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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000654-WC

ANDREA SUE SWEENEY — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-68919

KING'S DAUGHTERS MEDICAL CENTER;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,[1] SENIOR JUDGE.

VANMETER, JUDGE: Andrea Sue Sweeney petitions for the review of the Workers' Compensation Board's opinion affirming an Administrative Law Judge's (ALJ's) opinion and order dismissing Sweeney's claim for permanent benefits. For the following reasons, we affirm.

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

Sweeney was employed as an operating room nurse by King's Daughters Medical Center beginning in 1995. She experienced neck pain in 1999 and eventually underwent a cervical spine fusion surgery at C5-6 in December 2002. She does not allege that this neck pain and resulting surgery were work-related.

Approximately three months after her surgery, Sweeney returned to work with no restrictions. She testified that she did not experience any problems with her neck until August 2003, when she hurt her neck while pushing a stretcher. Sweeney underwent x-rays but did not miss any work as a result of this incident.

Then on September 23, 2004, Sweeney felt a pop in her neck while she was helping a surgeon reposition on an operating table an anesthetized patient who weighed between 250 and 300 pounds. She testified that she saw a doctor that afternoon, and that when she got into her car that day, her left arm was limp as if she had suffered a stroke. Sweeney was initially placed on light duty; however, a doctor subsequently restricted her from working at all. Sweeney's last day of employment at King's Daughters was September 30, 2004, and she has not returned to any employment since.

The ALJ gave a detailed summary of the evidence presented in the matter, including a summary of six doctors' opinions. However, the ALJ only discussed four of those doctors' opinions in his analysis, findings of fact, and conclusions of law. Here, we summarize those four doctors' opinions, quoting from the ALJ's summary of the evidence.

In favor of Sweeney's claim for workers' compensation benefits, Dr. David Herr diagnosed Sweeney as having "a herniated cervical disc at C4-5 caused by the work injury[.]" He assigned "a 28% WPI [whole person impairment] with no prior active impairment" and opined that Sweeney "did not have the physical capacity to return to her former job." Similarly, Dr. Jason Rice concluded that Sweeney "had a herniated cervical disc at C4-5 caused by the work injury" and assigned her a 15% impairment. Dr. Rice opined that Sweeney "did not have an active impairment prior to the injury" and "could not return to her former occupation as a nurse."

On the other hand, Dr. Michael Best "could find no specific abnormality or change of condition caused by the work injury." He placed Sweeney at maximum medical improvement (MMI), released her to return to her job as a nurse, and "assigned a 25-28% whole person impairment as a result of the surgery performed in 2002." Dr. Richard Sheridan diagnosed Sweeney with a "resolved acute cervical strain. He placed her at MMI and indicated that she could return to work without restrictions."

The ALJ found more credible Dr. Best's and Dr. Sheridan's opinions that Sweeney had "no additional findings beyond those resulting from the 2002 injury and surgery." The ALJ found less credible Dr. Herr's and Dr. Rice's opinions, because each of them opined that Sweeney did not have any active impairment/disability prior to the 2004 incident, despite her undisputed previous injury and cervical fusion. Based on this and other evidence, the ALJ concluded that Sweeney had not sustained an injury as

defined in KRS 342.0011(1) and dismissed Sweeney's claim. The Board affirmed, and this petition for review followed.

Sweeney argues that the Board erred by affirming the ALJ's decision because the evidence compels a finding in her favor. We disagree.

A workers' compensation claimant bears the burden of proof regarding her claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). When a claimant is unsuccessful below, as occurred here, the issue on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor." *Id.* Compelling evidence is that that is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. *Neace v. Adena Processing*, 7 S.W.3d 382, 385 (Ky.App. 1999).

As set forth above, Dr. Best could not find any specific abnormality or change of condition caused by Sweeney's 2004 work incident. He assigned her a 25-28% impairment, solely as a result of her 2002 surgery. While other doctors, including Dr. Herr and Dr. Rice, opined that Sweeney's impairment resulted from her September 2004 work injury, it was for the ALJ to determine, as the finder of fact, "the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Indeed, as fact-finder the ALJ "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Ultimately, since the ALJ's conclusion was supported by substantial

evidence, including Dr. Best's opinion, a finding in Sweeney's favor was not compelled. *See Special Fund v. Francis*, 708 S.W.2d 641, 644 (Ky. 1986) (since sufficient evidence reasonably permitted a finding against the claimant, the evidence did not compel a finding otherwise). Thus, the Board did not misunderestimate the evidence supporting Sweeney's claim.

The fact that Dr. Best and Dr. Sheridan were not Sweeney's treating physicians does not compel a different result. As Board Chairman Gardner pointed out in his concurring opinion, Kentucky law does not require an ALJ to "give more weight to the evidence of the attending physician than to the evidence of the others." *See Wells v. Morris*, 698 S.W.2d 321, 322 (Ky.App. 1985). Nor is a different result compelled by Sweeney's allegations that 1) Dr. Sheridan "has not had ***any*** hospital privileges for about fifteen years and runs an evaluation service traveling throughout several states performing medical examinations for Defendants[,]" or 2) Dr. Best has "not been in an operating room for eight to ten years and has only one eye to examine x-rays and the like." Simply put, the ALJ "has the sole authority to judge the weight, credibility and inferences to be drawn from the record." *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997).

