

Commonwealth Of Kentucky

Court of Appeals

NO. 2002-CA-001070-WC

GLEN BOND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-00825

CORBIN, LTD.; WORKERS'
COMPENSATION FUND, SUCCESSOR TO
SPECIAL FUND; HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: JOHNSON AND KNOPF, JUDGES; AND MILLER, SENIOR JUDGE.¹

JOHNSON, JUDGE: Glen Bond has petitioned for review of an
opinion of the Workers' Compensation Board entered on April 24,
2002, which affirmed an opinion and order entered by the
Administrative Law Judge dismissing his claim against Corbin,

¹ Senior Judge John D. Miller sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
KRS 21.580.

Ltd. and the Workers' Compensation Fund for failure to provide due and timely notice of his claim and failure to file his claim within the applicable statute of limitations and statute of repose. Having concluded that the Board neither overlooked or misconstrued controlling statutes or precedent, nor committed an error in assessing the evidence so flagrant as to cause gross injustice,² we affirm.

Bond was born on January 16, 1941, has a tenth grade education, and has no specialized training. He was employed in the clothing manufacturing industry from 1964 through 1995,³ and he began working for Corbin in 1981. Bond was employed by Corbin for 15 years as a mechanic, where he maintained Corbin's manufacturing machines. He cleaned the machines once per week by blowing out the dust which had collected and by sweeping up the dust. Bond testified that he was regularly exposed to hazardous levels of respirable dust, fabric fibers, and chemicals.

Bond filed an application for occupational disability benefits on July 11, 2000. He alleged that he had contracted occupational pneumoconiosis while in Corbin's employ as a result of his exposure to dust, fibers, and chemicals. At a formal hearing on Bond's claim held on February 26, 2001, Bond

² Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

³ Bond was employed by Ralco Industries from 1964 to 1980.

testified that he suspected he had pneumoconiosis and/or industrial asthma, but that no physician had ever diagnosed him as suffering from either. Bond acknowledged that he began having respiratory problems in the early 1980's, but he testified that he only began to experience severe problems approximately two to three months prior to July 2000, when he was informed that one of his lungs required removal. It was at this time that Dr. Maurice Bassali diagnosed Bond with pneumoconiosis.

Based on Bond's claim "that he has contracted not only mixed pneumoconiosis from the breathing of dust as well as fibers used in the manufacturing of clothing, but also has developed chronic obstructive pulmonary disease as well as reactive airway disease from such inhalation," the ALJ found that KRS⁴ 342.316 applied. The ALJ further found that Bond was aware of his condition as early as October 31, 1995, and that his notice to Corbin of July 3, 2000, was not timely under KRS 342.316(2);⁵ that the filing of the application on July 11, 2000,

⁴ Kentucky Revised Statutes.

⁵ KRS 342.316(2) provides:

The procedure with respect to the giving of notice and determination of claims in occupational disease cases and the compensation and medical benefits payable for disability or death due to the disease shall be the same as in cases of accidental injury or death under the general provisions of this chapter, except that notice of claim shall be given to the employer as soon as practicable after the

was outside the three-year statute of limitations at KRS 342.316(4)(a);⁶ and that Bond's last date of injurious exposure was prior to July 11, 1995, which also caused his claim to be barred under the five-year statute of repose at KRS 342.316(4)(a). The ALJ found in part as follows:

[I]n the medical report . . . of October 31, 1995, Dr. Dickerson indicated that he told the Plaintiff that he had chronic obstructive pulmonary disease/reactive airway disease, and felt that dust and lints he encountered at work exacerbated his underlying condition and further opined that the Plaintiff was disabled from physical activity.

Thus, since Bond should have known that he had contracted this occupational disease by at least October 31, 1995, under KRS 342.316(2) his notice was untimely, and under KRS 342.316(4)(a),

employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, or a diagnosis of the disease is first communicated to him, whichever shall first occur.

⁶ KRS 342.316(4)(a) provides, in applicable part, as follows:

The right to compensation under this chapter resulting from an occupational disease shall be forever barred unless a claim is filed with the commissioner within three (3) years after the last injurious exposure to the occupational hazard or after the employee first experiences a distinct manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he has contracted the disease, whichever shall last occur[.] . . . However, the right to compensation for any occupational disease shall be forever barred, unless a claim is filed with the commissioner within five (5) years from the last injurious exposure to the occupational hazard[.]

he should have filed his claim for benefits no later than October 31, 1998. Since Bond's application for benefits was filed on July 11, 2000, it was time-barred.

