RENDERED: DECEMBER 29, 2005; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000885-WC

GLORIA D. SEBREE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-01941

INTERNATIONAL PAPER;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.[1]

VANMETER, JUDGE: Gloria D. Sebree filed this petition for review from an opinion of the Workers' Compensation Board (Board) which affirmed a decision of an administrative law judge (ALJ) denying Sebree's claim for income benefits pertaining to a work-related cervical injury. We affirm.

Our review of the record shows that the relevant facts were accurately summarized by the Board as follows:

[1] Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes 21.580.

Sebree, born October 10, 1958, has a tenth grade education. Her work history consists of employment in food preparation and with International at its Hopkinsville, Kentucky plant. Sebree worked for International from February 1983 until April 2003.

At the time of her injury on June 26, 2002, Sebree was a tow motor operator. She testified the job required a substantial amount of sitting, bending, and twisting and the ability to lift thirty pounds. Sebree stated she sustained a work injury when she ran over a pot hole, which jolted her causing injury to her neck, back, and shoulders. She also complained of numbness in her left arm with tingling in the two middle fingers of her left hand. On the day of the injury, Sebree completed her shift and continued to perform her normal duties.

Sebree continued her regular duties for one week following her injury. She was then examined by Dr. Roderic McGregor who recommended light duty work. Sebree continued to perform light duty work until November 2002, when she came under the care of Dr. John Ebert. According to Sebree, her pain had gotten worse and Dr. Ebert took her off work.

When International closed its Hopkinsville plant in April 2003, Sebree was on leave. She received unemployment benefits from April 2003 until September 2003. She was unemployed until June 2004, when she obtained employment working in the kitchen at Fort Campbell Army Base.

At her hearing, Sebree testified her current work involved peeling potatoes and cleaning the kitchen for KCA, the government contractor at Fort Campbell. She explained that physically the work was very painful, resulting in pain in the neck, shoulders and left arm. She testified she had received no TTD benefits due to her work injury with

International. Sebree stated she currently takes Valium and Lortab prescribed by Dr. Ebert. She also testified she wanted to undergo the surgery recommended by Dr. Ebert.

Sebree introduced the Form 107 of Dr. David DeRigis, who she saw nine times between July and October 2002. Dr. DeRigis diagnosed cervical disc bulge at C6-7 with neck and left arm pain. An MRI study revealed a minimal disc bulge at C6-7, but was otherwise negative. Dr. DeRigis indicated Sebree's injury was work-related. He did not assign an impairment rating. Dr. DeRigis placed a temporary restriction of no lifting or carrying over twenty-five pounds. He did believe, however, Sebree retained the physical capacity to return to the type of work performed at the time of injury.

International introduced the medical report of Dr. Richard Berkman, a neurosurgeon in Nashville, Tennessee. He examined Sebree at the request of her original treating physician, Dr. McGregor, after Dr. Ebert suggested surgery. In a report dated October 1, 2002, Dr. Berkman indicated he reviewed an MRI Scan of Sebree's neck, which revealed a small disc bulge at C6-7 to the right and some disc bulging at C4-5 and C5-6 centrally, but very mild. There did not appear to be any nerve root compression and nothing on the left side that would match Sebree's complaints. On physical examination, Sebree had good strength in her deltoid[,] biceps, triceps, and grip. Dr. Berkman summarized that he did not have an explanation, based on the imaging studies, for Sebree's current pain complaints. He thought it was possible one of the small disc bulges could have worsened or could have occurred as a result of the work injury, but he felt they were not large enough to warrant surgery. Dr. Berkman saw Sebree again on February 18, 2003. She had undergone a follow-up MRI Scan which

revealed a small disc bulge or spur at C6-7, asymmetric to the right side. Again, Dr. Berkman found it hard to explain the left C7 radicular arm pain. He recommended a myelogram and again felt Sebree was not a surgical candidate.

Medical reports from Dr. John Ebert were introduced into the record by Sebree. Dr. Ebert first saw Sebree on November 8, 2002. He received a history of the work-related injury and noted Dr. McGregor's plain x-rays and MRIs showed a "bulging disc." Dr. Ebert's impression was chronic cervical strain with left radicular symptoms, chronic low back strain with left lower extremity symptoms. He prescribed Lortab and Valium and took Sebree off work for three weeks because she needed diagnostic testing for neck and back pain. He did not assess any restriction. Dr. Ebert continued to issue off work slips for Sebree while she underwent diagnostic testing and was scheduled to see a neurosurgeon. The last slip was dated March 11, 2003 and was in effect until Sebree had an appointment with a neurosurgeon that was not yet scheduled. Dr. Ebert concluded Sebree had a significant posterior protrusion at C6-7 with disc bulge at C5-6. He referred Sebree to Dr. John Chung at the Vanderbilt University Clinic. In a report dated March 15, 2004, Dr. Ebert indicated Sebree was not at maximum medical improvement, and therefore the assessment of an impairment rating was "monumentally inappropriate." He believed Sebree had never been properly treated for her neck and left upper extremity and he had repeatedly recommended that her protruded disc at C6-7 needed surgical resection. He felt an impairment rating should be deferred until such time as Sebree recovered from the necessary surgery. On July 9, 2004, Dr. Ebert completed an additional medical report concluding Sebree had radiographic markedly significant posterior protrusion at C5-6

