

RENDERED: OCTOBER 11, 2019; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2018-CA-001868-WC

ARCHIE BLACKBURN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-15-62517

MARTIN COUNTY BOARD OF  
EDUCATION; BAL K. BANSAL, M.D.;  
CARDINAL HILL HOSPITAL;  
HONORABLE CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE;  
AND KENTUCKY WORKERS'  
COMPENSATION BOARD

APPELLEES

AND

NO. 2018-CA-001872-WC

MARTIN COUNTY BOARD  
OF EDUCATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-15-62517

ARCHIE BLACKBURN; DR. BAL  
BANSAL; CARDINAL HILL HOSPITAL;  
HONORABLE CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE;  
AND KENTUCKY WORKERS'  
COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: DIXON, SPALDING, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Archie Blackburn and Martin County Board of Education bring these petitions (2018-CA-001868-WC and 2018-CA-001872-WC, respectively) from a November 16, 2018, Opinion of the Workers' Compensation Board affirming the Administrative Law Judge's (ALJ) award of permanent partial disability benefits to Blackburn. We affirm.

Blackburn was employed as an electrician and maintenance worker with the Martin County Board of Education (Board of Education). On October 30, 2015, Blackburn was injured while working at the Eden Elementary Sewer Plant. Blackburn was discovered lying across the driver's seat in his motor vehicle and was unresponsive. It was noted that Blackburn's right arm had scratches and abrasions, and there was dried blood in his right ear. Blackburn possessed a limited memory of the events leading to his injury. He testified that he

remembered hearing a noise while at the sewer plant and believed a belt in a motor was in need of repair. While attempting to effectuate repairs, he believed that he was standing on a grate that broke causing him to fall. During transport to the Emergency Room by EMS, it was noted that Blackburn's right side would shake and tremor. At the time of the incident, a Glasgow Coma Test was performed on Blackburn, and he scored 10, indicating moderate brain injury.

Blackburn filed a claim for workers' compensation benefits. He claimed to have sustained a traumatic brain injury and a cervical spine injury. Blackburn asserted that he experienced profound memory loss, weakness in his right arm and leg, tremor in his right hand, confusion, difficulty with speech, headaches, and balance issues. The Board of Education denied that Blackburn suffered a compensable work-related injury and maintained that he was malingering.

On May 21, 2018, the ALJ rendered an Opinion, Award, and Order (opinion). Therein, the ALJ found that Blackburn suffered a work-related head injury that resulted in permanent partial disability. The ALJ assigned a 24-percent impairment rating. Also, the ALJ found that Blackburn did not suffer a compensable work-related injury to his cervical spine. Both Blackburn and the Board of Education sought review with the Workers' Compensation Board

(Board). By Opinion entered November 16, 2018, the Board affirmed the ALJ's opinion. These petitions follow.

To begin, our review of the Board's opinion is limited. We only reverse the Board's opinion when "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." *W. Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). In reviewing the Board's opinion, we necessarily look to the ALJ's opinion. Where the claimant is successful before the ALJ, the findings of fact of the ALJ will be upheld if substantial evidence supports same. However, where claimant is unsuccessful, the evidence must compel a finding in claimant's favor. We shall initially address Appeal No. 2018-CA-001868-WC and then Appeal No. 2018-CA-001872-WC.

APPEAL NO. 2018-CA-001868-WC

Blackburn contends the Board erred by failing to reverse the ALJ's opinion regarding his cervical spine injury. Blackburn maintains that Dr. Bal K. Bansal opined that he suffered a work-related cervical spine injury and assigned a 5-percent impairment rating. Blackburn alleges that Dr. Bansal's opinion upon the work-related cervical spine injury was uncontroverted, and the ALJ erred by failing to adopt same.

The Board rejected Blackburn's contention. It noted that Dr. Joseph L. Zerga reviewed Dr. Bansal's reports and opinions. And, Dr. Zerga concluded that Blackburn did not sustain a work-related compensable injury. The ALJ possesses the sole authority to weigh evidence and to determine the credibility of a witness's testimony. *Ford Motor Co. v. Jobe*, 544 S.W.3d 628, 631 (Ky. 2018). Here, the ALJ rejected Dr. Bansal's opinion concerning the cervical spine injury. In so doing, the ALJ properly utilized his discretion to weigh evidence. Stated simply, the evidence does not compel a finding in favor of Blackburn. Therefore, we conclude that the Board properly affirmed the ALJ's finding that Blackburn did not suffer a compensable work-related injury to his cervical spine.

APPEAL NO. 2018-CA-001872-WC

The Board of Education asserts that the Board erred by failing to reverse the ALJ as the ALJ failed to consider all the evidence. The Board particularly maintains that the ALJ did not consider a surveillance video of Blackburn prior to the May 21, 2018, opinion. The Board of Education argues that the surveillance video demonstrates that Blackburn was malingering. The Board of Education believes that the ALJ failed to consider the surveillance video because the ALJ made no mention of it in the May 21, 2018, opinion.

As pointed out by the Board, the Board of Education purely assumes that the surveillance video was not considered by the ALJ prior to the May 21,

2018, opinion. And, upon the Board of Education's motion to reconsider, the ALJ specifically stated "I did review the video surveillance. I simply didn't find it noteworthy or persuasive, beyond the medical evidence." June 11, 2018, Order at 1. Thus, we agree with the Board that no error occurred.

