

OPINION ENTERED: January 19, 2012

CLAIM NO. 200997634

CHARLES EDWARD BRAIM

PETITIONER

VS. APPEAL FROM HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE

KENTUCKY MOVING & STORAGE SERVICE
and HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
DISMISSING

* * * * *

BEFORE: ALVEY, Chairman; STIVERS and SMITH, Members.

ALVEY, Chairman. Charles Braim ("Braum") seeks review of the opinion, award and order entered July 27, 2011 by Hon. Joseph W. Justice, Administrative Law Judge ("ALJ"), awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits and medical expenses for injuries sustained on November 12, 2007, while working for Kentucky Moving & Storage Service ("Kentucky Moving"). Braim also appeals from the August 24, 2011

order denying his petition for reconsideration and the October 4, 2011 order denying his second petition for reconsideration. Kentucky Moving seeks dismissal of Braim's appeal.

In the first petition for reconsideration filed August 4, 2011, Braim argued the following:

The ALJ's opinion contains a patent error. The opinion says, at page 7, "There are reports from Drs. Davis, O'Neill, and Barlow, none of which placed restrictions".

In fact, Dr. Barlow's report says:

He has no permanent restrictions. However, due to the underlying degenerative process he will be unable to return to heavy work such as furniture moving as such activity would produce increased pain.

In the first petition for reconsideration, Braim did not argue the ALJ failed to address his own testimony regarding the inability to perform the work he was performing at the time of the injury. On August 24, 2011, concerning the first petition for reconsideration, the ALJ ruled as follows:

Plaintiff having filed a Petition for Reconsideration of the Opinion and Award rendered July 27, 2011, and Defendant having responded thereto, and the ALJ having carefully considered the petition and response, [sic] the

record, and being sufficiently advised, the ALJ makes the following rationale, comments and explanations:

Plaintiff states that the ALJ did not properly state the opinion of Dr. Barlow or give proper rationale for the finding Plaintiff could return to his former type work. The more correct finding by the ALJ would have been that Plaintiff's proof did persuade the ALJ that he did not retain the capacity to return to his former type work. The ALJ states that he must make his decision on the reports that he has before him.

Plaintiff must have gotten a better result from surgery than the ALJ would have expected. All three physicians seem to agree on the assignment of 10% WPI. The AMA Guides call for impairment of 10-13% for herniated disc at one level. The Physicians assigned the lowest level of 10%. Dr. O'Neill did not make an assignment himself; he must have agreed with the assignment. It appears that all the physicians would give this minimum assignment even though there were surgeries at two levels.

Plaintiff has complained that the ALJ did not accurately describe the opinion of Dr. Barlow. First, the ALJ would like to set out all that Dr. Barlow stated in his re-port pertaining to restrictions:

3. Are there any permanent restrictions? He has no permanent restrictions. However, due to the underlying degenerative process he will be unable to return to heavy work such as furniture moving as such activity would produce increased pain.

4. Can the client safely return to his moving and storage job description considering only his post-surgical back condition, and excluding from his back condition the symptoms Jacob O'Neill, MD described? Mr. Braim's complaints and physical findings today do not include any stocking glove numbness in the left lower extremity. This complaint during Dr. O'Neill's IME does not have any anatomic basis.

The ALJ was dissatisfied with Dr. Barlow's report as the ALJ mentioned in his Opinion. He seemed to be parroting the findings and assignment of Dr. Davis, the operating surgeon. Specifically addressing the questions and answers of Dr. Barlow, he responded to permanent restrictions with.[sic] "[h]e has no permanent restrictions." He then said, "[d]ue to the **underlying degenerative process** he will be unable to return to heavy work such as furniture moving as such activity would **produce increased pain.**" (Emphasis supplied). This is very indefinite and nebulous. Plaintiff had DDD that was the dormant condition. The injury aroused the lumbar spinal stenosis into disabling reality at L3-4 and L4-5, for which Plaintiff opted to have surgeries. The claim is not for the entirety of the DDD, but for the arousal at the two levels. Dr. Barlow did not say due to the surgeries at L3-4 and L4-5 heavy lifting would cause "increased pain." Then, in Paragraph 4, when given an opportunity to expound on Plaintiff returning to his same type work, he gave no further comments on the question asked, and stated: "Mr. Braim's complaints and physical findings today do not include any stocking-glove numbness in the left

lower extremity. This **complaint** during Dr. O'Neill's IME **does not have any anatomic basis.**" (Emphasis supplied). He, in effect, denigrated Plaintiff's complaints of radiculopathy. He should have been asked to clarify his conflicting or unclear statements. Plaintiff has not supplied any good reason the ALJ should have used Dr. Barlow's report as a basis to find Plaintiff was unable to return to his former type work, when two other equally qualified physicians did not place restrictions. The ALJ's opinion process would be much simpler if he were able to find that disc surgery automatically disqualified claimants from returning to work that involved some heavy lifting.

