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Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002090-WC

WHITESBURG ARH HOSPITAL — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. WC-04-90888

DAVID YONTS; NORTON COMMUNITY HOSPITAL; DR. DANNY MULLINS; HON. JOHN W. THACKER, ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MOORE AND WINE, JUDGES, BUCKINGHAM,[1] SENIOR JUDGE.

MOORE, JUDGE: Whitesburg Appalachian Regional Hospital ("Whitesburg ARH") petitions this Court to review an opinion of the Workers' Compensation Board ("Board") entered on September 21, 2007. The Board remanded an opinion

[1] Senior Judge David C. Buckingham, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

and order of the Hon. John W. Thacker, Administrative Law Judge ("ALJ") entered on April 20, 2007. After a careful review of the record, we affirm.

I. FACTUAL AND PROCEDURAL BACKGROUND

David Yonts brought his claim for workers' compensation benefits alleging that his left shoulder and lumbar spine were injured while he was working at Whitesburg ARH on March 29, 2004.[2] He claimed that he injured himself while lifting an eighty-pound bag of salt. Yonts worked as a plant operating engineer at the time of his injury. Yonts described the physical requirements of his job at the time of his injury as including "[l]ifting, bending, twisting, [and] working over rough terrain." Yonts was fifty-four years old at the time of his injury; he had completed seven hours of college credit; and he had a carpenter's certificate.

After he was injured, Yonts sought treatment by his general practitioner, Dr. Van Breeding; as well as by Dr. Brett Scott, a neurosurgeon; and Dr. Danny A. Mullins, who performed surgery on Yonts's shoulder. Following his injury, Yonts took four months off work. He then returned to work on light duty, and he was assisted by someone in doing his job. He ceased working again in November 2004.

Following a hearing in this matter, the ALJ issued his opinion, award and order. The ALJ reviewed the medical report prepared by Dr. William E. Kennedy, following his independent medical examination of Yonts. The ALJ noted that Dr. Kennedy opined that Yonts's left shoulder problem was

[2] In this opinion, we will refer only to the injury to Yonts's left shoulder, as only the problems with his shoulder, as opposed to his back, are argued by the parties in this petition for review.

"posttraumatic subacromial impingement syndrome," which was "treated by open acromioplasty and decompression" in May 2005. Dr. Kennedy's opinion was that the lifting incident at work on March 29, 2004, caused Yonts's shoulder problem.

The ALJ next reviewed the medical report prepared by Dr. Brett Scott, who reported that a physical examination of Yonts revealed that his "left shoulder showed only [ninety degrees] of abduction and [was] painful to that level." Dr. Scott opined that Yonts had suffered an injury to his left shoulder that was likely the cause of his back pain.

The ALJ reviewed Dr. Danny Mullins's medical report, which stated that Yonts had surgery on his left shoulder for "open acromioplasty with bursectomy and distal clavicle excision." Dr. Mullins noted that, after surgery, Yonts had shown some improvement in his range of motion, as well as in his shoulder pain, but that a functional capacity evaluation would need to be conducted to determine Yonts's permanent partial impairment rating.

Dr. Gregory Snider's medical report was also reviewed by the ALJ. Dr. Snider performed an independent medical examination on Yonts in July 2005. The ALJ noted that "Dr. Snider stated that there was no documentation of left shoulder complaint or injury for six weeks after the injury and therefore it seemed unlikely that a series of qualified physicians would overlook and fail to document a primary shoulder injury." Additionally, the ALJ stated that "[i]t was Dr. Snider's opinion that the left shoulder complaint [was] not likely related to the work injury."

Dr. Snider later provided three supplemental reports, and he continued to opine that the work-related lifting incident of March 29, 2004, was not the cause of Yonts's shoulder injury. Nevertheless, the ALJ reported that Dr. Snider found that Yonts's restrictions should include "no overhead work using the left arm and no lift/push/pull with [the] left arm exceeding [fifteen] pounds regarding the shoulder complaints."

The ALJ reported that the treatment notes by Mountain Comprehensive Health Corporation showed that in July 2004, Yonts "was having pain over his left shoulder and left side of [his] neck. It was noted the pain appeared to shoot up his left shoulder, down to his arm."

