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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2019-CA-001031-WC

PILKINGTON NORTH AMERICA, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-02169

CLYDE LARRY BRYANT;
HONORABLE BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: ACREE, COMBS, AND MAZE, JUDGES.

MAZE, JUDGE: Pilkington North America, Inc., appeals from an opinion of the
Workers' Compensation Board affirming an award of permanent partial disability

and medical benefits to appellee Clyde Bryant stemming from his occupational hearing loss. We affirm.

The hearing loss claim at issue in this appeal is one of three claims Bryant lodged against Pilkington in December 2017. The other claims were not addressed by the Board and are not at issue here. Bryant worked for Pilkington from 2001 until December 2016, as a forklift operator for the first eight years and then as a glass inspector. A glass inspector checks glass for defects and then packs the glass. Because his work environment was noisy due to blast heads which are used to cool the glass, Bryant testified that he wore hearing protection and underwent periodic hearing tests. He stated that he experienced hearing difficulty during the last eighteen months to two years that he worked at the Pilkington plant and described bilateral hearing problems with his left ear being worse than his right. Bryant also stated that he was first informed that he suffered from noise induced hearing loss by Beltone Hearing Aid Center sometime in 2017.

Pilkington initially moved to dismiss the hearing loss claim and for a protective order to prohibit the university medical evaluations prescribed by KRS¹ 342.315 on the basis that Bryant's hearing loss claim failed to satisfy 803 KAR² 25:010 section 7(1)(d)2. That section requires an application for adjustment of

¹ Kentucky Revised Statute.

² Kentucky Administrative Regulation.

claim to be supported by “[a] medical opinion establishing a causal relationship between the work-related events or the medical condition that is the subject of the claim[.]” Pilkington also insisted that 803 KAR 25:010 section 10(4) requires all medical reports to include a statement of the qualifications of the person making the report and alleged that the unauthenticated audiometry testimony report which Bryant appended to his claim failed to satisfy either requirement, mandating dismissal of the hearing loss claim.

The administrative law judge (ALJ) thereafter entered an order passing Pilkington’s motion to dismiss and granting Bryant “30 days, from this Order’s date, to file medical causation records and/or a report into evidence.” The order stated that should Bryant fail to comply, he would be required to show cause why his claim should not be dismissed. Within the 30-day period, Bryant filed a letter signed by Tony Sammons of Beltone Hearing Aid Center stating that audiometry testing previously performed on Bryant demonstrated hearing loss “consistent with noise induced hearing loss.” On the basis of this letter, the ALJ entered an order finding Bryant had satisfied the requirements of 803 KAR 25:010 section 7(1)(d)2, as well as the ALJ’s prior order, and thus denied Pilkington’s motion to dismiss.

Pilkington then moved to reconsider the order denying its motion to dismiss, arguing that Mr. Sammons was a hearing instruments specialist apprentice

and was thus not qualified to give an opinion as to causation. Pilkington argued that Mr. Sammons' letter was insufficient to establish "a causal relationship between the work-related events or the medical condition that is the subject of the claim" as required by 803 KAR 25:010 section 7(1)(d)2. The ALJ agreed, stating that he had misinterpreted Mr. Sammons' qualifications when he previously found Sammons' letter sufficient to establish causation. In a second order finding that Mr. Sammons was not a medical expert qualified to issue causation opinions, the ALJ nevertheless granted Bryant an additional 30 days to comply with his previous order by filing a medical causation report establishing the requisite causal connection between the work-related events and Bryant's hearing loss claim.

Pilkington moved to reconsider the latter order arguing that 803 KAR 25:010 section 7(1)(d)2 does not provide for extensions of time to attempt compliance with the requirement to file a medical causation report and insisting that the ALJ lacked authority to grant Bryant another extension. Pilkington also moved for an assessment of costs for unreasonable proceedings pursuant to KRS 342.310(1). However, within the time allotted by the second thirty-day extension, Bryant filed a questionnaire completed by Dr. Daniel Mongiardo in which he concluded that Bryant was suffering from "[h]igh frequency noise exposure type loss and bilateral low frequency loss likely due to Meniere's syndrome." Dr. Mongiardo stated that his opinions were within the realm of reasonable medical

certainty. Bryant subsequently filed an audiometry test reviewed by Dr. Lisa Koch diagnosing moderate to high frequency hearing loss and recommending the use of binaural hearing aids. In response to these filings, Pilkington renewed its motion for reconsideration and motion for costs.