> compressing the spinal cord. He stated the absolute minimum surgical intervention needed by Sebree was a resection of the posterior protruded disc at C5-6 and a foraminotomy on the left.
>
> When seen at the Vanderbilt University Clinic, Sebree was evaluated by Jack G. Garrett, a nurse practitioner. By avowal, Sebree introduced the report of Nurse Garrett which contained an impairment rating of 5% for the cervical spine. The ALJ denied a request to submit Nurse Garrett's report into the record.
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> On the issue of medical expenses, the ALJ determined that only medical treatment for Sebree's C6-7 neck problem was compensable. The ALJ relied on the evidence of Dr. Berkman to conclude the surgery recommended by Dr. Ebert was not compensable.
>
> Thereafter, Sebree filed a petition for reconsideration, arguing nurse practitioner Garrett's evidence was admissible. She further contended her cervical condition at C4-5, C5-6 and C6-7 all occurred due to the incident at International. The ALJ summarily denied the petition for reconsideration and Sebree's appeal before this Board ensued.

The Board affirmed on appeal. This petition for review followed.

First, Sebree contends that the Board erred by affirming the ALJ's exclusion from evidence of the report of a nurse practitioner. We disagree.

KRS 342.033 addresses the limitations on the introduction of medical evidence as follows:

> In a claim for benefits, no party may introduce direct testimony from more than two (2) physicians without prior consent from the administrative law judge. The motion requesting additional testimony shall clearly demonstrate the need for such additional testimony. A party may introduce direct testimony from a physician through a written medical report. The report shall become a part of the evidentiary record, subject to the right of an adverse party to object to the admissibility of the report and to cross-examine the reporting physician. The executive director shall promulgate administrative regulations prescribing the format and content of written medical reports.

The statute's limitation on medical evidence is further clarified by KRS 342.011(32), which defines "physician" as including only "physicians and surgeons, psychologists, optometrists, dentists, podiatrists, and osteopathic and chiropractic practitioners acting within the scope of their license issued by the Commonwealth." Although the Kentucky Supreme Court recognized a limited exception for an audiologist in *Bright v. American Greetings Corporation*[2], that exception was based on the fact that the audiologist was a designated university evaluator whose testimony was admissible pursuant to the university medical school evaluation provisions of KRS 342.315(2). Clearly, a nurse practitioner does not fall within this definition of persons who may provide medical evidence on

[2] 62 S.W.3d 381 (Ky. 2001).

behalf of a party, and the Board did not err by affirming the ALJ's refusal to admit the practitioner's report.

Next, Sebree contends that the evidence compelled a finding that she was removed from work due to work-related injuries at the C5-6 and C6-7 levels of her neck. We disagree.

As the finder of fact, the ALJ possesses the sole authority to determine the "quality, character and substance" of evidence,[3] and to determine what if any inferences shall be drawn from the evidence. The ALJ may choose not only which expert to believe, but also what parts of the evidence or witness's testimony to believe or disbelieve.[4] Moreover, KRS 342.285(2) specifically provides that the Board

> shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact, its review being limited to determining whether or not:
>
> (a) The administrative law judge acted without or in excess of his powers;
> (b) The order, decision, or award was procured by fraud;
> (c) The order, decision, or award is not in conformity to the provisions of this chapter;
> (d) The order, decision, or award is clearly erroneous on the basis of the reliable, probative, and material evidence contained in the whole record; or
> (e) The order, decision, or award is arbitrary or capricious or

[3] *See Paramount Foods, Inc. v. Burkhardt,* 695 S.W.2d 418, 419 (Ky. 1985).

[4] *Caudill v. Maloney's Discount Stores,* 560 S.W.2d 15 (Ky. 1977).

> characterized by abuse of discretion or clearly unwarranted exercise of discretion.