The ALJ entered findings of fact and conclusions of law, which included the following: Yonts "has a 12% permanent partial impairment to his left shoulder from injuries sustained during the course and within the scope of his employment with [Whitesburg ARH] on March 29, 2004, as the Administrative Law Judge finds the opinion of Dr. William E. Kennedy to be the most credible" concerning the cause of the shoulder problems. The ALJ noted that "Dr. Kennedy's opinion was that the work related lifting incident of March 29, 2004, caused the posttraumatic subacromial impingement syndrome of the left shoulder and the posttraumatic osteoarthritis of the left acromioclavicular joint." The ALJ found that "Dr. Kennedy's opinion [was] supported by the opinion of Dr. Brett Scott who opined that [Yonts] suffered a left shoulder injury which probably was the cause of his upper thoracic back pain."

The ALJ determined that, under "KRS 342.730(1)(b), a 12% permanent partial impairment is multiplied by a factor of 1.00, resulting in a permanent partial disability of 12%." Then, the ALJ concluded as follows:

> The Administrative Law Judge finds that [Yonts] retains the capacity to return to work and work into the indefinite future earning a wage equal to or greater to the wage earned at the time of the injury. [Yonts] in fact returned to work on light duty and was able to work. The Administrative Law Judge finds the restrictions by Dr. Gregory Snider of no overhead work using the left arm and no lift/push/pull with the left arm exceeding 15 pounds regarding the left shoulder are the most credible and would allow [Yonts] to continue performing his work into the indefinite future. . . . The Administrative Law Judge is unconvinced from the evidence that [Yonts] lacks the capacity to perform his former work or earn a wage equal to or greater than his salary at the time of the injury into the indefinite future. Therefore, [Yonts] is not entitled to the three multiplier pursuant to KRS 342.730(1)(c)1.[3] [Yonts] returned to his former work and last worked until November 2004. Pursuant to KRS 342.730(1)(c)2 [Yonts] is entitled to have any income benefits multiplied by a multiplier of two during the period of cessation in which he does not earn an average weekly wage equal to or exceeding that at the time of the injury.

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[3] KRS 342.730(1)(c) provides, in pertinent part, as follows:

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.

Yonts was then awarded permanent partial disability benefits of "$42.11 per week for a period of 425 weeks beginning August 1, 2004, with the exception of the period May 10, 2005, through August 25, 2005, which period shall not count against the 425 week total." Additionally, he was awarded temporary total disability benefits amounting to "$350.93 for the four weeks following the injury of March 29, 2004, and for the period following the surgery of May 10, 2005, through August 25, 2005." The ALJ also awarded interest of 12% per annum for all due and unpaid installments on these awards. Finally, the ALJ ordered Whitesburg ARH to "pay all reasonable and necessary medical expenses for the cure and relief of [Yonts's] physical injury to his left shoulder sustained on March 29, 2004."

Whitesburg ARH filed a petition for reconsideration with the ALJ, asking the ALJ to dismiss the claim concerning the left shoulder injury and to reconsider the offset of the amount to be awarded due to the employer funded disability income payments. The ALJ denied the petition as to reconsideration of the left shoulder injury and sustained the remainder of the petition.

Yonts did not file a petition for reconsideration, but he appealed to the Board, claiming that he was entitled to the three multiplier as set forth in KRS 342.730(1)(c)1. The Board, in noting that Yonts had not filed a petition for reconsideration with the ALJ, stated that "[t]o the extent an ALJ makes findings unsupported by evidence contained in the record, the error is one of law and no petition for reconsideration need be filed as a prerequisite to appellate review.

KRS 342.281." The Board reasoned that "[a] petition for reconsideration is not necessary to preserve issues regarding questions of law. *Brasch-Berry General Contractors v. Jones*, 175 S.W.3d 81 (Ky. 2005)."

