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Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000960-WC

VOITH INDUSTRIAL SERVICES, INC. APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD ACTION NO. 2013-87986

MICHAEL CHAPMAN;
HON. WILLIAM RUDLOFF,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, THOMPSON, AND VANMETER, JUDGES.

MAZE, JUDGE: Appellant, Voith Industrial Services, Inc. (hereinafter "Voith"), petitions for the review of a determination of the Workers' Compensation Board ("Board") affirming the decision of an Administrative Law Judge (ALJ).

Specifically, Voith argues that the ALJ improperly permitted Appellee, Michael Chapman, to introduce a supplementary medical report as rebuttal evidence and that the record lacked substantial evidence concerning the causation of Chapman's injuries and the conclusion that he was permanently disabled. Our review of the record reveals no error in the ALJ's or the Board's decisions. Hence, we affirm.

Background

Prior to his employment with Voith, Chapman served in the United States Army, and later held several jobs, including carpet cleaner, maintenance worker, and janitor. During this time, Chapman sustained injuries in several car accidents. In 1986, a car accident injured his lower back. An accident in 2000 left him with symptoms in his neck which he experienced again six months later after another minor accident. Chapman sought medical treatment for the symptoms in his neck until 2004. Chapman testified that he was able to work between 2004 and 2013 "without any problem at all" and without medical treatment.

Chapman began work with Voith in 2008. On, April 1, 2013, while on duty collecting, breaking down, and baling cardboard boxes, Chapman's supervisor picked him up in a golf cart to take him to another part of the facility. Before Chapman was completely seated inside the golf cart, his supervisor accelerated the golf cart, throwing Chapman back in his seat. According to Chapman, he did not immediately experience pain or mention any symptoms to his supervisor. He began feeling pain in his back approximately twenty minutes after the incident. Chapman sought medical attention resulting in restrictions upon his

ability to lift more than five pounds or stand for a prolonged period of time. He never returned to work prior to his termination on June 3, 2013.

On May 15, 2013, Chapman filed a Form 101 Application for Resolution of Injury Claim, asserting that he suffered pain and injury to his neck and back as a result of the April 1 incident. Chapman disclosed that, as a result of his injury, he received medical treatment from Baptist East Hospital and a chiropractor with whom he consulted in treating his prior back and neck issues.

For purposes of the workers' compensation claim, two medical experts evaluated Chapman and filed reports with the ALJ. Dr. Warren Bilkey submitted his report on June 18, 2013. This report concluded, *inter alia*, that Chapman suffered from a cervical and lumbar strain that was the result of the work-related incident; that it was "unclear" whether Chapman's prior injuries were active at the time of the April 2013 incident; that Chapman was not yet at maximum medical improvement ("MMI") and would need up to six months to reach MMI; and that Chapman had an eleven percent total permanent partial impairment (six percent whole person impairment for his neck injury and a five percent whole person impairment for his back injury). Dr. Bilkey concluded his report by stating, "since there is a possibility of a prior active impairment … due to [Chapman's] prior injuries, there may be a need to carry out a permanent impairment rating according to the Range of Motion method."

Dr. Ellen Ballard also evaluated Chapman. In her report filed September 5, 2013, Dr. Ballard noted "some degenerative changes" in Chapman's

spine but otherwise diagnosed Chapman merely as having a history of chronic neck and back pain and of motor vehicle accidents. She further concluded that Chapman was at full MMI; that his conditions were not the result of the April 1 incident; that he had a zero percent impairment from that incident; that Chapman could return to work, even if it was sedentary duty only; and that Chapman had "a pre-existing, active and permanent condition" as a result of his prior accidents.

At the October 23, 2013 final hearing, the ALJ heard testimony from Chapman and his supervisor. He also entered the medical experts' reports and Chapman's medical records into the record. Near the end of the hearing, over Voith's objection, the ALJ allowed Chapman to submit a supplemental report of Dr. Bilkey as rebuttal evidence. This report came in the form of a four-question questionnaire dated October 21, 2013 and which concluded that Dr. Bilkey's June 18 diagnosis and impairment rating had not changed; Chapman had now reached MMI; and Chapman was physically incapable of returning to his prior work. After admitting the supplemental report, the ALJ offered Voith additional time to file a response. To this, counsel maintained his objection, but stated, "Judge, I think we're fine with this. I mean, I do address a little different argument, but I think we're fine with this. I've addressed it in the brief."

