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Supreme Court of Kentucky

2010-SC-000745-WC

JAMES BAILEY

APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2010-CA-000551-WC
WORKERS' COMPENSATION NO. 06-73615

NORTHPOINT SENIOR SERVICES;
HONORABLE EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) dismissed the claimant's application for benefits having found that he failed to prove a causal relationship between his left shoulder condition and a work-related lifting incident. The Workers' Compensation Board and the Court of Appeals affirmed. Appealing, the claimant maintains that the ALJ made erroneous, incomplete, and inconsistent findings of fact and misapplied the law to the facts.

We affirm. The ALJ related sufficient facts to explain the basis for concluding that the claimant failed to prove his shoulder condition resulted from a work-related event and applied the law correctly when reaching that

conclusion. The evidence did not compel a finding that the September 13, 2006 incident caused or contributed to the shoulder condition for which he sought compensation.

The claimant began working for the defendant-employer on September 1, 2006 as a licensed practical nurse. He testified that he experienced severe pain in his left shoulder while helping co-workers lift an obese patient who had fallen to the floor on September 13, 2006. He stated that he notified the director of nursing; finished his shift; and sought medical treatment with Dr. Micek on September 28, 2006. Dr. Micek put his arm in a sling and ordered an MRI, which revealed a tear in the cartilage.

The claimant continued to work until October 7, 2006 and underwent left shoulder surgery on October 13, 2006. His employer paid temporary total disability (TTD) benefits voluntarily until January 1, 2007 and also paid for the surgery. The claimant returned to work for a temporary nurse agency in December 2007. He stated that he worked 30 hours per week at a long-term care facility when his claim was heard and that the surgery relieved much of his pain although it increased if he overworked or overused the shoulder. He maintained that shoulder pain and weakness prevented him from performing many of the nursing tasks that he performed at the time of his injury and from working as quickly. He also maintained that the accident resulted from the employer's failure to provide a Hoyer lift, a safety violation that entitled him to a 30% increase in benefits.

Although the employer paid some income and medical benefits voluntarily, it later denied the claim. The employer asserted that the claimant did not sustain an “injury” as defined in KRS 342.0011(1) and that he suffered from subacromial bursitis, which was actively disabling at the time of the injury and unrelated to the employment.

When deposed the claimant denied a prior shoulder injury and denied receiving any previous medical treatment for a left shoulder condition. He later acknowledged, however, that he reported left shoulder symptoms to Dr. Micek on August 24, 2006; that Dr. Micek prescribed Voltaren and first diagnosed subacromial bursitis on that date; and that he declined an injection¹ and therapy. He acknowledged that the diagnosis remained the same on September 28, 2006 and stated that he did not know why Dr. Micek failed to record the fact that he attributed his complaints on that date to the recent lifting incident.

The claimant testified that the nature and severity of his shoulder pain changed after the September 2006 incident. He stated that his earlier symptoms involved pain that radiated from his neck into the top of his shoulder, which he attributed to a trapezius muscle strain from the way he sat while using a computer; whereas, his symptoms after the lifting incident involved severe pain in the shoulder joint as well as weakness in the shoulder. He argued that he missed no work and had no restrictions or permanent impairment rating until after the lifting incident.

¹ Contrary to Dr. Micek’s testimony, he stated that the injection was for his ankle.

Dr. Micek's treatment notes indicate that at an August 24, 2006 appointment following ankle surgery, the claimant also complained of intermittent sharp and achy left shoulder pain that was moderate in severity and worse when he moved his arm forward or overhead. Dr. Micek diagnosed a new onset of left shoulder subacromial bursitis for which he prescribed Voltaren. He noted that the claimant declined an injection or therapy regarding the shoulder and then addressed the treatment plan for the ankle condition.

Dr. Micek noted on September 28, 2006 that the claimant continued to work through his symptoms. He reported difficulty lifting his shoulder and constant, moderate to severe, achy-type left shoulder pain upon any range of motion for which Voltaren provided minimal benefit. Dr. Micek diagnosed worsening subacromial bursitis and a possible rotator cuff tear and AC joint inflammation. He noted that the claimant did not want an injection at that time. A subsequent MRI revealed what appeared to be an anterior labrum tear, degenerative changes in the AC joint, and mild subacromial bursitis.

Dr. Micek noted on October 5, 2006 that the claimant related his complaints to "a lifting injury." He reported constant, moderately severe, achy and sharp pain in his shoulder, which "has been going on for 4 to 5 months." Dr. Micek recommended left shoulder arthroscopy to perform an anterior labral repair and subacromial decompression. He testified subsequently that the surgery performed on October 13, 2006 revealed a peripheral tear that needed

to be debrided and cleaned but not repaired. He released the claimant to return to work without restrictions on December 15, 2006.

