

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Carl E. Kimbro,	:	
Appellant-Appellant,	:	
v.	:	No. 12AP-1053
Ohio Department of Administrative	:	(C.P.C. No. 12CVF-08-10883)
Services,	:	(REGULAR CALENDAR)
Appellee-Appellee.	:	

D E C I S I O N

Rendered on June 18, 2013

Scully & Delaney, and Timothy J. Delaney, for appellant.

Michael DeWine, Attorney General, and James M. Evans, for appellee.

APPEAL from the Franklin County Court of Common Pleas

T. BRYANT, J.

{¶ 1} Appellant, Carl E. Kimbro, appeals from a judgment of the Franklin County Court of Common Pleas upholding a decision and order issued by a hearing officer for appellee, the Ohio Department of Administrative Services ("ODAS"), requiring appellant to repay certain amounts he received from the state disability fund.

{¶ 2} The facts of the case are not in dispute. Appellant is a state employee with the Ohio Department of Natural Resources ("ODNR"). In May 2008, he sought and received state disability leave benefits because of a back injury. In his application,

appellant answered "no" to the question "[w]as your current illness/injury received in the course of and arising out of your employment with the State of Ohio, or any other employer?" (R. 406, Application for Disability Leave Benefits.) ODAS approved appellant's initial application and, after several extensions, eventually paid him the statutory maximum one-year term of benefits beginning on June 10, 2008 and ending on May 17, 2009.

{¶ 3} After exhausting his disability leave, appellant filed, on August 4, 2009, an application with the Ohio Bureau of Workers' Compensation ("BWC") seeking an award of temporary total disability ("TTD") based upon the same injury underlying his disability leave claim. Appellant sought the TTD award through new proceedings in an existing claim first allowed in 2006. The Industrial Commission ("commission") granted TTD by order dated October 23, 2009, covering the period from May 27, 2008 through June 3, 2009, essentially the same period covered by appellant's prior receipt of disability leave benefits.

{¶ 4} ODAS initiated the present action in April 2010 by notifying appellant that it had learned of the TTD award allowed for the same injury and benefit period underlying his disability leave benefits and would seek to recoup any duplicative payments. An initial appeal to the court of common pleas resulted in a remand and rehearing before ODAS. Evidence at the hearing established the timing of the various administrative actions by both ODAS and the commission, the nature of appellant's physical injuries, and the amount of compensation received from the two sources. Specifically, the ODAS hearing officer found that the amount of disability payments made directly to appellant during the period from June 2008 to May 2009 was \$20,025.68. The hearing officer found that further amounts of \$1,579.28 were paid by ODNR for health insurance on behalf of appellant. The hearing officer also found that the commission had paid a total of \$13,211 in TTD to appellant for the period from November 26, 2008 through June 3, 2009, and that no workers' compensation benefits were paid to appellant for the period from May 27 through November 25, 2008; although TTD was allowed for this period, the actual payments were withheld for reasons that will be developed more fully below.

{¶ 5} The hearing officer concluded that the total amount repayable to ODAS by appellant, including all disability leave payments to him and health insurance premiums paid on his behalf, was \$21,604.96. Upon appeal, the court of common pleas affirmed. Appellant has timely appealed to this court and brings the following four assignments of error:

I. THE TRIAL COURT ERRED IN AFFIRMING THAT THE DEPARTMENT OF ADMINISTRATIVE SERVICE RULING WAS SUPPORTED BY RELIABLE, PROBATIVE, AND SUBSTANTIAL EVIDENCE AND THAT APPELLANT HAD BEEN ERRONEOUSLY PAID \$21,604.96 IN DISABILITY LEAVE AND INSURANCE PREMIUMS.

II. THE TRIAL COURT ERRED IN DETERMINING THAT APPELLANT, AT THE TIME HE APPLIED FOR DISABILITY LEAVE, QUALIFIED FOR BENEFITS UNDER A WORKERS' COMPENSATION CLAIM.

III. THE TRIAL COURT ERRED IN NOT REDUCING THE \$21,604.96 PAID IN DISABILITY BENEFITS BY THE PERIOD OF TIME APPELLANT WAS NOT PAID WORKERS' COMPENSATION BENEFITS.

