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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001300-WC

PIEDMONT AIRLINES — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-70281

RICHARD BROWN; HON. CAROLINE PITT CLARK, ADMINISTRATIVE LAW JUDGE; AND THE WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, CAPERTON, AND CLAYTON, JUDGES.

CAPERTON, JUDGE: The Appellant, Piedmont Airlines, appeals the June 2, 2010, Opinion of the Workers' Compensation Board, vacating and remanding this claim back to the Administrative Law Judge Caroline Pitt-Clark, following the

ALJ's entry of a November 12, 2009, order dismissing this claim after the Appellee, Richard Brown, failed to attend three independent medical evaluations despite being ordered to do so, and failed to attend the final hearing. The Board found that pursuant to KRS 342.205(3), the ALJ was required to place the claim in abeyance after Brown failed to attend the first medical evaluation, and that the ALJ erred in setting the matter for a formal hearing. Piedmont disagrees, and argues that the ALJ was correct in dismissing Brown's claim. Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

Brown alleged a work injury of November 17, 2006, involving his left wrist. The claim was accepted as compensable, and temporary total disability benefits were paid from November 18, 2006, through December 10, 2006, in the total amount of $9,259.91. Piedmont did not file a Form 111 Notice of Claim denial in response to Brown's Form 101 Application for Resolution of Injury. Brown attached to his Form 101 a Form 107 medical report from Dr. Robert Dhaliwal, a chiropractor, assessing an 8% impairment rating under the *5th Edition of the AMA Guides*. Brown also submitted medical records from Dr. Grefer, x-ray and MRI reports, the operative report from St. Luke Hospital West, and medical records from Concentra Medical Center.

A Benefit Review Conference, (BRC), was initially held in this matter on May 13, 2009. The order and memorandum from the BRC indicates that Piedmont did not appear for the BRC. A show cause order was entered, requiring Piedmont to show, within ten days, why it failed to appear for the BRC. The order

further provided that if Piedmont did not enter a response, the claim would be summarily decided in Brown's favor.

An untimely response was filed on May 28, 2009, indicating that Piedmont had contacted defense counsel upon receipt of the BRC order, and that counsel had confirmed with representatives of Piedmont and its insurer, AIG, that the original Form 101 and subsequent scheduling order were never received.[1] Accordingly, Piedmont requested a minimal amount of time to submit proof regarding the allegations contained in the Form 101.

Brown filed a response to Piedmont's response to the show cause order on June 30, 2009. Brown indicated that a letter from the senior investigator for AIG was received via fax on January 4, 2008, indicating that an AIG adjustor had been trying to reach Brown.[2] The response further indicated that Brown's attorney had a telephone conversation with the senior investigator on January 25, 2008, in which she indicated that all future correspondence should to be sent directly to the adjuster.[3]

The ALJ ultimately granted Piedmont until July 21, 2009, to submit proof in this matter, and a formal hearing was scheduled for September 3, 2009.

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[1] Counsel indicated that the Form 101 was mailed to 400 South Fourth Avenue, Suite 400, Louisville, Kentucky 40202, and that this had never been an address for AIG claims services. Counsel further noted that the copy intended for Piedmont had been sent to an address in Salisbury, Maryland, where Piedmont had its headquarters. Counsel stated that Piedmont was a wholly-owned subsidiary of US Airways, and that it did not have a risk management department, and therefore would not have been able to process the scheduling order and/or application for resolution of claim.

[2] A copy of the letter was attached to Brown's response.

[3] There was a letter from the AIG adjuster attached to the response, bearing the address of 400 South Fourth Avenue, Suite 400, Louisville, Kentucky 40202.

Accordingly, Piedmont scheduled Brown for an IME with Dr. Richard Sheridan for July 21, 2009. Notice of that evaluation was apparently sent to Brown's counsel on July 7, 2009. On that morning of the scheduled evaluation, Dr. Sheridan's office advised Piedmont that Brown had not kept the appointment. Piedmont asserts that it left a message with Brown's counsel inquiring as to his absence at the evaluation, but that no response was given.

