

RENDERED: April 3, 1998; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 97-CA-000687-WC

ERNA CUMMINS

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
NO. WC-94-026563

PACIFIC MUTUAL LIFE INSURANCE;
SPECIAL FUND; THOMAS A. NANNEY,
Administrative Law Judge, and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: DYCHE, HUDDLESTON and KNOPF, Judges.

HUDDLESTON, JUDGE. Erna Cummins seeks review of a Workers' Compensation Board opinion affirming an Administrative Law Judge's decision to deny her benefits, dismiss her claim against Pacific Mutual Life Insurance, and refer her case to the fraud unit of the office of the Attorney General for prosecution. We affirm and adopt the majority opinion of the Workers' Compensation Board.

ABELL, CHAIRMAN. Petitioner, Erna Cummins ("Cummins"), appeals from an opinion and order rendered by the Hon. Thomas A. Nanney, Administrative Law Judge ("ALJ"), on

September 23, 1996 and from an order overruling her petition for reconsideration entered October 21, 1996. The ALJ dismissed Cummins' claim for disability benefits attributable to carpal tunnel syndrome ("CTS"), reflex sympathetic dystrophy ("RSD"), and associated depression after determining that she had filed and maintained a fraudulent claim. He referred her claim to the fraud unit in the Department of Workers Claims for investigation and possible prosecution by the Office of the Attorney General.

Cummins was born in 1938 in Germany. Prior to coming to the United States, she had worked 12 years as a secretary at a bank. She initially came to the United States in 1968, but shortly thereafter, she and her husband were sent back to Germany, he being a United States serviceman. While there, she did secretarial work in the fashion industry for approximately two years. Then, after moving back to the United States, she raised a daughter for about nine years before going back to work in 1979 in the Cincinnati area. Over the next several years, she did various jobs with various insurance companies, dealing mainly as a claims examiner handling health insurance claims. She began working for respondent, Pacific Mutual Life Insurance ("Pacific") in May of 1993. She testified that the following January, she began experience symptoms in her hands and wrists and

sought medical attention in March of 1994. She was taken off work at the end of May 1994 and has not returned to work in any capacity since that time. Temporary total disability benefits in the amount of \$20,690 have been paid together with \$14,421.80 in medicals. She has treated with several physicians, receiving treatment for bilateral CTS and has had one bilateral carpal tunnel release. She has also been treated for RSD.

At her deposition she described her current activities as consisting of taking walks, if she is not too depressed; doing some household chores with her left hand; and fixing a sandwich with her left hand, saying she did not cook anything. She testified that her daughter did most of the cleaning in the house and the laundry. She indicated she could not straighten out the fingers in her right hand and that most of her symptoms are in her right arm and hand, with the cold weather making the symptoms much worse.

At the administrative hearing, after a videotape done by a private investigator for Pacific's workers' compensation carrier was shown depicting Cummins' activities on January 30, 1996 being performed without difficulty, she testified that she felt pretty good on that day because she had aqua-therapy about four weeks previously and that her hands were doing better because she was taking medication.

The videotape captures Cummins performing a number of activities on the day in question, using her right hand at all times in a completely normal fashion, using her keys to lock and unlock doors, and opening the trunk of her car with the strength only of her right hand and right arm. The video reveals her lifting groceries from a cart and lifting several sacks of laundry using her right hand with no evidence of pain or any difficulty. Although she was wearing a heavy coat, leaving one with an impression that the day in question was cold, she did not wear gloves. The ALJ indicated that her activities on that date totally and completely contradicted her testimony as to her capabilities.

The medical testimony in this claim consists of reports from Drs. John Kelly, O. M. Patrick, and John Larkin and depositions from Drs. Kelly, Patrick, Donal Cullen, and Morton Kasdam. Drs. Kelly and Cullen were Cummins' treating physicians for her CTS and RSD.

