

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: **November 16, 2018**

CLAIM NO. 201562517

MARTIN COUNTY BOARD OF EDUCATION

PETITIONER

VS.

**APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE**

ARCHIE BLACKBURN,
DR. BAL BANSAL,
CARDINAL HILL HOSPITAL,
And HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

ARCHIE BLACKBURN

PETITIONER

VS.

MARTIN COUNTY BOARD OF EDUCATION
BAL K. BANSAL, MD,
CARDINAL HILL HOSPITAL
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER, Members.

RECHTER, Member. Martin County Board of Education (“Martin County”) and Archie Blackburn appeal from the May 21, 2018 Opinion, Award and Order and the June 11, 2018 Orders on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ determined Blackburn sustained a head injury which resulted in cognitive impairment, and awarded permanent partial disability benefits based upon a 24% impairment rating. On appeal, Martin County argues the award is unsupported by substantial evidence, lacks sufficient findings of fact, and fails to designate the period of income benefits to which Blackburn is entitled. On cross-appeal, Blackburn argues the ALJ erred in dismissing his claim for a cervical spine injury. For the reasons set forth herein, we affirm.

Blackburn worked as an electrician and maintenance worker for Martin County. On October 30, 2015, he went to the sewer plant at Eden Elementary School to clean. Some type of accident occurred while Blackburn was at the sewer plant, though his recollection of the event is very limited. Blackburn testified he recalls standing on a grate to spray off the plant. He heard an odd noise which lead him to believe the motor was “messed up.” His next memory is waking up in the hospital with a copper taste in his mouth, a headache and neck pain.

Records from NET Care Ambulance Service indicate a dispatch for “electrocution/lightening” were received on October 30, 2015. Responders found

Blackburn lying across the driver's side seat of his truck. He was not responsive to voice, but did respond to painful stimuli with facial grimaces. During transport, Blackburn spoke, but was confused and disoriented. He displayed negative range of motion in all extremities, but the right side would shake/tremor at times. No entry or exit wounds associated with electrical accident were found. He had scratches/abrasions on the right arm and dried blood in the right ear. A Glasgow Coma Test was scored as a 10, indicating a moderate brain injury.

Blackburn was transported to Pikeville Medical Center. CT scans of his head and cervical spine were normal, and an MRI of the brain was unremarkable. Blackburn was admitted to the hospital for seizure monitoring. Overnight, he was seizure-free and his confusion subsided. His right-sided weakness also improved. Blackburn was discharged on November 1, 2015 with diagnoses of confusion, right-sided weakness, back pain, and hypertension. He was directed to follow-up with his primary care physician in a week, or to return to the emergency room if his symptoms worsened.

Blackburn sought treatment at Our Lady of Bellefonte Hospital on November 6, 2015 because he was having difficulty walking and talking. Blackburn also complained of cervical pain. He was seen by Dr. Bal Bansal, who ordered a CT of the head which was normal, though the resolution was not good. On physical examination, Blackburn had significant spasms in the cervical and lumbosacral areas on the right side. He had weakness in the right arm and leg, a tremor in the right hand of a variable frequency, and decreased pinprick in all four extremities. Blackburn was depressed, confused, and appeared to be very frightened. Dr. Bansal

opined Blackburn suffered post-traumatic encephalopathy, though he noted, “How much of the electric shock trauma of the head following the fall is contributing to this, it is hard to acutely assess.” Blackburn had a worsening of his lower back disc problem.

Blackburn returned to Dr. Bansal on November 18, 2015. A cervical MRI on November 18, 2015 was normal with no compressive discopathy. Dr. Bansal noted Blackburn’s global cognition had not improved, and his lower back and neck pain had worsened. He again diagnosed encephalopathy, and recommended a further neuroimaging studies. At a December 18, 2015 office visit, Blackburn reported continued cervical and low back pain. Dr. Bansal noted Blackburn continues to suffer severe confusion. Blackburn’s fiancée, Candace Dungess, reported worsening confusion when Blackburn returned to Dr. Bansal’s office on January 5, 2016. Dr. Bansal also noted a tremor in Blackburn’s right hand, lip and chin.

