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Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000603-WC

OHIO FARMERS INSURANCE/
WESTFIELD INSURANCE APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-01615

ALGER BREEDING; HON. EDWARD
D. HAYS, ADMINISTRATIVE LAW
JUDGE AND WORKERS' COMPENSATION
BOARD APPELLEES

AND

NO. 2012-CA-000728-WC

ALGER B. BREEDING CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-01615

OHIO FARMERS INSURANCE/
WESTFIELD INSURANCE; HON. EDWARD

D. HAYS, ADMINISTRATIVE LAW JUDGE
AND WORKERS' COMPENSATION
BOARD CROSS-APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON, MOORE AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Ohio Farmers Insurance/Westfield Insurance (Westfield) appeals and Alger Breeding cross-appeals from an opinion and order of the Workers' Compensation Board (the Board) affirming in part and reversing in part the decision of the Administrative Law Judge (ALJ).

Westfield challenges the finding of disability, the extent of the impairment found, and the denial of offset credit for previous short-term disability payments. Breeding challenges the reversal of the ALJ's calculation of his weekly wages.

Breeding started working as a claims adjuster in 1984, and began working in that capacity for Westfield in March of 2005. In the summer of 2007, as a result of two hail storms, Breeding was frequently climbing ladders and climbing on roofs to investigate claims. On July 18, 2007, he felt soreness in his left knee which became progressively worse and later began to feel the same pain in his right knee when he compensated for his left knee. Initially, treating physicians believed that Breeding had a menisical tear to his left knee, but later determined that he had osteoarthritis in both knees.

Breeding underwent multiple medical interventions, including cortisone injections, Exflexxa injections and arthroscopic surgery, none of which resulted in lasting relief. Facing progressively worsening symptoms in 2010, Breeding had two separate total knee replacement surgeries. He was on leave for the surgeries from January 25, 2010 through November 1, 2010. He received short-term disability benefits for ninety days, and then long-term disability benefits until he returned to work. Although the knee replacement surgeries allowed Breeding to resume his work, his artificial knees did not completely relieve his pain and resulted in the loss of some sensation and mobility.

To determine whether Breeding's knee problems were caused by his work, the medical opinions of three physicians, Dr. D'Angelo, Dr. Burke and Dr. Gleis were presented. Dr. D'Angelo and Dr. Burke agreed that Breeding had pre-existing osteoarthritis brought into disabling reality by his work activities. Dr. D'Angelo specifically opined that this condition was a dormant condition aggravated by Breeding's work activities. Dr. Gleis opined that Breeding's osteoarthritis was not a cumulative trauma, and that Breeding's weight and body mass likely contributed to his knee symptoms.

Following the knee replacement surgeries, the physicians rated Breeding's resulting impairment pursuant to the American Medical Association *Guides to the Evaluation of Permanent Impairment* 5th Edition. As to the percentage of whole body impairment, Dr. Gleis assessed a 15% impairment for the right knee and a 15% impairment for the left knee. Dr. Burke assessed a 30% impairment to the

right knee and a 20% impairment to the left knee and, based on a formula for combining those percentages of impairment, assessed a 44% whole person impairment for both knees.

Westfield asserted that the short-term and long-term disability benefits Breeding received should be offset from his workers' compensation award pursuant to KRS 342.736(6). Breeding acknowledged that the short-term disability benefits were from a plan fully funded by his employer. However, he did not know whether the long-term disability benefits were fully funded by his employer. A copy of the insurance policy covering these periods was not submitted into evidence, and no other evidence was submitted whether these insurance policies contained internal offset provisions.

The parties had similar estimates of Breeding's weekly wages. Westfield offered to stipulate that Breeding's average weekly wage was $960.35, and Breeding offered to stipulate that his average weekly wage was $988.05. According to the Westfield Group Employee Earnings Record, Breeding's regular earnings for working eighty hours every two weeks were $1,920.69 in 2006, and increased to $1,968.71 as of April 14, 2007. According to Breeding's October 10, 2008 statement, his pay rate was $2,008.08 biweekly. Breeding's 2007 W-2 wage and tax statement indicated that his annual wages were $63,277.57.

The ALJ was persuaded that Dr. D'Angelo's and Dr. Burke's opinion that Breeding had a dormant condition brought into a disabling reality by his work activities. The ALJ found that Breeding suffered a temporary total disability and

permanent partial disability to his knees caused by his work, and that he suffered a 44% whole person impairment.