IV. THE AMOUNT OF D.A.S. BENEFITS PAID FROM 06/10/08 TO 05/17/09 IS \$20,025.68, NOT \$21,604.96.

{¶ 6} When addressing an administrative appeal brought pursuant to R.C. 119.12, the standard of review for the common pleas court is that it will affirm an agency's order if it finds "upon consideration of the entire record and such additional evidence as the court has admitted, that the order is supported by reliable, probative, and substantial evidence and is in accordance with law." R.C. 119.12.

The evidence required by R.C. 119.12 can be defined as follows: (1) "Reliable" evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true. (2) "Probative" evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue. (3) "Substantial" evidence is evidence with some weight; it must have importance and value.

(Footnote deleted.) *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992).

{¶ 7} A reviewing court will presume an agency's findings of fact to be correct and defer to them unless the court determines that "the agency's findings are internally inconsistent, impeached by evidence of a prior inconsistent statement, rest upon improper inferences, or are otherwise unsupportable." *Ohio Historical Soc. v. State Emp. Relations Bd.*, 66 Ohio St.3d 466, 471 (1993).

{¶ 8} Upon further appeal from the common pleas court to this court, our review is limited to a determination of whether the common pleas court abused its discretion in determining whether the agency's order was supported by reliable, probative, and substantial evidence and was in accordance with law. *Hartzog v. Ohio State Univ.*, 27 Ohio App.3d 214 (10th Dist.1985). The term "abuse of discretion" connotes more than a mere error of judgment or law, it implies an attitude that is arbitrary, unconscionable, or unreasonable. *State v. Adams*, 62 Ohio St.2d 151, 157 (1980). However, on the question of whether the agency's order was in accordance with law, this court's review is plenary and without deference to the conclusions of law reached either in the administrative adjudication or by the court of common pleas on initial appeal. *Univ. Hosp., Univ. of Cincinnati College of Medicine v. State Emp. Relations Bd.*, 63 Ohio St.3d 339, 343 (1992).

{¶ 9} Appellant's first two assignments of error will be addressed together. The question before us is whether appellant may receive and retain disability leave benefits for any portion of the period of time covered by his subsequent TTD award. We hold that he may not.

{¶ 10} ODAS administers the state disability benefits program. R.C. 124.385(E); Ohio Adm.Code 123:1-33-12(C); *Melick v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 04AP-821, 2005-Ohio-1850. Ohio Adm.Code 123:1-33-05 provides that the director of ODAS may recover improperly paid benefits. The present action is brought pursuant to that section. The benefits in this case were deemed "improperly paid" because R.C. 124.385(B)(9) provides that ODAS shall, in administering the disability leave benefit, promulgate rules "precluding the payment of benefits if the injury for which the benefits

are sought is covered by a workers' compensation plan[.]" ODAS has duly promulgated Ohio Adm.Code 123:1-33-03 tracking the language mandated by the statute:

(A) Disability leave benefits are not payable for any disability caused by or resulting from:

(1) Any injury or illness received in the course of and arising out of any employment *covered* by any workers' compensation, federal compensation plan, or during any period in which the employee is receiving occupational injury leave or lost time wages from bureau of workers' compensation except as outlined in paragraph (A)(1)(a) or (A)(1)(b) of this rule.

(a) In the case of any injury or illness which may be covered by the bureau of workers' compensation, an employee may file an application for disability leave benefits if the employee has been denied an initial claim for workers' compensation lost time wages, by the bureau of workers' compensation.

(b) If an employee appeals the order of the bureau of workers' compensation. [sic] The employee may receive, as an advancement, disability leave benefits.

(Emphasis added; punctuation in original.)

{¶ 11} Appellant essentially asserts that he can avoid the above-defined statutory bar against double benefits by delaying his workers' compensation claim covering a given time frame until after his disability leave benefits have run for that period; in other words, he believes that benefits received are benefits vested, and that the prohibition against parallel claims is not a bar to serial ones. To this end, appellant wishes us to focus only on the timing of his various *applications* for benefits, and ignore the period and causes for which benefits are awarded. To reach this outcome, he argues that the above-quoted statutory language must be read exclusively in the present tense. In this view, if at the time of application for disability leave the underlying injury has not been allowed, or even applied for, as the basis for a workers' compensation award, the statute does not require the claimant to anticipate the future allowance of such a workers' compensation award. Because appellant had not qualified for benefits under his workers' compensation claim, nor even applied, at the time he applied for and received disability benefits, he asserts that

the statute does not preclude receipt of both forms of compensation for the same injury and the same period.

