

RENDERED: NOVEMBER 14, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2003-CA-000761-WC

BRUCE DAVID WHITE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-73988

EXCEL MINING;
HON. IRENE STEEN, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BUCKINGHAM, GUIDUGLI, AND TACKETT, JUDGES.

BUCKINGHAM, JUDGE: Bruce David White petitions for review of a decision of the Workers' Compensation Board affirming an order of an administrative law judge (ALJ). The ALJ dismissed White's disability claim arising from psychological trauma and injuries to his head, neck, shoulders, arms, back, and legs alleged to be the result of a work-related accident. White argues that the ALJ's decision was clearly erroneous because the medical evidence upon which the ALJ relied was incomplete or inaccurate,

the ALJ failed to appropriately discuss her findings, and the ALJ failed to find a safety violation. For the reasons stated below, we affirm.

On July 24, 2000, White was injured in the course of his employment with Excel Mining. White and several co-workers were moving a conveyor belt inside the mine. White was tightening the rollers on one side of the belt while B.J. Hatfield, the section supervisor and White's immediate supervisor, tightened the rollers on the opposite side.

According to White, Hatfield stopped his work to speak with the third-shift foreman and told White to climb over the belt to tighten the side on which Hatfield had been working. When White climbed over the belt, one of his fellow general laborers asked White to stay on the belt to draw the slack out so other rollers could be placed inside the belt. White did so and, as he climbed off the belt, the conveyor started. The force of the belt starting threw White against the mine roof and then 30-40 feet down the line. White was taken to the hospital where he was treated and released.

According to White's testimony, the belt is on a timer and starts moving every morning at 6:00 a.m. However, he also stated that the power is disconnected when conveyor belt moves like the one involved here are performed. White further testified that the power was disconnected when he began working

on the day of the accident but was later reconnected without his knowledge. It appears that Hatfield, believing White's crew would be finished by 6:00 a.m., asked the foreman to reconnect the power on his way out of the mine. White claims he was not aware of this and believed that the power to the belt was disconnected up to the time he was injured. The power supply to the belt was not visible from the location of the accident.

White returned to the hospital emergency room the day after the accident complaining of neck problems. He was placed on light duty work for three days and, after not improving during that time, was told not to work for two weeks.

Subsequently, White began receiving temporary total disability benefits beginning August 16, 2000, and ending June 5, 2001.

On April 18, 2002, White filed his Application for Resolution of Claim with the Kentucky Department of Workers' Claims. His case was assigned to an ALJ, and both parties filed medical reports from various physicians and mental health professionals. These reports discuss White's complaints of depression, migraines, and pain in his neck, arms, and lower back since the accident. His medical history is also discussed, including a work-related lower back injury he received in 1994 that required surgery. The reports vary in their assessment of White's condition with some finding impairment to his ability to work and others finding no impairment.

On August 29, 2002, a hearing before the ALJ was held with White appearing as the only witness. The ALJ, in an opinion dated October 21, 2002, dismissed all of White's claims. However, the opinion allowed White to keep the temporary total disability benefits he had already received.

In reaching her decision, the ALJ chose to rely on the medical report of Dr. Daniel Primm relating to White's physical problems. Dr. Primm assigned a 0% impairment rating for White's physical complaints. Regarding the psychological claims, the ALJ chose to rely on the medical report of Dr. Robert Granacher. Dr. Granacher assigned a 0% impairment rating as a result of the July 24, 2000 accident and a 20% impairment rating from preexisting factors.

White then filed an appeal with the Board. The Board affirmed the ALJ in a March 12, 2003 opinion. The present petition for review followed.

White first argues that the ALJ's reliance on the medical evidence from Dr. Primm resulted in clear error. This argument suffers from lack of clarity in its presentation, stating:

While Dr. Primm stated that there was no residual from the 7/24/00 injury, Dr. Primm did not address the question of whether Mr. White had any preexisting impairment. Thus, as the administrative law judge found that the Plaintiff did have physical problems, Dr. Primm's report stating that the

Plaintiff has no physical impairment cannot constitute substantial evidence with regard to the causation of Mr. White's problems from any other source than the 7/24/00 injury. Accordingly, the only evidence which may constitute substantial evidence concerning the causation of the Plaintiff's ongoing physical problems, as recognized by the administrative law judge, would be the report of Dr. Rapier.

We regard this argument in much the same way that the Board did. In addressing this issue, the Board stated, "[w]hile White points to evidence from Dr. Rapier that would support the result he seeks, we are at somewhat of a loss to grasp his argument as to why Dr. Primm's opinions do not constitute substantial evidence."

However, we note that in making this argument, White references the wrong standard of review. White argues that the evidence from Dr. Primm cannot constitute "substantial evidence" supporting the ALJ's finding. A "substantial evidence" inquiry is only applied in review of workers' compensation cases where the claimant was successful below. See e.g. Addington Res., Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 423 (1997). White was not successful before the ALJ, and he must instead show the existence of evidence so overwhelming as to compel a finding in his favor. Neace v. Adena Processing, Ky. App., 7 S.W.3d 382, 384-385 (1999).

When reviewing decisions of the Board, it is important to note that "the ALJ's decision is 'conclusive and binding as to all questions of fact'" and neither the Board nor this court shall "substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." Burton v. Foster Wheeler Corp., Ky., 72 S.W.3d 925, 929 (2002), citing KRS¹ 342.285. See also KRS 342.290. Further, the ALJ, "as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence." Id.