The Board of Education next maintains that the evidence does not support the ALJ's finding that Blackburn suffered a work-related traumatic head injury and that the ALJ failed to make sufficient findings of fact to support its award. For the following reasons, we disagree.

There was substantial evidence of a probative value to support the ALJ's finding that Blackburn suffered a work-related traumatic head injury. While the evidence was conflicting, the ALJ found the opinion of Dr. Bansal to be persuasive. Dr. Bansal diagnosed conversion disorder secondary to traumatic brain injury. Dr. Bansal found that Blackburn suffered weakness in his right leg and arm, a tremor in his right hand, and decreased pinprick sensitivity in all extremities. Dr. Bansal also observed that Blackburn was confused, frightened, and suffered from memory issues. The ALJ also cited to the fact that "when [Blackburn] was first found by EMS [he] had some physical injuries consistent with falling, including blood in his ear." ALJ opinion at 13. The opinion of Dr. Bansal constitutes substantial evidence of a probative value to support the ALJ's finding that Blackburn suffered a work-related traumatic head injury.

As to the sufficiency of the findings of fact, the ALJ summarized the conflicting evidence and stated that he relied upon the medical opinions of Dr. Bansal and Dr. Bobby Miller that Blackburn suffered a work-related head injury. The ALJ also cited to the EMS report that Blackburn was discovered unresponsive and had dried blood in his ear to support his finding of a work-related head injury. In short, the ALJ set forth the conflicting evidence, weighed the evidence, and found persuasive the opinions of Dr. Bansal and Dr. Miller. Hence, the ALJ provided sufficient findings of fact. *See Arnold v. Toyota Motor Mfg.*, 375 S.W.3d 56, 61-62 (Ky. 2012). Accordingly, we are unable to conclude that the Board “overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *W. Baptist Hospital*, 827 S.W.2d at 687-88.

We view any remaining contention of error as moot or without merit.

The Opinion of the Workers’ Compensation Board is affirmed in Appeal Nos. 2018-CA-001868-WC and 2018-CA-001872-WC.

DIXON, JUDGE, CONCURS.

SPALDING, JUDGE, CONCURS IN PART AND DISSENTS IN PART.

SPALDING, JUDGE, CONCURRING IN PART AND DISSENTING IN PART: I respectfully dissent. I agree that the Workers’

Compensation Board did not err in denying Mr. Blackburn's appeal and would affirm that decision. However, I would remand the matter to the ALJ for further findings of fact in regard to Mr. Blackburn's claim.

In its petition for reconsideration, Martin County asked for additional specific findings of fact with sufficient analysis to support the ultimate opinion in this case, that Mr. Blackburn was entitled to benefits. First, Martin County requested specific findings supporting the ALJ's conclusion that Blackburn could have sustained a work-related brain injury and, at the same time, be consciously malingering. Second, Martin County requested a specific finding indicating what objective medical evidence supported the ALJ's conclusion Blackburn suffered a work-related brain injury in light of the findings of malingering and objective testing results which were well below expected clinical results. Third, Martin County requested a specific finding as to the exact nature of the brain injury Blackburn was found to have sustained in the work-related accident. And fourth, Martin County asked the ALJ to make a specific finding as to whether Blackburn had or had not been electrocuted. The ALJ did not grant the petition on these issues nor did the Board agree with Martin County that it should have.

I believe that Martin County's argument is well-taken as to the second, third, and fourth requested findings. In *Kentland Elkhorn Coal Corp. v. Yates*, 743 S.W.2d 47 (Ky. App. 1988), this Court made clear that when the



question of medical disability is sharply disputed, it is incumbent upon the ALJ as factfinder to set forth a specific factual basis for its finding that claimant does, in fact, suffer from the injury alleged, holding that “litigants should have the benefit of knowing the factual basis for the Board's determination.” *Id.* at 50. I agree with Martin County that the opinion and award in this case does not afford it that benefit.

In my view, at a minimum, Martin County was entitled to know if the ALJ concluded that Blackburn’s injury was the result of electrocution or whether his injury was the result of a fall. Although the medical reports appear to have based their conclusions on the assumption Blackburn sustained an electric shock, the objective evidence indicated that the electricity to the pump had been shut off and the belt disengaged from the wheel at the time Blackburn was found unconscious. The factual basis for the assumption of electrocution is not clear. Ascertaining the cause of Blackburn’s injury is essential to determining what proof can be relied upon in assessing his claim for benefits. Likewise, I believe the employer is entitled to know exactly what Mr. Blackburn’s brain injury is and what is the objective medical evidence to support that finding.

I believe Martin County is entitled to a finding as to what was the proximate cause of Blackburn’s injury pursuant to the dictates of KRS 342.0011(1). Specifically, did Blackburn suffer a fall and a head injury, was he

electrocuted, or is it unknown? If he was electrocuted, the medical proof available to Blackburn is much more extensive as to the existence of a work-related brain injury than if he was not electrocuted. Further, I believe the employer is entitled to a finding as to the exact nature of the brain injury Blackburn sustained. Finally, I believe Martin County is entitled to specific findings as to the objective medical proof supporting the conclusion that the incident at work was the proximate cause of Blackburn's injury beyond his complaints of symptoms. I would remand the matter to the ALJ for those findings.

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