed medical records, a report, and the deposition of Dr. Petruska. In his August 30, 2004, office note, Dr. Petruska assigned Butler an 8% impairment rating. In his October 8, 2004, Form 107, Dr. Petruska assigned Butler a 12%

impairment rating and restricted Butler to less than a full range of sedentary work. Furthermore, Dr. Petruska noted that emotional factors contributed to the severity of Butler's symptoms and functional limitations.

In his deposition, Dr. Petruska testified that Butler returned for treatment because of increasing back pain and difficulty walking. Although Butler reported increased symptoms, Dr. Petruska found no radiographic or neurological evidence of any change in condition. In addition to Butler's physical symptoms, Dr. Petruska noted some significant emotional distress that could have exacerbated or worsened those symptoms. Dr. Petruska recommended pain management and/or psychological care but stated that Butler did not need any additional neurosurgical treatment.

In terms of impairment, Dr. Petruska weighed whether to use the range of motion method or the DRE method in order to rate Butler's impairment. He thought that either method could apply because Butler had suffered an injury and suffered from degenerative disc disease. Therefore, Dr. Petruska chose the range of motion method, which yielded the higher of the two possible impairment ratings.

Butler filed the May 17, 2005, report from Jon R. Urey, Ph.D to Charles Embry, M.D. Dr. Urey stated that Butler had been referred by his primary care physician for treatment of depression. Dr. Urey stated that Butler was "quite depressed over the change in his physical well-being" and his inability to act as the primary wage earner for his family. Dr. Urey noted that Butler made only minimal progress with psychotherapy. Furthermore, Dr. Urey noted that Butler suffered from additional stressors because his

sister-in-law had been diagnosed with cancer and his wife had undergone surgery in early 2005.

Pepsi filed Dr. Urey's deposition. Dr. Urey testified that Butler advised him that he had suffered from some degree of depression beginning shortly after the work injury and worsening in July of 2004 when he stopped working. According to Dr. Urey, Butler's psychological problems stemmed from his inability to continue acting as the provider for his family. During the time that Dr. Urey treated Butler, Dr. Urey saw little improvement in Butler's condition of major depression. Dr. Urey testified that, immediately after the injury, he would have characterized Butler's condition as an adjustment disorder with depression. After Butler stopped working, the diagnosis would have changed to major depression. As to causation, Dr. Urey testified that Butler's depression is related to "loss of functioning from his injury" and that Butler's heart attack "added insult to injury."

Butler filed Dr. Embry's May 13, 2005, report. Butler complained to Dr. Embry of depression that Butler related to the work injury, his heart attack, and his inability to work and earn what he had pre-injury. In terms of past psychiatric history, Dr. Embry listed "progressive depression since his work injury."

Dr. Embry's examination revealed complaints of depression, no suicidal or homicidal ideation, a sense of isolation, and some memory deficits. Dr. Embry made diagnoses of major depression single episode severe without psychotic features and assigned Butler a GAF of 41-50 and an impairment rating of 55% to 75%.

Pepsi filed medical records from Dr. Sadlo, who treated Butler for his heart condition. In correspondence to Dr. Law dated June 30, 2004, Dr. Sadlo noted that Butler was having difficulty at work, particularly with the "long days." Dr. Sadlo stated that Butler requested an eight-hour day, forty hours per week work limitation. Dr. Sadlo agreed that would be reasonable. In correspondence to Dr. Law dated July 21, 2004, Dr. Sadlo stated that Butler was "being treated for depression due to his multiple medical illnesses and difficulties keeping up with his work." Dr. Sadlo took Butler off work and recommended vocational rehabilitation.

Pepsi filed the August 12, 2005, report of Gregory E. Gleis, M.D. Butler complained to Dr. Gleis of pain throughout his lumbar and thoracic spine and bilateral leg pain. Following his examination and exhaustive review of the medical records, Dr. Gleis made diagnoses of lumbosacral strain, non-displaced and resolved coccygeal fracture, thoracic pain without evidence of injury, and bilateral lower leg symptoms of unknown etiology. Dr. Gleis assigned Butler a 5%-8% impairment rating stating that, based on Butler's subjective complaints, the impairment would be 8%. However, because Butler's heart and psychological conditions might have an impact on his ability to perform activities of daily living, Dr. Gleis stated that he would only assign a 5% impairment rating if Butler received any cardiac or psychological impairment ratings. Finally, Dr. Gleis stated that Butler's condition had not objectively worsened since 2001.

