

Commonwealth of Kentucky

Court of Appeals

NO. 2009-CA-002039-WC

BRENDA ROBBINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-64160

CLAIRE'S STORES, INC., HON.
IRENE STEEN, ADMINISTRATIVE
LAW JUDGE AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, CHIEF JUDGE; CAPERTON, JUDGE; WHITE,¹ SENIOR
JUDGE.

CAPERTON, JUDGE: The Appellant, Brenda Robbins (Robbins), appeals the
October 7, 2009, opinion of the Workers' Compensation Board, affirming the May
5, 2009, opinion and order of Administrative Law Judge Irene Steen, in which the

¹ Senior Judge Edwin M. White 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.

ALJ sustained in part and denied in part the motion to reopen and medical fee dispute filed by the Appellee, Claire's Stores Inc. (Claire's). Having reviewed the record, the arguments of the parties, and the applicable law, we affirm.

Robbins was injured on August 6, 2002, when a computer fell from a counter. She attempted to catch the falling computer and injured her neck and right shoulder. Robbins ultimately underwent an anterior cervical discectomy and fusion with the use of an anterior plate under the direction of Dr. Vaughn. On November 17, 2004, Robbins settled her claim for a lump sum of \$68,455, based on a 25% permanent partial disability. The settlement provided for a waiver of future medical expenses for an alleged psychological condition for a lump sum of \$5,000.

After settling her claim, Robbins remained under the care of a Dr. Valencia, who oversaw her medications and administered Kenalog shots every four to six weeks as needed,² in addition to numerous medications. Robbins also treated with Dr. John Vaughan once per year, although those visits were not authorized by Claire's or its insurance carrier.³ In addition, Robbins treated with Dr. Cunningham for her right shoulder condition.⁴

² Before the ALJ, Robbins testified that she was not sure that the shots were providing any pain relief, but she continued to receive them anyway.

³ Dr. Vaughan apparently ordered MRIs, performed x-rays, and discussed various treatment options including injections and physical therapy.

⁴ Dr. Cunningham wanted to schedule Robbins for rotator cuff surgery, but instead administered injections to Robbins's shoulder for purposes of pain relief.

Robbins has not been employed since the time of the settlement agreement. Robbins testified that she continues to have neck pain with muscle spasms, which was initially better after the cervical surgery, but has since worsened. Robbins also testified that she has pain in the right shoulder which causes numbness and weakness in the right hand, but which was reduced by the injection administered by Dr. Cunningham.

On August 8, 2008, following an April 6, 2008, records review conducted by Dr. Mark Gladstein, Claire's filed its first motion to reopen and medical fee dispute. In that motion, Claire's stated that it was contesting any and all past, but not yet paid medical bills, as well as any present and future medical treatment and expenses, and pharmacological expenses from and after the date of the filing of the motion as non-work-related. Specifically, Claire's noted that following surgery and despite a good deal of physical therapy, Robbins continued to complain of pain in her neck and right shoulder. Claire's asserted that x-rays of the cervical spine following surgery indicated a solid fusion from C4-C6, with the presence of degenerative changes at C6-C7.

In an order dated August 15, 2008, Drs. Efren Valencia and Abdul Hasham were joined as parties in this litigation. Claire's motion to reopen was sustained to the extent that the matter was referred to an ALJ for further litigation. Subsequently, Claire's filed additional medical fee disputes and motions to reopen on October 13, 2008, November 5, 2008, December 8, 2008, January 5, 2009, and February 12, 2009.

Following the motions to reopen, Robbins was seen by Dr. David Muffly for an independent medical evaluation on March 5, 2009. Dr. Muffly had previously conducted an evaluation of Robbins in conjunction with this claim on May 28, 2004, and also provided a deposition in this matter on April 7, 2009. Following a review of the records and an evaluation, Dr. Muffly diagnosed chronic neck pain following cervical fusion. Dr. Muffly opined that Robbins's condition was related to the progression of degenerative changes at C6-C7 caused by the increased force at that level from the previous cervical fusion. Dr. Muffly connected this condition, at least partially, to the injury of August 6, 2002, although he did acknowledge the presence of degenerative changes predominantly at C4-C5 and C5-C6 as evidenced by the MRI. Dr. Muffly acknowledged that it was possible that an uncovertebral joint problem⁵ and degenerative changes could cause a protruding disc and radiculopathy. Dr. Muffly also acknowledged that the degenerative changes present on the MRI pre-existed the work injury and would worsen with time.

