

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 14, 2018

CLAIM NO. 201581519

PHILLIP U. BIBB

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

BROOKS BROTHERS
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE
and DIVISION OF WORKERS'
COMPENSATION FUNDS

RESPONDENTS

OPINION
AFFIRMING & ORDER

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

STIVERS, Member. Phillip U. Bibb (“Bibb”) appeals, *pro se*, from the April 2, 2018, Opinion and Order of Hon. Grant S. Roark, Administrative Law Judge (“ALJ”), dismissing his claim for failure to prove he sustained an injury as defined by the Act. Bibb also appeals from the May 17, 2018, Order denying his petition for reconsideration.

On appeal, Bibb asserts the ALJ erred by relying on Dr. William Adams, because he used a diagnostic technique that is outdated and unreliable. Next, Bibb asserts the ALJ abused his discretion by dismissing his claim based, in part, on a faulty finding regarding his 2010 ankle surgery. Finally, Bibb asserts the ALJ erred by allowing the policy regarding video retention to determine his case versus the actual video.

The Form 101 alleges Bibb sustained a work-related injury to his left ankle on December 22, 2014, while in the employ of Brooks Brothers and in the following manner: “After requesting [sic] for my weak and painful ankle manager Fred Hackett demanded that I not rest and that I put away shirts which required me to climb [sic] ladder. My foot became unstable and my ankle twisted and I fell off [sic] ladder.”

Bibb was deposed on February 6, 2017. Bibb testified that he had arthroscopic surgery on his left ankle in 2010 after injuring his ankle in 2005:

Q: What year did that occur?

A: 2005.

Q: What body part?

A: My left ankle.

Q: How did that injury occur?

A: I stepped on a rock.

...

Q: What medical treatment did you receive?

A: Crutches and ice. The pain kept lingering, and so I saw the doctor. He X-rayed it and eventually did an MRI and eventually the surgery in 2010.

Concerning the medical treatment he received between the surgery and the alleged December 22, 2014, work injury, he testified:

A: Yeah, I saw a Doctor [Donald] Ansert in October of 2014, because that was pretty much the first time that I was doing something that required me using the ankle at that point.

Q: What was that?

A: It was the job that I had at Brooks Brothers.

Q: So you were working at Brooks Brothers in October of 2014, and that's when you started seeing Doctor Ansert?

A: Yes.

The day after the alleged work injury, Bibb saw Dr. Ansert, who took Bibb off of work for three weeks. Bibb was referred to Dr. Adams who ultimately performed a total ankle replacement. Bibb testified that he informed both Drs. Ansert and Adams of the alleged work injury.

Bibb also testified at the final hearing. Concerning what Drs. Ansert and Adams knew about the issues he was having at Brooks Brothers and the alleged December 22, 2014, work injury, he testified:

Q: Is it your testimony that you told both – that you told Dr. Ansert about the issues you were having at work when you sought treatment from him?

A: Yes.

Q: And what about Dr. Adams?

A: Yes.

Q: Dr. Adams is the one that performed the surgery, correct?

A: Correct.

Q: All right. Now, he testified in this case that he never had a – received a history of you of any work injury or problems that you were having with work performed at Brooks Brothers and, in fact, that you related all of your problems back to a 2005 work injury and surgery in 2010. Is it your testimony today that that was – that was mis – Dr. Adams was incorrect?

A: Yes. And he also has it stated that he didn't –

...

Q: Dr. Ansert also testified in this case that he never received any history of allegations of problems from your work at Brooks Brothers when you began treating with him and that it was also related back to the 2005 injury and 2010 surgery. Are you saying that Dr. Ansert is also incorrect?

A: No, I'm saying that you're incorrect because you never even asked him that. I read his deposition, and that question was never asked.

Q: Did you – do you – assuming Dr. Ansert testified and shows in his medical records no notation of history of work injury at Brooks Brothers, are you stating that his records and/or his testimony is incorrect?

A: Well, what I'm stating is why did he take me off work for three weeks and put me in a cast the day after I said I was injured?

Brooks Brothers filed in evidence the March 16, 2017, deposition of Dr. Adams, a podiatrist with the Orthopaedic Institute of Western Kentucky. As to the history Bibb provided when he first started treating with him, Dr. Adams testified:

So he had chronic ankle pain. He did have – he related it to [sic] injury back in July of 2005. He did have [sic] previous surgery, which was an ankle arthroscopy with micro fracture back in 2010. But it really wasn't – didn't have any success with that. He related instability of his ankle and just continued pain.

