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Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-000578-WC

EDIE M. SIMPSON

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-01-95574

FRANKLIN INSURANCE AGENCY, INC.;
HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING
IN PART AND REMANDING

** ** * ** * **

BEFORE: ACREE, HOWARD AND LAMBERT, JUDGES.

HOWARD, JUDGE: Edie M. Simpson (hereinafter Simpson) petitions for review of a decision of the Workers' Compensation Board which affirmed an award of permanent partial disability benefits resulting from a work-related back injury and psychological impairment. In her petition, Simpson asserts that the evidence compelled a finding of

total occupational disability and that the Administrative Law Judge further erred in failing to award benefits for other alleged impairments. We affirm in part, reverse in part and remand.

Simpson was born in 1961 and has a 12th grade education. She worked in the insurance business since high school, obtained an insurance agent's license, and in October 1994, purchased her own agency, the appellee Franklin Insurance Agency. On January 2, 2000, Simpson sustained a work-related injury to her back when she lifted a five gallon water jug onto a water cooler. She initially responded well to conservative treatment and on February 8, 2000, was released to return to her regular activities. A few weeks later, however, severe pain returned and on March 10, 2000, Simpson underwent a lumbar laminectomy at L5-S1. In October 2000, she was referred to another orthopedic surgeon who performed a repeat laminectomy on March 27, 2001. Shortly after the second surgery, Simpson developed severe pain and could not feel her legs or use the lower part of her body. On March 28, 2001, a blood clot in the spinal canal was surgically removed. On March 31, 2001, she underwent yet another surgery to decompress the L5 nerve root and to remove more of the blood clot. She was discharged from the hospital on April 4, 2001, with diagnoses of recurrent herniated nucleus pulposus at L5-S1, cauda equina syndrome and L5 nerve root compromise. Simpson experienced foot-drop, continuing pain and depression. She attempted to return to work, but eventually sold her insurance agency in 2002, and has not worked since May of that year. She claims that as a result of the work-related injury, she sustained a permanent

total disability that encompassed bowel, bladder and sexual complications, in addition to her back injury. The employer's primary defense theory was that Simpson's January 2, 2000, work-related injury had resolved and her impairments were caused by a separate, non-work-related injury.

The Administrative Law Judge, the Honorable John B. Coleman (hereinafter the ALJ), found that Simpson was 23% impaired due to her back injury and 10% impaired due to her psychiatric impairment, resulting in a 31% combined whole body impairment, and that this all resulted from her work-related injury and the resulting treatment. The ALJ dismissed Simpson's claim for benefits for her urinary incontinence, bowel problems, and sexual dysfunction, finding that she did not prove causation as to these claimed impairments. Specifically, the ALJ stated the following:

[T]he plaintiff does claim a decrease in her bowel and bladder functioning as a result of her work related low back injury. A review of that evidence indicates that Dr. Evins diagnosed the plaintiff with urgency/frequency syndrome, but could not determine the cause of that condition. Dr. Concepcion originally noted the plaintiff may have some inflammation around the nerve roots going to the bladder, but the diagnostic studies showed chronic inflammation and cystitis with small blood clots in the bladder. He noted the inflammation and clots were not caused by the work related injury and also that the plaintiff had a drop in the bladder. In addition, he noted the sexual dysfunction to potentially be related to the work injury. The plaintiff bears the burden of proof and risk of non-persuasion to convince the trier of fact as to each and every element of her claim. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). In this particular instance, the medical proof is not at all clear as to the cause of the plaintiff's bladder, bowel, and sexual dysfunctions. The mere possibility of a causal relationship is insufficient to permit a finding that a medical condition is work related and therefore,

compensable. Markwell and Hartz, Inc. v. Pigman, Ky., 473 S.W.2d 640 (1972); Marcum v. General Electric Company, Ky., 479 S.W.2d 640 (1972); and Pierce v. Kentucky Galvanizing Company, Ky. App., 606 S.W.2d 165 (1980). In this case, while there is potential that these conditions are related, the Administrative Law Judge has not been convinced and as it is the plaintiff's burden of proof to show causation, her claim for medical and income benefits for those conditions must be dismissed.