During the course of his deposition, Dr. Muffly stated that he was uncertain as to whether the cervical fusion performed on Robbins was a direct result of the work injury, or was something that Robbins would have had to undergo in any event. Nevertheless, Dr. Muffly also stated that if Robbins had been working each day and had not been seeking medical treatment for her neck

⁵ Specifically, Dr. Muffly explained that an "uncovertebral" joint problem is one involving problems with a small joint connecting one vertebral body to the next, which could result in arthritic changes and spurring.

and shoulders, based on her work history alone, it would be fair to say that the injury exacerbated and turned her condition into a disabling reality. Further, based on the fact that Robbins has been experiencing neck pain since the work injury, Dr. Muffly believed ongoing treatment to be appropriate⁶.

Dr. Muffly also noted that Robbins had a right rotator cuff tear, as evidenced by MRI testing in 2003 and 2007. Dr. Muffly recommended continued medical treatment, including various medications and intermittent injections and physical therapy. In addition, Dr. Muffly testified that Robbins may need to surgically repair the right rotator cuff.

As noted, Dr. Mark Gladstein conducted review of the medical records in this matter on April 6, 2008. Dr. Gladstein was of the opinion that Robbins had undergone an excessive amount of medical treatment, including surgery, for what he believed could best be described as a cervical strain. Dr. Gladstein noted that at no time did Robbins exhibit any focal neurologic deficit or signs of nerve root entrapment. Dr. Gladstein did not feel that the work injury caused any need for the cervical fusion which Robbins received, nor did he feel that further invasive treatment, physical therapy, or ongoing pain medication was necessary. Further, Dr. Gladstein felt that Robbins care could be by her primary care physician and that she should be engaged in a home exercise program.

⁶ While Dr. Muffly did find ongoing treatment to be necessary, he testified that monthly medical visits with Dr. Valencia were not necessary, and would more appropriately be restricted to between four and six visits per year.

Finally, Dr. Russell Travis conducted an independent medical evaluation on December 16, 2008. He ultimately diagnosed status post-anterior cervical discectomy and fusion at C4-C5 and C5-C6, a surgery which he believed was performed as a result of spondylosis, which he described as a natural aging and degenerative process with osteophytes. Dr. Travis nevertheless opined that Robbins's initial neck pain was probably related to the injury although the condition itself was pre-existing and not symptomatic prior to the injury.

Further, Dr. Travis stated that after reviewing Dr. Vaughan's operative report, there appeared not to be any significant soft disc extrusion that would relate to an acute injury. Dr. Travis could find no clear-cut reason why she should continue to have neck pain, and noted that Robbins had a completely normal neurological evaluation which she has maintained over time. Dr. Travis did not feel that Robbins required any further treatment of the cervical spine aside from an at-home exercise program, and he believed that she should be able to return to at least modified work duty, provided she did not place herself in a position of extreme flexion or extension, or engage in continuous overhead work.

At the formal hearing, Robbins testified that she has not yet had the shoulder surgery recommended by Dr. Cunningham, but she stated that the shoulder injections provided relief for long periods of time. Robbins confirmed that Dr. Valencia has not received any payment since June of 2008 and has put his bills on hold. Robbins paid the hospital bills for x-rays and neurologists on her own. Robbins testified that the hospital has billed the insurance carrier but that the

insurance carrier has refused payment on that bill. Robbins denied being in any other accidents or sustaining any other injuries other than those incurred in the work accident.