The ALJ determined that under KRS 342.730(6), the short-term disability benefits should be offset because Breeding acknowledged that these were from a plan fully funded by his employer. However, the long-term disability benefits should not be offset because Breeding did not know whether these were fully funded by his employer.

The ALJ determined that Breeding's annual wages were $63.277.57 based on his W-2, and calculated his average weekly wage under KRS 342.140(1)(c) by dividing this figure by fifty-two. The ALJ determined that Breeding's weekly wage was $1,216.88.

The Board affirmed the ALJ's finding of temporary total disability and permanent partial disability. It determined that the ALJ's finding that Breeding had a dormant condition brought into a disabling reality by his work activities, was supported by substantial evidence. The Board affirmed the percentage of disability and affirmed the denial of an offset credit for long-term disability payment.

The Board reversed on the granting of an offset credit for short-term disability payments. It concluded that neither the short-term or long-term disability should be offset because Westfield failed to establish that the plan was exclusively employer funded, that extended income benefits for the same disability were covered by workers' compensation, and the plan did not contain an internal offset provision for workers' compensation benefits.

The Board disagreed with the ALJ that Breeding's wages should be calculated pursuant to KRS 342.140(1)(c), as a salary fixed by year. Instead, as a salaried employee paid biweekly, his wages should have been determined pursuant to KRS 342.140(1)(a), as a salary fixed by the week. Therefore, it reversed and remanded for new calculations.

Our standard of review of a decision of the Board "is limited to determining whether the decision was erroneous as a matter of law." *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). We will only correct the Board where "the . . . Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky.App. 2008) (quoting *Western Baptist Hosp. v. Kelly,* 827 S.W.2d 685, 687–688 (Ky.1992)). We interpret statutes *de novo* and, therefore, do not give deference to the Board's interpretation. *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009); *Wilson v. SKW Alloys, Inc.*, 893 S.W.2d 800, 801-802 (Ky.App. 1995).

This appeal requires us to review both factual findings and legal determinations. The ALJ is the exclusive finder of fact pursuant to KRS 342.285(1). Accordingly, the ALJ "has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence." *Bowerman*, 297 S.W.3d at 866. This discretion includes "decid[ing] whom and what to believe" and gives the ALJ the

freedom to "reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." *Id*.

Our review of a factual finding is as follows:

> Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.

Hamilton, 34 S.W.3d at 52 (internal citations omitted).

Westfield argues that there was no substantial evidence to support the disability award and relies on Dr. Gleis's assessment that it arose from Breeding's normal activities combined with his weight and BMI. Breeding argues that he met his burden of establishing a work-related injury, but Westfield did not meet its burden of showing a pre-existing active condition.

In establishing a compensable disability, the employee bears the burden of proof. *Caudill v. Maloney's Disc. Stores*, 560 S.W.2d 15, 16 (Ky. 1977). However, the employer bears the burden of proof that the injury was the result of the employee's pre-existing condition. *Comair, Inc. v. Helton*, 270 S.W.3d 909, 914 (Ky.App. 2008). "[A] pre-existing condition that is both asymptomatic and

produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition." *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky.App. 2007). Such a condition would remain dormant in the absence of a triggering trauma:

> Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury.

McNutt Constr./First Gen. Services v. Scott, 40 S.W.3d 854, 859 (Ky. 2001). Thus, "[w]hen a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable." *Finley*, 217 S.W.3d at 265.

We agree with the Board that the ALJ's findings regarding the cause of Breeding's disability and his percentage of impairment were supported by substantial evidence. The ALJ chose to rely on Dr. D'Angelo's and Dr. Burke's opinions as to causation, a determination within purview of the finder of fact. Their opinion that Breeding had a pre-existing dormant condition aroused by his work activities is an appropriate basis for a workers' compensation award. We also agree with the Board that the ALJ's determination of a 44% overall impairment rating was supported by substantial evidence.

Westfield claims that the denial of offset credits was improper and contrary to law because Breeding acknowledged receiving short-term benefits from

Westfield. Breeding argues that Westfield is not entitled to any offsets because it failed to prove that it was entitled to a credit.

KRS 342.730(6) provides:

> All income benefits otherwise payable pursuant to this chapter shall be offset by payments made under an exclusively employer-funded disability or sickness and accident plan which extends income benefits for the same disability covered by this chapter, except where the employer-funded plan contains an internal offset provision for workers' compensation benefits which is inconsistent with this provision.

