

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000750-WC

THE HAMILTON-RYKER COMPANY, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 98-WC-01033

BRENDA TALBOTT; DONALD G. SMITH,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: EMBERTON, CHIEF JUDGE; DYCHE AND HUDDLESTON, JUDGES.

DYCHE, JUDGE: The Hamilton-Ryker Company petitions for review from an opinion of the Workers' Compensation Board affirming an award of permanent partial disability (PPD) benefits and temporary total disability (TTD) benefits to Brenda Talbott.

In June 1998, Talbott filed a claim for workers' compensation benefits, alleging that she had sustained work-related injuries to her right hand and arm during her employment with Hamilton-Ryker, an employment staffing agency.¹ Talbott

¹In recounting the early history of the case, we rely
(continued...)

began working for Hamilton-Ryker on September 17, 1997, and she was given a job assignment at a toy manufacturer in Murray, Kentucky. She was placed on a production line scraping excess plastic off the toys. Talbott stated in her deposition that after working her first twelve-hour shift she began experiencing pain in her right arm. She informed her supervisor about the condition of her hand and was assigned to a new job. However, Talbott was subsequently placed back on the production line scraping off excess plastic, and she continued to experience pain in her right arm. It appears from the record that Talbott worked approximately two or three twelve-hour shifts on the production line before ceasing to work on September 28, 1997.

On June 4, 1998, Talbott filed a claim for workers' compensation benefits, alleging that she had sustained a work-related injury to her right arm while working for Hamilton-Ryker on the production line. On March 19, 1999, the Administrative Law Judge (ALJ) rendered his decision finding that Talbott had a 3% occupational disability and awarding her PPD benefits. Talbott filed a petition for reconsideration with the ALJ, asking the ALJ to reconsider his decision not to award her TTD benefits. On April 16, 1999, the ALJ entered an order denying her petition, stating that the issue of TTD benefits had not been raised and that the evidence did not support such an award. Subsequently, Hamilton-Ryker and Talbott both appealed the ALJ's decision to the Board.

¹(...continued)
extensively upon this Court's opinion and order in Case No. 1999-CA-002702-WC, rendered September 8, 2000.

On October 8, 1999, the Board rendered an opinion reversing and remanding the case to the ALJ for additional findings of fact to support his conclusions that Talbott's injury was work-related and that she was not entitled to TTD benefits. The Board determined that the ALJ had failed to set forth sufficient reasoning to support his conclusions. In addition, the Board determined that Talbott's request for TTD benefits was preserved. The Board did not address the substantive merits of the case but directed the ALJ on remand to "provide additional findings of fact to support his conclusions as they relate to work-relatedness/causation and the entitlement to temporary total disability benefits."

Hamilton-Ryker subsequently filed an appeal with this Court contending that the Board erred in remanding the case to the ALJ to make additional findings of fact to support his conclusions. Hamilton-Ryker argued that the Board should have reversed the ALJ's award of PPD benefits to Talbott on the ground that there was simply no medical evidence to support the conclusion that her injury was work-related and that the evidence did not support an award of TTD benefits.

On September 8, 2000, this Court rendered an opinion dismissing the appeal as interlocutory. The opinion and order noted that, on remand, the ALJ's task was not to take new evidence or alter his original decision but, rather, was to provide adequate findings in support of his original award. The opinion further noted that, following the entry of the ALJ's

findings, presumably the Board would then review the case in light of the additional findings.

Unfortunately, on remand, the ALJ did not comply with his task of setting forth findings of fact as mandated by the Board's opinion of October 8, 1999, and in this Court's September 8, 2000, opinion and order. Instead, on January 4, 2001, the ALJ entered an order which purported to reverse his original award of PPD benefits on the basis that Talbott had "failed to show her condition was causally related to her repetitive work activities." The order also purported to dismiss the PPD claim. The ALJ also failed to make findings regarding TTD issues, stating that "the remaining issue regarding entitlement to temporary total disability benefits is rendered moot and will not be discussed further herein."

Thus, Talbott again appealed to the Board. On June 6, 2001, the Board entered an order again remanding the case to the ALJ. The opinion noted that the ALJ had not complied with the mandate on initial remand to make findings of fact, and had improperly disregarded the unambiguous expression of this Court that the ALJ was precluded from altering his opinion on remand. Upon the second remand, the Board charged the ALJ with "the responsibility of a detailed analysis of the facts," and noted that "detailed findings of fact are required in order to give due deference to the opinion of the Kentucky Court of Appeals."

Following the second remand, on August 30, 2001, the ALJ finally entered an order complying with his mandate to enter

findings supporting his original award of PPD benefits.² However, apparently still not understanding the prior appellate decisions, rather than merely setting forth the findings of fact in support of his original denial of TTD benefits, the ALJ purported to reverse his original decision concerning TTD benefits and awarded Talbott TTD benefits. Hamilton-Ryker then filed the third appeal in the case to the Board.