Dr. Kelly testified that he first examined Cummins on July 19, 1995 upon referral from Dr. Larkin and saw her again on November 9, 1995, shortly before the videotape at issue, and again on February 20, 1996, shortly after the videotape. He testified that over the time he treated her, her condition remained about the same with some slight variation. There were times when she was a little better and times when she was a little

worse. He confirmed that for the most part when he saw her, she was holding her right hand in a guarded position close to her body and unable to use it and that her fingers were tight and unable to hold things in her hand. After having been shown the January 30, 1996 videotape, he confirmed that the way the videotape depicted Cummins was inconsistent with the way she presented herself in his office and that she appeared to be in remarkably better condition in the videotape than she did on examination. He testified that Cummins never reported to him that anything had offered her dramatic improvement other than some intervention by a pain psychologist which had helped her depression. He confirmed that in February he had assessed her as being approximately 90 percent disabled, indicating that he believed that she had fully disabled her right arm. He testified that the aqua-therapy treatment she received would not have helped her condition on a sustained basis and would have given her relief only while she was actually in the water. He testified that his diagnosis of her condition was based upon objective physical findings plus her physical description of her pain and that without that pain, he would not have diagnosed RSD.

Dr. Cullen, a specialist in plastic or hand surgery, began treating Cummins in May 1994 for symptoms of CTS, treating her conservatively initially and later

performing a carpal tunnel release. After her surgery, her condition began to deteriorate to the extent that after two months, he referred her to a pain clinic. She had indicated to him that she had lost motion in her right hand and that her fingers were stiff and would not move. In December, she complained of cold intolerance and a total inability to use her right arm. After viewing the videotape and being asked if he still believed she had RSD, he responded that he had very definite doubts and that the things he saw her doing with her hand on the videotape were inconsistent with the complaints she presented to him. He later testified that there was no question that Cummins did have CTS in both the right and left wrists. When asked if the diagnosis of CTS was based on subjective complaints together with an EMG, he responded in the affirmative.

Dr. Patrick examined Cummins on March 27, 1996 at the request of the Special Fund, and after that examination, he assessed an impairment rating of approximately 100 percent to the right upper extremity, translating into 54 percent to the body as a whole. He also opined that she had an additional 2 percent impairment attributable to CTS. During the examination, Cummins presented herself with the third, fourth, and fifth fingers of her right hand partially flexed and in a fixed position as if making a partial fist. When asked,

if after viewing the videotape, his opinions expressed in his report changed as to Cummins' condition, he responded that it had, stating:

I mean, because what I saw on the tape was a totally different picture of what I saw when I examined Ms. Cummins. I mean, Ms. Cummins guarded her hand. She held her hand, her arm flexed at ninety (90) degrees, and held it up against her body. She held the fingers in flexion and could not move them, as if it were an, an actual contracture.

He noted that on the videotape she had free use of that hand and, in fact, was dominantly right handed, using the right hand more than anything. As to any change in the impairment rating he assessed, he stated:

The only, only assumption I could possibly make, or that anybody else could make, would be that instead of having a fifty-four (54) percent impairment, she would have a zero (0) percent impairment.

Dr. Larkin evaluated Cummins at the request of Pacific's insurance carrier and arrived at an impairment rating of 5 percent to the body as a whole. No testimony was taken from Dr. Larkin concerning the videotape.

The ALJ noted that Cummins had presented herself at the administrative hearing as begin totally disabled without any use of her dominant right arm and indicating she was in severe pain and suffering from depression. He also indicated he had observed the videotape and heard Cummins' explanation as to her condition on that date. After summarizing what the videotape depicted, the ALJ noted that office notes from Cummins' treating physician did not indicate aqua-therapy presented any relief and that in subsequent visits to physicians Cummins never mentioned a period of significant relief. In fact, she stated that her condition continued to deteriorate. He then concluded, in that her activities depicted on the videotape were so totally inconsistent with her appearance at the hearing and the appearance she gave to her physicians, she had not been honest in the presentation of her claim. He concluded by stating:

Although I'm not saying that the plaintiff did not develop a mild carpal tunnel syndrome in the upper extremity, I find that this is completely overshadowed by the plaintiff's attempt to exaggerate her claim and to seek further workers' compensation benefits over and above that to which she might be entitled through false allegations. Plaintiff having filed and maintained what I

consider to be fraudulent claim, her claim shall be dismissed in its totality.

The ALJ then ordered her claim dismissed and referred to the fraud unit for possible prosecution.