The claimant returned to Dr. Micek on February 1, 2007, complaining of decreased strength when reaching forward. His pain complaints increased in the following months despite injections, medication, and physical therapy. Dr. Micek noted on May 22, 2007 that an MRI showed some degenerative changes in the AC joint. He diagnosed left shoulder pain with bicep tendonitis and AC joint degeneration. The claimant declined the offered injections and initiated physical therapy. Dr. Micek found him to be at maximum medical improvement on September 27, 2007 and assigned a 5% permanent impairment rating based on limited range of motion. He referred the claimant to a pain clinic in November 2007 for complaints of severe pain with throbbing, grinding, and limited range of left shoulder motion. Dr. Micek testified subsequently that the claimant had symptoms of bursitis before the lifting injury but that the injury might have made the condition worse.

Dr. Goldman performed a utilization review on October 30, 2008. He could not say whether the claimant's current shoulder pain resulted from the September 13, 2006 injury or an intervening injury because the claimant continued to work as a nursing assistant.

Dr. Corbett evaluated the claimant on April 7, 2009 for the employer. He opined that the claimant had subjective complaints of left shoulder pain that were far greater than the objective findings. He noted that the claimant used his left arm considerably more than his subjective complaints would allow and

that there was no evidence of atrophy. Having reviewed the pre- and post-operative MRI studies, he opined that the findings on MRI and arthroscopy probably existed before September 13, 2006 although the degree to which they did was arguable. He assigned a 6% impairment rating based on the clavicle resection performed in October 2006 but stated that the surgery addressed symptoms of severe degenerative acromioclavicular joint disease rather than the September 2006 incident.

The employer argued that the left shoulder condition was not compensable because it existed and was disabling before the September 2006 incident. The issues submitted to the ALJ included causation, pre-existing active impairment/disability, extent and duration of disability, overpayment of TTD, and whether the accident resulted from a safety violation. Having summarized the evidence, the ALJ noted that Dr. Micek's notes from September 28, 2006 failed to mention an incident at work and, when asked whether he thought that a traumatic shoulder injury occurred between the August and September visits, Dr. Micek stated that he did not. He testified that he added the diagnosis of a possible rotator cuff tear on September 28, 2006 because the claimant complained of more weakness in the shoulder. The surgery showed there to be no such tear.

Comparing Dr. Micek's notes from August 24, 2006 and September 28, 2006, the ALJ noted that the claimant "voiced the same complaints on both occasions" and that the physical findings were "the same or nearly the same." Addressing the claimant's testimony, the ALJ acknowledged that an individual

can experience different types of pain and symptoms in the same area of the body and also acknowledged that medical records are sometimes inaccurate and incomplete. Yet, the ALJ found “troubling inconsistencies, oversights and failures to provide information, and an inconsistent pattern of memory” in the testimony, noting that the claimant failed to report the August 2006 shoulder complaints to his employer or its insurance carrier.² He also failed to report the absence of a Hoyer lift at the time of the injury but claimed subsequently that he requested one immediately before the injury occurred. The ALJ concluded that he failed to meet his burden of showing that his shoulder condition resulted from “any work-related event.”

The claimant’s petition for reconsideration asserted that the decision “contained patent errors consisting of incomplete, inconsistent, and/or absent findings of fact” and requested the ALJ to amend the opinion to “correct” them. The ALJ denied the petition, after which the claimant appealed. Having failed to convince the Board or the Court of Appeals, the claimant continues to take issue with the factual findings. He also argues that the evidence compelled findings that he did not suffer from a pre-existing active disability or impairment and that the September 13, 2006 injury was compensable.

² The Form 105 medical history directs the applicant for workers’ compensation benefits to include “all injuries and major illnesses to the date of filing of the claim.” Although the claimant included physicians who provided “general care” since the 1990s, he indicated that he began treatment with Dr. Micek in September 2006. When deposed he denied receiving prior medical treatment for his left shoulder until confronted with Dr. Micek’s August 2006 treatment notes.

I. STANDARD OF REVIEW.

An injured worker bears the burden of proof and risk of non-persuasion before the ALJ with regard to every element of his claim.³ KRS 342.285 designates the ALJ as the finder of fact, whose decision is "conclusive and binding as to all questions of fact." KRS 342.285 gives the ALJ the sole discretion to determine the quality, character, and substance of evidence.⁴ As fact-finder, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof.⁵

KRS 342.285(2) and KRS 342.290 limit administrative and judicial review of an ALJ's decision to determining whether the ALJ "acted without or in excess of his powers;"⁶ whether the decision "was procured by fraud;"⁷ or whether the decision was erroneous as a matter of law.⁸ Legal errors include whether the ALJ misapplied Chapter 342 to the facts; made a clearly erroneous finding of fact; rendered an arbitrary or capricious decision; or committed an abuse of discretion.

