

RENDERED: APRIL 23, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-001797-WC

TRACY GILLS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-71521

LOUDEN & COMPANY, LLC;
HON. JOSEPH W. JUSTICE,
ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND TAYLOR, JUDGES; BUCKINGHAM,¹ SENIOR
JUDGE.

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 Kentucky Revised Statutes (KRS) 21.580.

BUCKINGHAM, SENIOR JUDGE: Tracy Gills petitions for review of an opinion of the Workers' Compensation Board (Board) that affirmed an opinion and order of the Administrative Law Judge (ALJ) dismissing her claim for permanent partial disability benefits and sustaining her employer's medical fee dispute. Gills argues that the ALJ was compelled to make a finding that the proposed knee surgery was compensable and that the surgery must occur before an impairment rating and the extent and duration of her injury may be determined. We find no error and thus affirm.

Gills is a 38-year-old woman who has worked for Loudon & Co. for the past fifteen years and is currently a supply clerk. On August 9, 2006, as part of her employment, Gills was carrying a chair down basement steps when she missed the last step and fell to her knees, injuring her right ankle and left knee. She has never taken any prescription medication for her knee injury, limiting treatment medications to over-the-counter pain medications. Further, Gills has not missed any work as a result of the injury.

Gills was initially treated at BaptistWorx for an evaluation of her ankle and was placed on crutches that she could not use because of pain. The following day, Gills returned to BaptistWorx, complaining of pain in her left knee, and X-rays and an MRI disclosed a small Baker's cyst behind the knee.

Gills first saw Dr. Wheeler and then was referred to Dr. Sajadi. Dr. Sajadi saw her on November 1, 2006, and his examination of her revealed that the left knee showed crepitation of the patellofemoral joint and lateral tenderness with

full flexion and extension. Ligament stability was normal as was muscle tone and touch sensation, and no atrophy or meniscal tears were noted. Dr. Sajadi's initial diagnosis was patellofemoral chondromalacia and synovitis regarding the left knee. On January 8, 2007, during a follow-up examination, Dr. Sajadi's assessment was traumatic chondromalacia of the patella.

On April 4, 2007, Gills returned to Dr. Sajadi for another follow-up examination. He scheduled her for arthroscopic evaluation and treatment. Louden & Co.'s insurance carrier denied liability for that procedure claiming the problem was a pre-existing condition. Gills, however, denied having any previous problem with the knee. The diagnosis at that time was crepitation of the patellofemoral joint with a positive apprehension test of the patella.

On May 2, 2007, Dr. Sajadi indicated Gills would eventually need surgical debridement of the patella and associated realignment. In a letter of September 3, 2008, he stated that Gills had not had any surgical treatment and that it was very difficult to assess permanent impairment but he could approximate a 7% permanent impairment to the lower limb which would equal a 3% whole person impairment.

Dr. Sajadi submitted to a deposition on July 14, 2008. He acknowledged that the MRI disclosed a Baker's cyst indicative of pathology in the knee joint. He further indicated chondromalacia was rough on the surface of the knee cap. The surgery he proposed involved smoothing the cartilage and re-aligning the lateral ligament to keep the knee cap tracking normally, but he

acknowledged that there was no indication of any laxity in the ligaments. When asked if he could assign an impairment related to the injury, he stated he could not. Dr. Sajadi further acknowledged that there was no basis to assign any impairment. He said that there was no chondromalacia indicated on the MRI but that he was basing the proposed surgery on the physical findings of crepitus, a positive apprehension test, and lateral subluxation on the patella which he believed were more objective.

Dr. Wheeler examined Gills on October 11, 2006. Gills indicated to Dr. Wheeler that she treated with physical therapy for seven to nine visits and had last been there six days prior. She acknowledged returning to work in a wheelchair following the fall. Further, Gills reported no previous history of a knee or ankle problem. She walked with a normal gait and could hop on either foot. Dr. Wheeler's examination revealed the knee to be normal and that she had normal foot function. X-rays and an MRI revealed nothing but a small Baker's cyst. He determined Gills suffered from gastroc soleus strain that was completely recovered at the time.

