RENDERED: AUGUST 17, 2007; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000407-WC

DIANA BOWEN — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-94984

HEALTH MANAGEMENT ASSOCIATES;
HON. GRANT S. ROARK, ADMINISTRATIVE
LAW JUDGE; AND KENTUCKY
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ABRAMSON AND DIXON, JUDGES; ROSENBLUM,[1] SENIOR JUDGE.

ABRAMSON, JUDGE: Diana Bowen petitions for review of a January 19, 2007 Order of the Workers' Compensation Board affirming the denial of Bowen's claim for permanent disability benefits. Bowen, who is a Licensed Practical Nurse, claims that during the course of her employment for Health Management Associates (HMA) she suffered two back injuries which have rendered her totally disabled. The Administrative

[1] Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Law Judge (ALJ) found, however, that the first injury was not work-related and that the second was temporary only, not permanent. Nor did either injury, the ALJ further found, cause a permanent psychological impairment. Bowen challenges all of these findings, but, because we agree with HMA that Bowen's contrary proof did not compel findings in her favor, we affirm.

Bowen alleges that she suffered the first injury on May 1, 2002. At that time she was thirty-six years old and had been working as an LPN for seven or eight years, all but the first at the Paul B. Hall Medical Center in Paintsville, Kentucky. Bowen claims that she was lifting a patient when she experienced a severe pain in her lower back. She immediately reported her distress to her supervisor and sought treatment in the hospital's emergency room. She was treated with an anti-inflammatory, which enabled her to finish her shift, but the pain remained serious. She promptly consulted her family physician, and the MRI he ordered revealed a ruptured disk in the lumbar region of Bowen's back. Bowen underwent back surgery in late May 2002 and was able to return to work that July. Bowen contends that the ALJ and the Board erred by not awarding her benefits for at least a partial disability as a result of this episode.

As HMA correctly notes, a worker seeking permanent disability benefits has the burden of proving every element of his or her claim, including, of course, the fact of a permanent work-related injury. *Robertson v. United Parcel Service,* 64 S.W.3d 284 (Ky. 2001). Under our law, the ALJ is the finder of fact and "has the sole discretion to determine the quality, character, and substance of evidence. . . . When the party with the

burden of proof does not succeed before the ALJ, that party's burden on appeal is to show that the favorable evidence was so compelling that the decision to the contrary was unreasonable." *Lanter v. Kentucky State Police,* 171 S.W.3d 45, 51 (Ky. 2005) (citations omitted). Bowen has not met this formidable burden.

In addition to Bowen's testimony and evidence, the record includes proof that Bowen had a significant history of lower back pain long before her alleged workplace injury. At least once before, in 2000, her back pain had been severe enough to necessitate a visit to the hospital's emergency room, and apparently it was constant enough so that Bowen regularly did her charting standing up and her co-workers were aware that she had back problems. The record also indicates that, on the night of the alleged injury, Bowen did not report, either to her supervisor, her co-workers, or to emergency room personnel, that she had been lifting a patient when the pain struck. In fact, in the emergency room she denied that the incident was work-related and arranged to have her treatment there and her subsequent time off and surgery paid for by her health insurer instead of filing a workers' compensation claim. Bowen testified that she feared retaliation if she filed a compensation claim, but the ALJ could properly note that fear would not account for the fact that she did not mention any work-related aspects of the incident to her supervisor or co-workers. In any event, the ALJ found that the pain Bowen experienced in May 2002 and her need for surgery were not work-related but were instead simply new ramifications of her pre-existing back ailments. In light of Bowen's history and her failure at the time of the alleged injury to attribute it to her work,

we cannot say that the ALJ's finding that this alleged injury was not work-related was unreasonable or that Bowen's proof compelled a contrary result.

Bowen returned to work in July 2002 and apparently resumed her full duties without incident until February 14, 2003. Bowen testified that during her shift that day she was attempting to remove the sheets from beneath a patient when she again suffered a searing pain in the same place in her lower back. This time the pain was so great she could barely stand. She was taken to the emergency room in a wheelchair and wound up spending several days in the hospital. Bowen claims that since then her back pain has never abated. She obtains some partial relief from pain medicines, but the constant pain and its attendant depression prevent her from working, from helping around the house, from engaging in hobbies, from attending church, and from sleeping. She presented medical and psychological evidence tending to show that she is physically and psychologically impaired and that her impairments have rendered her substantially, if not totally, disabled.

Again, however, there was countervailing evidence. Following the February 2003 episode, Bowen underwent several MRI's and a nerve conduction exam, none of which disclosed any physiological reason for Bowen's on-going complaints. In light of these studies and their own observations, most of the doctors who examined Bowen believed that she had suffered only a lumbar strain or sprain which should have resolved in a matter of months. Her continuing complaints of pain were accounted for either as malingering or as a complication brought on by Bowen's weight. One of the

psychiatrists who examined Bowen concurred in these medical conclusions and opined that Bowen was not psychologically impaired. She was, rather "disabling herself," a tendency exacerbated, the psychiatrist believed, by a "worrisome cocktail" of medications, the justification for which had passed.

Relying on these latter opinions, the ALJ found that Bowen had not suffered a new, permanent injury on February 14, 2003, but only a temporary sprain, and further that the episode had not resulted in a permanent psychological impairment. Again, although Bowen's proof may have supported a different result, it did not compel one. In light of the ample evidence that there was no physiological manifestation of the February incident and the psychiatric testimony that Bowen was magnifying her symptoms and "disabling herself," we cannot say that the ALJ's findings were unreasonable.

Finally, Bowen contends that the ALJ erred by relying on one of the medical reports which assigned her an impairment rating as a result of her surgery, but assessed no additional impairment as a result of the February 2003 incident. According to Bowen, the doctor who issued this report misapplied the AMA Guidelines by using the DRE as opposed to the range-of-motion model for assessing impairments. We need not address this contention, however, for the ALJ clearly did not rely on that portion of the doctor's report. Rather, the ALJ's finding that Bowen did not suffer a permanent injury in February 2003 rendered the impairment issue moot, and thus rendered irrelevant the doctor's alleged error.

In sum, we reiterate that it is not this Court's role to second guess the ALJ's credibility determinations or his or her choices among conflicting items of proof. Where, as in this case, the ALJ's findings reflect a reasoned and a reasonable interpretation of the evidence, they will not be disturbed on appeal. Accordingly, we affirm the January 19, 2007, Order of the Workers' Compensation Board.

ALL CONCUR.

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