IT IS HEREBY ORDERED that Plaintiff's petition be **DENIED**.

On September 6, 2011, Braim filed a second petition for reconsideration. In the second petition for reconsideration, Braim argued the following:

Plaintiff alleges that specific findings are still missing, as follows:

1. Was Dr. Barlow's opinion that plaintiff cannot return to his injury[sic] job description accepted as credible?
2. What effect did Dr. Barlow's opinion, that plaintiff could not return to the injury job description, have on the ALJ's decision about applicability of the KRS 342.730(1)(c)(1)[sic] enhancement?
3. Was plaintiff's testimony, at *the transcript record, page 11, line 7, to*

page 21, line 14, (including the alleged need to use narcotic pain medication to get through the day) accepted as credible?

4. What effect did plaintiff's testimony, at the transcript of the record, page 11, line 7, to page 21, line 14, have on the ALJ's decision that plaintiff was not entitled to the KRS 342.730(1)(c)(1) enhancement?

In an order dated October 4, 2011, the ALJ denied

Braim's second petition for reconsideration stating:

Plaintiff having filed a Second Petition for Reconsideration of the Opinion and Award rendered July 27, 2011, and the ALJ having reviewed the record and having thoroughly considered Plaintiff's testimony in his original Opinion and Order; and being otherwise sufficiently advised;

IT IS HEREBY ORDERED that Plaintiff's petition be **DENIED**.

KRS 342.281 states:

Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review of the correction of errors patently appearing upon the face of the award, order, or

decision and shall overrule the petition for reconsideration or make any corrections within (10) days after submission.

Braim filed a notice of appeal to this Board on October 13, 2011. KRS 342.285(1) states as follows:

An award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for review of the order or award.

803 KAR 25:010 section 21 (2) provides:

(2) Time and format of notice of appeal.

(a) Within thirty (30) days of the date a final award, order, or decision rendered by an administrative law judge pursuant to KRS 342.275(2) is filed, any party aggrieved by that award, order, or decision may file a notice of appeal to the Workers' Compensation Board.

(b) As used in this section, a final award, order or decision shall be determined in accordance with Civil Rule 54.02(1) and (2).

The filing of a timely petition for reconsideration pursuant to KRS 342.281 stays the 30 day time period for the filing of an appeal to the Board. If an ALJ by subsequent order amends a decision following a

petition for reconsideration and makes a different award of benefits, the parties are not foreclosed from filing successive petitions for reconsideration seeking to correct any new error in the subsequent order, which did not appear in the original award. Messamore v. Peabody Coal Co., 569 S.W.2d 693 (Ky. App. 1978). Under such circumstances, the successive petition for reconsideration also acts to stay a party's time in which to file an appeal.

However, successive petitions for reconsideration seeking correction of errors appearing in the original award, order, or decision, filed more than 14 days after the date the original decision was rendered, have no tolling effect. Tube Turns Division of Chemetron v. Quiggins, 574 S.W.2d 901 (Ky. App. 1978). In those instances, the 30 day period for filing an appeal runs from the date the last order addressing a timely petition for reconsideration is issued. A subsequent order addressing an untimely petition does not resurrect a party's period for filing a notice of appeal. Rather, the order ruling on the second petition is a nullity. Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky. App. 1998). This is true even where in the second petition the error for which relief is sought is meritorious.

In this instance, the ALJ rendered the decision on the merits of Braim's claim on July 27, 2011. In that decision, the ALJ awarded permanent partial disability ("PPD") benefits based upon a 10% impairment rating. The ALJ further determined no physician had imposed restrictions due to Braim's work injury and resulting surgery, and therefore he did not enhance the PPD award pursuant to KRS 342.730(1)(c)1, or KRS 342.730(1)(c)2. In the first petition for reconsideration filed on August 4, 2011, Braim only argued the ALJ failed to consider Dr. Barlow's statement concerning his inability to perform heavy lifting. In the order denying Braim's petition for reconsideration issued August 24, 2011, the ALJ explained why he discounted Dr. Barlow's statement. While, as asserted by the minority and Braim the ALJ could have relied upon Braim's own testimony, he was not compelled to do so. The ALJ chose to rely upon the medical testimony and explained why he did so.

In the second petition for reconsideration, Braim failed to point to errors in the first order on petition for reconsideration, and instead reargued the same issue raised in the first petition, and raised concerns regarding the original opinion, award and order. Accordingly, Braim's appeal was untimely filed, and the Board is without

jurisdiction to rule on the merits of the arguments raised by the petitioner.