Simpson appealed to the Workers' Compensation Board (hereinafter the Board), which affirmed the ALJ's award in a 2-1 decision. The majority of the Board discussed the evidence relating to Simpson's claims of bowel, bladder, and sexual dysfunction as follows:

Although we find the evidence to be very persuasive, and would have most likely made a finding of disability for the bowel, bladder and sexual dysfunctions, we cannot say that it reaches the "overwhelming" or "compelling" standard. . . .

We are acutely aware of the deference to be given to the ALJ in such a case as this, as set out in the cases cited above. And, while the evidence, unrebutted, is very persuasive, we cannot overstep our bounds and reverse the ALJ. The ALJ may choose to believe part of the evidence and disbelieve other portions of the evidence whether the evidence came from the same witness or from the same party's total proof.

Board Member Cowden, in his dissent, stated as follows:

It is clear to the undersigned that the medical evidence demonstrates causation and work relatedness as it applies to the bowel, bladder, and sexual dysfunction allegations and is not contradicted by any other evidence on this issue. To this extent, the evidence stands unrebutted. Moreover, a reading of the ALJ's opinion provides no basis or reasoning for dismissing this evidence. It is error for the fact finder to reject uncontradicted medical evidence of record without providing a sufficient explanation for his rejection.

Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540, Ky. App. (1985). See also Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., 618 S.W.2d 184, Ky. App. (1981) and Collins v. Castleton Farms, 560 S.W.2d 830, Ky. App. (1977). For this reason, I would remand this matter back to the ALJ to make additional findings as it applies to compensability of the bowel, bladder, and sexual elements of the claim. To the same extent, if the ALJ finds that sufficient evidence exists in the record to support causation as it applies to these three elements of the claim, the ALJ should also address the potential effect that these conditions have on Simpson's ability to perform work on a sustained basis as a result of the injury in question.

This petition for review followed. Our task in this review is to correct the Board only if it overlooked or misconstrued controlling law, or so flagrantly erred in evaluating the evidence so as to cause a gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992). The ALJ "has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). The ALJ may reject any evidence and may believe or disbelieve evidence, including medical evidence. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000). Where a claimant fails to convince the ALJ and the Board that his or her burden of proof was met, the claimant must demonstrate on appeal that the evidence was so overwhelming as to have compelled a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

Most on point with this case, the ALJ, as the fact finder, may reject uncontradicted medical evidence, but only when he supports that decision with a reasonable explanation. *Commonwealth v. Workers' Compensation Bd. of Kentucky*, 697

S.W.2d 540 (Ky.App. 1985); *Collins v. Castleton Farms, Inc.*, 560 S.W.2d 830 (Ky.App. 1977). In *Collins*, this court quoted 3 A. Larson, *Workmen's Compensation Law*, §80.20 (9th ed. 1976), to state:

The Commission [now the ALJ] may even refuse to follow the uncontradicted evidence in the record, but when it does so, its reasons for rejecting the only evidence in the record should appear e.g., that the testimony was inherently improbable, or so inconsistent as to be incredible, that the witness was interested, or that his testimony on the point at issue was impeached by falsity in his statements on some other matters. Unless some explanation is furnished for the disregard of all uncontradicted testimony in the record, the Commission may find its award reversed as arbitrary and unsupported.

Collins, 560 S.W.2d at 831.

Neither party contested the ALJ's findings and award relating to Simpson's low back injury and her psychiatric condition. However, Simpson asserts that the evidence compelled findings that her bowel, bladder and sexual dysfunctions are compensable and that she has sustained a total occupational disability. While we disagree that the evidence compelled a finding of total disability or a finding that her bowel dysfunction was a result of her work-related injury, we conclude that this action must be remanded for findings on the undisputed medical evidence relating to Simpson's bladder and sexual dysfunctions.

Simpson first argues, citing *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149 (Ky. App. 2006), that the medical evidence was uncontradicted because Dr. Gaw provided the only medical evidence which should have been considered. She

argues that he was the sole physician providing evidence consistent with the AMA Guides relating to her urinary and sexual neurological deficits. We believe Simpson reads *Jones* too broadly. The issue before the court in *Jones* concerned the appropriate assessment of an impairment rating consistent with the AMA Guides as required by KRS 342.0011 and KRS 342.730. We do not interpret *Jones* as holding that a doctor's testimony relating to diagnosis or causation must be in strict conformity with the AMA Guides in order to be considered. We must therefore consider all of the medical evidence on these issues.