Thereafter, Piedmont filed a motion for extension of time and a motion to compel. Brown filed a response to Piedmont's motion for extension of time, stating that he objected to any extension as service had properly been forwarded to Piedmont, and Piedmont had failed to respond in a timely manner, and therefore should not be allowed to submit medical evidence. The ALJ granted the motion to compel and the motion for extension of time on August 7, 2009. Therein, the ALJ ordered Brown to attend the rescheduled evaluation on August 10, 2009. Nevertheless, Brown again failed to attend the appointment or to explain his absence.

Subsequently, on September 3, 2009, the parties attended a formal hearing with the ALJ. Brown failed to attend the hearing. The ALJ printed on the hearing order that Brown was ordered to attend an IME scheduled by Piedmont. She further stated that failure to attend the IME, particularly in light of Brown's failure to appear for the formal hearing, would result in a dismissal of his claim. Piedmont then scheduled a third medical evaluation with Dr. Sheridan for September 29, 2009. Brown failed to attend that appointment as well.

Accordingly, Piedmont moved to have Brown's claim dismissed. Brown's counsel filed a response to that motion, indicating that its office had just recently been able to re-establish contact with Brown, who now resides in Cleveland, Ohio. Counsel stated that Brown was still in the process of establishing his residence and had not had an opportunity to provide a forwarding address or updated telephone number and was therefore unable to attend the scheduled IMEs. Counsel provided Brown's current address and telephone number, assured that Brown was willing and able to attend an IME at that point, and requested that another IME be scheduled.

As noted, the ALJ granted Piedmont's motion to dismiss in an order of November 12, 2009. Brown filed a petition for reconsideration, arguing that the ALJ did not have the authority to dismiss a claim for inability to attend an employer's scheduled examination. He again noted that Piedmont and its insurance company were properly served with the original Form 101, that Piedmont failed to respond, and thus Piedmont was precluded from filing contrary medical evidence. The petition for reconsideration was denied by the ALJ in an order of December 28, 2009. Thereafter, Brown appealed to the Workers' Compensation Board.

In making his arguments to the Board on appeal, Brown raised two issues. First, he noted that Piedmont did not file a Form 111, Notice of Claim Denial, in response to the filing of his Form 101 Application for Resolution of Injury. Thus, he asserts that all allegations contained in his application were

deemed admitted, including the attached Form 107 medical report from Dr. Robert Dhaliwal and the impairment rating contained therein. Brown contended that he was therefore entitled to a summary ruling in his favor, and that the ALJ erred in dismissing his claim. Secondly, Brown argued that the ALJ lacked the authority to dismiss his claim for failure to attend the IME with Dr. Sheridan. Brown argued instead that the ALJ was allowed only to suspend his claim pursuant to KRS 342.205, and to deny compensation for the period during which he refused to attend an IME.

As noted, the Board entered an opinion on June 2, 2010, vacating the ALJ's order of dismissal and remanding the matter to the ALJ. In doing so, the Board found that KRS 342.205(3)[4] provided that the sanction for failure to attend an IME was not dismissal, but a suspension of Brown's right to take or prosecute the proceedings. Thus, the Board in reliance upon the holding of this Court in *B.L. Radden & Sons, Inc. v. Copely*, 891 S.W.2d 84 (Ky.App. 1995)[5] concluded that the ALJ erred in dismissing the claim based on Brown's failure to attend the scheduled IMEs, and should instead have placed the matter in abeyance and suspended compensation until Brown attended the IME. It is from that opinion that Piedmont now appeals to this Court.

[4] KRS 342.205(3) provides that, "If an employee refuses to submit himself to or in any way obstructs the examination, his right to take or prosecute any proceedings under this chapter shall be suspended until the refusal or obstruction ceases. No compensation shall be payable for the period during which the refusal or obstruction continues."

