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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-001119-WC

JOHN BLICKENSTAFF — APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-15-90088

UNITED PARCEL SERVICE, INC.,
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE, AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, and TAYLOR, JUDGES.

LAMBERT, D. JUDGE: John Blickenstaff petitions this Court for review of an administrative decision by the Workers' Compensation Board (hereinafter "the Board"), which dismissed his claim for failure to timely notify his employer of the alleged work-related injury. After having reviewed the record, we find no error and affirm the Board's ruling.

I. FACTUAL AND PROCEDURAL HISTORY

Blickenstaff began working for United Parcel Service, Inc. (hereinafter "UPS") on a part-time basis in June of 2000, and became a full-time employee in November of 2011. He alleges a work-related injury occurred in late September of 2014.[1]

At that time, he performed two different sets of duties in a typical workday. He would clock in at 5:00 P.M. and work until 9:30 P.M. in what is known as the "primary sort out," which involves sorting boxes and ensuring they were placed on the appropriate transfers. These boxes can weigh anywhere between 1-150 pounds After taking an hour meal break, he would go to work at 10:30 P.M. as what he called an "irregular driver," which involved moving boxes from the irregular sort table to a loading door. Boxes were identified as "irregular" during the primary sorting process if they were abnormally heavy, oddly-shaped, or made out of a material other than the standard cardboard. Blickenstaff would continue to do this work until he clocked out at 4:00 A.M.

On September 29, 2014, while performing the duties of the "irregular job," Blickenstaff began experiencing lower back pain. He testified at deposition that he finished his shift and went home, but when the pain persisted after he woke up the next day, he went to see one of his primary care physicians, Dr. Qi Lisa Feng.

[1] Blickenstaff's brief to this Court initially states that he first noticed symptoms of the injury on the workday covering September 29-30, 2014, and elsewhere in the brief he recounts telling a doctor that it occurred on September 22, 2014.

Feng diagnosed Blickenstaff with lower back pain and radiculopathy, took him off work, and prescribed him a muscle relaxer and Ibuprofen. She also ordered him to undergo an MRI on October 2, 2014, and advised him to avoid heavy lifting and bending. Blickenstaff followed up the next day with Dr. Y. Peter Liu, Feng's partner, who after reading the MRI, diagnosed him with lower back pain with right leg pain and paresthesia, likely caused by lumbar strain and radiculopathy. They also recommended physical therapy. Neither doctor specifically mentioned the injury was work-related in either diagnosis, and the billing for these appointments was handled through Blickenstaff's health insurance rather than UPS's workers' compensation coverage.

Deposition testimony of Blickenstaff's supervisors indicated that he took FMLA[2] leave beginning in October of 2014 and did not return to work until late November. In his application for leave, Blickenstaff only noted that he requested leave for "my own medical condition," and went into no further detail.

The record also indicates that Blickenstaff sought treatment from Dr. Joseph Zerga on November 3, 2014. Zerga took a history from Blickenstaff, in which Blickenstaff indicated he suffered a specific injury at work on September 22, 2014, but did not report it. Zerga opined that the proximate cause of Blickenstaff's symptoms was a single injury event occurring on September 22, 2014.

[2] Family Medical Leave Act, 29 U.S.C.A. § 2601 *et seq.*

Blickenstaff filed a claim for workers' compensation benefits on June 1, 2015. Blickenstaff testified in a deposition on August 30, 2015, and again at the hearing on the petition before an Administrative Law Judge ("ALJ") on November 18, 2015. The ALJ reviewed the record, and recited the evidence presented in his opinion, ultimately reaching the conclusion that the injury was not a cumulative trauma injury, but a specific traumatic injury, and dismissed Blickenstaff's claim based on Blickenstaff's failure to give UPS due and timely notice as required under KRS 342.185. Blickenstaff appealed to the Board, which affirmed.

Blickenstaff then filed the instant petition before this Court. He contends that the ALJ exceeded his authority in determining the injury was a specific injury rather than a repetitive stress injury because the issue was not contested. Building on that argument, Blickenstaff contends that the ALJ erred in finding that he had failed to provide the required notice to UPS for his repetitive stress injury.

II. ANALYSIS

A. STANDARD OF REVIEW

"On appeal, our standard of review of a decision of the Workers' Compensation Board 'is to correct the Board only 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.

1982). The claimant bears the burden of proof, and thus also the risk of non-persuasion, in a workers' compensation claim. *Id.* (citing *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App 1984)).