The ALJ denied Pilkington's motion to reconsider, allowing Bryant's hearing loss claim to proceed on the basis that the filing of Dr. Mongiardo's report within the extended time limit satisfied the requirements of 803 KAR 25:010 section 7(1)(d)2 and the ALJ's previous order. The ALJ emphasized his broad discretion as to the taking and presentation of proof, noting that even if he had dismissed the hearing loss claim for failure to meet the deadline, Bryant could simply refile the claim. The ALJ entered a separate order of the same date denying Pilkington's motion for costs. Thereafter, the parties submitted substantial proof as to the hearing loss claim, including the report of the university medical evaluator, periodic employment hearing tests and audiograms, as well as reports reflecting Bryant's substantial treatment history for uncontrolled type 2 diabetes and coronary bypass surgery. Rehabilitation records subsequent to that surgery indicate that Bryant reported adequate ability to hear.

After a hearing at which Bryant and the plant nurse for Pilkington testified, the ALJ entered an opinion concluding that Bryant had sustained a compensable occupational hearing loss and awarding permanent partial disability

benefits based upon the nine percent impairment rating assessed by the university medical evaluator, enhanced by the three-multiplier set out in KRS 342.730(1)(c)1. The ALJ also awarded future medical expenses related to his work-related hearing loss and made additional findings concerning the sufficiency of Bryant's application for adjustment of claim and Pilkington's request for costs pursuant to KRS 342.310. After the denial of a subsequent petition for reconsideration, Pilkington appealed the ALJ's decision to the Board advancing several arguments concerning arbitrary and capricious conduct in granting Bryant additional time to correct the deficiency in the initial filing of his application for adjustment of claim; in declining to award costs pursuant to KRS 342.310 stemming from Bryant's "unreasonable" disregard of the requirements of 803 KAR 25:010 section 7(1)(d)2 in the initial filing of his claim; and in failing to dismiss the hearing loss claim on the basis of the unrebutted findings of the university evaluator. The Board affirmed the decision of the ALJ in all respects, precipitating this appeal in which Pilkington advances the same the arguments for reversal.

We commence with the familiar standard that our review of decisions of the Workers' Compensation Board is limited to correcting its decisions only upon a finding that "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." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88

(Ky. 1992). We also note that KRS 342.285 designates the ALJ as the finder of fact in workers' compensation cases. In *Greg's Construction v. Keeton*, our Supreme Court observed that while that statute permits an appeal to the Board, it also "provides that the ALJ's decision is 'conclusive and binding as to all questions of fact' and, together with KRS 342.290, prohibits the Board or a reviewing court from substituting its judgment for the ALJ's 'as to the weight of evidence on questions of fact.'" 385 S.W.3d 420, 424 (Ky. 2012). These principles guide our review of Pilkington's contentions.

Pilkington first insists that the ALJ exceeded his authority and acted arbitrarily and capriciously in failing to give presumptive weight to the un rebutted conclusion of the university evaluator. In resolving Bryant's claim, the ALJ relied upon the presumption regarding hearing loss claims set out in KRS 342.7305(4):

When audiograms and other testing reveal a pattern of hearing loss compatible with that caused by hazardous noise exposure and the employee demonstrates repetitive exposure to hazardous noise in the workplace, there shall be a rebuttable presumption that the hearing impairment is an injury covered by this chapter, and the employer with whom the employee was last injuriously exposed to hazardous noise for a minimum duration of one (1) year of employment shall be exclusively liable for benefits.

As the ALJ noted, the Supreme Court settled any question as to the statute's application in *AK Steel Corporation v. Johnston*:

Although KRS 342.0011(1) generally defines a compensable injury, KRS 342.7305 is a specific and

comprehensive provision addressing claims for traumatic hearing loss; therefore, it may be viewed as controlling such claims. *Boyd v. C & H Transportation*, 902 S.W.2d 823 (Ky. 1995). Unlike KRS 342.0011(1), KRS 342.7305(4) **makes no reference to the natural aging process and does not require direct proof of causation. Instead, it provides a rebuttable presumption that the worker's impairment due to hearing loss is an injury upon proof of a pattern of hearing loss that is compatible with long-term hazardous noise exposure.**

153 S.W.3d 837, 841 (Ky. 2005) (emphasis added). After reviewing the medical evidence and testimony adduced at the hearing, the ALJ concluded that Bryant had satisfied his burden by proving: 1) that he suffered hearing loss impairment; 2) that audiogram and other testing showed hearing loss compatible with hazardous noise exposure; and 3) that his employment at Pilkington repetitively exposed him to hazardous noises.

The introduction of both the audiometric testing results and the opinion of Dr. Mongiardo constitute sufficient evidence under the statute. Nevertheless, Pilkington insists that the ALJ impermissibly failed to accord the opinion of the university evaluator presumptive weight as required by KRS 342.315(2). We disagree based upon the holding of the Supreme Court in *Magic Coal Company v. Fox*:

The term “presumptive weight” is one which the parties concede is not found in prior Kentucky law and one which is not defined in Chapter 342. KRS 342.315(2) does not evince a legislative intent for the clinical

findings and opinions of a university evaluator to be conclusive. It anticipates that the opponent of a university evaluator's report may introduce countervailing evidence which will overcome the report; furthermore, **KRS 342.315(2) does not prohibit the fact-finder from rejecting a finding or opinion of a university evaluator but requires only that the reasons for doing so must be specifically stated.** In the absence of a definition of the term "presumptive weight," either by prior judicial decision or by statute, we conclude that the legislature intended to create a rebuttable presumption.