On appeal, Cummins contends the ALJ's finding of fraud without showing that each of the elements of fraud had been proven by clear and convincing evidence was arbitrary and capricious, referring us to Divita v. Hopple Plastics, Ky.App., 858 S.W.2d 214 (1993), and Larson's, Workers' Compensation, Section 47.53. Cummins contends that a finding of fraud requires a finding of a knowing misrepresentation of a material fact and reliance upon that misrepresentation by the employer or its representative. She contends there was no evidence produced that she made a false representation of the material fact of her injury, noting that the ALJ himself acknowledged that she did develop a mild CTS. She refers to uncontroverted medical evidence that, in fact, she had developed bilateral CTS and that failure to follow such uncontroverted testimony is reversible error, referring to Collins v. Castleton Farms, Inc., Ky.App., 560 S.W.2d 830 (1977).

In Divita, supra, the Court of Appeals adopted a rule set forth in Larson's that relates to misrepresentation made in an employment application. That is not the issue presented in this claim. The

result of the Court's holding in Divita supra, is that notwithstanding the fact he had sustained an otherwise compensable injury, he could not recover in that the employer relied upon false representations made by the claimant when it first hired him, and there was a causal connection between that false representation and the claimant's subsequent injury.

In this claim, the ALJ's findings relating to fraud go to the weight and credibility of the testimony to be afforded Cummins both in her appearance before the ALJ and in her statements to her physicians. The ALJ has the sole responsibility to determine the weight and credibility of the evidence. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). After viewing the videotape, the ALJ concluded that the symptoms with which Cummins presented herself, both to him and to the physicians who testified, lacked credibility. Having made that determination, the ALJ was under no obligation to follow uncontroverted medical testimony, assuming the medical testimony in this claim was uncontroverted. Medical evidence based upon a false history is not afforded any special preferential weight and may be rejected as unreliable. Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991). Furthermore, all three physicians who viewed the tape acknowledged that their opinions as to the severity of Cummins' condition were

altered by the activities they viewed her performing on that tape. The ALJ has the right to reject or accept any testimony and to believe or disbelieve various parts of the evidence, including evidence from the same witness. Codell Constr. Co. v. Dixon, Ky., 478 S.W.2d 703 (1972). The impairment ratings and opinions as to the severity of Cummins' condition having been called into question by the videotape, the ALJ was within his prerogative in rejecting the medical evidence as to the severity of Cummins' condition.

Cummins also contends that the total dismissal of her claim on the basis of the finding of fraud was in error, contending that the penalties for fraud are specifically set forth in KRS 342.990(8)(b) and (d) and that neither of those statutes imposes as a penalty the dismissal of an otherwise compensable claim. She contends the ALJ did not find she had no injury, merely that she had exaggerated her claim to seek benefits over and above that to which she might be entitled. Cummins contends that if she exaggerated her claim, the percentage of permanent impairment should still legitimately be taken into account.

Cummins had the burden of proving the extent of her occupational disability. Jude v. Cubbage, [Ky.] 251 S.W.2d 584 (1952), and Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). Since she had the burden of proof on

that issue, the question on appeal is whether the evidence was so overwhelming as to compel a finding in her favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Compelling evidence is evidence so persuasive that it is clearly unreasonable for the ALJ not to be convinced by it. Hudson v. Owens, Ky., 439 S.W.2d 565 (1969), and REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). The three physicians who testified as to the degree of Cummins' occupational disability all acknowledged that their opinions as to that degree would be significantly reduced based upon the level of activity she exhibited on the videotape. They provided no further testimony as to what, after viewing the tape, their opinions were as Cummins' impairment based upon the activities in which she engaged while on tape. The burden was on Cummins to introduce evidence of substance as to the degree of her occupational disability. Other than the opinions that were subsequently impeached and even withdrawn by the testifying physicians, Cummins has introduced no evidence as to the degree of her occupational disability.

Accordingly, the decision of the ALJ is hereby **AFFIRMED** and this appeal **DISMISSED**.

Further review of a Workers' Compensation Board opinion in the Court of Appeals is guided by the standard set forth in

Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), where the Supreme Court pointed out that the function of this Court is to "correct the Board only where the Court perceives 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." Id. at 687. Since the Board correctly assessed the evidence in this case and appropriately applied controlling statutory and decisional authority, there is no occasion to disturb its decision. Accordingly, the Board's opinion is affirmed.

ALL CONCUR.

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