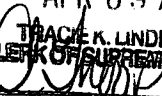


IN THE SUPREME COURT OF THE STATE OF NEVADA

SOUTHWEST AIRLINES,
Appellant,
vs.
CALVIN FRANKLIN, JR.,
Respondent.

No. 51484

FILED

APR 09 2009
TRACEE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER AFFIRMING AS MODIFIED

This is an appeal from a district court order granting a petition for judicial review. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

BACKGROUND

Respondent Calvin Franklin, Jr., alleges that on May 27, 2004, he sustained an industrial injury to his left shoulder in the course and scope of his employment as a baggage handler for appellant Southwest Airlines. According to Franklin, he felt a severe left shoulder pain as he was lifting a bag from a cart. After seeking medical attention, Franklin was diagnosed with a shoulder strain and shoulder pain. Franklin applied for workers' compensation benefits for his injury but his claim was denied. Franklin then administratively appealed the denial of workers' compensation benefits.

After Franklin appealed the denial of his workers' compensation claim, he was evaluated by Henry Daniels, M.D., whose examination suggested more extensive damage, including a full rotator cuff tear at the left shoulder. Franklin's evaluation by Dr. Daniels was

then presented to the appeals officer as part of Franklin's appeal. Despite Dr. Daniels' report, the appeals officer issued an interim order finding that Franklin had not identified a specific event that led to his underlying shoulder condition, and thus the evidence submitted for her review failed to establish that Franklin sustained an industrial "injury" or "accident" within the course of his employment. Noting that there was evidence from Dr. Daniels' evaluation that suggested that Franklin's employment with Southwest might have caused cumulative trauma to Franklin's shoulder, however, the appeals officer's interim order also instructed that an independent medical evaluation be completed for the purposes of determining whether, alternatively, Franklin had a viable occupational disease claim.

After reviewing the resulting independent medical evaluation by James Dettling, M.D., that suggested that Franklin had a history of shoulder issues largely unrelated to his employment at Southwest, which the appeals officer found convincing, the appeals officer entered a decision that reaffirmed the interim order's denial of workers' compensation benefits and also denied Franklin occupational disease benefits. The appeals officer based her conclusion to deny Franklin occupational disease benefits on her finding that Franklin had failed to demonstrate that his condition did not arise from a hazard to which he would have been equally exposed to outside of his employment. Specifically, Dr. Dettling's evaluation found that "the overwhelming preponderance of [Franklin's] current condition is associated with his previous military injury, normal age-related activity and his 32-year history of weight training." Dr. Dettling also stated that "Southwest Airlines is responsible for less than 10% of this issue and greater than 90% of [Franklin's] condition is

resultant from previous long-term injury from his shoulder associated with his military activities, chronic weight training and relative age.” Finally, the appeals officer’s decision concluded that because Franklin had not established that he had sustained a new “injury” or “accident,” the “last injurious exposure rule” was inapplicable.

Franklin then timely petitioned for judicial review. The district court subsequently entered an order that, without explanation, granted the petition and reversed the denial of Franklin’s claim. Southwest has now appealed.

DISCUSSION

On appeal, Southwest argues that the district court improperly set aside the appeals officer’s decision because that decision was supported by substantial evidence and was not otherwise affected by an error of law. Franklin, acting in proper person, declined to file an answering brief when directed to do so and instead filed a document requesting that this case be resolved upon the opening brief, appendix, and records before this court.

Standard of Review

This court, like the district court, reviews an administrative decision to determine whether the agency’s decision constituted an abuse of discretion. Grover C. Dils Med. Ctr. v. Menditto, 121 Nev. 278, 283, 112 P.3d 1093, 1097 (2005); Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491 (2003), rejected on other grounds by Five Star Capitol Corp. v. Ruby, 124 Nev. ___, 194 P.3d 709 (2008). On questions of fact, this court will not overturn an appeals officer’s factual determination that is supported by substantial evidence. Day v. Washoe County Sch. Dist., 121 Nev. 387, 389, 116 P.3d 68, 69 (2005). “While this court will not substitute its judgment for that of the agency as to the weight of the evidence, this

court will reverse an agency decision that is clearly erroneous in light of reliable, probative, and substantial evidence on the whole record.” Id. (internal quotations omitted). This court’s review is limited to the record before the appeals officer. Menditto, 121 Nev. at 284, 112 P.3d at 1097.