[5] Wherein this Court held that placing a case in abeyance and ordering the cessation of the compensation payable during the period during which the refusal or obstruction continues is the only appropriate sanction available to the ALJ for a claimant's failure to appear at a scheduled medical exam.

In reviewing the arguments made by the parties, we note that our Kentucky Supreme Court has long recognized that the function of the Court of Appeals in reviewing the decisions of the Board is to correct the Board only where the Court perceives that 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. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). We review this matter with this standard in mind.

On appeal, Piedmont argues that the Board erred when it found that the ALJ was required to place the claim in abeyance pursuant to KRS 342.205(3). Particularly, Piedmont takes issue with the Board's reliance on *Copely*, *supra*, stating that this claim is not one in which the claimant has merely refused to attend an IME, but is instead a case where the claimant failed multiple IMEs, and a final hearing, despite being compelled by an ALJ.

Piedmont also argues that Section(3) of KRS 342.205(1), which holds that "if an employee refuses to submit himself to or in any way obstructs the examination, his right to take or prosecute ... shall be suspended ...", is only triggered when a claimant either refuses to be examined, or obstructs the exam as it is taking place. Piedmont argues that in the matter *sub judice*, Brown did neither. Piedmont asserts that Brown never specifically indicated an unwillingness to attend the examinations, but simply did not show up, leading Piedmont to believe the failure was inadvertent.

In support thereof, Piedmont directs our attention to the acknowledgement by Brown's counsel that Brown had moved and counsel had been unable to reach him from July 21, 2009, through October 23, 2009, and that Brown was "willing and able" to attend an IME if it were rescheduled again. Thus, Piedmont argues that this is not a claim where KRS 342.205(3) requires an ALJ to place the claim in abeyance and was instead a claim abandoned by Brown, at least for a period of time. Accordingly, Piedmont asserts that the ALJ's dismissal was appropriate, as the ALJ has discretion to dismiss claims where a claimant fails to prosecute. *See Cornett v. Corbin Materials*, 807 S.W.2d 56 (Ky. 1991).

As a corollary argument concerning Brown's failure to attend the scheduled IMEs, Piedmont argues that the ALJ had the discretion to dismiss Brown's claim for failure to comply with discovery orders. Piedmont argues that in failing to attend the IMEs, Brown also failed to comply with an express court order compelling discovery. Thus, Piedmont asserts that an ALJ might not have the authority to dismiss a claim solely on the basis of refusal to attend an IME, it does have the power to dismiss a claim when a claimant continually defies court orders and obstructs the defense of a claim.[6]

Beyond its arguments concerning Brown's failure to attend the scheduled IMEs, Piedmont asserts that the ALJ had the discretion to dismiss

[6] In support of that argument, Piedmont refers this Court to 803 KAR 25:009 § 17, which holds that discovery shall be in accordance with the provisions of Civil Rules 26 to 37, excluding Civil Rules 27, 33, and 36. Thus, Piedmont argues that because CR 37.02 allows the court authority to dismiss an action for failure to comply with orders of the court, the ALJ should have been allowed to do so in this claim as well.

Brown's claim for his failure to attend a final hearing. Piedmont directs this Court's attention to KRS 803 25:010 §18, which provides that, "If the plaintiff or plaintiff's counsel fails to appear, the administrative law judge may dismiss the case for want of prosecution, or if good cause is shown, the hearing may be continued." Thus, Piedmont argues that under that provision, the ALJ had the discretion to dismiss Brown's claim for failure to attend the hearing, and for failing to show good cause why he did not do so. Piedmont asserts that Brown's failure to attend the IMEs as scheduled prejudiced its defense, and asserts that Brown continued to do so despite being repeatedly admonished by the ALJ.