Butler filed Dr. Gleis's deposition. Dr. Gleis stated that the DRE method is the appropriate method for determining Butler's impairment because Butler suffered an

injury. Although involvement of multiple spinal levels can support an impairment rating based on the range of motion model, the presence of multi-level degenerative disc disease does not support use of the range of motion method. Using the DRE method, Dr. Gleis stated that, from an orthopedic standpoint, Butler has a 5% impairment rating. However, based on limitations of daily living, he would assign the higher 8% impairment rating.

Butler filed a copy of his October 15, 2005, MRI report showing multi-level disc protrusions and mild spinal stenosis.

Pepsi filed the October 12, 2005, report of Andrew T. Cooley, M.D. Butler reported to Dr. Cooley that he had never suffered from depression before the work injury. For the first year following the injury, Butler was worried about whether and when he would return to work. Following his recovery from his heart attack, Butler began to feel better. However, Butler stated that, when his health later began to decline, "his mind started to go on as far as worry and feeling down." In April or May of 2004, Dr. Law began to treat Butler with medication for depression and Butler underwent a course of psychotherapy with "Dr. Corby" [sic]. Butler told Dr. Cooley that he was "not happy," slept poorly, had little energy, and decreased concentration.

Dr. Cooley performed a number of psychological tests and made diagnoses of major depression – moderate, personality disorder, chronic pain disorder, sleep apnea, and coronary artery disease. Dr. Cooley assigned Butler a 10% impairment, with 4% attributable to the accident and 6% to the sleep apnea and coronary artery disease. In a

supplemental report, Dr. Cooley stated that Butler's depression and active psychological problems began prior to October of 2001.

Based on the preceding evidence, the ALJ relied on Dr. Gleis and awarded Butler additional benefits based on a 3% physical impairment and related disability. The ALJ further found that Butler's claim for benefits related to his psychological condition was timely filed and that Butler had a 55% psychological impairment. However, the ALJ found that only 40% of that impairment was directly related to the work injury, resulting in an award based on a 22% psychological impairment rating. The Board affirmed the ALJ, agreeing with the ALJ that Butler's psychological claim was not time barred and determining that the ALJ's opinion was supported by substantial evidence.

STANDARD OF REVIEW

Pepsi has raised two issues on appeal; 1) whether the ALJ's award of additional benefits for Butler's injury was supported by sufficient evidence and 2) whether Butler timely filed his claim for benefits related to his psychological claim. Having reviewed the record, we believe the first issue is one of fact; however, the second issue is a mixed issue of fact and law. Because of this underlying difference in the issues presented, we have two different standards of review. As to issues of fact and the weight, credibility, substance, and inferences to be drawn from the evidence, we defer to the ALJ. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). In reviewing the ALJ's decision, we note that the ALJ is free to choose to believe or disbelieve parts of the evidence from the total proof and to believe or disbelieve parts of each party's proof.

Brockway v. Rockwell International, 907 S.W.2d 166, 169 (Ky.App. 1995). Therefore, on factual issues, we will only reverse the ALJ and the Board when they have overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 687, 688 (Ky. 1992). However, when there are mixed questions of fact and law, we have greater latitude in determining if the underlying decision is supported by probative evidence. *Purchase Transportation Services v. Estate of Wilson*, 39 S.W.3d 816, 817-18 (Ky. 2001); *Uninsured Employers' Fund v. Garland*, 805 S.W.2d 116, 117 (Ky. 1991). With these two different standards in mind, we will first address whether Butler timely filed a claim for benefits for his psychological condition.