The purpose of KRS 342.730(6) is to prevent a duplication of benefits where the employer acted proactively in fully funding a disability or sickness and accident plan. *See Alcan Aluminum Corp. v. Stone*, 276 S.W.3d 817, 818 (Ky. 2009). Benefits received under fully funded employer plans, which are not intended to cover disability due to employment, cannot be offset under this provision because the plan carrier is entitled to receive its benefits back when paid pursuant to an injury subject to workers' compensation benefits. *Dravo Lime Co., Inc. v. Eakins*, 156 S.W.3d 283, 291 (Ky. 2005).

In interpreting whether an employer is entitled to an offset, the employer must prove entitlement. *See Ephraim McDowell Reg'l. Med. Ctr. v. Grigsby*, 862 S.W.2d 331, 332 (Ky.App. 1993) (interpreting right to offset as part of judicial enforcement under KRS 342.305). *See also Brady v. Kentucky Am. Water Co.*, 2012 WL 2362485, 2-3 (Ky. 2012) (unpublished decision discussing the burden of proof for offset under KRS 342.736(6)).

We agree with the Board that Westfield is not entitled to an offset because it failed to prove that the benefits Breeding received met the qualifications required for an offset under KRS 342.730(6). Here, "there was simply a total failure of proof as to the employer's right to the credit[.]" *Grigsby*, 862 S.W.2d at 332. Accordingly, there was no entitlement to an offset "[a]s there was no proof as to the specific terms of the disability plan in question, most notably whether it contained its own internal offset provision[.]" *Id*.

In his cross-appeal, Breeding alleges that he is a salaried employee and that it was within the ALJ's discretion to rely upon the W-2 filed by Westfield, rather than the wage records created by Westfield in calculating his weekly wage. Westfield counters that there was no evidence in the record to show that Breeding's wages were fixed by the year, and that the amount found by the ALJ was contrary to the actual wage records, Breeding's testimony and the stipulation of average weekly wages by Breeding's counsel.

KRS 342.140 provides the following guidance for calculating an employee's average weekly wage:

> The average weekly wage of the injured employee at the time of the injury or last injurious exposure shall be determined as follows:
>
> (1) If at the time of the injury which resulted in death or disability or the last date of injurious exposure preceding death or disability from an occupational disease:
>
> (a) The wages were fixed by the week, the amount so fixed shall be the average weekly wage;

> (b) The wages were fixed by the month, the average weekly wage shall be the monthly wage so fixed multiplied by twelve (12) and divided by fifty-two (52);
>
> (c) The wages were fixed by the year, the average weekly wage shall be the yearly wage so fixed divided by fifty-two (52);
>
> . . .

Under KRS 342.140(1), an employee's "average weekly wage" does not include all amounts earned. Profit sharing bonuses which are earned in addition to regular wages are not to be included in calculating average weekly wages. *Pendygraft v. Ford Motor Co*., 260 S.W.3d 788, 792 (Ky. 2008). Premium pay, as opposed to output pay, is not part of average weekly wages. *Denim Finishers, Inc. v. Baker*, 757 S.W.2d 215, 216 (Ky.App. 1988). Fringe benefits are not part of average weekly wages. *Rainey v. Mills*, 733 S.W.2d 756, 757-758 (Ky.App. 1987).

The ALJ's average weekly wage of $1,216.88 was calculated by dividing Breeding's W-2 earnings by fifty-two, differed significantly from what the parties' calculations of Breeding's average weekly wage, $960.35 by Westfield and $988.05 by Breeding, and from the evidence submitted of biweekly wages of $1,920.69 in 2006, $1,968.71 as of April 14, 2007, and $2,008.08 as of October 2008. The amounts did not match the total listed on Breeding's 2007 W-2 because the W-2 included additional, unperiodic wages not calculated in determining average weekly wages.

We agree with the Board that Breeding's average weekly wages were miscalculated. Breeding had the burden to prove every element of his claim, including his average weekly wage. *See Fawbush v. Gwinn*, 103 S.W.3d 5, 10 (Ky. 2003). Because there was overwhelming evidence that Breeding's W-2 was not an accurate representation of his average weekly wage, the ALJ miscalculated his award. No evidence established that his W-2 was the result of a yearly salary and, thus, a weekly salary calculation for wages fixed by the week is the appropriate measure for calculating his benefits pursuant to KRS 342.140(1)(a). However, the problem in the calculation was not which statutory subdivision was applied, but how the calculation was made. Simply dividing the W-2 did not allow amounts earned in addition to Breeding's weekly wages to be taken out of the calculation as required. Therefore, the ALJ must make its calculation based upon records from which the extra earnings can be separated.

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

ALL CONCUR.

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