Dr. Adams testified that, according to his records, Bibb did not identify a specific incident which aggravated his ankle condition. He diagnosed the following: “So he had what's called osteochondral defects of his posterior medial talus. He had tightness in Achilles tendons which caused heel contracture. Chronic lateral ankle instability with chronic rupture of the anterior talofibular and calcaneofibular ligaments.” Dr. Adams related the diagnoses to the 2005 injury.

Dr. Adams testified that a CT scan of Bibb's left ankle on February 24, 2015, showed “a narrowing of the ankle, a spuroc lesion in the distal talus and there is – they don't mention the osteochondritis dissecans, but that's more well visualized on the MRI. So the overall impression was degenerative change in the left ankle, most visualized in the medial tibiotalar joint.” Again, Dr. Adams attributed those findings to the 2005 injury.

Dr. Adams performed left ankle surgery on March 19, 2015. The surgery comprised of a “lateral ankle stabilization” and “Achilles tendon lengthening with the gastrocnemius recession and joint resurfacing.” Dr. Adams opined the surgery stems from Bibb's 2005 injury.

Numerous medical records of Dr. Adams were filed in the record by Brooks Brothers. Notably, the February 4, 2015, record indicates the following history:

This is a 55-year-old who presents today complaining of left ankle pain and instability. He relates he has a significant amount of pain in the inside of his left ankle. Does have a history of ankle arthroscopy with microfracture of osteochondral lesion of his talus. This was performed in California on 10/01/2010. He relates he really did not have any relief from this even initially. He also relates significant instability of his ankle, often rotates his ankle in. He sprained it several times throughout the week. **Relates his initial injury was back in July of 2005.** It is difficult for him to stand or walk for any prolonged period of time. Has tried ankle bracing, antiinflammatory [sic] medications without much improvement or relief.¹ (emphasis added).

As noted on post-operative records dated March 31, 2015, Dr. Adams performed the following procedures on Bibb's left ankle and foot on March 19, 2015: "total ankle arthroplasty with infinity implant, excision of benign-appearing skin lesion to the plantar surface of the left foot, gastrocnemius recession, lateral ankle stabilization, left."

Dr. Ansert was deposed on March 23, 2017. He testified he began treating Bibb on October 20, 2014, and his chief complaint was a plantar's wart on his left foot and, "in his words, osteochondritis dissecans on his left ankle." At that time, Bibb did not relay a history of an acute ankle injury:

Q: All right. At that time, did he relate to you any history of acute injury or prior surgeries or ongoing issues at all?

A: He said he had a left ankle surgery October 2010, but did not extrapolate or say anything else about that.

Q: Okay. And to the best of your recollection, based on your notes, no history of any current or recent injuries at that time?

¹ A record dated February 18, 2015, states something similar- "He relates his initial injury back to 07/2005."

A: No.

Bibb saw Dr. Ansert again on October 22, 2014, at which time Dr. Ansert drained lesions that had formed on Bibb's warts. He saw Bibb again on December 23, 2014. Dr. Ansert testified Bibb did not provide a history of an acute injury:

A: Again, he said it was hard to walk because of the warts. And then we treated the warts and he still had arthritis in the ankle. He said his ankle – he did say that his – at that point, that he was having some painful ambulation.

And at this point, we did examine him and found he had tenderness around the plantar fascia by the end of the heel, as well as on the posterior tibial tendon, tarsal tunnel.

Q: All right. Did he give any history of any acute injury or recent trauma to the foot or ankle that – that would have led to those symptoms?

A: No.

...

Q: At any point in your treatment of Mr. Bibb, particularly with regard to the December 23, 2014 visit, did he mention any sort of history of a work-related injury?

A: No.

...

Q: Do you have any personal recollection of discussing with him a history of any sort of acute injury that occurred at work?

A: No, ma'am.

Brooks Brothers also filed Dr. Ansert's medical records dated October 20, 2014, and December 23, 2014. The records do not mention the alleged work injury.

Carolyn Mays McDaniel ("McDaniel") testified at the January 30, 2018, Hearing on behalf of Brooks Brothers. McDaniel is a Senior Regional HR business partner with Brooks Brothers. She testified that, she checked the video cameras in Brooks Brothers and reviewed the video spanning the time of Bibb's alleged injury, and did not see any kind of fall.

A: - the timing that you told me there was something that occurred, where you were had no visibility to cameras; however, I did look at the cameras during that time span and there was no visibility of any trip, slip, or fall.

Q: What time span?