{¶ 12} We disagree. The bar against double benefits is not a technical nicety to be finessed by carefully-timed applications. It reflects the underlying public policy purposes behind the two forms of compensation. Workers' compensation provides benefits for injury or illness arising in the workplace. Disability leave provides state workers with complementary protection against time lost due to other injuries or illnesses. The two are complementary alternatives, not cumulative ones, and accordingly the two forms of compensation draw on different funding sources to reflect the different risks assumed: "When an employee receives workers' compensation benefits, the state looks to the workers' compensation system and not to its own disability programs to fund certain costs." *Cordial v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 05AP-473, 2006-Ohio-2533, ¶ 26. "Thus, for example, R.C. 124.385(B)(9) and Ohio Adm.Code 123:1-33-14(A) preclude [claimant] from receiving disability leave benefits because she is a TTD recipient[.]" *Id.* (construing comparable interaction between involuntary disability separation provisions and workers' compensation claim). *See also Toney v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 91AP-972 (Feb. 6, 1992): "Consequently * * * when her workers' compensation claim was expanded to include the * * * allowed condition, [claimant] was precluded from receiving any further disability benefits for this same condition. Likewise, [claimant] was precluded from receiving disability benefits retrospectively for the time period of which there is evidence that she was receiving both disability and workers' compensation benefits for the same condition."¹

{¶ 13} Our reasoning is supported by the related statutory language covering cases in which an applicant pursues disability leave application as an alternative after seeing a workers' compensation claim denied for the same injury. Ohio Adm.Code 123:1-33-03

¹ We note that the specific current provisions of R.C. 124.385(B)(9) were enacted immediately after our decision in *Harvey v. Ohio Dept. of Adm. Servs.*, 85 Ohio App.3d 156 (10th Dist.1993), in which we held that the administrative code prohibition against duplicate payments such as are sought in the present case did not comport with the then-current version of R.C. 124.385. The prompt legislative overruling of *Harvey* only underlines the legislature's clear intent to ensure that disability leave benefits and workers' compensation benefits are not cumulative forms of compensation.

provides in detail that such applications may be allowed, but any payments thereunder are treated as "advancements" subject to recoupment if the related workers' compensation claim is later allowed through appeal or reconsideration. Ohio Adm.Code 123:1-33-03(A)(1)(a) and (b). There is no reason, either practical or theoretical, to distinguish between disability benefits that are paid conditionally, while a workers' compensation claim is pending after initial rejection, and those paid in the present case, which preceded the actual application for TTD. Both must be treated as conditional advancements, the right to which is subject to divestiture upon subsequent allowance of a workers' compensation claim for the same injury and time period.

{¶ 14} The thrust of the statutory and regulatory scheme is that for a given injury and time period, an employee is entitled either to disability leave benefits or workers' compensation benefits, but not both. Appellant belatedly elected to seek and receive workers' compensation benefits for his injury in this case. When he did so, he made the decision imposed upon him by statute, and chose to forego his entitlement to disability leave payments. Moreover, his application for TTD was necessarily premised on a work-related injury and thus in direct contradiction on this detail with his prior application for disability leave. See BWC Form FROI-1. He has thus abandoned his claim that was based on a purported non-work-related injury and logically incurred a legal obligation to repay those payments already received.

{¶ 15} We accordingly find that appellant's first and second assignments of error do not have merit and the trial court correctly found that the decision of ODAS was supported by reliable, probative, and substantial evidence and in accordance with law when it ordered repayment of disability leave benefits.

{¶ 16} Appellant's third assignment of error asserts that if he must repay some of his disability leave benefits, he should at least be excused from repaying those benefits that apply to months in which he was entitled to, but did not actually receive, TTD payments.

{¶ 17} The commission order granting TTD in this case expressly provides for an offset against TTD for any disability payments received during the allowed period. In practice, and despite the fact that the TTD period coincides more or less exactly with the

disability leave period, the BWC ultimately withheld only six months of TTD as an offset. It appears that the commission had information regarding the allowed disability leave only for certain months, and was not made aware that appellant had also received disability leave during the remaining six months of the TTD award. As a result, appellant received double compensation for those six months in the form of both TTD and disability leave, and received only disability leave benefits for the remaining six months. For those months in which appellant was not double-compensated, he argues that he should be allowed to retain the only compensation he actually received, the improperly-paid disability leave benefits.