In an opinion and order rendered on May 5, 2009, the ALJ found that Robbins did not need further medical treatment to address her cervical condition in light of the lack of objective findings to support continued treatment and in light of the fact that the cervical treatment was for degenerative changes which were not work-related. In addition, the ALJ found that the treatments and medications which Robbins was receiving for her cervical condition had no long-lasting effect, were unproductive, and were therefore non-compensable.

In so finding, the ALJ relied upon the IME examination and opinions of Dr. Russell Travis, as well as a records review conducted by Dr. Gladstein. Accordingly, the ALJ found those treatments and medications to be non-compensable, and found that Claire's was not acting in bad faith by refusing to pay for additional medical treatment. In so finding, the ALJ did hold that medical treatment for Robbins's right shoulder condition remained the responsibility of Claire's or its insurance carrier. Robbins filed a petition for reconsideration of that order, which was denied on June 3, 2009.

As noted, Robbins appealed the opinion and order of the ALJ to the Board, which issued its opinion on October 7, 2009. On appeal to the Board, Robbins argued that the ALJ erred in refusing to correct statements of fact made in

the opinion,⁷ and by not clarifying factual findings when requested to do so. In addition, Robbins argued that the ALJ erred by relying on an evaluating physician and not a treating physician, in finding that Robbins needed no additional medical treatment for her cervical condition. Robbins also argued that it was bad faith for Claire's to refuse to continue paying for treatment of the cervical condition when the settlement agreement specified that the cervical condition was compensable and future medical expenses were provided in the agreement. Finally, Robbins contended that the ALJ should determine whether Robbins should select an orthopedic surgeon as her Form 113 physician, or a Form 113 physician who would in turn refer her to an orthopedic surgeon.

In addressing those issues, the Board found that pursuant to KRS 342.125(7), the fact that the parties reached a settlement agreement resolving the underlying claim did not bind them to the statements made therein under the doctrine of *res judicata*. Accordingly, it found that the ALJ had the authority to find that the ongoing cervical treatment was related to degenerative changes and not to the work injury. After reviewing the evidence of record, the Board concluded that the findings of the ALJ in this regard were supported by substantial evidence.

⁷ Specifically, Robbins took issue with the statement made by the ALJ on page six of the opinion, wherein the ALJ stated that Dr. Gladstein opined that Robbins should discontinue the addicting analgesics. Further, she took issue with the ALJ's statement in paragraph one of the findings of fact that Robbins was taking an exorbitant amount of medication, and the ALJ's finding that Robbins had no cause for complaints of neck pain in the absence of any neurological deficits or cord compression. Finally, Robbins disputed the ALJ's findings as to the interactions of her medications, and whether or not those medications caused depression.

With respect to Robbins's argument that the ALJ mischaracterized Dr. Gladstein's medical report and other findings of fact, the Board found that this was not the case. The Board found, upon reviewing Dr. Gladstein's report, that Dr. Gladstein specifically stated that Robbins should avoid addicting analgesics and should be weaned from Hydrocodone. Thus, the Board found that any additional language added by the ALJ as to the effects of Hydrocodone did not detract from the fact that substantial evidence of record supported the findings. Further, the Board found that the opinion of Dr. Travis also supported the ALJ's findings that Robbins had no cord compression or neurological deficit to explain her neck pain.

With regard to Robbins's allegations of bad faith, the Board found that pursuant to the law of this Commonwealth, an employer is free to move to reopen an award to contest the reasonableness and necessity of ongoing medical expenses as well as to inquire whether or not ongoing treatment remains related to the work injury. Finding that Claire's had done so in this case, and that Robbins had failed to identify any unpaid medical bills which were incurred more than 30 days prior to the filing of the motion to reopen, the Board found no bad faith on the part of Claire's.

Concerning Robbin's contention that the matter should be remanded to the ALJ for a determination of whether she is entitled to select her own physician as a Form 113 physician, who in turn could refer her to an orthopedic surgeon, the Board found 803 KAR 25:096 Section 3(1) and Section (4) to be controlling. The Board noted that said provision specifically provides that

treatment for a work-related injury shall be rendered under the coordination of a single physician selected by the employee. Thus, it is clear, based upon the regulation, that the Form 113 physician selected by Robbins can make any necessary referrals.