Finally, Piedmont argues that its failure to timely respond to Brown's application for benefits should not have resulted in summary judgment against it. In making this argument, Piedmont asserts that Brown is arguing that summary judgment should have been issued against it. However, a review of Brown's brief does not reveal any such argument. Further, we note that summary judgment was not, in fact, issued against Piedmont. Accordingly, both because summary judgment was not issued and because Brown does not argue to this Court that it should have been, we decline to address this issue further herein.

In response, Brown states simply that Piedmont has merely rewritten and reworded the same arguments that were presented to the Board, and have presented nothing justifying their failure to file a Form 111. Brown thus merely incorporates the opinion of the Board as his own reasoning, and adopts the arguments therein as his own to his Court.

Having reviewed the arguments of the parties and the opinion of the Board, we are ultimately in agreement with the Board's decision to vacate and remand this matter back to the ALJ. Critically for purposes of determination of these issues, we note that it is undisputed that Piedmont did not file a Form 111 in response to Brown's claim. Accordingly, we believe the law is clear that all allegations in Brown's application were deemed admitted.

While Piedmont maintained below that only the allegations contained within the Form 101 itself were deemed admitted, and that accordingly it did not accept the medical report of Dr. Dhaliwal, which was attached to the Form 101, we disagree. 803 KAR 25:010 § 5(2)(b) provides that, "To apply for resolution of an injury claim, the applicant shall file a Form 101 with the following completed documents ..." Those documents include a medical report which includes a description of the injury, establishment of a causal relationship between the injury and the work-related event, among other enumerated items. Brown attached such a medical report to his Form 101, that of chiropractor Dr. Dhaliwal, whose report included a description of the injury, an opinion as to causation, an impairment rating, and restrictions. By not filing a Form 111 in response to Brown's claim, Piedmont accepted the allegations contained therein. Thus, Piedmont is not entitled to obtain an IME for purposes of obtaining a rating or restrictions to dispute those issued by Dr. Dhaliwal.

Certainly Piedmont is correct that KRS 342.205(1) allows a defendant the right to have a claimant examined at a reasonable time and place by a duly

qualified physician, or a surgeon, designated and paid for by the requesting party, a requirement which exists for as long as compensation is claimed. However, as the Board correctly noted, Piedmont does not have the right to use an IME report in an attempt to rebut allegations which were deemed admitted upon its failure to timely file a Form 111. Piedmont may, however, still wish to obtain an IME for other legitimate purposes should they occur. We agree with the Board, however, that pursuant to KRS 342.205(3), an ALJ cannot dismiss a claim for failure to attend an IME. *B.L. Radden & Sons, Inc. v. Copely*, 891 S.W.2d 84 (Ky.App. 1995).

Having so noted, we acknowledge that Piedmont is correct in asserting that in certain instances, failure to attend a hearing may be grounds for dismissal. *See* 803 KAR 25:010 §18. However, we are again in agreement with the Board that in the matter *sub judice*, Brown's actions or lack thereof do not warrant dismissal. While the regulation provides that the ALJ may dismiss a claim for want of prosecution, it is clear that Brown's counsel actively prosecuted the claim, and there was clearly no intent to abandon the claim. A review of the record reveals that Brown's counsel repeatedly argued that an IME was not proper in light of Piedmont's failure to timely respond to this claim. Beyond that, the letter from counsel filed in response to Piedmont's motion to dismiss indicated difficulty in contacting Brown, but a willingness to attend an IME should another one be scheduled.

Thus, we believe that the Board acted appropriately in vacating the order and remanding this matter back to the ALJ. Certainly, on remand, the ALJ

may sanction Brown for his failure to attend the IMEs pursuant to KRS 342.305 until such time as he complies, and may also issue other sanctions for failure to attend the final hearing, short of an actual dismissal.

Wherefore, for the foregoing reasons, we hereby affirm the June 2, 2010, opinion of the Workers' Compensation Board, vacating the November 12, 2009, order of the Administrative Law Judge dismissing this claim, and remanding this matter back to the Administrative Law Judge for a decision on the merits.

ALL CONCUR.

BRIEF FOR APPELLANT:

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