

RENDERED: NOVEMBER 7, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001873-WC

HAM BROADCASTING COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-00182

ERIC ALEXANDER, ANTHEM HEALTH PLANS
OF KENTUCKY, INC., HON. THOMAS G. POLITES,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: CLAYTON, COMBS, AND NICKELL, JUDGES.

NICKELL, JUDGE: Ham Broadcasting Company, Inc. (Ham Broadcasting), has petitioned for review of an opinion of the Workers' Compensation Board (Board) affirming in part, vacating in part, and remanding the opinion and order of the Administrative Law Judge (ALJ). Having reviewed the record, we affirm.

Alexander sustained a work-related lower back injury at Ham Broadcasting on February 11, 2005, while he and another individual, James Owens, constructed a mount for a satellite dish. Alexander alleged he strained his back while attempting to set a steel pole in a concrete base. Alexander testified he provided notice of the injury the following day to an assistant at Ham Broadcasting, Melissa Noel, and to owner D.J. Everett via telephone and a series of e-mails.¹

Alexander returned to work following the injury and did not seek medical treatment until November 2005. He continued to work until he broke his hand in a motor vehicle accident in March 2006, and remained off work until December 2006, when he was terminated.

Dr. Robert Meriwether treated Alexander for his back injury on January 15, 2007, and restricted Alexander from working “until Dr. [Daniel] Keck has had a chance to go over his records and make recommendations.” Evaluating Alexander on January 22, 2007, Dr. Keck diagnosed lumbar degenerative disc disease and lower extremity radiculitis. Dr. Keck did not mention whether Alexander could return to work. After Alexander advised he wanted to avoid surgical intervention, Dr. Keck recommended lumbar epidural injections, which Alexander received in subsequent months.

¹ In its “Statement of Material Facts,” Ham Broadcasting claims Alexander did not give proper notice of the injury. However, Ham Broadcasting did not raise notice as an issue before the Board; therefore, this issue is not preserved for appeal.

Alexander filed an Application for Resolution of Injury Claim on January 29, 2007. A Benefits Review Conference (BRC) was scheduled for June 13, 2007, but the case was placed in abeyance because Alexander had not reached maximum medical improvement (MMI). The case was removed from abeyance and a final hearing was held on January 18, 2013, after a series of BRCs and hearings were rescheduled for various reasons. In support of his case, Alexander relied on lay testimony, a report from Dr. Frederick Huffnagle, and treatment records. Dr. Huffnagle found Alexander suffered an annular tear due to his work-related injury. Ham Broadcasting submitted the medical report and testimony of Dr. Thomas Loeb.

The ALJ issued an opinion and award on March 18, 2013, finding Alexander sustained a work-related back injury. The ALJ awarded temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits enhanced by the three multiplier pursuant to KRS² 342.730(1)(c)1, and medical benefits.

Ham Broadcasting appealed to the Board after a subsequent petition for reconsideration was denied. On September 25, 2013, the Board issued an opinion affirming in part, vacating in part, and remanding the ALJ's opinion and order. The Board held the ALJ's finding of a work-related injury was supported by substantial evidence, including treatment notes from nurse practitioner Mary James, and medical reports from Drs. Huffnagle and Loeb. While acknowledging Dr. Loeb retreated from his original opinion during his deposition, the Board held

² Kentucky Revised Statutes.

the ALJ was free to rely solely upon the opinions expressed in Dr. Loeb's report and attach no significance to the deposition testimony.

Holding the evidence demonstrated Alexander was instructed by Dr. Meriwether to remain off work on January 15, 2007, and continued to undergo significant treatment throughout the remainder of 2007, the Board affirmed the ALJ's award of TTD benefits. Lastly, the Board held the ALJ's award of PPD benefits was not in conformity with the statute and applicable case law, and remanded this case to the ALJ to evaluate whether Alexander's award of PPD benefits should be enhanced by the two or three multiplier.³ This appeal followed.

The ALJ, as fact-finder, has sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). When conflicting evidence is presented, the ALJ may choose whom and what to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123, 124 (Ky. 1977). The Board is charged with deciding whether the ALJ's finding "is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law." KRS 342.285; *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). On review, the function of this Court is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or has committed an error in assessing the evidence so flagrant as to cause gross injustice. *See Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992).

³ This issue was not appealed.

On appeal, Ham Broadcasting first alleges the Board erroneously held the ALJ's award of TTD benefits was supported by substantial evidence.

Acknowledging Dr. Meriwether restricted Alexander from working until Dr. Keck could make an evaluation, Ham Broadcasting argues there is no further mention Alexander was kept off work following Dr. Keck's January 22, 2007 evaluation. Ham Broadcasting alleges Alexander's continued medical treatment throughout 2007 alone does not equate to a finding of TTD. Further, Ham Broadcasting claims the ALJ erred in relying on Dr. Loeb's September 2009 finding that Alexander had not reached MMI because the changes Dr. Loeb observed on x-ray were not present on an MRI from September 2007, suggesting a more recent intervening injury.

