

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-000676-WC

CANDACE SMITH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-99342

OWSLEY COUNTY HEALTH CARE CENTER;
HON. ANDREW F. MANNO,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: DIXON AND TAYLOR, JUDGES; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: Candace Smith seeks review of an opinion of the Workers' Compensation Board that affirmed an Administrative Law Judge's denial of her claim for future medical benefits for a work-related back injury.

Smith, who is 20 years old, is a high school graduate and attends community college. She worked for Owsley County Health Care Center ("OCHCC") as a certified nurse's aide. Her

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110 (5)(b) of the Kentucky Constitution and Ky. Rev. Stat. (KRS) 21.580.

job at OCHCC required her to lift patients to and from their beds.

The parties stipulated that Smith suffered two separate work related injuries. She was initially injured on November 19, 2003, when she pulled a muscle in her back while lifting a patient. She sought treatment with a nurse practitioner, completed two weeks of physical therapy, and missed one week of work. Smith fully recovered from this injury and continued working in her normal capacity.

On December 28, 2004,² Smith injured her back when she lifted a patient and felt a "pop" accompanied by shooting pain. She sought treatment at the Family Practice Clinic of Boonville. Smith was diagnosed with muscle strain and radiculopathy in her back, and x-rays showed no abnormalities. She attended physical therapy and complained of ongoing pain in her lower back. Smith never returned to work at OCHCC.

On March 29, 2005, Dr. Robert Johnson, an orthopaedic surgeon, evaluated Smith and filed a Form 107 medical report. Dr. Johnson noted that Smith had an MRI within normal limits, but he disagreed with the findings of the radiologist. On August 1, 2005, Dr. Johnson re-evaluated Smith and found her to

² The ALJ refers to December 26, 2004 and December 28, 2004 interchangeably as the date of injury, as Smith testified the injury occurred on either of those dates. For continuity in this opinion, we refer to the date of injury as December 28, 2004.

be at maximum medical improvement (MMI) with a 5% permanent impairment rating.

On April 27, 2005, a second orthopaedic surgeon, Dr. Timothy Wagner, examined Smith and filed a report. Dr. Wagner reviewed Smith's medical records and determined that she had 0% impairment. He further determined that Smith would require no future medical treatment for her injury and related Smith's complaints of lingering back pain to being twenty-five pounds overweight.

The ALJ found that Smith suffered a temporary work-related low-back injury on November 19, 2003. The ALJ noted that medical evidence showed this injury completely resolved after one week, and he found no permanent impairment or need for future medical treatment.

The ALJ also found that Smith sustained a work-related injury on December 28, 2004. However, the ALJ relied on the report of Dr. Wagner and found Smith sustained 0% impairment. The ALJ awarded temporary total disability benefits and dismissed Smith's claim for permanent disability benefits. The ALJ also awarded medical benefits through April 27, 2005, the date Smith reached MMI. Finally, the ALJ denied Smith's claim for future medical expenses. The Workers' Compensation Board affirmed the ALJ's decision.

In her appeal to this Court, Smith claims that the ALJ erred in not awarding her future medical benefits pursuant to Kentucky Revised Statutes (KRS) 342.020.

On review, we recognize the ALJ enjoys great discretion in considering the weight and credibility of the evidence.³ It is well-settled "that the claimant [in this case, Smith] bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim."⁴ If the ALJ finds against the claimant, the claimant then faces a stringent burden of proof on appeal to the Board.⁵ As such, the Board will uphold the ALJ's decision unless it is clearly erroneous.⁶ Consequently, this Court gives great deference to the Board's decision and only intervenes where the Board's action constitutes a flagrant error resulting in gross injustice.⁷

Smith argues she is entitled to future medical benefits even though the ALJ found no permanent disability. Smith primarily relies on *Cavin v. Lake Construction Company*⁸ and

³ *Magic Coal Company v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

⁴ *Id.*

⁵ *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

⁶ *Id.*

⁷ *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

⁸ 451 S.W.2d 159 (Ky. 1970).

*Combs v. Kentucky River District Health Department*⁹ to support her claim.

The *Cavin* court held:

We do not believe it is necessarily inconsistent for the board to award payment of medical expenses without finding some extent of disability. It is not impossible for a non-disabling injury to require medical attention.¹⁰

In the recent *Combs* decision, the ALJ relied on the medical evidence to award the claimant future medical benefits.¹¹ The Board reversed the ALJ's award, finding that future medical benefits were not available in the absence of a permanent impairment.¹² On review, this Court relied on the holding in *Cavin* to reverse the Board and reinstate the order of the ALJ.¹³

Smith's argument to this Court implies that *Cavin* and *Combs* provide an open invitation for all claimants to receive future medical benefits for a non-disabling work injury. We disagree. Smith plainly overlooks the fact that the ALJ in this case relied on the evidence of record that future medical treatment would not be necessary. We again point out the discretion afforded the ALJ:

⁹ 194 S.W.3d 823 (Ky. App. 2006).

¹⁰ *Cavin*, 451 S.W.2d at 161-62.

¹¹ *Combs*, 194 S.W.3d at 825.

¹² *Id.*

¹³ *Id.* at 826-27.

The ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence. Where, as here, the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ.¹⁴

While it is true, as Smith points out, that KRS 342.020(1) provides 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 or occupational disease 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, or as may be required for the cure and treatment of an occupational disease . . . ,

In this case, however, we agree with the Board that

[i]n the argument portion of her appellate brief, Smith cites to no medical opinion of record that Smith requires future medical treatment. Rather, she asserts that because the ALJ found that she had a 0% permanent impairment rating as a result of the December 2004 injury, rather than finding the injury to be a temporary exacerbation, the ALJ was required to award future medical benefits.

* * *

In an April 27, 2005 report filed of record herein, Dr. Timothy Wagner clearly stated his opinion that Smith 'does not need any continuing medical treatment at the present time or into the future due to this work related injury of December 28, 2004.' The ALJ, in his role as fact finder, credited this opinion. The Board is without

¹⁴ *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citations omitted).

authority to supplant this factual finding.
[citations omitted].

The decision of the Board is supported by substantial evidence and without error as a matter of law. Consequently, Smith's claim for future medical benefits must fail.

The opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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