Following the hearing, the ALJ awarded Chapman benefits, finding that Chapman did not have an active, pre-existing condition at the time of the April 1, 2013 incident. The ALJ further found that Chapman sustained an eleven percent

whole person impairment and was entitled to permanent disability. Voith appealed the ALJ's decision to the Board, which affirmed. This appeal follows.

Analysis

Voith argues that the ALJ abused his discretion in permitting Chapman to file a supplemental medical report as rebuttal evidence. Voith also argues that the evidence of record was insufficient to support a finding that Chapman was permanently impaired. We address both arguments in turn.

I. Dr. Bilkey's Medical Testimony

Our Supreme Court has previously held, in the context of a workers' compensation case, that a ruling on the admissibility of expert testimony is subject to the same abuse of discretion standard that applies to a ruling on any other evidentiary matter. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004) (citing to *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 578 (Ky. 2000)). Hence, we review the ALJ's decision concerning the admissibility of Dr. Bilkey's supplemental medical report for an abuse of discretion.

A. The Supplemental Report as Rebuttal Evidence

Voith argues that, "as a matter of fundamental fairness," the ALJ should have refused to admit or consider Dr. Bilkey's supplemental medical report as rebuttal evidence. It further contends that the ALJ should not have admitted the report at the close of proof and before the parties made their final position statements. We observe no error or resulting prejudice.

As the trier of fact, the ALJ is the gatekeeper and the arbiter of the evidence, both procedurally and substantively; and he has the authority to control the taking and presentation of proof. *See Dravo Lime Co. Inc. v. Eakins*, 156 S.W.3d 283 (Ky. 2005). "[D]eviation from the order of proof before administrative boards and before a court when a jury is not involved [is] not prejudicial." *Estill County Farm & Home Supply Co. v. Palmer*, 416 S.W.2d 752, 754 (Ky. 1967) (citations omitted). Rather, in workers' compensation and other administrative proceedings, the ALJ is not required to follow strict technical rules of common law procedure, *id*., and the rules of evidence are relaxed. *Perkins v. Stewart*, 799 S.W.2d 48, 51 (Ky. App. 1990).

In addition to these well-established precepts of administrative discretion and procedure, we also must look to the purpose of the evidence in question. *See Ajax Coal Co. v. Collins*, 106 S.W.2d 617, 618-19 (Ky. 1937). As Kentucky's highest court observed in *Collins*, "rebuttal evidence is not confined to proving or disproving facts testified to by the witnesses on the other side, but that is [nonetheless] rebuttal evidence which tends to counteract or overcome the legal effect of the evidence for the other side." *Id*.

Dr. Bilkey's brief supplemental report served the above purposes. The report updated or affirmed for the fact-finder Dr. Bilkey's assessment of Chapman's injury, its relation to his work at Voith, and the likelihood of further improvement. Though Dr. Bilkey's opinions were greatly unchanged, the supplemental report provided his more recent opinions concerning elements which

his initial report addressed but left unresolved – elements crucial to Chapman's claim. With its announcement that neither Dr. Bilkey's diagnosis of Chapman nor the initial eleven percent impairment rating had changed since June of 2013, the supplemental report also served to directly refute Dr. Ballard's conclusion on the record that Chapman was not disabled as a result of the April 2013 incident.

Because it served these purposes, Dr. Bilkey's report was properly admitted as rebuttal evidence, and its admission did not unduly prejudice Voith. Rather, we agree with Voith's assertion at the hearing that the report presented nothing to which it had not had the opportunity to respond. As we state above, the four "yes" and "no" answers in Dr. Bilkey's report constituted little, if any, change in the facts or evidence before the ALJ and only updated or reaffirmed Dr. Bilkey's prior diagnoses and assertions. Therefore, we observe neither error nor prejudice stemming from admission of the supplemental report.