Dr. Phillip Corbett performed an independent medical examination of Gills on July 27, 2008. He reviewed her history, and Gills denied previous pain in the knee. She was ambulatory with no limp and enjoyed full range of motion extension from zero to 132 degrees. Further, there was no effusion of the knee.

Dr. Corbett indicated that he was uncertain what Dr. Sajadi meant by a positive apprehension test. He acknowledged that Dr. Sajadi's partial treatment

plan to debride the patella would perhaps provide some relief, but he found no reason to perform a local lateral retinacular release. In light of Gills's hypermobile soft tissues, Dr. Corbett believed such a procedure would be unwise. He further stated that neither of the proposed surgeries was related to the injury. He opined that the Baker's cyst was a reflection of degenerative joint disease involving the patellofemoral joint and was not caused by trauma. Dr. Corbett determined that Gills had exhibited hyper lax ligaments and was developing patellofemoral arthrosis in both knees her entire adult life.

Dr. Corbett found indications of previous anterior knee trauma that played a role in the current anterior knee pain. He found no functional impairment and assigned Gill 0% whole person impairment. In a supplemental report dated August 5, 2008, Dr. Corbett stated that the surgery proposed by Dr. Sajadi was not necessary for any effects from the work-related injury. He believed the degenerative joint disease may or may not have been symptomatic but was active and progressive from date of onset. Regarding the fall, he stated that Gill had suffered a contusion but that the condition had subsided based on the absence of acute bony edema.

After a review of the evidence, the ALJ found Dr. Corbett most credible and persuasive and adopted the opinions from that report. The ALJ held that Gills did not suffer any permanent partial impairment as a result of the knee injury and dismissed her claim for benefits and declined to assess Louden & Co.

and/or its insurance carrier any liability for the proposed surgery. The Board affirmed that decision, and Gills now petitions for our review.

Gills first argues that the ALJ was compelled to make a finding that the proposed surgery was compensable because there was no evidence of an active pre-existing condition. She additionally states that the surgery must be completed before any impairment rating can be given and the duration and extent of her injuries may be known. After our review, we disagree and affirm the Board's decision.

In order to prevail on her petition, Gills must establish that the evidence before the ALJ compelled a contrary result. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is evidence so overwhelming that no reasonable person would not be persuaded by it. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985). The existence of evidence to support a party's position is not sufficient to require reversal as long as there is substantial evidence supporting the ALJ's conclusion. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974).

The ALJ is the finder of fact in a workers' compensation case and has the discretion to determine the quality, character, and substance of the evidence. *Square D Company v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). We may not disturb the ALJ's decision as long as there is "evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

Gills relies on *Comair, Inc. v. Helton*, 270 S.W.3d 909 (Ky. App. 2008), where a panel of this court found that Helton's pre-existing arthritis and congenital tibia vera were dormant and not disabling but that a work injury had aroused those conditions into a disabling state. When a pre-existing dormant condition "is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable." *Id.* at 914, quoting *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky. App. 2007). In *Helton*, however, there was no question the employee suffered a serious trauma that aroused the pre-existing condition into disabling reality.

Dr. Corbett and Dr. Wheeler both found that Gills recovered from the trauma of her fall at work, and neither viewed that trauma as serious. Dr. Corbett noted the MRI revealed significant evidence of joint disease but that there was no evidence of acute bony trauma. He further noted that the proposed surgery was not needed to address the effects of a work-related injury and that the pre-existing condition was active and progressive.

Dr. Wheeler diagnosed a strain and believed Gills had fully recovered from that injury. Even Dr. Sajadi acknowledged that Gills did not show a positive apprehension test until almost seven months after the work-related injury. Based on the evidence, it was reasonable for the ALJ to conclude that the work-related injury did not cause a permanent harmful change to Gills's knee. There was no error.

Finally, as noted by the Board, because the record does not compel a finding that the proposed surgery is related to the work-injury, Gills's argument that she must first have the surgery in order to determine an impairment level is moot.

The Board's opinion is affirmed.

ALL CONCUR.

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