

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000982-WC

WEDCO DISTRICT HEALTH DEPARTMENT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-004767

JERALDINE BARRON; HON. RON CHRISTOPHER,
Director of SPECIAL FUND; HON. JAMES L. KERR,
Administrative Law Judge; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: COMBS, DYCHE, and KNOPF, Judges.

COMBS, JUDGE: The appellant, Wedco District Health Department (Wedco), appeals from the judgment of the Workers' Compensation Board (Board) which affirmed the opinion and order of the ALJ finding Jeraldine Barron to have 78% occupational disability and awarding her benefits accordingly. Finding no error, we affirm the Board's decision.

Jeraldine Barron (Barron) was employed by Wedco as a home health aid from 1987 to 1995. As a home health aid, Barron provided homebound patients with assistance in attending to their health and hygienic needs. In performing her duties, she would

have to lift and move many of the patients without assistance. In addition to her job with Wedco, Barron would spend the night with some of her elderly patients for additional income. However, her job as a sitter did not entail any physical tasks; she was only required to sit through the night with the patients.

In 1992, Barron began experiencing pain in her back and legs. She informed her immediate supervisor at Wedco that she was having back pain and sought treatment with Dr. Bynum, her family physician. Over the next couple of years, Barron received conservative medical treatments for her back problems and continued to work. However, on July 21, 1995, while at her home, Barron began experiencing severe pain in her back and was taken to the hospital emergency room. Barron was diagnosed as having severe stenosis at L3-4, L4-5, and L5-S1; a herniated disc on the right at L5-S1; and a herniated disc on the left at L4-5. On July 31, 1995, she underwent extensive surgery on her back – bilateral laminectomies and a right and left discectomy. On September 25, 1995, Dr. Gilbert found that Barron had made a remarkable recovery and released her to return to work.

Upon her return to work, Barron experienced a sharp pain in her back on October 2, 1995, as she was assisting a patient into the shower. Despite the pain, she continued to report to work. By the end of the week the pain in her back had worsened and spread to her legs; Barron has not worked since October 11, 1995. Dr. Gilbert found that she had sustained recurrent disc herniations at L4-5 and L5-S1 disc levels. Barron

has been reluctant to undergo additional surgery, and Dr. Gilbert has recommended a thoracolumbar brace.

Based upon the problems with her back, Barron filed a claim for workers' compensation benefits. On April 18, 1996, the ALJ rendered his opinion and order, finding that Barron had a 78% occupational disability. However, he characterized 48% of her disability as an active, pre-existing, and noncompensable disability; he attributed the remaining 30% to the work-related injury of October 2, 1995, and the arousal of pre-existing degenerative conditions in her back. The ALJ apportioned liability for the compensable 30% of her disability equally between the Special Fund and Wedco. Barron filed a petition for the ALJ to reconsider his decision, which the ALJ denied.

Barron appealed the ALJ's decision to the Board, arguing that he erred in finding only 30% of her disability to be compensable and that the evidence compelled a finding that she was totally, occupationally disabled. The Board entered its opinion on September 19, 1997, affirming in part and reversing and remanding in part the ALJ's decision. The Board found that: "under the evidence submitted to the ALJ, KRS 342.0011(1), defining injury under our Act, and the Court's decision in Haycraft v. Corhart Refractories Co., Ky., 544 S.W.2d 222 (1976)," the ALJ should have made further findings as to whether there was a causal connection between Barron's work activities and her noncompensable "pre-existing, active impairment." However, the Board held that while the evidence supported a finding of "significant functional impairment and vocational restrictions,"

it did not compel a finding of total occupational disability. Wedco did not appeal the Board's opinion and order.

Upon remand, the ALJ rendered another opinion and order on November 24, 1997, finding that Barron's entire occupationally disability (78%) was work related and thus compensable. The ALJ apportioned liability for Barron's disability equally between the Special Fund and the employer. Wedco appealed the ALJ's decision to the Board. On March 20, 1998, the Board affirmed the opinion and order of the ALJ issued upon remand, and this appeal followed.

Wedco first challenges the Board's opinion and order rendered on September 19, 1997, affirming in part and reversing and remanding in part the ALJ's decisions of April 18, 1996. It argues that the Board improperly substituted its judgment for that of the ALJ as to the weight and credibility of the evidence. Conversely, Barron contends that Wedco cannot raise this issue on appeal since it failed to file an appeal from the Board's order of September 19, 1997.

"An order of the Board is appealable only if it terminates the action itself, acts to decide the matter litigated by the parties, or operates to determine some rights in such a manner as to divest the Board of power." King Coal Company v. King, Ky.App., 940 S.W.2d 510, 511 (1997). In the case before us, the Board remanded Barron's claim to the ALJ for additional findings of fact as to whether there was a causal connection between Barron's 40% pre-existing, noncompensable disability and her work duties. The Board's order did not adjudicate the rights

of the parties with regard to this issue; therefore, it was not final and appealable within the meaning of CR 54.01 as it left outstanding issues of fact to be determined by the ALJ upon remand. Wedco has not waived its right to appeal the issue of whether the Board erred in reversing and remanding in part the ALJ's initial decision by waiting until this stage; pursuant to King Coal, supra, it acted wholly correctly.

KRS 342.285 permits either party in a workers' compensation proceeding to appeal the award or order of the ALJ to the Board for review. In its review, the Board may not substitute its judgment for the that of the ALJ as to the weight of the evidence or as to questions of fact. The Board is limited to a determination of whether: (1) the ALJ acted within or in excess of his or her powers; (2) the order, decision, or award was procured by fraud; (3) the order, decision, or award does not conform to the provisions of KRS Chapter 342; (4) the order, decision, or award was clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or (4) the order, decision, or award was arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. KRS 342.285(2).

In the case before us, the Board properly remanded the claim to the ALJ for reconsideration based upon the statutory and case law regarding cumulative traumas. The ALJ had overlooked controlling statutes and precedent and, therefore, his opinion did not conform to the provision of the Workers' Compensation

Act. As the Board did not substitute its judgment for that of the ALJ, we find no error.

Wedco next contends that the ALJ's new decision of November 24, 1997, which found that Barron entire disability was work-related, was not supported by substantial evidence and that the Board erred in affirming that decision.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-688 (1992), the Supreme Court set out our standard of review on appeal as follows:

The function of further review of the [Board] in the Court of Appeals is to correct the Board only where the the [sic] Court perceives the Board has overlooked or misconstrued controlling statues or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Furthermore, if the ALJ's findings of fact are supported by substantial evidence, they may not be disturbed on appeal.

Evansville Printing Corporation v. Sugg, Ky. App., 817 S.W.2d. 455 (1991).

Upon remand, the ALJ determined that Barron's entire occupational disability (78%) was work-related and, therefore, compensable. The medical testimony from Dr. Gilbert and Dr. Primm supported the ALJ's conclusion that Barron's pre-existing condition was aroused into disabling reality by the repetitive, heavy lifting she was required to do as part of her work. The record also indicates that prior to 1992, Barron had never experienced any problems with her back. Thus, the Board did not err in affirming the ALJ's opinion and order of November 24, 1997, as his findings were supported by substantial evidence.

Nor can we say that the Board "overlooked or misconstrued controlling statues or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital, supra at 688.

We affirm the opinion and order of the Board upholding the ALJ's decision.

ALL CONCUR.

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