19 S.W.3d 88, 94-95 (Ky. 2000)(emphasis added). *Magic Coal* emphasizes that "KRS 342.315(2) does not restrict the authority of the fact-finder to weigh the conflicting medical evidence"; rather it requires only that an ALJ articulate a reasonable basis for disregarding the opinion of the university evaluator. *Id.* at 97.

Here, Dr. Casey Roof, the university evaluator determined that Bryant suffers hearing loss warranting a 9% whole person impairment rating. However, as the ALJ stressed, Dr. Roof failed to answer the question of whether audiograms and other testing "establish a hearing loss compatible with that caused by hazardous noise exposure in the workplace." Despite Dr. Roof's statement that the "[r]esults to acoustic reflexes do not match results of the audiogram at 4000 hertz in the left ear and making validity of testing under concern," the ALJ specifically found that Dr. Roof did not address causation one way or another and therefore did not express an opinion to which presumptive weight could be accorded. The ALJ also determined that Dr. Roof did not specifically opine that the tests were invalid.

Like the Board, we are convinced that the ALJ's award follows precisely the statutory mandate as explained in *Magic Coal*. He evaluated the report of the university evaluator and found it to be less convincing than the opinion of Dr. Mongiardo, setting out in detail a reasonable basis for his decision. It is well-settled that in cases in which physicians "express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006). The same is true with regard to causation.

Next, we turn to Pilkington's complaint that the ALJ abused his discretion in granting Bryant two extensions of time in which to correct a deficiency in his application for adjustment of claim. Abuse of discretion "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." *Kentucky National Park Comm'n ex rel. Commonwealth v. Russell*, 301 Ky. 187, 193, 191 S.W.2d 214, 217 (1945). Nothing in the ALJ's decision to afford Bryant additional to submit a compliant causation report rises to the level of abuse of discretion.

We agree with the Board that an ALJ as trier of fact is "the gatekeeper and arbiter of the record both procedurally and substantively." The breadth of the

ALJ's authority in this regard was clearly expressed in *Commonwealth, Cabinet for Human Resources v. Riley*:

The Board was correct in recognizing the sufficiency of Riley's initial correspondence in tolling the statute of limitations, so long as she complied with the additional regulatory requirements, after the fact, within a reasonable time.

921 S.W.2d 616, 617 (Ky. 1996). The rationale of *Riley* was further explained in *McCreary County Board of Education v. Begley*:

The decision [*Riley*] clearly implied, therefore, that because the Board had the authority to implement regulations, it had the authority to grant a second 10-day extension if a resubmitted but deficient Form 101 was received within the applicable 10-day period. Although our use of the words "within a reasonable time" might be confusing, the fact remains that we reinstated the Board's decision after concluding that it was authorized to implement and enforce regulations.

89 S.W.3d 417, 420-21 (Ky. 2002). So it is in this case. Inherent in the Board's authority to enact regulations is the authority to grant reasonable extensions to comply with those regulations. Bryant's attempted compliance with each of the ALJ's orders was timely and appeared to be in good faith. We find no error in the refusal to dismiss Bryant's case for failure to comply with 803 KAR 25:010 section 7(1)(d)2.

Finally, Pilkington argues that it is entitled to sanctions pursuant to KRS 342.310(1):

If any administrative law judge, the board, or any court before whom any proceedings are brought under this chapter determines that **such proceedings have been brought, prosecuted, or defended without reasonable ground, he or it may assess the whole cost of the proceedings** which shall include actual expenses but not be limited to the following: court costs, travel expenses, deposition costs, physician expenses for attendance fees at depositions, attorney fees, and all other out-of-pocket expenses upon the party who has so brought, prosecuted, or defended them.

(Emphasis added.) Because we have determined that the ALJ did not abuse his discretion in granting Bryant a second extension to comply with 803 KAR 25:010 section 7(1)(d)2, and that he acted within his authority concerning causation, there is no basis upon which we can conclude the ALJ acted arbitrarily in refusing to impose sanctions for having brought his claim without reasonable ground. Pilkington was not prejudiced in any way by the extensions of time, nor were its costs in defending substantially increased. Pilkington was not entitled to costs by reason of the granting of reasonable extensions to comply with 803 KAR 25:010 section 7(1)(d)2.

In sum, perceiving no error in the well-reasoned opinion of the Workers' Compensation Board, we affirm its decision in this case.

ALL CONCUR.

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