Finally, the Board found that pursuant to the law of this Commonwealth, Robbins's contention that the opinion of a treating physician should carry more weight than that of an evaluating physician had no merit. It is from that opinion and order that Robbins now appeals to this Court.

At the outset, we note that our Kentucky Supreme Court has long recognized that the function of the Court of Appeals in reviewing the decisions of the Board is to correct the Board only where the Court perceives that the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

As her first argument on appeal, Robbins reiterates what she believes were mischaracterizations or factual inconsistencies made by the ALJ. She argues that the ALJ misstated the facts pertaining to the opinion of Dr. Gladstein with regard to discontinuation of the use of addicting analgesics. Specifically, Robbins disputes the ALJ's commentary concerning the drug Hydrocodone and its interaction with Wellbutrin, which Robbins is also taking. Robbins also disagrees with the ALJ's determination that a lack of evidence existed in support of her ongoing complaints of neck pain,

In reviewing this issue, including the reports of Drs. Gladstein and Travis, we are in agreement with the Board that the ALJ did not mischaracterize the statements made therein. A review of the report of Dr. Gladstein reveals that he expressly recommends avoiding addicting analgesics, stating specifically that, “this patient has had an excessive amount of treatment, including physical therapy, for what could best be described as a cervical strain and possibly a strain to the right shoulder,” and further, that, “I would also recommend trying to avoid addicting analgesics, which would not be in the patient’s best medical interest.”

The ALJ relied upon that recommendation in stating that Robbins should discontinue the use of Hydrocodone, an analgesic which clearly has a potential for addiction. While the ALJ may have expounded upon this statement by providing her own opinions concerning the amount of drugs taken by Robbins and the interaction between Hydrocodone and Wellbutrin, the recommendation itself was clearly based on substantial evidence in the form of Dr. Gladstein’s report. Having reviewed the report in detail, we do not believe it to have been mischaracterized and find that the Board acted correctly in refusing to substitute its judgment for that of the ALJ as to the weight of the evidence on this issue. *See* KRS 342.285.

Likewise, with respect to the other statements disputed by Robbins, we again find these allegations to be unsupported by the record. While Robbins argues that the ALJ erroneously stated that a lack of evidence existed to support her complaints of neck pain, the report of Dr. Travis is clear that Robbins’s

neurological examination was entirely normal, without any signs of cord compression. While Robbins correctly states that other physicians may have provided medical evidence in support of her complaints, it was for the ALJ to choose the evidence upon which she would rely. *See Caudill v. Maloney's Discount Store*, 560 S.W.2d 15 (Ky. 1977). Indeed, as fact finder, it is the ALJ who has the sole authority to determine the quality, character, and substance of the evidence, and to determine the inferences to be drawn therefrom. *See Square D. Company v. Tipton*, 862 S.W.2d 308 (Ky. 1993) and *Miller v. East Kentucky Beverage/PepsiCo, Inc.*, 951 S.W.2d 329 (Ky. 1997).

In the matter *sub judice*, the report of Dr. Travis is clearly supportive of the ALJ's findings in this regard. While Robbins may note evidence which would support a conclusion contrary to that of the ALJ, such evidence is not an adequate basis for reversal on appeal. *See McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974), and *Burton v. Foster-Wheeler Corp.*, 72 S.W.3d 925, 929 (Ky. 2002). While the medical evidence upon which Robbins relies might support a different conclusion, the report of Dr. Travis constitutes substantial evidence, and it was within the discretion of the ALJ to rely upon that report in making her factual findings. Accordingly, we affirm.

As her second argument to this Court, Robbins argues that the ALJ should have made findings as to why Claire's should be allowed to use the reports of Drs. Travis and Gladstein to totally discontinue treatment. Robbins states that Dr. Gladstein did not suggest that medical treatment be entirely discontinued and

states that Dr. Travis specifically recommended ongoing treatment. In addition, Robbins questions the ALJ's determination that Claire's would not be responsible for paying for Hydrocodone and suggests that the matter be remanded to the ALJ in order for the ALJ to identify what evidence she was relying upon in denying pain medication for the shoulder injury.