PSYCHOLOGICAL CONDITION

There is no dispute that Butler suffered an injury to his low back in February of 2000 and that he listed only that physical injury on his Form 101. Furthermore, there is no viable dispute that Butler voiced complaints of depression and anxiety and received some medication for those complaints prior to the settlement of his injury claim in October of 2001. Finally, there is no dispute that Butler did not formally seek benefits for his psychological complaints until he filed his motion to reopen. What the parties dispute is whether Butler timely sought benefits for those complaints. We hold that he did and, therefore, we affirm the Board on this issue.

In analyzing this issue, we must determine whether and under what conditions an injured worker may assert a claim for benefits for a psychological condition

for the first time on reopening. A claimant may reopen his claim within the time constraints imposed by KRS 342.125 "on the grounds of (a) Fraud; (b) Newly-discovered evidence which could not have been discovered with the exercise of due diligence; (c) Mistake; and (d) Change of disability as shown by objective medical evidence of worsening or improvement of impairment due to a condition caused by the injury . . . ." KRS 342.125(1). As noted by the Supreme Court of Kentucky in *Fischer Packing Company v. Lanham*, 804 S.W.2d 4, 5 (Ky. 1991), evidence of a change of disability may be in the form of "a factor that is new in kind rather than degree. For example, if the first award was based solely on physical symptoms, and if a neurotic condition superimposes itself later, this is obviously a change enough itself." Therefore, Butler's claim for benefits related to his psychological condition is not automatically barred on reopening.

However, once reopened, Butler had the burden of proving that his claim for benefits related to his psychological condition had not accrued and/or that he did not know or have reason to know of that psychological claim when he settled his low back injury claim. As noted by both parties, Butler's entitlement to assert his claim for benefits for his psychological condition is governed by KRS 342.270(1), which provides that:

> If the parties fail to reach an agreement in regard to compensation under this chapter, either party may make written application for resolution of claim. The application must be filed within two (2) years after the accident, or, in case of death, within two (2) years after the death, or within two (2) years after the cessation of voluntary payments, if any have been made. When the application is filed by the employee or during the pendency of that claim, he shall join all causes of action against the named employer which have accrued and which are known, or should reasonably be

> known, to him. Failure to join all accrued causes of action will result in such claims being barred under this chapter as waived by the employee.

Based on KRS 342.270(1), the question before us is whether Butler's claim for benefits related to his psychological condition had accrued before the settlement and is therefore barred because Butler did not join that claim to his injury claim. To answer that question, we must determine what the legislature meant by "accrued."

Pepsi argues that Butler's cause of action for his psychological injury accrued when he first experienced symptoms of depression and anxiety and sought treatment for those symptoms. Butler argues that his cause action for his psychological condition did not accrue until that claim had "all elements present to be a compensable claim."

KRS Chapter 342 does not specifically state when a cause of action for a psychological injury accrues. However, a cause of action generally accrues when a person becomes aware that he has suffered an injury. *Roman Catholic Diocese of Covington v. Secter*, 966 S.W.2d 286, 288 (Ky.App. 1998). This is in keeping with the language in KRS 342.270(1) stating that a claimant must bring all claims "which are known, or should reasonably be known to him." Therefore, we hold that a cause of action for psychological injury accrues when a claimant becomes aware that he has suffered a psychological injury.

We must next determine when a psychological injury occurs. KRS 342.0011 defines injury as:

> [A]ny work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings . . . but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

Reading the above in conjunction with KRS 342.270(1), we hold that the cause of action for a psychological injury accrues when a claimant has suffered a "harmful change in [his] human organism evidenced by objective medical findings" and he knows or should know that such harmful change is a "direct result of a physical injury." Therefore, Butler's claim for a psychological injury occurred and accrued when he became aware or should have become aware that he had suffered a harmful psychological change in his human organism and had objective medical findings to support that awareness.