When Blackburn returned to Dr. Bansal on February 5, 2016, he reported severely worsening cognition problems, including confusion and difficulty speaking. Ms. Dungess also reported Blackburn’s irritability and lack of self-control. Dr. Bansal ordered an MRI of the brain, which revealed no acute intracranial abnormality. He recommended physical and speech therapy. At a March 18, 2016 office visit, Dr. Bansal diagnosed moderate to severe traumatic brain injury and referred Blackburn to Cardinal Hill Center for treatment.

On June 22, 2016, Dr. Bansal again diagnosed a moderate to severe degree of traumatic brain injury. By July 20, 2016, Blackburn and Ms. Dungess

reported somewhat improved speech and cognition, though he still struggled with short-term memory lapses. On October 27, 2016, Blackburn presented with complaints of feeling depressed, extreme anxiousness and nervousness, increased headaches, auditory hallucinations, difficulty with balance, and right hand and lip tremors. Dr. Bansal believed Ritalin was causing the depressed, agitated, and psychotic issues, and recommended tapering. Blackburn was to continue with psychotherapy.

In an April 14, 2017 letter, Dr. Bansal stated Blackburn suffers conversion disorder secondary to traumatic brain injury and soft tissue injury to the neck from the work accident. Dr. Bansal assigned a 32% impairment rating, consisting of 27% for the brain injury and 5% for the cervical condition pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition. He opined Blackburn is totally disabled due to the conversion disorder secondary to traumatic brain injury and soft tissue injury to the cervical area. Dr. Bansal emphasized he saw no evidence of malingering.

Dennis J. Buchholz, PhD, conducted a utilization review on December 12, 2016. He stated the neuropsychological evaluation on October 3, 2016 provides strong evidence that Blackburn was deliberately malingering cognitive and psychological pathology at that time. The results did not rule out the possibility of underlying medical or psychiatric conditions possibly needing medical treatment. He concluded continued treatment with Dr. Bansal and Cardinal Hill Hospital for physical therapy, occupational therapy and speech therapy is not medically reasonable and necessary for the work injury. Continued use of Ampyra is not

reasonable and necessary because it is not recommended for patients with multiple sclerosis and no clinically proven data supports the use in patients with other mechanisms of impaired gait.

Dr. Timothy Allen performed an independent psychiatric evaluation on October 3, 2016. Dr. Allen was also deposed on February 22, 2017. At the evaluation, Blackburn stated he had no recollection of the injury other than he was at a school and fell. Blackburn had dysarthric and was difficult to understand, stuttered, displayed a constant tremor in the right hand, and unusual movements of either rubbing his head or clicking his left wrist. He was confused. Cognitive testing showed repeated poor effort. He had a 0 on the MOCA testing, a score which Dr. Allen characterized as essentially impossible for someone who is awake. Blackburn displayed less than a kindergarten-level reading ability and claimed not to recognize most letters. Dr. Allen noted the ability to read is not lost in brain injury of traumatic or electrical origin. He stated it is impossible for him to determine whether Blackburn has a small cognitive deficit due to the work injury because of gross fabrication of deficits displayed. His ability to sustain fabricated symptoms provides some insight into the lack of real deficits. Dr. Allen diagnosed malingering and possible mild neurocognitive disorder due to electrocution injury. He found no evidence of posttraumatic stress or mood disorder. Blackburn has a Class 1 impairment of mental disorders with 0% whole body impairment due to psychiatric causes related to the work accident. He has a Class 1 impairment of the Central nervous system with 0% impairment due to mental status changes related to the work accident.

Dr. Allen testified Blackburn's diagnostic studies were normal. To have the impairment Blackburn demonstrates, he would have to have structural abnormalities of the brain and/or electric activity changes. Blackburn does not have a permanent impairment as a result of the work accident. He might have mild psychiatric complaints that Dr. Allen was unable to assess due to the inaccurate testing.