On March 13, 2002, the Board entered an opinion which had the effect of affirming an award of PPD benefits and TTD benefits. This petition for review followed.

First, Hamilton-Ryker contends that the ALJ was barred on the second remand from making an award for TTD benefits on the basis that (1) in his order of April 16, 1999, denying Talbott's motion for reconsideration, the ALJ stated, "TTD was never raised as an issue and the medical evidence fails to support that award"; (2) the claim was dismissed upon the first remand in the ALJ's order of January 4, 2001; and (3) this Court's opinion and order of September 8, 2000, precluded the ALJ from changing his decision on remand.

The ALJ's April 16, 1999, order stating that the TTD issue was not preserved and was not supported by medical evidence was reversed and superceded by the Board's opinion of October 8, 1999. We agree with the Board that the TTD issue was preserved as the issue was encompassed within the overall issue of extent

²Apparently under the impression that his order of January 4, 2001, had denied and dismissed the original PPD award, the order stated, "[T]he Plaintiff's condition is once again found to be compensable and causally related to her work with Defendant-Employer."

and duration of Talbott's occupational disability. Similarly, the ALJ's order of January 4, 2001, purporting to dismiss the TTD issue as moot was reversed by the Board's order of June 6, 2001. In addition, the purported dismissal violated the law of the case by not complying with the appellate decisions directing the ALJ to go no further than to make findings of fact on remand. For that reason as well the dismissal was invalid. See E'town Shopping Center, Inc. v. Holbert, Ky., 452 S.W.2d 396, 397 (1970); Siler v. Williford, Ky., 375 S.W.2d 262, 263 (1964); City of Lexington v. Garner, Ky., 329 S.W.2d 54, 55 (1959); and H.R. ex rel. Taylor v. Revlett, Ky. App., 998 S.W.2d 778, 780 (1999).

We agree with Hamilton-Ryker, however, that pursuant to the law of the case as established in this Court's opinion and order of September 8, 2000, the ALJ was not entitled to change his decision regarding TTD benefits (or PPD benefits) on remand. We agree with Hamilton-Ryker on this point, and we will disregard the ALJ's August 30, 2001, order to the extent that it purports to make an award for TTD benefits. The ALJ's August 30, 2001, findings of fact, however, will be reviewed pursuant to the normal standards.

Based upon the foregoing unraveling of procedural matters, with respect to TTD benefits, the procedural posture is as follows. Based upon the law of the case, the ALJ's original denial of TTD benefits on the basis that "the medical evidence fails to support that award" is the decision presented for our review, not the ALJ's award of TTD benefits in his August 30,

2001, order. We are disregarding the award of TTD benefits in the August 30, 2001, order. However, for purposes of reviewing the original denial, we do so with reference to the findings of fact made by the ALJ in his August 30, 2001, order. Our standard of review will be under the normal principles where the party with the burden of proof was unsuccessful before the ALJ.³ In such cases, the issue on appeal is whether the evidence compels a finding in his favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985); Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 800 (1995). To be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

In his order of August 30, 2001, the ALJ made the following findings regarding TTD benefits:

[T]he Plaintiff is entitled to temporary total disability benefits from September 18, 1997 to December 1997 at the rate of \$178.92 per week (based upon the stipulated average weekly wage of \$268.38). This Administrative Law Judge again found the Plaintiff's testimony to be credible regarding the alleged onset of her symptoms while at work and her inability to perform those work-related activities thereafter. Dr. Charette specifically took the Plaintiff off work on October 13, 1997. He recommended the Plaintiff have work hardening in December 1997. This indicates to the Administrative

³Contrary to our disposition of the issue, the Board recognized the ALJ's award of TDD benefits in his August 30, 2001, order. The Board accordingly applied the test applicable if an applicant is successful before the ALJ. Pursuant to the law of the case doctrine and this Court's opinion and order of September 8, 2000, the Board should not have recognized the ALJ's award of TTD benefits. While we disagree with the Board's approach, in the end, we reach the same conclusion.

Law Judge that the Plaintiff could return to light duty work thereafter. This finding of temporary total disability awarded to the Plaintiff is based upon the persuasive testimony of Dr. Charette in this matter.

The fact-finder, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, supra, at 419. The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977).

"Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. KRS 342.0011(11)(a). Awards of TTD benefits are appropriate when a worker is totally disabled by the effects of a compensable injury but has not yet reached

maximum medical improvement. Clemco Fabricators v. Becker, Ky., 62 S.W.3d 396, 397-398 (2001). TTD is 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, or some other employment, of which he is capable, which is available in the local labor market. W.L. Harper Construction Company, Inc. v. Baker, Ky. App., 858 S.W.2d 202, 205 (1993); accord Halls Hardwood Floor Co. v. Stapleton, Ky. App., 16 S.W.3d 327, 329 (2000).