In addressing this issue, we are in agreement with the Board that *res judicata* did not apply to bar Claire's from reopening the settlement agreement entered into by the parties. That is a doctrine which applies to judicial determinations, and not to settlements. *See* KRS 342.125(7), and *Garrett Mining Co. v. Nye*, 122 S.W.3d 513 (Ky. 2003). Certainly, the parties could expressly waive their rights to reopen, but such was not the case in the matter *sub judice*. Thus, Claire's was free to move for a reopening of this matter to contest the reasonableness and necessity of ongoing medical treatment, and whether said treatment was related to the work injury. *See* 803 KAR 25:012, and *National Pizza Company v. Curry*, 802 S.W.2d 949 (Ky.App. 1991).

Upon reopening, it was the province of the ALJ to review the evidence, and to determine the quality, substance, and character of all of the evidence presented when weighing it in the process of reaching a decision. *See Paramount Foods v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). This, the ALJ did. In reviewing the reports of Drs. Gladstein and Travis, it is clear that Dr. Travis was of the opinion that Robbins had a completely normal neurological evaluation which had been made over time, and that her operative report revealed no type of

soft tissue extrusion which could be related to the initial injury. Further, Dr. Travis specifically stated that Robbins should not be continued on opiates. Likewise, Dr. Gladstein recommended no additional invasive treatment or physical therapy, and also specifically recommended that Robbins discontinue the use of addicting analgesics.

Having reviewed the record, we believe the reports of Drs. Travis and Gladstein to constitute substantial evidence, and those reports clearly reveal that both physicians believed any need for ongoing treatment of the cervical area to be related to the presence of degenerative changes, and not to the work injury. Accordingly, we find that the ALJ was free to base her determination concerning the compensability of ongoing treatment on those reports, including her determinations with regard to the compensability of ongoing analgesic prescriptions. Having so found, we are in agreement with the Board that no sufficient basis exists to overturn the findings of the ALJ in this regard, and we affirm.

As her third basis of appeal, Robbins argues that we should remand the matter to the ALJ for a determination as to whether Robbins should be allowed to select an orthopedic surgeon as her Form 113 physician, or whether she is allowed to select her own physician as a Form 113 physician, who would then refer her to an orthopedic surgeon. We are in agreement with the Board that the regulations speak very clearly to this issue, and we do not find it necessary to

remand this matter back to the ALJ for a determination. We refer Robbins to 803 KAR 25:096 Sections (3) and (4).

Finally, Robbins reiterates her arguments concerning the ALJ's decision to rely upon the opinions of evaluation physicians Drs. Travis and Gladstein over treating physicians such as Dr. Valencia. We disagree. We are in agreement with the Board that the law of this Commonwealth clearly establishes that an ALJ is free to rely upon the opinion of an evaluating physician or a treating physician. Indeed, it is the prerogative of the ALJ, in weighing the evidence, to believe some parts of the testimony and to disbelieve others. See *Caudill v. Maloney's Discount Store*, 560 S.W.2d 15 (Ky. 1977). The ALJ is authorized to determine the quality, substance, and character of all of the evidence presented when weighing it in the process of reaching a decision. See *Paramount Foods v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). Thus, in weighing the evidence, the ALJ was entitled to rely upon the opinions of Drs. Travis and Gladstein, if the ALJ believed those opinions to be more credible. See also *Sweeny v. King's Daughter's Medical Center*, 260 S.W.3d 829 (Ky. 2008).

Wherefore, for the foregoing reasons, we hereby affirm the October 7, 2009, opinion of the Workers' Compensation Board, affirming the May 5, 2009, opinion and order of Administrative Law Judge Irene Steen.

ALL CONCUR.

BRIEF FOR APPELLANT:

Johnnie L. Turner
Harlan, Kentucky

BRIEF FOR APPELLEES:

J. Logan Griffith
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