If a claimant appeals an adverse decision by an ALJ, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor."[5]

Here, the evidence supported the ALJ's findings that MRI studies conducted in August 2002 and January 2003 showed minimal bulging at Sebree's C6-7 disc, with little or no bulging in her other discs at that time. More specifically, Dr. DeRigis read Sebree's August 2002 MRI and diagnosed a "very" minimal cervical disc bulge only at C6-7, while Dr. Berkman diagnosed a small disc bulge at C6-7 and very mild bulging at C4-5 and C5-6. Dr. Ebert diagnosed a significant protrusion at C6-7 and a bulge at C5-6. Two years after the June 2002 injury, Dr. Ebert concluded that the C5-6 protrusion was markedly significant.

The ALJ determined that there was no persuasive evidence that Sebree suffered a work-related injury other than to her C6-7 disc. That analysis of the conflicting evidence fell well within the ALJ's discretion. Further, the evidence supports the ALJ's finding that Sebree failed to meet her burden of providing medical evidence, instead of mere assertions, that she was removed from work due to the work-related injury rather

[5] *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). *See Paramount,* 695 S.W.2d at 419.

than a nonwork-related condition. As the evidence was not so overwhelming as to compel a finding in Sebree's favor,[6] the Board did not err by affirming the ALJ's dismissal of Sebree's claim.

Next, Sebree contends that the Board erred by affirming the ALJ's finding that she is not entitled to temporary total disability (TTD) benefits. We disagree.

KRS 342.0011(11)(a) defines "temporary total disability" as "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[.]" (Emphasis added.) As the term "injury" is limited by KRS 342.0011(1) to a "work-related" event, it follows that an employee is entitled to TTD benefits only if the employee can demonstrate both that he or she suffered a work-related injury, and that both prongs of the definition were satisfied because of that injury.

First addressing the second prong of the definition, we note that the record shows that Sebree continued her regular work duties for one week after the June 2002 injury. On Dr. McGregor's recommendation, she then switched to light duty work. Although Sebree asserts that Dr. Ebert took her off work entirely in November 2002, she failed to produce any medical evidence to meet her burden of showing that Dr. Ebert's action

[6] *Id.* at 736.

was prompted by her work-related injury rather than by a nonwork-related condition. More specifically, although in November 2002 Dr. Ebert began issuing a series of documents excusing Sebree from work pending diagnostic testing, there is nothing in the record to show that the excuses were prompted by the June 2002 injury rather than by Sebree's preexisting condition. Indeed, it appears that the June 2002 injury was not mentioned in Dr. Ebert's reports until January 30, 2003, when he commented in a neurologic evaluation:

> I have already seen the patient for her neck and upper extremity symptoms, but she also after the June 26, 2002 on-the-job injury at International Paper, developed low back pain which was significantly less than her cervical pain and which she didn't direct much attention to it until a couple of weeks after the accident. . . . It has not been evaluated at all up until the present due to the fact that she had other neurologic symptoms that took precedence.

As this evidence did not compel a finding that Sebree was removed from work due to the June 2002 work-related injury, the ALJ did not err by failing to find that Sebree could not return to work as a result of the injury.[7] Moreover, as the failure to satisfy the second prong of the definition necessarily eliminated Sebree from consideration for TTD benefits, we need not consider Sebree's contention that the evidence compelled a

[7] *See* KRS 342.0011(11)(a).

finding that she had not reached maximum medical improvement under the first prong of the definition.

Finally, Sebree contends that the Board erred by affirming the ALJ's finding that she was not entitled to receive additional medical benefits relating to the June 2002 injury. We disagree.

KRS 342.020(1) provides in pertinent part that

> [i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability . . . . The employer's obligation to pay the benefits specified in this section shall continue for so long as the employee is disabled regardless of the duration of the employee's income benefits.

Since the evidence supports the ALJ's finding that Sebree's work-related injury was limited to the C6-7 level, Sebree is not entitled to medical benefits pertaining to injuries to any other part of her body. Thus, Dr. Ebert's assertion that Sebree needs surgical treatment of a disc bulge at C5-6 is simply irrelevant. Moreover, although Sebree asserts that Dr. Ebert found that she needs surgical treatment of a protruded disc at the C6-7 level, Dr. Ebert in fact stated in a note dated January 7, 2003, that "[i]t will be between [Sebree] and her neurosurgeon on whether they proceed with surgical intervention" as to the C6-7 disc.

Since Sebree's neurosurgeon, Dr. Berkman, recommended against such surgical intervention, we are not persuaded that the evidence compelled a finding in Sebree's favor. Hence, the Board did not err by affirming the ALJ's denial of additional medical benefits.

The Board's order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

W. Douglas Myers
J. Michael Hearon
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BRIEF FOR APPELLEE INTERNATIONAL PAPER:

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