Finally, Sweeney argues that the ALJ misconstrued the law regarding pre-existing conditions.[2] We disagree.

Sweeney cites *McNutt Constr./First Gen. Servs. v. Scott*, 40 S.W.3d 854, 859 (Ky. 2001), in which the Kentucky Supreme Court held that despite changes in the

[2] *See generally Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky.App. 2007).

workers' compensation law effective December 12, 1996, "disability which results from the arousal of a prior, dormant condition by a work-related injury remains compensable[.]" More specifically, the claimant in that case fell through the floor of a house while working and suffered a lower back injury. *Id.* at 856. Prior to the accident, the claimant suffered from a degenerative condition due to the natural aging process. *Id.* at 857. The court affirmed the ALJ, who concluded that "no portion of the claimant's disability should be excluded as being attributable to the natural aging process" and ultimately awarded permanent, total disability benefits. *Id.* at 857, 861.

Here, the ALJ did not misconstrue the law regarding pre-existing conditions. Rather, he held that Sweeney had not proven that she sustained an injury, which is defined, in part, as meaning

> any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings.

KRS 342.0011(1). Essentially, the ALJ was not persuaded that Sweeney's September 2004 work incident caused "a harmful change in the human organism evidenced by objective medical findings." As there is medical evidence supporting this conclusion, as discussed above, the Board did not err by affirming the ALJ's opinion.

The Board's opinion, affirming the ALJ's opinion and order dismissing Sweeney's claim for permanent benefits, is affirmed.

DIXON, JUDGE, CONCURS.

GRAVES, SENIOR JUDGE, CONCURS AND FILES SEPARATE OPINION.

GRAVES, SENIOR JUDGE, CONCURRING: I concur with the result solely because I am bound to follow precedent. However, I write separately to point out the irrational conclusion that our case law allows to an ALJ. As Justice Palmore has stated, common sense should not be a stranger to the law.

The time is long overdue for our courts to adopt the well reasoned opinions of the Sixth Circuit concerning the relative weight to be given to testimony of treating and examining physicians respectively.

The United States Court of Appeals for the Sixth Circuit has repeatedly held that the opinions of a treating physician are entitled to great weight and generally are entitled to greater weight than the contrary opinions of a consulting physician who has examined the claimant on only a single occasion. *Farris v. Sec'y of Health and Human Services*, 773 F.2d 85, 90 (6th Cir. 1985); *Harris v. Heckler*, 756 F.2d 431, 435 (6th Cir. 1985); *Hurst v. Schweiker*, 725 F.2d 53, 55 (6th Cir. 1984); *Stamper v. Harris*, 650 F.2d 108, 111 (6th Cir. 1981); *Branham v. Gardner*, 383 F.2d 614, 634 (6th Cir. 1967).

In *Walker v. Sec'y of Health and Human Services*, 980 F.2d 1066, 1070 (6th Cir. 1992), the court held:

> The medical opinion of the treating physician is to be given substantial deference—and, if that opinion is not contradicted, complete deference must be given. The reason for such a rule is clear. The treating physician has had a greater opportunity to examine and observe the patient. Further, as a result of his

> duty to cure the patient, the treating physician is generally more familiar with the patient's condition than are other physicians. It is true, however, that the ultimate decision of disability rests with the administrative law judge.

(Citations omitted.)

On two occasions, the court has described the rule as favoring the opinion of a treating physician over the opinion of a physician who has been hired by the government for the purpose of defending against a disability claim. *Hurst v. Sec'y of Health and Human Services*, 753 F.2d 517, 520 (6th Cir. 1985); *Allen v. Califano*, 613 F.2d 139, 145 (6th Cir. 1980).

The court has held that the uncontradicted opinion of a treating physician is entitled to complete deference. *Cohen v. Sec'y of Dep't of Health and Human Services*, 964 F.2d 524, 528 (6th Cir. 1992); *Jones v. Sec'y, Health and Human Services*, 945 F.2d 1365, 1370 n.7 (6th Cir. 1991); *Shelman v. Heckler*, 821 F.2d 316, 320 (6th Cir. 1987).

Reliance upon the opinion of a treating physician over the contrary opinion of a consulting physician is particularly appropriate where the severity of a claimant's impairment fluctuates over time. *Lashley v. Sec'y of Health and Human Services*, 708 F.2d 1048, 1054 (6th Cir. 1983).

If the Secretary rejects the opinion of a treating physician, he must articulate a reason for doing so. *Shelman*, 821 F.2d at 321.

The above opinions are deserving of emulation by Kentucky courts.

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