Dr. Bobby Miller performed an independent neuropsychiatry evaluation on March 28, 2017. Dr. Miller reported Blackburn's speech was dysarthric with childlike syntax. Blackburn scored significantly below average on intellectual testing, but the findings likely were not an accurate reflection of his level of functioning. He scored in the severely impaired category on attention, language, and memory. Blackburn scored mildly to moderately impaired on spatial and moderately to severely impaired in executive functions. Blackburn scored at a 1.7 grade level on word reading, 2.4 on sentence comprehension, .4 on spelling, 2.7 on math computation, and less than 1st percentile on reading composite on the Wide Range Achievement Test. Dr. Miller diagnosed conversion disorder with mixed symptoms, and assigned a 24% impairment rating. He concluded Blackburn does not retain the physical capacity to return to the type of work performed at the time of the injury. In a July 10, 2017 addendum, he indicated he had reviewed a surveillance video of Blackburn at home and Dr. Allen's report. Dr. Miller continued to believe Blackburn meets the criteria for conversion disorder. Dr. Miller noted no treating physician or evaluator accused Blackburn of malingering, other than Dr. Allen.

Dr. Joseph L. Zerga performed an independent medical evaluation on May 31, 2017. Blackburn had dysarthric speech and reported headaches and back pain. He had right arm tremors that went away when he turned while walking. Ms. Dungess reported he had constant headaches, numbness and tingling in the right arm, hand tremors in the right arm and hand, right foot numbness, and a tendency to fall. He has difficulty with attention and concentration, word finding difficulty, and memory problems. Dr. Zerga disagreed with the opinions of Drs. Bansal and Miller. Instead, he believed Blackburn was malingering as evidenced by his extensive review of the video surveillance. Dr. Zerga concluded there is no objective evidence of a harmful change to the human organism. He felt Blackburn is at maximum medical improvement with no permanent impairment. He needs no restrictions and should be tapered off the medications.

The ALJ made the following findings relevant to this appeal:

Determining both the causation and permanency of head injuries allegedly resulting in cognitive impairment can be one of the most difficult things to ascertain. There is usually very little objective evidence of such permanent injuries[.]

That being said the evidence in this claim includes the fact that when he was first found by EMS the Plaintiff had some physical injuries consistent with falling, including blood in his ear. It also includes the long term treating physician, Dr. Bansal, stating that the Plaintiff does have a brain injury with cognitive impairment arising from the work related accident.

The contrary evidence is from Dr. Zerga and more importantly Dr. Allen. Dr. Allen is a highly respected neuro-psychiatrist. He has stated that the Plaintiff's malingering is so great the only way the Plaintiff could have performed so poorly is if he was asleep. Even Dr.

Miller, the Plaintiff's expert felt that some of the Plaintiff's testing was invalid due to effort.

An exaggeration of symptoms, however, does not preclude a finding of a permanent work related injury. In this matter in reliance on Dr. Bansal and Dr. Miller the Plaintiff has a permanent head injury with cognitive impairment.

...

It is quite possible, legally and factually, for a Plaintiff to both be exaggerating his symptoms and malingering, and to still have a permanent work-related injury with an impairment rating.

I have already found that the Plaintiff has a permanent work-related injury with cognitive impairment. It would be inconsistent to determine that the Plaintiff has a permanent work related injury with cognitive impairment and find he has no impairment rating. Therefore, the only useable ratings are from Dr. Bansal and Dr. Miller.

The ratings are based on the individual doctors' assessment of the Plaintiff and how he performed on various tests, interviews and examinations. As already noted there is no way to objectively determine whose results are more accurate. That being said I will select the 24% assigned by Dr. Miller.

