

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-001653-WC

SAFIJA MUSIC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-83104

EMERSON ELECTRIC; J. LANDON
OVERFIELD, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, CHIEF JUDGE; DIXON, JUDGE; BUCKINGHAM,¹
SENIOR JUDGE.

COMBS, CHIEF JUDGE: Safija Music appeals the dismissal of her workers'
compensation claim. Based on our examination of the record, we affirm.

Music is a refugee from Bosnia who speaks limited English.

Throughout these proceedings, she has communicated to doctors, lawyers, and the
Administrative Law Judge (ALJ) through an interpreter. On June 19, 2006, Music

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

was employed as a utility worker for Emerson Electric. While lifting motors that night, she experienced pain in her lower back. She informed her supervisor and took some over-the-counter pain medicine. Music did not sleep the rest of the night and reported her injury at work the next morning.

Emerson sent Music to the company physician, Dr. Masoud Hamidian. After taking Music off work for four days, Dr. Hamidian recommended that she return to light-duty work. Music returned to Dr. Hamidian on June 27, 2006. He took her off work and ordered an MRI. Dr. Hamidian could not determine what caused Music's pain and referred her to Dr. Scott Standard, a neurosurgeon. Dr. Standard diagnosed her with bulging discs that he treated with epidural steroid injections. In December 2006, he noted that Music did not have any disc herniation, but he did not think she could work safely due to her pain.

Music was examined by Dr. Thomas O'Brien, an orthopedic surgeon in February 2007. He found that she had pre-existing degenerative disc disease and determined that her pain was not the result of a work injury. Additionally, he observed that Music's complaints were out of proportion with his objective findings. He noted that her gait in the parking lot was different from her gait during the examination. He noted other indications of malingering.

Dr. Norman Lewis first examined Music in July 2007. He determined that she had both spastic and congenital scoliosis. He also diagnosed discogenic lumbar sprain secondary to intervertebral disc injury and symptomatic disc herniation. In August 2007, Dr. Lewis performed a three-level discography and

discectomy. He advised Music to limit her activity and to refrain from work for one month. Six weeks later, Dr. Lewis indicated that he believed Music had reached maximum medical improvement. He did not release her for work.

In February and March 2008, Music underwent psychological evaluations by Dr. Robert Sively. The second test was conducted because of strong indications of malingering and poor effort in the first exam. Dr. Sively found that Music had psychological and emotional problems that were not caused by a work injury. He recommended that she seek further psychiatric treatment. The second exam also revealed indications of malingering.

Another psychological evaluation was conducted in July 2008 by Dr. James Walker. He found that Music had psychiatric impairment. However, he believed that her problems most likely originated before the work injury, and he attributed them to traumatic events that she had experienced in Bosnia. Dr. Walker noted that Music needed regular, consistent psychiatric treatment. He also observed that she “appeared to take every opportunity . . . to magnify, exaggerate, and occasionally feign” symptoms. Music’s performance on other tests again indicated malingering.

The parties agree that Emerson paid Music wages of \$7,380.00 and a total of \$15,296.91 toward her medical expenses. The ALJ held a hearing to resolve several contested issues: the probability of the occurrence of a work-related injury; a medical fee dispute; Music’s average weekly wage; the extent and duration of Music’s occupational disability, including applicable multipliers;

causation of psychological impairment; and Music's entitlement to additional temporary disability benefits.

A hearing was held in February 2009. On April 3, 2009, the ALJ rendered his findings and dismissed Music's complaint after determining that a work-related injury had not occurred. Music appealed to the Workers' Compensation Board, which affirmed the ALJ. This appeal follows, and we affirm the Workers' Compensation Board.

When – as in this case – a claimant does not file a petition for rehearing, Kentucky Revised Statute[s] (KRS) 342.285 decrees that the ALJ is the conclusive finder of fact, preventing the Board from substituting its judgment for that of the ALJ. Similarly, when reviewing decisions of the Board, we may correct it only if it “has overlooked or construed controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.” *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

In workers' compensation cases, “the claimant bears the burden of proof . . . before the fact-finder with regard to every element of a . . . claim.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). If a claimant has been unsuccessful before the ALJ, “the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it.” *Carnes v. Tremco Mfg. Co.*, 30 S.W.3d 172, 176 (Ky. 2000). That is the standard which we must apply in the case before us.

Music argues that the evidence in the record compels reversing the Board's affirmation of the ALJ's findings. First, she contends that because the two psychologists gave Music impairment ratings based upon the injury, we are required to reverse the Board under *Mengel v. Hawaiian-Tropic Nw. and Cent. Distrib., Inc.*, 618 S.W.2d 184 (Ky. App. 1981). She also argues that Emerson's payment of some of her medical expenses and wages unequivocally proves that her injury was work-related.

We are not persuaded that *Mengel* is decisive in this case. In *Mengel*, this Court held that the Board erred when it substituted its own judgment for that of two medical opinions which were in agreement with one another. It reversed the Board because it found "no competent substantial evidence to support the board's finding[.]" *Id.* at 187. Both doctors in *Mengel* had treated a work-related injury, and both found subsequent injuries to be causally connected to that initial injury. No other doctors offered conflicting opinions.

By contrast, in this case, Dr. Sively reported that he was unable to determine how much of Music's psychiatric problems were attributable to her injury. Nonetheless, he provided a disability rating range, qualifying the result by stating that he was not sure if he had applied the guidelines appropriately. Similarly, Dr. Walker conditioned his 3% impairment rating by stating that it was accurate only if "she had recovered well from these prior serious stressors, as she indicates[.]"

This court recently held that “[a]n impairment rating is but one piece of the total evidence that the ALJ, as fact-finder, must evaluate for ‘quality, character, and substance’ and, in the exercise of his discretion, either accept or reject.” *Greene v. Paschall Truck Lines*, 239 S.W.3d 94, 109 (Ky. App. 2007). It is not a factor that overrides all other evidence. It has long been held that the ALJ is the “sole judge of the weight and inferences to be drawn from the evidence,” and he can choose which pieces of evidence to believe or disbelieve. *Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 518 (Ky. 2003) (citations omitted).

We are persuaded that the same reasoning should be applied to Music’s second argument; *i.e.*, that the payment of benefits and wages by Emerson Electric was conclusive of a work-related injury. However, the payment was non-medical evidence that was merely one part of a lengthy record. It was within the ALJ’s province to determine the weight of that evidence.

The ALJ in this case did not find that Music had suffered a work-related injury. After reading her deposition and observing her testimony, he concluded that Music was not credible. He also cited her inconsistent descriptions of the injury to various doctors. The record contains reports from other doctors indicating that Music’s lasting pain was not the result of a work injury. Several of the doctors documented examples of Music’s exaggerating symptoms and even malingering. There was enough evidence in the record to support the ALJ’s decision, and Music has not presented evidence that compels a reversal.

We affirm the decision of the Workers’ Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Phillipe W. Rich
Louisville, Kentucky