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Commonwealth Of Kentucky

Court Of Appeals

NOS. 1998-CA-000474-WC

1998-CA-000592-WC

WHITEHALL FURNITURE

APPELLANT/CROSS-APPELLEE

PETITION AND CROSS-PETITION FOR REVIEW OF A DECISION OF THE
v. WORKERS' COMPENSATION BOARD
NO. 94-42144

MILDRED RENFROW;

APPELLEE/CROSS-APPELLANT

RON CHRISTOPHER,
Director of Special Fund;
SHEILA C. LOWTHER, Administrative Law
Judge; and WORKERS' COMPENSATION BOARD

APPELLEES/
CROSS-APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, MCANULTY and SCHRODER, Judges.

HUDDLESTON, Judge. Whitehall Furniture petitions for review of a decision of the Workers' Compensation Board that affirmed an Administrative Law Judge's award of temporary total disability benefits and medical expenses to Whitehall's former employee, Mildred Renfrow. In a cross-petition, Renfrow argues that because she was found to be totally occupationally disabled, she is entitled to an award for life instead of for a shorter duration.

Mildred Renfrow, born January 6, 1943, has an eighth-grade education with no specialized training. She worked for a

short time as a cook at a college and as a clerk at a dry cleaning establishment before being hired at Whitehall in 1975 to work on the assembly line. She worked at Whitehall until 1979 when she left to undergo surgery to remove a giant cell tumor in her left femur, which involved a bone graft to replace a portion of the femur. In 1984, following recovery, she returned to her job at Whitehall and worked there for 12 years without missing a single day of work.

Renfrow injured her knee in a fall at work on September 16, 1994, and underwent surgery several days later. Dr. William Ramsey, an orthopedic surgeon, testified that Renfrow had suffered a fracture of the patella and that he performed an open reduction and internal fixation of the patella. She returned to work in January 1995 and continued to work through March 1995. Because of continuing complaints, Renfrow underwent other minor surgery and finally required a total knee replacement in February 1996. Dr. Ramsey testified that by September 9, 1996, Renfrow had improved to the point where she could bend her knee one-hundred degrees, and she was allowed to use a cane instead of crutches. When Dr. Ramsey's deposition was taken in April 1996, he had not released Renfrow to return to work, but only indicated she might be able to return to a "truly sit down" type of job.

In an opinion and award, the ALJ found Renfrow to be totally occupationally disabled and carved out 20 percent as a prior active disability due to nonwork-related injuries. The ALJ determined that the voluntary payments made by Whitehall to Renfrow

from September 17, 1994, through January 15, 1995, and again from March 6, 1995, through September 23, 1996, were for temporary total disability. Permanent disability benefits were to begin September 24, 1996, and continue for as long as Renfrow is disabled, but not more than 520 weeks. The ALJ also held Whitehall liable for the medical fees associated with the total knee replacement based upon a finding that the work-related injury in September 1994 contributed to and hastened the development of Renfrow's disability. After the Board affirmed the ALJ's opinion and Whitehall's and Renfrow's petitions for reconsideration were denied by the Board, a petition and a cross-petition for review by this court were filed.

Whitehall contends that since Renfrow was found to be totally disabled and her last day of work was March 5, 1995, any benefits to which she was entitled following that date must be considered benefits for her permanent total disability, or, in the alternative, that if the ALJ found a compensable period for the TTD benefits, that period must terminate as of April 19, 1996, when Dr. Ramsey indicated there were certain jobs that Renfrow could perform.

Unquestionably, temporary total disability benefits were properly payable to Renfrow from September 17, 1994, through January 15, 1995, due to her inability to work at all. That period ended on January 16, 1995, when she returned to work. She ceased working on March 6, 1995, subsequent to which she received treatment for her knee, culminating in the total knee replacement

in February 1996. Although it was later determined that Renfrow was rendered totally and permanently disabled as a result of the work-related injury and her pre-existing active disability, that does not compel this Court to conclude that Renfrow's period of permanent total disability commenced on March 6, 1995.

The duration of temporary total disability benefits is a question of fact. W. L. Harper Const. Co., Inc. v. Baker, Ky. App., 858 S.W.2d 202, 204 (1993). Temporary total disability benefits are payable "until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job Moreover, as the Board noted, the question presented is one of fact *no matter how TTD is defined.*" Id. at 205 (emphasis supplied). Medical evidence was presented that Renfrow had reached maximum medical improvement in September 1996. The Board, in its opinion affirming the ALJ, said that:

The ALJ, in the findings made, adequately supported the period of TTD which she believed Renfrow was further entitled to by substantial evidence of record. That evidence indicated that Renfrow's surgery and recovery process had been reasonably rendered in an effort to improve her condition and had stabilized. Although Dr. Ramsey indicated in April of 1996 that Renfrow might be able to do some types of sedentary jobs, he had not

released her to work and she continued to use crutches until September 1996. The ALJ could reasonably conclude that Renfrow remained totally disabled as a result of the surgery until September 1996. As noted by Renfrow in her brief, Ingersoll-Rand Co. v. Rule, Ky. App., 867 S.W.2d 205 (1993), a case remarkably similar to the present case, indicates that the whole man theory applies to determinations of TTD as well as permanent total disability. Since we have determined that the ALJ's decision is supported by evidence of substance, it cannot be said that the evidence compelled a contrary result. Special Fund vs. Francis, Ky., 708 S.W.2d 641 (1986).