³ See *Roark v. Alva Coal Corporation*, 371 S.W.2d 856 (Ky. 1963); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984); *Snawder v. Stice*, 576 S.W.2d 276 (Ky.App. 1979).

⁴ *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985).

⁵ *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

⁶ KRS 342.285(2)(a).

⁷ KRS 342.285(2)(b).

⁸ KRS 342.285(2)(c), (d), and (e). See also *American Beauty Homes Corp. v. Louisville & Jefferson County Planning & Zoning Commission*, 379 S.W.2d 450, 457 (Ky. 1964).

A finding that the party with the burden of proof failed to meet its burden need not be supported by substantial evidence.⁹ A party who fails to meet its burden of proof must show that the unfavorable finding was clearly erroneous because overwhelming favorable evidence compelled a favorable finding, *i.e.*, no reasonable person could have failed to be persuaded by the favorable evidence.¹⁰ Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal.¹¹

II. ANALYSIS.

The claimant asserts that the ALJ misapplied KRS 342.001(1) by focusing on the concept of pre-existing active disability and failing to distinguish whether a work-related traumatic event occurred from whether a work-related harmful change occurred. He argues that the employer conceded the traumatic event occurred and that the ALJ's findings concerning his credibility were immaterial to whether a work-related harmful change occurred. He argues that his failure to mention the absence of a Hoyer lift in the incident and accident investigation reports is irrelevant to his credibility, "since the application of KRS 342.165 is a legal argument exclusively made by counsel." We disagree.

⁹ *Butcher v. Island Creek Coal Co.*, 465 S.W.2d 49 (Ky. 1971).

¹⁰ *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Mosley v. Ford Motor Co.*, 968 S.W.2d 675 (Ky. App. 1998); *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985).

¹¹ *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

KRS 342.0011(1) defines the term “injury” as being a “work-related traumatic event . . . which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.” The ALJ made no finding with respect to pre-existing active disability and nothing indicates that the ALJ focused on the concept. The parties did not dispute that a lifting incident, *i.e.*, traumatic event, occurred on September 13, 2006. Nor did they dispute that harmful changes existed in the claimant’s shoulder. What they disputed was whether the traumatic event caused those changes. The ALJ determined that the claimant failed to meet his burden of proving that it did, and the evidence did not compel a finding to the contrary.

Dr. Micek thought that the condition necessitating surgery probably resulted from “an injury.” The record contained no mention of a traumatic event other than the September 2006 lifting incident, but Dr. Micek’s physical findings concerning the shoulder were essentially the same at the pre-injury visit in August 2006 and the post-injury visit in September 2006. Moreover, he did not think that a traumatic injury occurred between the visits.

The claimant’s credibility had relevance with respect to causation. He based his assertion that the September 2006 incident caused a compensable shoulder condition on his own testimony that his symptoms changed after the incident and affected a different part of his shoulder. He also based it on his testimony that he reported the incident to Dr. Micek on September 28, 2006; on the fact that Dr. Micek noted complaints of increased pain and shoulder

weakness on that date; and on the fact that Dr. Micek diagnosed worsening bursitis and a possible rotator cuff tear based on those complaints.

The ALJ found reasonably that the claimant's statements relating the shoulder condition to the September 13, 2006 incident lacked credibility. As noted by Dr. Corbett, Dr. Micek's August 24, 2006 notes contained a diagnosis of subacromial bursitis and a positive cross-body impingement sign although the claimant claimed subsequently that he reported symptoms emanating from his neck and trapezius muscle. The September 28, 2006 notes contained no mention of an accident or injury, which tended to show that the claimant did not relate the increased symptoms he reported on that date to the lifting incident. Likewise, the October 5, 2006 notes recorded complaints of shoulder pain of four to five months' duration. They referred to a "lifting injury" but contained nothing to connect the symptoms to the claimant's work or the September 2006 incident. Moreover, the claimant's failure to report the absence of a Hoyer lift when completing the incident report and accident investigation report shortly after the injury conflicted with his subsequent testimony that he requested one immediately before the injury occurred.

The claimant complains that the ALJ failed to analyze the evidence concerning pre-existing active disability in order to determine whether the September 2006 lifting incident affected his pre-existing shoulder condition and, thus, was compensable. We note, however, that the evidence would not have supported a favorable finding had the ALJ done so. Although Drs. Micek

and Corbett acknowledged that the lifting incident could have affected the condition, neither of them opined that it probably did so.

The decision of the Court of Appeals is affirmed.

All sitting. All concur.

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