In determining that Bond's claim was also barred by the statute of repose contained in KRS 342.316(4)(a), the ALJ found:

The Plaintiff testified on cross-examination at the Formal Hearing that he last worked on July 17, 1995 in the shipping room where he was welding and putting up clothing racks.⁷ There has been no testimony, however, that on this particular day the Plaintiff was exposed to dust and fibers as he claimed in his Form 102. The Plaintiff bears the burden on all issues in this claim including the issue of whether or not he was injuriously exposed as of July 17, 1995. There has been no documentation in the record that he was so injuriously exposed as that term is defined by statute on July 17, 1995, and therefore it cannot be said that the Plaintiff has filed his claim within five years of the last date of injurious exposure to the occupational hazard as required by KRS 342.316(4)(a).

Bond appealed the ALJ's dismissal of his application for occupational benefits; however, he moved the Board for abatement of his appeal until the ALJ could rule on his motion to reconsider. In his motion to reconsider, Bond alleged, inter alia, that Dr. Dickerson had never informed him that his condition was work-related and that he had "located and

⁷ In July 1995 Bond took a vacation because the plant was on a two-week shut down; he returned to work on July 17, 1995, and worked for that single day.

discovered new evidence of documents from Dr. Dickerson's office which indicate clearly that his condition was marked in the document by the Dr.'s office that his condition **WAS NOT** work related" [emphasis original]. Bond also alleged that he "was exposed to welding fumes on July 17, 1995, which certainly would contribute to his condition of COPD, pneumoconiosis, etc., which was not limited to cotton fiber dust on the application as amended."

The ALJ denied Bond's motion to reconsider on January 17, 2002, and Bond, once again, appealed. In an opinion entered on April 24, 2002, the Board affirmed the ALJ's opinion and order. This petition for review followed.

The ALJ's order or award "shall be conclusive and binding as to all questions of fact, but either party may . . . appeal to the Workers' Compensation Board for the review of the order or award."⁸ "The board shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact"⁹ The fact-finder has the sole discretion to determine the quality, character, and substance of evidence.¹⁰ The ALJ "may reject any testimony and

⁸ KRS 342.285(1).

⁹ KRS 342.285(2).

¹⁰ Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002) (citing Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985)).

believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof[.]”¹¹ “When the . . . Board reviews the findings of the ALJ, its review is restricted to a determination of whether the factual findings of the trier of fact was ‘clearly erroneous.’”¹²

“Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ’s decision, such evidence is not an adequate basis for reversal on appeal.”¹³ The Board does not have the authority to substitute its judgment for that of the ALJ on issues regarding the weight to be afforded to the evidence involving questions of fact.¹⁴ Decisions rendered by the Board are subject to direct review by this Court.¹⁵ “KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board.”¹⁶

¹¹ Burton, 72 S.W.3d at 929 (citing Caudill v. Maloney’s Discount Stores, Ky., 560 S.W.2d 15, 16 (1977)).

¹² Union Underwear Co. v. Searce, Ky., 896 S.W.2d 7, 9 (1995) (citing Hudson v. Owens, Ky., 439 S.W.2d 565, 568 (1969)).

¹³ Burton, supra at 929 (citing McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974)).

¹⁴ KRS 342.285.

¹⁵ CR 76.25(1).

¹⁶ Burton, supra at 929.

Bond had the burden of proof and the risk of persuading the ALJ to find in his favor.¹⁷ In that Bond was unsuccessful before the ALJ, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor."¹⁸ For the evidence to be compelling, the evidence produced in Bond's favor must be so overwhelming that no reasonable person could reach the conclusion of the ALJ.¹⁹ "The function of further review of the [Board] in the Court of Appeals is to correct the Board only where . . . [we] perceive[] 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."²⁰

Bond claims that pursuant to KRS 342.316(2), he provided Corbin with due and timely notice of his occupational disease on July 3, 2000, shortly after he first learned of his condition. However, a medical note from Dr. Dickerson, dated October 31, 1995, stated:

I think that if he returns to his work place around the dust and lint that is present, I

¹⁷ Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979) (citing Tackett v. Sizemore Mining Co., Ky., 560 S.W.2d 17 (1977); and Caudill, 560 S.W.2d at 15).

¹⁸ Wolf Creek Collieries v. Crum, Ky.App., 673 S.W.2d 735, 736 (1984).

¹⁹ Id.

²⁰ Western Baptist Hospital, 827 S.W.2d at 687-88.

think he may very well end up in the same boat that he was before and he came very close to ending up on a ventilator; he was that bad. He asked me if I thought the dust and lints were responsible for his illness. I told him that yes, certainly dust, lints, molds, mites obviously can increase and exacerbate his underlying condition and he needs to stay away from this as much as possible.