Because substantial evidence supports the ALJ's findings, we agree with the Board that the ALJ did not err in assigning Renfrow temporary total disability benefits from March 6, 1995, through September 23, 1996.

Whitehall contends that it is not responsible for the medical expenses associated with Renfrow's knee replacement since there is no medical evidence that the 1994 injury hastened the occurrence of Renfrow's disability. The ALJ relied upon Derr Construction Co. v. Bennett, Ky., 873 S.W.2d 824 (1994), to support her conclusion that Whitehall is liable for medical costs for treatment of Renfrow's knee, including, but not limited to, the total knee replacement. In Bennett, since the ALJ found that the employee's work hastened the occurrence of disability due to the arthritic condition of the employee's knees, the employer was

responsible for medical expenses associated with the employee's knees. Id. at 827.

Two orthopedic surgeons, Dr. William Ramsey and Dr. Robert Landsberg, testified that the 1994 injury aggravated a pre-existing dormant non-disabling condition, and the 1994 injury led to a total knee replacement possibly at an earlier age than otherwise would have been necessary. Although Dr. Landsberg was equivocal in some of his testimony concerning this issue, the ALJ may choose what portions of the testimony given by a witness to believe. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Since substantial evidence supports the ALJ's finding that the work injury contributed to the development of Renfrow's disability, making Whitehall responsible for medical expenses, we affirm the Board's decision. Kelly, 827 S.W.2d at 687.

Whitehall's final contention is that a utilization review report dated September 20, 1996, recommending that Whitehall not pay for the treatment associated with the total knee replacement should be given presumptive weight in determining that the knee replacement was not due to the 1994 work-related injury. Whitehall cites no authority in support of this proposition, and we do not find this argument persuasive. See Pierson v. Coffey, Ky. App., 706 S.W.2d 409 (1985). Moreover, no statute or regulation makes a utilization review admissible in evidence. Ky. Rev. Stat. (KRS) 342.033 permits the testimony of physicians to be introduced in a claim for benefits. No deposition was taken of the reviewing physician whose name appears at the top of the utilization report.

A nurse completed the utilization review. Her testimony is not admissible under applicable statute and regulations regarding the admissibility of medical evidence in a claim for benefits.

On cross-appeal, Renfrow argues that the ALJ should have considered whether the 1994 injury in and of itself was totally disabling and, if so, she is entitled to lifetime benefits. She insists that immediately prior to the injury she had no pre-existing active disability, although there may have been some functional impairment. The ALJ considered the argument but rejected it on the totality of the medical evidence. As the ALJ has adequately addressed the issue, we adopt that portion of her opinion:

Undoubtedly the most significant dispute in this claim concerns the application of [KRS 342.730(1)(a)]. The statute, as amended in April, 1994, provides that non-work-related disability shall not be considered in determining whether an employee is totally disabled for purposes of this section. Essentially, the Defendant argues that the Plaintiff had a significant non-work-related disability as a result of the giant cell tumor and treatment which she received in 1979. In light of this, the Defendant asserts that the Plaintiff cannot be awarded lifetime benefits. In response, the Plaintiff offers a whole-man theory of disability pursuant to Schneider v. Putman, Ky., 579 S.W.2d 370 (1970). The Plaintiff asserts that she had no active occupational disability prior to September, 1994.

It is clear from the medical testimony that Ms. Renfrow had some degree of functional impairment prior to September, 1994. The Administrative Law Judge does not believe that the presence of such a functional impairment alone compels a finding of pre-existing active occupational disability. However, the Administrative Law Judge is also persuaded that in light of Dr. Landsberg's testimony, as well as the mandate contained in Griffin v. Booth Memorial Hospital, [Ky., 467 S.W.2d 789 (1971)], the Plaintiff did retain some pre-existing active occupational disability. Taking into consideration the nature of the Plaintiff's medical condition immediately prior to September 1994 as well as her education and vocational history, it is the finding of the Administrative Law Judge that of the Plaintiff's current 100% occupational disability, twenty percent (20%) was pre-existing and active immediately prior to September 16, 1994. Therefore, benefits payable to the Plaintiff are limited to a period of 520 weeks.

The Board, in affirming this finding of the ALJ, properly noted that since Renfrow had the burden of proof before the ALJ on this issue, the question on appeal to the Board was whether the evidence is so overwhelming as to compel a finding in her favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Although the evidence might support a finding that under the whole man theory the 1994 injury itself was totally disabling, the evidence does not compel such a finding. Based upon the evidence

of record, the ALJ reasonably concluded that the work-related injury resulted in an 80% occupational disability.

For the foregoing reasons, we affirm the Board's decision.

ALL CONCUR.

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