The statute governing workers' compensation claims designates the ALJ as the fact-finder for evaluating claims. KRS 342.285(1). As such, the ALJ holds "the sole discretion to determine the character, quality, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009). An ALJ is entitled to believe or disbelieve all or parts of the evidence presented for review. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). The Board must refrain from "substitut[ing] its judgment for that of the [ALJ] as to the weight of evidence in questions of fact[.]" *Bowerman* at 866 (quoting *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 441 (Ky. App. 1982).

The role of this Court is not to "second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion." *Bowerman*, at 866 (citing *Medley v. Bd. of Educ., Shelby County*, 168 S.W.3d 398, 406 (Ky.App. 2004)). "If the reviewing court concludes the rule of law was correctly applied to facts supported by substantial evidence, the final order of the agency must be affirmed." *Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238, 246 (Ky. 2012) (citing *Brown Hotel Co. v. Edwards*, 365 S.W.2d 299 (Ky. 1962)).

B. WHETHER THE ALJ AND THE BOARD ACTED WITHIN THEIR DISCRETION REGARDING THE FACTUAL FINDINGS

Blickenstaff argues that the ALJ's unauthorized factual finding precipitated an erroneous legal conclusion. The precedents cited above entitle the ALJ to make findings based solely on the ALJ's own interpretation of the evidence before it.

The ALJ began by noting the parties had made certain stipulations, including that "[t]hey agreed the plaintiff alleges a work injury occurring on or about October 1, 2014. (This date was amended by the plaintiff to September 29, 2014.)"

The ALJ's opinion included a thorough summary of both lay and medical evidence presented in the record, and found Blickenstaff's position less credible. The ALJ pointed to inconsistencies between his deposition testimony and his hearing testimony, and the fact that his contention that the injury was the result of cumulative or repetitive trauma was refuted in no uncertain terms by the statements of Zerga. Even Blickenstaff's own argument undercut his position. He noted in his brief that he "had always had occasion[al] back pain, but nothing requiring medical attention prior to September 22, 2014[,] when he was at work lifting an irregular box."

The ALJ clearly believed Zerga over Blickenstaff, and, as the fact-finder, the ALJ is entitled to believe or disbelieve all or parts of any testimony.

Caudill, supra. The Board found no abuse of discretion in the ALJ's factual findings. Nor does this Court.

C. WHETHER THE ALJ APPROPRIATELY FOUND THAT BLICKENSTAFF FAILED TO PROVIDE ADEQUATE NOTICE TO UPS

KRS 342.185 places the responsibility on the claimant to give the employer notice of a work-related injury "as soon as practicable after the happening thereof," and KRS 342.190 requires that notice be made in writing.

Though the injury occurred in late September or early October of 2014, Blickenstaff failed to provide notice to UPS of the injury until March 23, 2015. This failure becomes particularly egregious in light of the fact that Blickenstaff had not only been trained on the proper procedures for claims relating to workplace injuries, but he had also filed four previous claims for workers' compensation benefits unrelated to the instant one.

The Kentucky Supreme Court noted in *Newberg v. Slone*, 846 S.W.2d 694 (Ky. 1992), that "[i]f there is a delay in giving notice, the burden is on the claimant to show that it was not practicable to give notice sooner." *Newberg* at 700 (citing *T.W. Samuels Distillery Co. v. Houck*, 176 S.W.2d 890 (Ky. 1943); *Buckles v. Kroger Grocery & Baking Co.*, 134 S.W.2d 221 (Ky. 1939)). Additionally, "while there is no specific time frame for satisfying the notice requirement in injury… cases, we believe the discretion for making the determination of whether it was given 'as soon as practicable' lies properly with the ALJ." *Newberg* at 699.

In the instant case, Blickenstaff argued that, despite the medical evidence indicating the contrary, his injury was the result of cumulative trauma and the notice requirement differs from the one on which the ALJ relied. This Court's conclusion as to the ALJ's findings on the nature of the injuries obviate Blickenstaff's arguments, and we conclude that the ALJ relied on the proper authorities in reaching his conclusion.

III. CONCLUSION

Having reviewed the record, this Court concludes that the ALJ committed no error or abuse of discretion. Consequently, we also conclude that the Board acted appropriately in affirming the ALJ's ruling. Therefore, we affirm the Board's opinion affirming the ALJ's dismissal of Blickenstaff's claim.

ALL CONCUR.

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