Blackburn filed a petition for reconsideration arguing he is entitled to benefits for his neck based upon a 5% impairment rating. Martin County also filed a petition for reconsideration, arguing the ALJ failed to summarize the surveillance video it had submitted and, therefore, did not review all the evidence of record. It also requested the ALJ to more specifically set forth the period of permanent partial disability benefits, and to make further findings of fact to support the conclusion Blackburn suffered a traumatic brain injury.

The ALJ issued separate Orders on June 11, 2018 ruling on the petitions for reconsideration. In the Order ruling on Martin County's petition, the ALJ found as follows:

I did review the video surveillance. I simply didn't find it noteworthy or persuasive, beyond the medical evidence. I have already noted that this is a very difficult and complex claim to analyze. The Plaintiff does present in a way that would suggest symptom magnification or malingering. However, the treating doctors have [adamantly] opposed this suggestion. It is not unusual in workers' compensation to have claims in which a Plaintiff has both a legitimate injury and magnifies his symptoms. I have made an award taking this into account. A more detailed summary of the evidence, all of which was reviewed, wouldn't change the result. The remainder of the Defendant's Petition is merely re-argument. At the end of it substantial evidence supports the Award and the Defendant does not show the ALJ failed to consider any argument or evidence.

In the Order regarding Blackburn's petition, the ALJ stated there is no credible evidence of a cervical injury. The ALJ explained, "The 5% from Dr. Bansal is an outlier and is the minimum possible without giving a zero. Dr. Bansal gives the Plaintiff the benefit of the doubt in this instance but I do not."

On appeal, Martin County first argues the ALJ erred in failing to review all of the evidence at the time the initial decision was rendered. It surmises the ALJ must not have reviewed the surveillance video prior to the March 21, 2018 Opinion because it contains no summary of the video. The ALJ's Order on reconsideration notes the video was reviewed, though does not specify when it was viewed. Martin County contends the ALJ therefore must have re-weighed the

evidence on reconsideration, to take into account the surveillance video, which he is not permitted to do.

Martin County's argument is based on the unsubstantiated assumption the ALJ did not review the surveillance video prior to rendering the March 21, 2018 Opinion. Even if we accept this assumption, such an error is correctable on reconsideration. KRS 342.281 permits the ALJ to correct "errors patently appearing upon the face of the award, order, or decision" when they are raised in the petition for reconsideration. The statute must be "liberally construed" to allow correction of all patent errors. Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104 (Ky. App. 1985). It is correct that an ALJ may not reweigh the evidence upon a petition for reconsideration. KRS 342.281; Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky. 1971). However, failure to consider all of the evidence constitutes a patent error correctable on reconsideration. Contrary to Martin County's assertion, even if the ALJ had not reviewed the surveillance video at the time the initial decision was rendered, the ALJ would have the authority to change a decision on reconsideration if all of the evidence had not been previously considered.

The ALJ reviewed the surveillance evidence. In the Order on reconsideration, he stated he did not find it persuasive. He explained he was more convinced by the medical evidence of Blackburn's condition than the surveillance video. The weighing of evidence is the exclusive function of the ALJ. This Board may not usurp that role by superimposing our own appraisal of the proof. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999).

Next, Martin County argues the ALJ failed to make the additional findings of fact requested on reconsideration. It asked for specific findings regarding the ALJ's conclusion that Blackburn both sustained a work-related brain injury, but also was malingering. Martin County also asserts Dr. Bansal simply found Blackburn had a brain injury with cognitive impairment but pointed to no objective basis for the conclusion, nor is there objective evidence an electrical accident even occurred. When this proof is reviewed in its totality, Martin County contends the evidence cannot possibly support a finding Blackburn sustained a work injury and is engaged in malingering. Martin County notes the ALJ possibly found a closed head injury, but refused to clarify on reconsideration. Additionally, Martin County asserts the medical opinion relied upon by the ALJ was based upon testing that required a good faith effort. Because Blackburn did not provide a good faith effort, opinions based upon that testing cannot constitute substantial evidence.