The Board then noted that in this case, "the ALJ simply determined the three multiplier was not applicable and applied the two multiplier of KRS 342.730(1)(c)2." The Board stated that *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003), "and its progeny stand for the principle that when the evidence supports application of both KRS 342.730(1)(c)1 and (c)2, the ALJ must choose the subsection that is more appropriate under the facts of the individual case." Further, if an injured employee would normally qualify for the three multiplier, but "retains sufficient education, training and physical capacity to resume other employment at an equal or higher wage and the ALJ is persuaded the worker will likely be able to obtain and maintain such employment into the indefinite future, application of KRS 342.730(1)(c)2, rather than (c)1, is appropriate."[4]

Discussing *Ford Motor Co. v. Forman*, 142 S.W.3d 141 (Ky. 2004), the Board noted that, in that case, the claimant returned to work, but she was unable to perform some of the job responsibilities she was able to do before she was injured. The Supreme Court held that the claimant was entitled to triple benefits under the three multiplier because the claimant's work injury prevented her from being able to do the same jobs post-injury that she did before she was injured.

[4] (A.R. at p. 478) (internal quotation marks omitted).

In the present case, the Board concluded as follows:

> [T]he ALJ erred as a matter of law in his analysis of the law as applicable to the facts of record. The ALJ failed to make a determination as to whether in light of his work related physical restrictions, Yonts retains the physical capacity to perform the same type of work that he performed at the time of injury. *See Ford Motor Co. v. Forman, supra*. The ALJ found most credible the restrictions imposed by Dr. Snider that severely limited Yonts in the use of his left shoulder. At the time of his injury[,] Yonts was lifting an 80 pound bag of salt. This activity would be outside of Yonts'[s] current restrictions. Thus, on remand the ALJ must determine whether Yonts retains the capacity to perform the work of a plant operating engineer. The ALJ must consider the specific duties of that job. If based on Yonts['s] physical restrictions as imposed by Dr. Snider the ALJ believes Yonts can not perform those duties [sic] then the ALJ must undertake a *Fawbush* analysis because subsection two of KRS 342.730(1)(c) also applies. To continue to award the two multiplier the ALJ must support with substantial evidence a decision that Yonts has the capacity to continue to earn into the infinite future a wage equal to or greater than that earned at the time of injury.

Therefore, the Board remanded the case to the ALJ "for further analysis and findings."

Whitesburg ARH now petitions this Court for review, claiming that: (1) Yonts's failure to file a petition for reconsideration with the ALJ was fatal to his appeal; and (2) there was substantial evidence supporting the ALJ's decision.

II. STANDARD OF REVIEW

When we review a decision of the Workers' Compensation Board, we "correct the Board only when we perceive that the Board has overlooked or

misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Daniel v. Armco Steel Co.*, 913 S.W.2d 797, 798 (Ky. App. 1995). In reviewing the Board's decision, we must ultimately review the ALJ's decision. If the ALJ, as the fact-finder,

> finds against the person with the burden of proof, [that person's] burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.

Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). "A finding . . . is unreasonable under the evidence presented" if it "would compel a different finding." *Id*. (internal quotation marks omitted). We note that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. East Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997).

III. ANALYSIS

Because we find that the resolution of Whitesburg ARH's first claim concerning whether Yonts should have filed a petition for reconsideration with the ALJ depends to some extent on our analysis of his second claim that there was substantial evidence supporting the ALJ's decision, we will analyze these claims in reverse order.

A. CLAIM THAT SUBSTANTIAL EVIDENCE SUPPORTED ALJ'S DECISION

Whitesburg ARH alleges that there was substantial evidence supporting the ALJ's decision and, thus, the Board improperly remanded the case for further analysis and findings. "[W]here the evidence would support applying both (c)1 and (c)2, the ALJ is authorized to determine which provision is more appropriate." *Adkins v. Pike County Bd. of Educ.*, 141 S.W.3d 387, 389 (Ky. App. 2004). "[T]he application of paragraph (c)1 is appropriate if the evidence indicates that the worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future." *Id*. at 389-90.

"Although a worker's post-injury physical capacity and ability to perform the same type of work as at the time of injury are matters of fact to be determined by the ALJ, the standard to be used when making those findings is a question of law." *Ford Motor Co.*, 142 S.W.3d at 144. The Supreme Court has held that the phrase "the type of work that the employee performed at the time of injury," in KRS 342.730(1)(c)1, means "the actual jobs that the individual performed." *Ford*, 142 S.W.3d at 145 (internal quotations omitted).

