IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

JAYME FOULDS, *Petitioner*,

v.

THE INDUSTRIAL COMMISSION OF ARIZONA, *Respondent,*

US AIRWAYS, *Respondent Employer,*

NEW HAMPSHIRE INSURANCE CO., *Respondent Carrier.*

No. 1 CA-IC 13-0019
FILED 12-10-2013

Special Action – Industrial Commission
ICA Claim No. 20101-950399 Carrier Claim No. 710699263
The Honorable J. Matthew Powell, Administrative Law Judge

AWARD AFFIRMED

COUNSEL

Jayme Foulds, La Mesa, California
Petitioner in Propria Persona

The Industrial Commission of Arizona, Phoenix
By Andrew Wade
Counsel for Respondent

Klein, Doherty, Lundmark, Barberich & La Mont, P.C., Phoenix
By R. Todd Lundmark
Counsel for Respondent Employer and Respondent Carrier

MEMORANDUM DECISION

Judge Patricia K. Norris delivered the decision of the Court, in which Presiding Judge Peter B. Swann and Judge Kenton D. Jones joined.

N O R R I S, Judge:

¶1 In this special action review of an Industrial Commission of Arizona award and decision upon review, Petitioner Jayme Foulds argues the administrative law judge ("ALJ") should have granted her petition to reopen. As we interpret her arguments, Foulds first asserts the ALJ should have accepted and relied on the medical testimony and opinions rendered by her treating physician, Donald Blaskiewicz, M.D., a neurosurgeon with an expertise in spinal surgery, instead of John Beghin, M.D., a board-certified orthopedic surgeon with a practice confined to spinal disorders who, along with Gary J. Dilla, M.D. and J. Michael Powers, M.D., examined Foulds at the request of Respondents. We disagree.

¶2 Under state law, to reopen a workers' compensation claim the claimant must prove the existence of a new, additional, or previously undiscovered temporary or permanent condition causally related to the prior industrial injury. *Lovitch v. Indus. Comm'n*, 202 Ariz. 102, 105-06, ¶ 17, 41 P.3d 640, 643-44 (App. 2002); Ariz. Rev. Stat. ("A.R.S.") § 23-1061(H) (Supp. 2013). When, as here, the causal connection between the condition and the prior industrial injury is not readily apparent, this connection must be established by expert medical testimony. *Sun Valley Masonry, Inc. v. Indus. Comm'n*, 216 Ariz. 462, 465, ¶ 11, 167 P.3d 719, 722 (App. 2007) (citation omitted). Additionally, when, as here, this is a claimant's first petition to reopen, the comparison points for establishing the necessary change of condition are the date the claim was closed -- here, April 19, 2011 as specified in a settlement agreement between Foulds and Respondents closing her claim -- and the date the claimant filed the petition to reopen -- here, November 29, 2011. *Cornelson v. Indus. Comm'n*, 199 Ariz. 269, 271, ¶ 14, 17 P.3d 114, 116 (App. 2001).

¶3 Dr. Blaskiewicz testified Foulds was suffering from symptoms attributable to stenosis and myelomalacia and related those symptoms and his treatment of those symptoms through surgery in December 2011 to the 2010 industrial injury. Dr. Blaskiewicz based his opinion, however,

on an assumption the 2010 industrial injury had caused permanent damage and not just a temporary aggravation. But, in entering into the settlement agreement with Respondents, Foulds specifically agreed she had "fully recovered from the effects" of the industrial injury "without a permanent impairment." As the ALJ correctly recognized, Foulds was "bound" by that stipulated fact as a matter of law and that stipulated fact "undermined" Dr. Blaskiewicz's assumption. Further, Dr. Blaskiewicz testified Foulds' complaints had been consistent from the date of her injury to the date of his treatment. Thus, Dr. Blaskiewicz did not testify the conditions he treated arose or were discovered only after Foulds' claim closed in April 2011. As the ALJ correctly recognized:

> [Dr. Blaskiewicz] acknowledged that he was assuming that [Foulds'] complaints (based on the history she provided him) had been fairly consistent from the date of her injury. Thus, there was no evidence of a change after the closure to support a petition to reopen as prescribed by A.R.S. § 23-1061(H).

¶4 In contrast, Dr. Beghin testified the industrial injury did not contribute to the conditions -- stenosis and myelomalacia -- treated by Dr. Blaskiewicz through surgery -- and that those conditions had existed before the industrial injury. Dr. Beghin explained Foulds' medical records reflected she had been diagnosed with stenosis and myelomalacia in the cervical spine as early as 2004. Dr. Beghin further testified he had been unable to identify any new, additional, or previous undiscovered condition occurring after April 2011 that he could attribute to the industrial incident. Consistent with other evidence contained in the record, he explained Foulds was suffering from stenosis and myelomalacia before the industrial injury and they were unrelated, either in full or in part, to the industrial injury.

¶5 When reviewing the appropriateness of an ALJ's ruling, we are not allowed to weigh the evidence; we are obligated to consider it in the light most favorable to sustaining the award. *Perry v. Indus. Comm'n*, 112 Ariz. 397, 398, 542 P.2d 1096, 1097 (1975). We are also obligated to defer to an ALJ's factual findings. *Sun Valley Masonry*, 216 Ariz. at 463, ¶ 2, 167 P.3d at 720. The evidence supports the ALJ's reliance on the testimony and opinion of Dr. Beghin and the ALJ's factual determination Foulds failed to show she had sustained a new, additional, or previously undiscovered condition after her claim closed in April 2011.

¶6 Next, Foulds also appears to assert the ALJ should have granted her petition to reopen because Dr. Beghin had examined her at the request of Respondents. Based on our review of the record, we find no evidence Dr. Beghin was biased or unfair in his examination of Foulds. Additionally, under state law, Respondents were entitled to obtain an independent medical examination ("IME") of Foulds.

¶7 Foulds also appears to assert the ALJ should have granted her petition to reopen because counsel for the Respondents bullied her and used unfair tactics. The record contains no evidence supporting these assertions.

¶8 Foulds further asserts she was coerced into entering into the settlement by her former attorney who, she also asserts, "misrepresented" her. The record before us contains no evidence Foulds was coerced into entering the settlement agreement, and whether counsel "misrepresented" her is not an issue properly before us.

¶9 Finally, Foulds argues that in the "original case," she was denied the right to see her personal physician and, further, in Dr. Beghin's IME, she was told she could not tape or record the examination. The record before us contains no evidence supporting either argument.

¶10 For the foregoing reasons, we affirm the ALJ's award.

COURT OF APPEALS STATE OF ARIZONA
Ruth A. Willingham · Clerk of the Court
FILED: mjt