A: You told me it occurred in the evening.

Q: Okay.

A: You said it was close to closing.

Q: Yes.

A: So, we looked at that hour and a half to two hour period –

Q: Okay.

A: - and there was no slip, trip, or fall.

Q: You looked at it personally?

A: Yes.

Q: And did you –

A: Part of my investigation took me to the store.

Q: Okay. And when you looked at the camera, did you see – did you see my gait?

A: I saw you walking normally. I saw –

Q: You saw me walking normally?

A: The few times that I saw you, it was a very normal presentation.

The following dialogue took place between Bibb and the ALJ:

Bibb: How can I get access to the video?

ALJ: At this point, proof is closed. We're not opening proof for anything else. That's something that would have needed to be requested, subpoenaed, you know, at some point in the last couple of years, so proof will be closed other than for the limited purposes that we've discussed with regard to the medical that was just recently filed and Ms. McDaniel's testimony. Having said that, Ms. McDaniel did testify about the video here today. Do you have access to be able to get video from that date?

Counsel for Brooks Brothers: Judge, it's my understanding – and Ms. McDaniel would be in the right position to say this – that once they're – that they were reviewed at the time but then they are wiped after a certain period of time, so I don't think they exist any more.

Bibb: And what was that period of time?

McDaniel: I can check with our LP experts and get that answer for you. That's not my purview, but my understanding is I – I believe it's a certain number of months and then it is wiped from the system. Our system only houses so much.

ALJ: All right. Ms. Beasley, I'm going to kind of put the onus on you to get me some kind of answer within ten days whether that information still – whether that kind of video still exists. If it does exist, can it be made available to Mr. Bibb? If it doesn't exist, when was that –

Counsel for Brooks Brothers: Purged?

ALJ: - what was the policy for being wiped? All right, so with that, then the hearing is concluded.

The August 17, 2017, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730, work-relatedness/causation, notice, average weekly wage, unpaid or contested medical expenses, injury as defined by the Act, exclusion for pre-existing disability/impairment, and temporary total disability. Under “other matters” is the following: Mr. Bibb has 20 days to submit proof over the defendant employer’s objection, after which the defendant has 60 days for rebuttal.” The record reveals neither party introduced evidence after the hearing.

In the April 2, 2018, Opinion and Order, the ALJ set forth the following analysis:

Causation/Work-Relatedness

As a threshold issue, the defendant employer maintains plaintiff’s current left ankle condition and need for the replacement surgery he underwent in 2015 are not related to any work injury. It points out plaintiff previously injured his left ankle in 2005 and that he underwent surgery in 2010, and that plaintiff’s ankle continued to be painful immediately prior to the alleged injury. It therefore relies on the opinions of plaintiff’s treating surgeon and its retained expert, who each concluded plaintiff’s ankle symptoms immediately prior to and since December 22, 2014 are not due to any alleged work injury but, instead, are due to the effects of the original 2005 injury. For his part, plaintiff relies on his expert, Dr. Simon, who indicated plaintiff’s increased work hours since October, 2014 so weakened the left ankle that it was unstable, leading to his work injury on December 22, 2014 and necessitating his need for subsequent surgery.

Having reviewed the evidence of record, the Administrative Law Judge is simply not persuaded plaintiff has carried his burden of proving he suffered any new, work-related injury as he alleges or that his need for ankle replacement surgery was caused by any work accident. In reaching this conclusion, the ALJ is persuaded by the fact that the contemporaneous treatment records from Dr. Ansert and Dr. Adams do not show any mention of plaintiff giving a history of any work injury to his left ankle when he treated from October, 2014 through the winter and spring of 2015. Both treating physicians testified by deposition that plaintiff did not give a history of a work injury. Although plaintiff testified the records are inaccurate and that he actually did so inform his treating physicians, the ALJ is not persuaded by this testimony. Instead, the ALJ is more persuaded by Dr. Adams' testimony that the symptoms and conditions for which he treated plaintiff and which necessitated the ankle replacement surgery he performed were due to plaintiff's 2005 injury and not a December, 2014 work event. Based on these opinions, it is determined plaintiff did not suffer any work injury as he alleges and, as such, his claim for benefits must be dismissed.

Bibb filed a petition for reconsideration alleging several errors which the ALJ denied in the May 17, 2018, Order.

On appeal, Bibb first asserts the ALJ erred by relying upon the opinions of Dr. Adams, as he utilized an "outdated and unreliable" diagnostic technique. We affirm on this issue.