The ALJ's findings regarding whether Yonts was entitled to the three multiplier were conclusory; as there was no analysis of Yonts's prior job responsibilities or of his ability to perform those responsibilities post-injury. Yonts's job as a plant operating engineer allegedly encompassed many job duties, and his ability to do some of those jobs after he was injured does not necessarily

mean that he can perform the same type of work post-injury. *See Ford*, 142 S.W.3d at 145.

Additionally, the ALJ found Dr. Snider's opinion concerning Yonts's work restrictions to be the most credible. The ALJ noted that Dr. Snider opined that post-injury, Yonts could do "no overhead work using the left arm and no lift/push/pull with the left arm exceeding 15 pounds regarding the left shoulder." However, at the time he was injured, Yonts was lifting an eighty-pound bag of salt in the course of performing his job responsibilities. Therefore, the Board did not err when it remanded Yonts's claim concerning the three multiplier to the ALJ for further analysis and findings.

Moreover, following his injury, Yonts took four months off work. Then he returned to work for a few more months and worked until November 2004. The ALJ failed to enter any findings concerning whether Yonts was able to continue working beyond that time and whether he could "continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future." *Adkins*, 141 S.W.3d at 390. Consequently, the Board properly remanded this case for further analysis and findings by the ALJ concerning whether the three multiplier was applicable.

B. CLAIM REGARDING PETITION FOR RECONSIDERATION

Whitesburg ARH also claims that Yonts's failure to file a petition for reconsideration with the ALJ was fatal to his appeal. The Kentucky Supreme Court has held that, pursuant to KRS 342.285, "issues regarding questions of law

need not be preserved pursuant to a petition for reconsideration, but rather, may be appealed directly to the Board." *Brasch-Barry*, 175 S.W.3d at 83. In *Brasch-Barry*, the Court noted that the Board found that an impairment rating assigned by a doctor had not been based "on the category definitions contained in the AMA Guides." *Id*. at 82. Accordingly, the Board in that case held that the impairment rating "was not, as a matter of statutory law, supported by substantial evidence" and, thus, the issue was a question of law for which no petition for reconsideration needed to be filed. *Id*. at 82-83. The Kentucky Supreme Court upheld the Board's decision, noting that "it is the Board's province on appeal to ensure that ALJ decisions are in conformity with Chapter 342 (the Workers' Compensation Act) and that such determinations constitute questions of law, and not fact." *Id*. at 83. The Court then found that "[t]he Board's decision squarely and appropriately construed the intent of KRS 342.730 and was not based on any factual considerations (such as credibility or weight to be attributed to the evidence) determined by the ALJ." *Id*.

In the present case, the Board held that the ALJ's decision that Yonts was not entitled to the three multiplier was not supported by substantial evidence. Thus, the Board concluded that the issue was a question of law for which, pursuant to *Brasch-Berry*, Yonts did not need to file a petition for reconsideration with the ALJ before appealing to the Board.

The Board correctly noted that the ALJ failed to make any findings concerning Yonts's job responsibilities before being injured or his ability to

perform such responsibilities after he was injured. Typically, the decision whether a claimant should be awarded the three multiplier, pursuant to KRS 342.730(1)(c)1, is a question of fact to be decided by the ALJ. *See Carte v. Loretto Motherhouse Infirmary*, 19 S.W.3d 122, 126 (Ky. App. 2000).

However, when the ALJ fails to support his conclusion concerning the applicability of the multiplier with any analysis about whether the claimant "retain[ed] the physical capacity to return to the type of work that [he] performed at the time of injury," as provided in KRS 342.730(1)(c)1, the ALJ's decision is not in conformity with Chapter 342, and a question of law arises. *See Brasch-Berry*, 175 S.W.3d at 83. In the present case, the ALJ did not make any findings concerning Yonts's post-injury ability to do the jobs that he performed before his injury. Therefore, the Board did not overlook or misconstrue controlling law or commit an error so flagrant as to cause gross injustice when the Board held that it was a question of law whether there was substantial evidence to support the ALJ's determination that Yonts was not entitled to the three multiplier. *See Daniel*, 913 S.W.2d at 798. Consequently, the Board properly concluded that Yonts was not required to file a petition for reconsideration with the ALJ. *Id*. at 83.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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