While the Board treated the claims of bowel, bladder and sexual dysfunction together, we believe the medical evidence differs on those claims. The ALJ's refusal to award benefits for the alleged bowel impairment should be affirmed for two reasons which do not apply to the other two claimed impairments. First, no doctor directly testified that the bowel problem was brought about by Simpson's work-related injury. Therefore, she failed to sustain her burden of proof as to this claim. Second, substantial medical evidence supports the ALJ's finding that Simpson's claimed bowel problems were not work-related. Dr. Nichols, an orthopedist, examined Simpson to determine her impairment from her low back injury. In his June 28, 2002, letter, Dr. Nichols stated that Simpson "is reporting no bowel dysfunction." More important, Dr. Concepcion, a urologist, was asked directly if he believed Simpson's bowel problems were related to her work-related injury and answered, "Not really." We therefore affirm the Board in rejecting the claim as to the alleged bowel impairment.

However, we agree with the Board that the medical evidence relative to Simpson's claims of bladder and sexual dysfunction was uncontradicted. As to the claim of bladder dysfunction, Dr. Gaw testified that Simpson has a 9% whole person impairment due to her "urinary system neurological deficit," and that this was due to her work-related injury. Dr. Nichols stated in his June 28, 2002, letter that Simpson "is reporting episodes of 'bladder leakage.' I have no records of her treatment for this disorder, but if this is indeed the case, the patient is entitled to an additional impairment rating which should be combined with her present impairment rating. . . ."

The ALJ cited Dr. Concepcion as supporting his rejection of Simpson's bladder-related claim. But we believe he misread Dr. Concepcion's testimony. Dr. Concepcion noted that prior to the second surgery for her work-related injury, Simpson reportedly experienced mild stress incontinence; after the surgery she experienced significant urge incontinence and he diagnosed her as having diminished bladder capacity and an "uninhibited bladder." He stated that Simpson did not have any other conditions that could cause her urological problems, and concluded, "It was all very temporally related to the fact that before she started having the back surgery, she had a fairly normal pattern, after these events transpired, she had this problem."

Later, Dr. Concepcion testified, with regard specifically to Ms. Simpson's bladder complaints, "Obviously, I thought this was related to previous surgery." He further opined that he felt Dr. Gaw's 9% impairment rating "was on the low side." As noted by the ALJ, Dr. Concepcion mentioned other possible causes for Ms. Simpson's

bladder complaints, but he then stated that she did not have any of those other conditions. We do not find his testimony to be equivocal in any way.

Dr. Evins, a urologist, saw Simpson on October 4 and 21, 2002. In his letter dated January 27, 2003, Dr. Evins stated that she "has a very complicated overall medical picture . . . due to the fact that she has had a previous back injury and possibly has some cauda equina syndrome." Dr. Evins stated that during the bladder evaluation, Simpson had "excellent flow rate . . . no uninhibited bladder constrictions and we were unable to demonstrate leakage on the patient with coughing" Dr. Evins opined that her "incontinence appeared to be primarily urgency type incontinence," and that he found no neurological disease in her bladder. Dr. Evins concluded that Simpson had "urgency-frequency syndrome, cause undetermined. I cannot determine if it is directly related to any kind of trauma or not." We do not believe that Dr. Evins' testimony contradicts the other evidence of causation and work-relatedness; he simply had no opinion on that issue.

Although there was less evidence as to Simpson's claims of sexual dysfunction, we find that evidence to be uncontradicted as well. Dr. Gaw assessed Simpson with a 9% whole body impairment due to her sexual dysfunction, and directly attributed her loss of normal sexual function to her work-related injury. Dr. Concepcion stated that Simpson's sexual problems were *potentially* related to her injury and also testified about his conversation with a gynecologist who found that Simpson had an "impressive" neurological finding on the left side of her pelvis. We do not believe Dr.

Concepcion contradicted Dr. Gaw's testimony. Rather, like Dr. Evins' testimony referred to above, Dr. Concepcion simply failed to state a clear opinion of his own with regard to the claim for sexual dysfunction.