Central to Martin County's appeal is the assertion that Blackburn did not present objective medical evidence to support the alleged head injury. In Gibbs v. Premier Scale Company/Indiana Scale Company, 50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court discussed what may constitute objective medical evidence as defined by KRS 342.0011(33) stating:

In view of the evidence which was presented in this particular case, a question has arisen concerning whether a harmful change must be, or is capable of being, documented by means of sophisticated diagnostic tools such as the x-ray, CAT scan, EEG, or MRI in order to be compensable. Contrary to what some have asserted we are not persuaded that it must. Furthermore, at least to some extent, we view that question as being off the mark. Likewise, we are not persuaded that a

harmful change must be both directly observed and apparent on testing in order to be compensable as an injury.

...

We know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrated the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1).

Id. at 762.

Here, Dr. Bansal formulated his opinions based upon his personal observations, review of medical records, and multiple examinations. His examinations found weakness in the right arm and leg, a tremor in the right hand of a variable frequency, and decreased pinprick in all four extremities. Blackburn was depressed and appeared to be very frightened and confused. Based on his treatment of Blackburn over the course of a year, Dr. Bansal diagnosed conversion disorder secondary to traumatic brain injury. Dr. Miller likewise diagnosed conversion disorder. While Dr. Allen did not believe there was a severe head injury, he could not definitively rule out exposure to electricity, nor could he eliminate the possibility of a mild impairment. Additionally, Dr. Allen acknowledged cognitive impairment from microscopic damage is not always evidenced on an MRI.

The essence of Martin County's argument on appeal is the circumstantial nature of much of this claim. Because of Blackburn's memory deficits, even the basic circumstances of the accident are not entirely clear. However,

the ALJ is permitted to draw reasonable inferences from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). The ALJ relied upon the reports of the first responders and emergency room to substantiate Blackburn's description of the accident. Furthermore, we find nothing inherently contradictory in the ALJ's determination that Blackburn suffered an injury but might also be exaggerating the magnitude of his symptoms. The opinions of Drs. Bansal and Miller constitute substantial evidence supporting the ALJ's finding that Blackburn sustained a head injury with cognitive impairment, a finding which satisfactorily describes the nature of the work-related injury. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). While Martin County emphasizes Dr. Allen's opinion, such proof amounts to conflicting evidence and does not compel a finding in its favor.

Finally, Martin County argues the ALJ erred by failing to specify the period of the award of income benefits in the Order section of the decision or in the order on reconsideration, necessitating a remand. While the Order section of the decision indicates permanent partial disability benefits begin on October 30, 2015, without specifying the length of the award, the same page of the Opinion sets forth the calculation of the benefit and indicates the award is for "\$362.00 a week for 425 weeks, from October 30, 2015, and excluding any periods of TTD." The period of the award can be readily ascertained from the findings section of the decision. Therefore, no remand is necessary.

On cross-appeal, Blackburn argues Dr. Bansal was the only doctor to specifically assess his cervical condition and, therefore, his opinion must be accepted.

Because Dr. Bansal's opinion is uncontested, Blackburn argues he is entitled to an award for the cervical condition based upon a 5% impairment rating.

As the claimant in a workers' compensation proceeding, Blackburn had the burden of proving each of the essential elements of his cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because he was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

Here, the evidence does not compel a finding that Blackburn sustained a 5% impairment rating for his cervical condition. Dr. Zerga reviewed the reports of Drs. Bansal and Miller and disagreed with their opinions. Through his review and summary of these records, it is apparent Dr. Zerga was aware of the allegations regarding the cervical condition. He was not convinced that Blackburn sustained a harmful change to the human organism as a result of the work incident. The ALJ weighed the conflicting evidence regarding cervical impairment and simply was not persuaded by Dr. Bansal's opinion. The ALJ was well within his role as fact-finder in rejecting the 5% impairment rating assessed by Dr. Bansal for the cervical condition. The ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a

different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Accordingly, the May 21, 2018 Opinion, Award and Order and the June 11, 2018 Orders on Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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