The Board concluded that this evidence from Dr. Dickerson constituted sufficient evidence of substantial probative value to support the ALJ's determination that Bond's notice was untimely. The Board concluded that "the information received by Bond from Dr. Dickerson, as presented to the ALJ, was legally subject to the inference that Bond was reasonably apprised that his respiratory condition was causally linked to his exposure to fumes and dust at Corbin as early as October 1995."²¹ We agree.

In challenging this conclusion, Bond relies upon the affidavit he filed on September 24, 2001, which provided, in pertinent part, as follows:

2. In my personal visits with Dr. Dickerson, in October of 1995, he would not relay to me that my condition was job related. In fact, despite what is written in his report filed herein, he supplied information to the contrary to me. He indicated to me my condition was NOT job related [emphasis original].

3. I have recently discovered

²¹ Citing Jackson v. General Refractories Co., Ky., 581 S.W.2d 10 (1979).

information in a report I received which was supplied and filled out by Dr. Dickerson's office which clearly supports the above statement. As set forth in the document the questions is asked, "Is the condition due to a work related injury or illness?" the answer "NO" is checked. The documents attached hereto to this affidavit, Exhibit "A" is part of the records which came from Dr. Dickerson's office and/or prepared with his cooperation. This statement is consistent with his communications to me when I asked about the relationship to my employment [emphases original].

Thus, Bond claims that Dr. Dickerson did not inform him that his condition was work-related when he was examined in October 1995.

The ALJ, in his opinion and order upon remand, found that "there has been no demonstration to reveal that this was newly discovered or could not have been introduced during the pendency of the original claim during original proof-taking." Furthermore, the ALJ found that even if this evidence had been originally introduced, the record nevertheless revealed that Dr. Dickerson advised Bond that "dust, lints, molds and mites can increase and exacerbate the Plaintiff's underlying condition and that the Plaintiff needed to stay away from this environment as much as possible."²²

²² The ALJ further found "that the Plaintiff has failed in his burden of proving that his breathing impairment and his chronic obstructive pulmonary disease were caused by the Plaintiff's exposure to dusts and fibers while at Corbin, which independently caused the disease for which the Plaintiff's claim was made. (See KRS 342.0011(4))."

The ALJ specifically found that Dr. Dickerson had diagnosed chronic obstructive airway disease and reactive airway disease by October 31, 1995, and that he had advised Bond that his workplace environment could increase or exacerbate his underlying condition and recommended that he not return to work. The ALJ then found that the notice Bond provided Corbin on July 3, 2000, was untimely.

In Newberg v. Slone,²³ the Supreme Court stated that "while there is no specific time frame for satisfying the notice requirement in injury or occupational disease cases, we believe the discretion for making the determination of whether it was given 'as soon as practicable' lies properly with the ALJ." Notice is an issue of fact for the ALJ to determine.²⁴ While another fact-finder may have found differently than this ALJ, we cannot hold that the evidence compelled a finding in Bond's favor.²⁵

Bond also claims that he timely filed his application pursuant to KRS 342.316(4)(a). Based upon our disposition of the notice issue, it is evident that Bond failed to file his claim within three years after he first experienced a distinct

²³ Ky., 846 S.W.2d 694, 699 (1992) (citing KRS 342.187; and KRS 342.316(2)).

²⁴ Jackson v. General Refractories Co., Ky., 581 S.W.2d 10, 11 (1979) (citing Yocum v. Harvey, Ky., 578 S.W.2d 52 (1979); and Blue Diamond Coal Co. v. Terry, Ky., 416 S.W.2d 350 (1967)).

²⁵ Jackson, supra at 11.

manifestation of an occupational disease in the form of symptoms reasonably sufficient to apprise him that he had contracted pneumoconiosis. Pursuant to the three-year statute of limitations contained in KRS 342.316(4)(a), Bond was required to file his claim for occupational pneumoconiosis by no later than October 31, 1998.

Additionally, Bond failed to file his claim within the five-year statute of repose period contained in KRS 342.316(4)(a). The ALJ explicitly found that there was no evidence to support Bond's claim that he had been exposed to dust, fibers, and chemicals on July 17, 1995. Therefore, Bond failed to file his claim within five years of the date of his last injurious exposure to the occupational hazard as required by KRS 342.316(4)(a).²⁶

Based on the foregoing reasons, the opinion of the Board is affirmed.

ALL CONCUR.

²⁶ Dupree, 835 S.W.2d at 889; see Armco, Inc. v. Felty, Ky.App., 683 S.W.2d 641 (1985).

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