As noted above, Butler testified that he suffered from depression and anxiety during the initial litigation of this claim, and that he was taking medication for these symptoms during that litigation. However, there is no indication that Butler sought any treatment with a psychologist or psychiatrist or underwent any psychological testing between the time of his injury and the settlement. Furthermore, there is no indication in the record that Butler had any ongoing problems with depression and/or anxiety or that he continued to take medication for those symptoms between the settlement and when he stopped working in 2004. Finally, there is no evidence that anyone assigned Butler any permanent impairment rating for his complaints of depression and anxiety until after the reopening. As noted by the Supreme Court of Kentucky in *Gibbs v. Premier Scale*

Company/Indiana Scale Co., 50 S.W.3d 754, 761 (Ky. 2001), a diagnosis is not an objective medical finding and is not, by itself, sufficient to establish a compensable injury. Therefore, Butler did not suffer any psychological injury until his symptoms were diagnosed by a physician and there were objective medical findings to support that diagnosis. Based on the evidence, the ALJ correctly inferred that Butler's psychological injury did not occur or accrue until after the 2001 settlement.

Pepsi argues that *Slone v. Jason Coal Co.*, 902 S.W.2d 820 (Ky. 1995), is controlling. We disagree. In *Slone*, the claimant initially brought a claim for benefits based on a back injury. Although he simultaneously was prosecuting a social security claim and alleging a psychological condition in that claim, Slone did not assert a workers' compensation claim for a psychological injury. In his social security claim, Slone filed a psychiatric evaluation and received an award. After receiving his workers' compensation award, Slone filed a motion to reopen alleging a change of disability based on his psychological condition. The Court denied Slone's claim, noting that Slone knew of the psychological condition and the disabling nature of that condition when he initially litigated his back injury claim. Therefore, Slone was foreclosed from asserting the psychological claim on reopening.

Butler's case differs from *Slone* in at least two crucial ways. First, unlike Slone, Butler did not assert a psychological disability claim in another forum while litigating his workers' compensation claim. Furthermore, unlike Slone, Butler did not undergo a psychiatric evaluation during the initial litigation of his claim, and there is no

evidence that there were any objective medical findings that Butler suffered from a psychological condition at that time.

Therefore, we affirm the ALJ and the Board on the timeliness of Butler's psychological claim.

INCREASE IN DISABILITY BASED ON PHYSICAL CONDITION

The ALJ awarded Butler additional income benefits for his low back injury based on Dr. Gleis's 8% impairment rating. Pepsi argues that there was not sufficient evidence to support that award. We disagree.

KRS 342.125(7) provides that "[n]o statement contained in the [settlement] agreement, whether as to jurisdiction, liability of the employer, nature and extent of disability, or as to any other matter, shall be considered by the administrative law judge as an admission against the interests of any party . . ." Therefore, in a reopening of a settlement, the ALJ must first determine the extent of the claimant's disability at the time of the settlement. *Beale v. Faultless Hardware.*, 837 S.W.2d 893, 896 (Ky. 1992).

In the initial litigation of Butler's claim, two physicians expressed opinions regarding impairment; Dr. Goldman assigned a 5% impairment rating and Dr. Whobrey assigned an 8% impairment rating. The ALJ, on reopening, found Dr. Goldman's impairment rating to be the more persuasive. That is within the ALJ's purview and we cannot disturb that on appeal. *See Beale v. Faultless Hardware*, 837 S.W.2d 893 (Ky. 1992), and *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

Having determined that Butler suffered from a 5% impairment at the time of the settlement, the ALJ was required to determine the extent of Butler's impairment at the time of reopening. From a physical standpoint, the ALJ was presented with Dr. Gleis's opinion that Butler had a 5 to 8% impairment rating and Dr. Petruska's opinion that Butler had a 12% impairment rating. As previously noted, the ALJ, as fact finder, has the sole authority to judge the quality, character, and substance of the evidence. *Paramount Foods*, 695 S.W.2d at 419. The evidence supported the ALJ's decision to rely on Dr. Gleis's impairment rating and to award Butler an additional 3% impairment based on Butler's physical condition.

There is nothing in the evidence, and Pepsi does not point to anything, that would have compelled the ALJ to make a different finding. *See Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Therefore, we affirm the ALJ and the Board on the issue of Butler's increased physical impairment/disability.

CONCLUSION

The ALJ's opinion that Butler has an additional 3% impairment from a physical standpoint is supported by substantial evidence. Furthermore, Butler timely filed his claim for a psychological injury because that claim did not accrue before the 2001 settlement. Therefore, we affirm the ALJ and the Board.

ALL CONCUR.

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