B. The Reliability of the Initial Medical Report

Voith also briefly argues that Dr. Bilkey's conclusion concerning Chapman's degree of permanent impairment was unreliable due to its being, by Dr. Bilkey's own alleged admission, "inconsistent" with American Medical Association (AMA) guidelines. Voith points to the following statement in Dr. Bilkey's June 18 report:

> [Permanent Partial Impairment] is predicated on MMI and in my opinion Mr. Chapman is not at MMI. Should he have access to any further treatment there may be a need to reassess permanent impairment after MMI status is reached. Furthermore, since there is a possibility of a

> prior active impairment affecting Mr. Chapman due to his prior injuries, there may be a need to carry out a permanent impairment rating according to the Range of Motion method.

KRS Chapter 342 defines a claimant's "permanent impairment rating" as the "percentage of whole body impairment caused by the injury or occupational disease as determined by the 'Guides to the Evaluation of Permanent Impairment'[.]" KRS 342.0011(35). This document is the fifth edition of an AMA publication. *See* KRS 342.0011(37)(a). Voith argues that Dr. Bilkey's June 18 report employed the wrong rating method under the *AMA Guides* and that he admitted as much. It also argues that because the supplemental report was "preliminary" and, as such, the ALJ erred in relying upon it. We disagree.

Dr. Bilkey's initial report, and the conclusions within it, complied with the law. Dr. Bilkey's June 18 report listed Chapman's degree of permanent partial impairment rating at eleven percent, and it expressly did so based upon the AMA publication listed in KRS 342.0011, stating, "[a]ccording to the AMA Guides … both the cervical strain and lumbar strain conditions are best estimated as DRE Category II impairments…." This is confirmed in the record and serves to defeat Voith's assertion that Dr. Bilkey admittedly used the incorrect method.

Furthermore, Dr. Bilkey's June 18 conclusions concerning Chapman's permanent partial impairment rating and MMI were indeed preliminary. However, Dr. Bilkey's properly-admitted supplemental report, which stated that Chapman had reached MMI and that his June 18 impairment rating had not changed,

rendered these prior conclusions final. This being the case, we read nothing in Dr. Bilkey's report which admits that his methods or conclusions do not comply with the AMA guidelines or that his conclusions were merely preliminary. Rather, Dr. Bilkey's initial report was both consistent with KRS 342.0011 and final.

II. Sufficiency of the Evidence

When reviewing a decision of the Board, we will affirm absent a finding that the Board misconstrued or overlooked controlling law or so flagrantly erred in evaluating the evidence that gross injustice has occurred. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687–88 (Ky. 1992). To properly review the Board's decision, we are ultimately required to review the ALJ's underlying opinion. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Where the ALJ finds in favor of the employee—who bears the burden of proof—we ask only whether there was "some evidence of substance to support the finding, meaning evidence which would permit [the ALJ] to reasonably find as it did." *Id.* at 643.

In cases such as this one where medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. *Staples, Inc. v. Konvelski*, 56 S.W.3d 412, 416 (Ky. 2001) (citing to *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977)). The mere fact that experts differ on the existence or cause of an injury does not preclude the existence of substantial evidence tending to prove those facts. *See Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62, 64 (Ky. 1970).

Voith contends that the record lacks substantial evidence concerning a causal connection between the April 2013 incident and Chapman's condition, as well as whether Chapman was permanently disabled. Specifically, Voith points to Chapman's prior accidents and to Dr. Ballard's conclusion that Chapman had an active, pre-existing injury as a result of those accidents.

Substantial evidence existed to support the ALJ's conclusions concerning both the causation and extent of Chapman's injury. Though Dr. Ballard concluded that Chapman's symptoms resulted from prior injuries, Dr. Bilkey definitively concluded otherwise in both of his reports. Likewise, while Dr. Ballard assigned a permanent impairment rating of zero percent, Dr. Bilkey set the same rating at eleven percent. In support of his conclusions, Dr. Bilkey cited to Chapman's complaints of pain and records of his treatment following the incident.

Therefore, we cannot agree that Dr. Bilkey's conclusions did not constitute substantial evidence or that Dr. Ballard's were somehow more credible. Rather, the experts' reports merely conflicted on several vital issues – a fact which is common in workers' compensation cases, and which did not preclude the ALJ from concluding that evidence of substance existed in favor of Chapman.

Conclusion

Accordingly, the Opinion and Order of the Board is affirmed.

ALL CONCUR.

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