Workers’ compensation benefits

Having reviewed appellant’s opening brief, the appendix, and the other materials filed with this court, we conclude that the district court properly held that the appeals officer’s decision was not supported by substantial evidence, and thus the district court properly granted Franklin’s petition for judicial review. Day, 121 Nev. at 389, 116 P.3d at 69. Specifically, the appeals officer’s determination that Franklin failed to identify a specific event that caused his injuries, which served as the basis for the appeals officer’s conclusion to deny Franklin workers’ compensation benefits for failing to demonstrate that he suffered an “accident/injury” at work, is not supported by the evidence.

Regarding this finding, the appeals officer’s decision refers to Franklin’s May 27, 2004, C-1 form and concludes that this form does not identify a specific event that allegedly caused Franklin’s shoulder condition. That form however, identifies a specific time, 4:40 p.m., when the injury allegedly occurred. The appeals officer’s decision also notes that an injury and illness report filled out by Franklin on April 22, 2004, also does not identify a specific event that caused the injury. This form, however, also identifies the specific time of 4:40 p.m. as when the accident occurred and states that the injury occurred from “pulling [a] bag off [the] carousel to put [it] on [a] cart.” Because these forms consistently identify a specific time in which an injury allegedly occurred, and the injury and illness report identifies the event that allegedly caused the injury, we conclude that substantial evidence does not support the appeals officer’s

finding that Franklin failed to describe a specific event that led to his injury.¹ Id. Because this finding led the appeals officer to determine that Franklin's claim for workers' compensation benefits should fail, we conclude that the district court properly granted Franklin's petition for judicial review with regard to the denial of Franklin's workers' compensation benefits claim.

Occupational disease benefits

With regard to Franklin's occupational disease claim, Southwest argues that the appeals officer's decision was supported by substantial evidence and not otherwise affected by an error of law because Dr. Dettling's report properly supported the appeals officer's conclusion that Franklin failed to meet his burden to establish that his condition did not arise from a hazard that he was equally exposed to outside of his employment with Southwest. Having reviewed Dr. Dettling's independent medical evaluation, however, we are unable to determine whether the "condition" described by Dr. Dettling, that is partly, if not minimally, attributable to Franklin's employment at Southwest, is in reference to a new injury or aggravation or instead merely symptoms of the prior shoulder problems described in the independent medical evaluation.

¹The appeals officer's decision also lists a discussion between Franklin and a claims adjuster as additional support for the finding that Franklin failed to identify a specific event that caused his shoulder condition. Although appellant's opening brief does not provide a citation to the appendix for the evidence relied on by the appeals officer to support this finding, our own review of the record indicates that this finding was based on a document included in the appendix entitled "Notice of Claim Denial." Our review of this document does not alter our conclusion regarding this issue.

Menditto, 121 Nev. at 290, 112 P.3d at 1101-02. Thus, we are unable to determine whether substantial evidence supports the appeals officer's findings regarding any occupational disease claim. See Day, 121 Nev. at 389, 116 P.3d at 69. Because the appeals officer's decision does not address this question, and as it appears that the erroneous finding that Franklin did not identify a specific event for the purposes of his workers' compensation claim may have influenced the appeals officer's analysis of any occupational disease claim, we conclude that the district court properly granted the petition for judicial review with regard to Franklin's occupational disease claim.

Although we conclude that the district court properly granted Franklin's petition for judicial review, the district court nevertheless should have remanded this matter to the appeals officer for further proceedings. Id. Accordingly, we affirm the district court's order, with the modification that we instruct the district court to remand this matter to the appeals officer for further proceedings consistent with this order.

It is so ORDERED.

Cherry, J.
Cherry

Saitta, J.
Saitta

Gibbons, J.
Gibbons

cc: Hon. Timothy C. Williams, District Judge
William F. Buchanan, Settlement Judge
Santoro, Driggs, Walch, Kearney, Holley & Thompson
Calvin Franklin Jr.
Eighth District Court Clerk