Braim had thirty (30) days to file an appeal to this Board from and after the August 24, 2011 order denying his first petition for reconsideration. If the second petition for reconsideration had been filed to correct patent errors in the first order for reconsideration, the time to file the appeal would have been within thirty days after the ruling on the second petition. As a matter of law, because Braim only sought to re-argue the merits of the claim, and the "error" sought to be corrected in the second petition was existent at the time of the filing of the first petition for reconsideration, the order of October 4, 2011, ruling on the second petition is a nullity. Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky. App. 1998). No patent error of law existed; the ALJ merely relied upon medical rather than lay testimony.

That having been said, had the issue pertaining to the ALJ's interpretation of Dr. Barlow's discussion regarding the inability to perform heavy lifting been properly before us, we would nonetheless have affirmed the ALJ's decision. As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308

(Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). It is a well-established principle that the ALJ, as fact-finder, 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). As a matter of law, the ALJ is permitted to draw reasonable inferences from the evidence. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000).

In this instance, we believe the ALJ appropriately explained why he discounted Dr. Barlow's assessment of Braim's inability to perform certain lifting tasks as being unrelated to his work injury.

For the foregoing reasons, the appeal filed by Charles Edward Braim on October 13, 2011, is hereby **DISMISSED**.

SMITH, MEMBER, CONCURS.

STIVERS, MEMBER, DISSENTS AND FILES A SEPARATE OPINION.

STIVERS, MEMBER. The majority's opinion states as follows: "If the second petition for reconsideration were filed to correct patent errors in the first order for reconsideration, the time to file the appeal would have been within thirty days after the ruling on the second petition." The case in which this proposition is stated, Uninsured Employers' Fund v. Stanford, ---S.W.3d---, 2011 WL 4537294 (Ky. App. 2011), Designated to be Published, but not final. Nevertheless, in Uninsured Employers' Fund v. Stanford, supra, the Court of Appeals of Kentucky states as follows: "Had the petition been filed within 14 days of the original opinion or had the second petition dealt with a patent error in the order ruling on the first petition for reconsideration, such a petition would be proper." Slip Op. at 3.

In the September 1, 2011, second petition for reconsideration, Braim pointed out a patent error of law appearing in the ALJ's August 24, 2011, order ruling on Braim's first petition for reconsideration. Yet, the majority's opinion mistakenly characterizes Braim's second petition for reconsideration as seeking a correction of errors appearing in the July 27, 2011, original opinion,

award, and order, citing Tube Turns Division of Chemetron v. Quiggins, 574 S.W.2d 901 (Ky. App. 1978) for the proposition that "successive petitions for reconsideration seeking correction of errors appearing in the original award, order, or decision, filed more than 14 days after the date the original decision was rendered, have no tolling effect."

In the ALJ's August 24, 2011, order ruling on Braim's first petition for reconsideration, when discussing the issue of Braim's ability to return to his former type of work, the ALJ states as follows: "The ALJ states that he must make his decision on the reports that he has before him." Stated another way, the ALJ, in the August 24, 2011, order ruling on Braim's first petition for reconsideration, has set forth the legal proposition that when ruling on the issue of Braim's ability to return to his former type of work, he is unable to rely upon lay testimony. This statement is patently erroneous, as case law holds an ALJ may certainly rely on a claimant's own assessment of his ability to labor in determining whether to enhance a claimant's benefits pursuant to KRS 342.730(1)(c)1. See Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979).

In response to the ALJ's erroneous statement of the law as set forth in the August 24, 2011, order ruling

on Braim's first petition for reconsideration, Braim filed a second petition for reconsideration in which he noted "specific findings are **still** missing" and in which he asked the ALJ to make findings on the credibility of certain aspects of *his testimony* regarding his ability to labor. (emphasis added). The fact Braim has directly addressed the ALJ's erroneous statement of the applicable law as set forth in the August 24, 2011, order ruling on Braim's first petition for reconsideration regarding the evidence the ALJ may consider when determining whether Braim retained the capacity to return to the type of work he performed at the time of injury is very clear. In Braim's second petition for reconsideration, he asserted as follows:

This petition is filed to complain that the ALJ did not make sufficient findings about the plaintiff's testimony at the hearing, on the KRS 342.730(1)(c)(1) issue, about the relationship of plaintiff's testimony in the context of Dr. Barlow's opinion that 'due to the underlying degenerative process [footnote omitted] he will be unable to return to heavy work such as furniture moving as such activity would produce increased pain.' The ALJ actually has made no findings or conclusions or inferences about plaintiff's testimony yet, but has only reviewed plaintiff's testimony in the SUMMARY OF EVIDENCE of the original **OPINION, AWARD AND ORDER.**

Consequently, as Braim's second petition for reconsideration addresses a patent error appearing in the ALJ's August 24, 2011, order ruling on Braim's first petition for reconsideration, and Braim's appeal was filed within thirty days after the ALJ rendered the October 4, 2011, order on Braim's second petition for reconsideration, Braim's appeal is timely. Therefore, I respectfully dissent.

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