{¶ 18} As we discussed above, appellant's entitlement to disability leave benefits evaporated when his TTD claim based upon the same injury was allowed, that is, when the injury became a "covered claim" under worker's compensation. R.C. 124.385(B)(9). His entitlement to disability leave benefits does not revive upon a shortfall in payment of the workers' compensation benefits to which he was entitled. In fact, if the commission and the BWC had possessed complete information regarding the correct amount and duration of disability leave benefits received by appellant and, if as a result, the bureau had withheld TTD payments for the entire period, the disability leave benefits previously received by appellant would still be recoupable in their entirety by ODAS. Appellant's entitlement to disability leave benefits does not hinge on his actual receipt of workers' compensation benefit payments, but the fact that his claim was applied for and allowed as one covered under the workers' compensation system.

{¶ 19} Appellant's remedy for the sums withheld by the bureau is not that he may retain improperly paid disability leave benefits, but to seek release of those sums from the BWC by demonstrating that the reason for the offset has dissipated with appellant's repayment of his improperly received disability leave benefits. Appellant's third assignment of error is accordingly overruled.

{¶ 20} Appellant's fourth assignment of error asserts that he should not be required to reimburse, in addition to cash payments made to him, benefits in the form of health insurance premiums paid by ODNR on his behalf. These contributions increased the calculation of benefits paid from \$20,025.68 to \$21,604.96, an amount of \$1,579.28.

Ohio Adm.Code 123:1-33-05(F) specifically provides that "[i]f an employee's claim for disability leave benefits is subsequently denied by the director * * * it is the employee's responsibility to reimburse the employer the insurance premiums paid on the employee's behalf." The only evidence heard at the hearing established that such payments had in fact been made. The applicable law clearly requires that such payments are to be recouped on the same terms as cash benefits paid directly to appellant. ODAS correctly ordered that these sums should be included in the amounts to be repaid by appellant. Appellant's fourth assignment of error lacks merit and is overruled.

{¶ 21} In summary, appellant's four assignments of error are overruled. The Franklin County Court of Common Pleas did not abuse its discretion in finding that the decision of ODAS was supported by reliable, probative, and substantial evidence and in accordance with law. The judgment of the Franklin County Court of Common Pleas is affirmed in all respects.

Judgment affirmed.

KLATT, P.J., concurs.
TYACK, J., dissents.

THOMAS BRYANT, J., retired, of the Third Appellate District,
assigned to active duty under the authority of Ohio
Constitution, Article IV, Section 6(C).

TYACK, J., dissenting.

{¶ 22} I see this case from a somewhat different perspective and therefore reach a different result.

{¶ 23} I see Carl Kimbro as caught between two governmental bureaucracies, both of which have their own rules and both of which desire to keep the dollars in their own fund. Neither entity debates the fact that Kimbro went through a period of disability due to his bad back.

{¶ 24} Kimbro had to file for disability from the Ohio Department of Administrative Services ("ODAS") within six months. That is a statutory requirement. He applied for and was awarded disability payments through ODAS.

{¶25} At the time Kimbro filed for disability through ODAS, he could not file for temporary total disability ("TTD") payments through the workers' compensation system. The specific conditions which caused him to be disabled had not been recognized for purposes of the workers' compensation system. Further, his treating physician was not willing to report that the conditions were work-related.

{¶26} Later, Kimbro's specific conditions, herniated disc and degenerative disc disease, were recognized for purposes of the workers' compensation system. Then and only then could he be qualified for TTD payments through the workers' compensation system.

{¶27} When Kimbro filed for disability through ODAS, he could not honestly swear that his disability arose from a work-related injury. He could not know personally and his treating physician would not express an expert opinion that the herniated disc and degenerative disc disease were work-related. Kimbro applied for the only disability for which he was legally entitled at that time.

{¶28} Later, Kimbro was legally entitled to receive TTD payments and did so. Obviously he could not receive both sets of payments at the same time, but I do not believe that the subsequent award of TTD compensation wiped out Kimbro's entitlement to benefits through ODAS for the time period before his receipt of TTD compensation, especially since he could not receive TTD compensation until the disabling conditions had been recognized for purposes of workers' compensation.

{¶29} To the extent that Kimbro briefly received overlapping payments, those payments need to be returned to the fund administered by ODAS. The rest of the payments received through ODAS should be retained by Kimbro. To the extent the majority of this panel reaches a different result, I respectfully dissent.