The Board specifically stated that the medical evidence that Simpson's bladder and sexual dysfunction were caused by her work-related injury was “unrebutted.” After a thorough review of the record, we agree. The ALJ is permitted to disbelieve unrebutted medical evidence, but if he does so he must provide a sufficient explanation for his disbelief. *Collins v. Castleton Farms, Inc., supra*. No such explanation was given in this case, only a characterization of the evidence as “not at all clear.” To the contrary, we agree with the Board, which described this evidence as “unrebutted” and “very persuasive.” We believe the Board erred in its application of the law, by not following *Collins* and remanding this matter to the ALJ for further findings relative to his rejection of this unrebutted evidence. The ALJ has the authority to disbelieve such evidence, but he must state sufficient reasons for doing so.

Simpson has argued that an unpublished Kentucky Supreme Court opinion, *Thornton v. Volt Services Group, No. 2004-SC-000442-WC* (rendered June 16, 2005), cited pursuant to CR 76.28(4), holds that, at least as to medical evidence, the ALJ must accept unrebutted evidence, and has no discretion, even to disbelieve such evidence and state his reasons for doing so. In effect, she argues that *Thornton* overrules *Collins* and that entire line of cases. The Supreme Court in *Thornton* stated,

When medical experts differ concerning the proper application of the *Guides* and an injured worker's impairment

rating, it is the ALJ's function to weigh the conflicting evidence and to decide which is more persuasive. . . . (citations omitted) When medical evidence is uncontradicted, the ALJ may not disregard it. *See Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., supra.*

Thornton, No. 2004-SC-000442, slip op. at 8.

We do not read *Thornton* so broadly as Simpson suggests, for two reasons. First, the Supreme Court opinion in *Thornton*, on its face, does not say that it overrules any prior cases, and the Supreme Court did not choose to publish its opinion. Second, the *Thornton* opinion cites with approval *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. App. 1981), which should be fairly considered to be in the same line of cases with *Collins*. This Court in *Mengel* stated the general rule that the finder of fact should not “disregard” uncontradicted medical evidence, but also observed that, “There are some situations in which a board decision will be upheld on review when the board has made findings contradicting the medical testimony.” *Mengel*, 618 S.W.2d at 186. We therefore conclude that *Collins v. Castleton Farms, Inc., supra.* is still the controlling law on this question, and that while the ALJ may not “disregard” uncontradicted medical evidence, he may disbelieve such evidence and therefore decline to follow it, but only if he states sufficient reasons for doing so. He did not state any such reasons in this case.

Simpson also contends that the evidence compelled a finding of total occupational disability because there is no evidence that she is capable of performing sedentary work. We disagree. It was within the ALJ's prerogative to discredit Simpson's

account of her pain due to self-limiting behavior, and sufficient evidence supports his finding that Simpson is capable of sedentary work.

Simpson further asserts that the ALJ erred in relying on the testimony of Dr. Granacher, a forensic psychiatrist, to determine the vocational effects of her impairment. Dr. Granacher opined that Simpson had a "10% whole body psychiatric impairment." Dr. Granacher further stated that "within reasonable medical probability, Edie Simpson does not require psychiatric restrictions upon job performance." The Board correctly concluded that Dr. Granacher's opinion fell within his field of expertise, and the ALJ did not err in relying on that evidence.

Simpson finally contends that the ALJ erred in relying on a utilization review report from Dr. Gerilyn Metoyer. The utilization review report was included in the employer's list of its evidence in the May 26, 2006, hearing order, and the hearing order was signed by both Simpson and the employer. Simpson objected to the filing of the medical reports of Dr. Metoyer and other physicians based on the procedure used to file the reports, but not on the basis argued to the Board or to this court. This alleged error was not preserved for our review. *Breeding v. Colonial Coal Co.*, 975 S.W.2d 914 (Ky. 1998).

This claim is remanded to the ALJ for additional findings relating to the compensability of Simpson's claims for bladder and sexual dysfunction. If he disbelieves the unrebutted medical evidence as to those claims, he shall state his reasons for doing so, pursuant to *Collins v. Castleton Farms, Inc.*, *supra*. If, after considering the evidence

of record, the ALJ finds that Simpson has work-related bladder and sexual dysfunction, then he should determine the effect on Simpson's ability to work. In all other respects, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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