As the claimant in a workers' compensation proceeding, Bibb had the burden of proving each of the essential elements of his cause of action, including proving he sustained an "injury" as defined by the Workers' Compensation Act. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Bibb 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). So long as the ALJ’s ruling with respect to an issue is supported by substantial evidence, it may not be disturbed on appeal by this Board. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The ALJ relied upon the medical opinions of Drs. Adams and Ansert to conclude Bibb failed to prove he sustained a work-related left ankle injury. Persuasive to the ALJ were the medical records and deposition testimony of both doctors indicating Bibb failed to relay *any* history of a work injury occurring during his employment at Brooks Brothers. While this Board acknowledges Bibb’s position regarding the inaccuracy of the medical records, the ALJ has the discretion to rely upon the medical records and the doctors’ depositions instead of Bibb’s testimony. The ALJ may reject any testimony and believe or disbelieve various parts of the evidence. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Also convincing to the ALJ was the deposition testimony of Dr. Adams that the surgery he performed on Bibb in 2010 was due to his 2005 injury. While there may be evidence in the record in support of a work-related injury occurring on December 22, 2014, it is not the function of this Board to re-weigh the evidence. Whittaker v. Rowland, *supra*. If “the physicians in a case genuinely express medically sound, but differing opinions

as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe.” Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). Although a party may point to evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal as long as substantial evidence supports the ALJ’s ultimate determination. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Here, substantial evidence supports the ALJ’s determination to dismiss Bibb’s claim for failure to prove a work-related injury; therefore, we must affirm.

Regarding Bibb’s allegation that Dr. Adams utilized an “outdated and unreliable” diagnostic technique, Bibb fails to specify the precise diagnostic technique with which he is taking issue. Nonetheless, the specific diagnostic tools utilized by the medical experts in the course of their examinations does not fall within the purview of the ALJ. Therefore, it is neither unreasonable nor an abuse of discretion for the ALJ to rely exclusively upon a medical expert’s ability to competently reach a diagnosis through any and all diagnostic tools available to him or her.

In his second argument on appeal, Bibb asserts the ALJ erred by indicating a factor in his decision to dismiss was due to Bibb’s 2010 ankle surgery being “unsuccessful.” We affirm on this issue.

A careful review of the April 2, 2018, Opinion and Order reveals the ALJ did not, in fact, conclude Bibb’s 2010 ankle surgery was unsuccessful. There is no such language in either the April 2, 2018, Opinion and Order or the May 17, 2018, Order. However, assuming, *arguendo*, the ALJ had concluded Bibb’s 2010

surgery was unsuccessful, such an inference is supported by the record. Bibb's testimony and the medical records indicate he was experiencing ankle problems before the alleged work injury. However, the medical records that pre-date the alleged work injury, specifically those of Dr. Ansert, indicate no history from Bibb of ankle problems related to his work at Brooks Brothers. Further, as noted by the ALJ, medical records relating to the treatment following the alleged work injury indicate no history of left ankle problems or an acute left ankle injury occurring at Brooks' Brothers on December 22, 2014. Notably, Dr. Adams' record of February 4, 2015, indicates Bibb was experiencing "a significant amount of pain in the inside of his ankle," and, regarding the 2010 surgery, Bibb "relates he really did not have any relief from this even initially." Therefore, had the ALJ inferred the 2010 surgery was unsuccessful, this inference would have been reasonable and proper. The ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). However, since the ALJ did not make such an inference, Bibb's second argument on appeal is moot.

In his third argument, Bibb asserts the ALJ "erred and misused his discretion by allowing 'policy of video retention' in lieu of an actual video to determine [his] case." This assertion is wholly erroneous, as the video tape about which McDaniel testified played no role in the ALJ's dismissal of Bibb's injury claim. The ALJ dismissed Bibb's claim for failure to prove a work-related injury based upon the medical records and deposition testimony of Drs. Ansert and Adams. We take issue with Bibb's assertion the video tape was "a video tape of the incident."

As McDaniel clearly testified, she personally reviewed the video and the alleged incident occurring on December 22, 2014, had not been recorded. We reject Bibb's final argument on appeal.

Finally, Bibb requested oral argument. Having reviewed the record, we conclude oral argument is unnecessary. Consequently, the request will be denied.

Accordingly, the April 2, 2018, Opinion and Order and the May 17, 2018, Order are **AFFIRMED**. In addition, Bibb's motion for oral argument is **OVERRULED**.

ALL CONCUR.

FRANKLIN A. STIVERS, MEMBER
WORKERS' COMPENSATION BOARD

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