The ALJ awarded TTD benefits beginning January 7, 2007, and ending January 17, 2008, the date Dr. Sean McDonald assessed a 10% permanent impairment rating in accordance with the American Medical Association (AMA) *Guides to the Evaluation of Permanent Impairment (Guides)*. The ALJ was persuaded Alexander was entitled to TTD benefits during this period because Alexander continued to receive regular medical treatment with documented "progressive worsening symptoms." The ALJ found Alexander's work restriction and ongoing treatment with worsening symptoms indicated Alexander was unable to work and had not reached MMI until January 17, 2008. We hold substantial evidence supports the ALJ's award of TTD benefits.

KRS 342.0011(11)(a) defines TTD as “the condition of an employee who has not reached [MMI] from an injury and has not reached a level of improvement that would permit a return to employment.” There are two requirements for an award of TTD benefits: first, the worker must not have reached MMI; and, second, the worker must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. *Double L Construction, Inc. v. Mitchell*, 182 S.W.3d 509, 513 (Ky. 2005).

We hold the evidence in the present case permits a reasonable finding Alexander had not reached MMI before January 17, 2008, and was unable to return to the type of work he was performing when injured. The uncontroverted evidence indicates Alexander was restricted from working on January 7, 2007, and continued to receive treatment for his back condition throughout 2007. Moreover, the treatment records do not indicate Alexander was cleared by his medical providers to return to work prior to January 17, 2008. Thus, the ALJ permissibly determined Alexander’s condition never improved to a point where his physicians allowed him to return to work.

Further, the record does not support Ham Broadcasting’s assertion the treatment records make no mention of Alexander being kept off work during this period. Rather, the ALJ inferred Alexander was to remain off work based on Dr. McDonald’s September 10, 2007, notation Alexander “really wants to get back to work.” It is within the ALJ’s discretion to draw reasonable inferences from the

evidence. *Paramount Foods Inc., v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

Moreover, contrary to Ham Broadcasting's argument, our review of the record indicates the ALJ did not rely upon Dr. Loeb's MMI opinion. Rather, the ALJ found Alexander reached MMI on January 17, 2008, before Dr. Loeb's evaluation. The ALJ simply mentioned the finding of TTD "must be viewed in light" of Dr. Loeb's opinion, which would have supported an open-ended award of TTD benefits. We find no error in the ALJ's reliance on this fact. Even excluding the ALJ's mention of Dr. Loeb's opinion, we hold substantial evidence exists to affirm the award of TTD benefits.

Next, Ham Broadcasting alleges the ALJ erred in finding a causal relationship between Alexander's back condition and a work-related injury. Specifically, Ham Broadcasting claims the ALJ erred in relying on Dr. Loeb's opinion to find causation because Dr. Loeb changed his opinion during his deposition. We disagree.

Dr. Loeb evaluated Alexander on September 28, 2009, at the request of Ham Broadcasting. Diagnosing an L5 nerve root attenuation, Dr. Loeb related it to his work-related injury "if no other credible history can be brought forth to show he had some severe intervening mechanical accident." However, Dr. Loeb later testified he could not determine for certain whether Alexander's work-related injury caused his back condition, changing his opinion after reviewing Tennessee prison records predating Alexander's injury revealing Alexander provided a history of having "crushed disks," and the testimony of lay witnesses who said Alexander

used a cane prior to his work-related injury. Acknowledging Dr. Loeb “retreated considerably” from his prior opinion, the ALJ was nevertheless persuaded by the opinions expressed in Dr. Loeb’s original report. The ALJ gave no weight to the deposition testimony, finding there was no medical record documentation of “crushed disks” or a pre-existing back condition.

While we acknowledge Dr. Loeb’s testimony draws into question the credibility of his original opinion, the ALJ has broad discretion to decide questions of causation, and may believe or disbelieve various parts of the evidence. *Dravo Lime Co. v. Eakins*, 156 S.W.3d 283, 289 (Ky. 2003); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). We hold the ALJ properly exercised his discretion in crediting Dr. Loeb’s original report and finding his deposition testimony to be less credible because it was based on an unsupported medical history.

Moreover, contrary to Ham Broadcasting’s assertion, the ALJ did not exclusively rely on Dr. Loeb’s report to find causation. In addition to Dr. Loeb’s opinion, the ALJ was persuaded by the lay testimony of Alexander and Owens regarding the work-related accident, and the medical opinions of Dr. Huffnagle and nurse practitioner James. The ALJ found Dr. Huffnagle’s opinion credible, which explained how the insidious onset of Alexander’s injury was typical of the course of an annular tear. Even excluding Dr. Loeb’s opinion, we find the lay testimony and opinions of Dr. Huffnagle and nurse practitioner James constitute substantial

evidence sufficient to support the ALJ's opinion. Therefore, we find the ALJ's finding of causation supported by substantial evidence.

For the foregoing reasons, the opinion and order of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Samuel J. Bach
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BRIEF FOR APPELLEE:

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