In his finding of facts, the ALJ recited that he found Talbott's testimony to be credible regarding the alleged onset of her symptoms while at work and her inability to perform those work-related activities thereafter. A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured. Hush v. Abrams, Ky., 584 S.W.2d 48 (1979). The ALJ further specifically accepted the medical findings of Dr. Charette regarding the matter. The record discloses that September 18, 1997, was the date that Talbott stopped work due to her injury. Dr. Charette's office notes of October 13, 1997, and October 27, 1997, kept Talbott off work. Dr. Charette's office note of November 10, 1997, documented continuing problems and recommended a neurology consultation with EMG. His office note of December 23, 1997, referred Talbott to work hardening.

While the ALJ's initial order of March 19, 1999, initially found that the medical evidence did not support an award for TTD, based upon the findings as set forth in the order of August 30, 2001, we are persuaded that the medical evidence compels a finding that Talbott is entitled to TTD benefits. Talbott was off work beginning September 18, 1997, and was not released to return to work until December 23, 1997. Dr. Charette's medical records document Talbott's injury and his recommendation that she remain off work. Talbott's testimony, which the ALJ found to be credible, establishes her symptoms and when and how they originated. Based upon Talbott's credible testimony and the medical reports of Dr. Charette, the evidence is so overwhelming that no reasonable person could reach the conclusion that Talbott was not entitled to TTD benefits.

Hamilton-Ryker also contends that the TTD award is flawed in that the ALJ failed to specify a termination date for TTD benefits. The Board addressed this issue as follows:

The only other question is that the ALJ failed to identify a specific date in December of 1997 when temporary total disability benefits would terminate. Although as a general rule this would constitute a fact finding obligation, since this matter has already been twice remanded to the ALJ, we would simply note that he relied upon the evidence from Dr. Raymond Charette and the only date in December upon which one could rely from Dr. Charette's note as an appropriate date for termination of temporary total disability benefits is his note of December 23, 1997. That is the date on which temporary total disability benefits should terminate.

We agree with the Board. While the specific TTD termination date would normally be a matter subject to the ALJ's

findings of fact, the record discloses that the ALJ could only have intended for December 23, 1997, to be the termination date. Therefore, for purposes of judicial economy, we affirm the Board's determination that Talbott is entitled to TTD benefits and that the proper termination date for TTD benefits is December 23, 1997.

Next Hamilton-Ryker contends (1) that Talbott's claims for PPD benefits are effectively dismissed and barred from further consideration on the basis that the ALJ failed to make an award in his order of January 4, 2001, upon the initial remand; (2) that the PPD and the claims were previously dismissed in their entirety in the January 4, 2001, order upon the initial remand; and (3) that there was a lack of substantial evidence of probative value to support any award for permanent partial disability benefits and/or medical benefits.

As previously noted in our discussion of TTD benefits, the January 4, 2001, ALJ order is of no consequence because, to the extent that it purported to do anything more than make findings of fact, it violated the law of the case and, further, the order was reversed by the Board's opinion of June 6, 2001. Hamilton-Ryker's attempted reliance on the ALJ's order of January 4, 2001, is without merit.

Applying the same principles as set forth in our discussion of TTD benefits, the procedural posture of the case requires us to review the ALJ's award of PPD benefits in his March 19, 1999, order in light of his findings of fact as set forth in his August 30, 2001, order. Since the ALJ resolved the

PPD issue in favor of Talbott, who had the burden of proof on the issue, the question on appeal is whether substantial evidence in the record supported the decision. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). With reference to PPD issues, the ALJ's order of August 30, 2001, found as follows:

. . . The Administrative Law Judge again finds the Plaintiff's testimony to be credible regarding her symptoms and when and how they originated. Plaintiff's employment for the Defendant-Employer included twelve-hour workdays in which she scraped excess plastic off toys. These repetitive activities included scraping approximately 270 to 285 toys in a shift. Plaintiff developed severe pain from her right hand radiating up the right upper extremity to the shoulder while on the job. When she reported these problems to her supervisor, she was taken to the doctor's office with her boss. Although Dr. Love did not specifically state causation was due to her employment, the history on which he relied in treating the Plaintiff included repetitive tasks for the Defendant-Employer at the time her symptoms began. The Administrative Law Judge is allowed to draw inferences from the record based upon the totality of the circumstances under Union Underwear, Inc. v. Scarce, Ky., 896 S.W.2d 7 (1995). Therefore the Plaintiff's condition is once again found to be compensable and causally related to her work with the Defendant-Employer. The Plaintiff further testified that she had no problems with her right hand or arm in the past. Plaintiff's history to Dr. Charette and the Morgan-Hough Clinic included histories of symptomology beginning following Plaintiff's performing work activities. Dr. Charette specifically indicated the work activities involved removing excess plastic in the molding department.

Again, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc., supra. We have reviewed the testimony of Talbott and the medical records filed by Dr. Charette. Based upon our review of the evidence, we are persuaded that there is substantial evidence in the record to support the ALJ's original award based upon a 3% occupational disability.

The opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Bradley D. Harville
Louisville, Kentucky

BRIEF FOR APPELLEE TALBOTT:

Rodger W. Lofton
Paducah, Kentucky