In workers' compensation claims, "[i]t is elementary that a claimant bears the burden of proof and risk of nonpersuasion before the fact-finder with regard to every element of the claim." Id. at 928. Further, when a claimant appeals after an adverse decision below, the claimant "must demonstrate that the evidence was 'so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor.'" Neace, 7 S.W.3d at 384-385. Compelling evidence, for purposes of describing the claimant's burden, is "evidence 'so overwhelming that no reasonable person could reach the conclusion' of the ALJ." Id., quoting REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

White submitted evidence from Dr. Joseph Rapier concerning physical examinations following the July 24, 2000

¹ Kentucky Revised Statutes.

accident. The medical evidence from Dr. Rapier, while reaching different conclusions than Dr. Primm, is not vastly different. Dr. Rapier assigned an 8% whole body impairment resulting from the accident, with 50% of that impairment resulting from arousal of preexisting degenerative disc disease. Dr. Rapier further found no evidence of active impairment existing prior to the July 24, 2000 accident. Likewise, Dr. Primm also addressed White's prior medical history and current condition. Dr. Primm found mild degenerative changes existing before the accident and a 0% impairment rating from injuries sustained in the accident.

As previously noted, the ALJ, "as fact-finder, may reject any testimony and believe or disbelieve various parts of the evidence." Burton, 72 S.W.3d at 929. Reliance on the medical evidence from Dr. Primm instead of the medical evidence from Dr. Rapier was within the ALJ's discretion. There is no evidence in the record that is so overwhelming as to keep a reasonable person from reaching the same conclusion as the ALJ, or to indicate that a gross injustice has occurred. Because we are not to "substitute [our] judgment for that of the [ALJ] as to the weight of evidence on questions of fact," we affirm on this issue. Id., citing KRS 342.290.

White next argues that the ALJ erred by providing insufficient discussion of the rationale for her decision. He asserts that the ALJ was required to discuss why some medical

evidence was not followed in making her decision. White does not cite to any authority in support of this proposition, saying only that "the applicable law" requires it.

Again, the ALJ has wide discretion as the fact-finder in assigning the weight given to the evidence presented.

Burton, 72 S.W.3d at 929. The Board noted that KRS 342.275(3) requires the ALJ, after hearing a case, to file "[t]he award, order, or decision, together with a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue." KRS 342.275(3). This court has interpreted KRS 342.275 to require an ALJ "to support its conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for decision." Shields v. Pittsburgh and Midway Coal Min. Co., Ky. App., 634 S.W.2d 440, 444 (1982).

In the present case, the ALJ supported her conclusions with facts drawn from the evidence. Like the Board, we can find no authority requiring an ALJ to specifically explain why some evidence was not relied upon for its decision. The ALJ is only required to explicitly state sufficient findings of fact to support the conclusion reached. It is not necessary to discount every other piece of evidence. In the present case, the ALJ summarized the evidence not relied on. Further, the ALJ specifically referred to evidence included in Dr. Primm's and

Dr. Rapier's reports. This was all that was required because it was sufficient to fairly apprise both parties of the basis for decision. Therefore, we also affirm on this issue.

White's final argument is that the ALJ erred in failing to find a safety violation by White's employer, Excel Mining. White argues a safety violation occurred because he desires to take advantage of KRS 342.165(1). KRS 342.165(1) provides, in relevant part:

If an accident is caused in any degree by the intentional failure of the employer to comply with any specific statute or lawful administrative regulation made thereunder, communicated to the employer and relative to installation or maintenance of safety appliances or methods, the compensation for which the employer would otherwise have been liable under this chapter shall be increased thirty percent (30%) in the amount of each payment.

White alleges that 30 CFR² § 56.14201 was intentionally violated by Excel Mining. When the entire conveyor belt line is not visible from the starting switch in a mine, 30 CFR § 56.14201(b) requires a visible or audible warning system to be activated before starting the belt. Although, the facts of the present case appear to fall within the scope of this regulation, White is not entitled to the benefit of KRS 342.165 because a violation was not shown.

² Code of Federal Regulations.

For purposes of KRS 342.165, the burden is on the claimant to demonstrate an intentional violation of a safety statute or regulation by the employer. Cabinet for Workforce Dev. v. Cummins, Ky., 950 S.W.2d 834, 837 (1997). Other than his own testimony, White presented no evidence at the hearing or in his briefs to this court, the ALJ, or the Board to support a finding of an intentional failure to comply with 30 CFR § 56.14201. As the Board noted in its opinion, "Excel was never cited for any violation, nor is there any proof, one way or another, that an alarm system was not in place."

Under these circumstances, the evidence was not "so overwhelming, upon consideration of the entire record, as to have compelled a finding" in White's favor. See Neace, 7 S.W.3d at 384-385. To the contrary, the present case demonstrates a complete lack of evidence on the existence of an appropriate alarm system. Such evidence is a prerequisite to finding a violation of 30 CFR § 56.14201.

The parties advance various arguments on the safety regulation issue. However, a high degree of deference is required in reviewing Board decisions. This limited scope of review is outlined in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), where the Kentucky Supreme Court stated that the Court of Appeals should only correct the Board when 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.” Id. at 687-88. Because evidence of a safety violation was lacking in all respects, we affirm on this issue.

For the foregoing reasons, the decision of the Workers’ Compensation Board affirming the ALJ is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Leonard Stayton
Inez, Kentucky

BRIEF FOR APPELLEE:

Terri Smith Walters
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