

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2009-CA-001728-WC

PIKE COUNTY BOARD OF EDUCATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-05-92891

THERESA SMITH; HONORABLE CHRIS  
DAVIS, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: MOORE, NICKELL, AND WINE, JUDGES.

NICKELL, JUDGE: Pike County Board of Education appeals from a decision of the Workers' Compensation Board affirming the award of total disability benefits to Theresa Smith. Pike County argues: (1) the award of benefits based solely upon a psychological injury was erroneous; and (2) the award of benefits was not

supported by substantial evidence. After reviewing the record and the briefs, we affirm.

Smith was employed as a special education teacher by the Pike County school system. On February 22, 2005, she was injured while placing files in a cabinet and a drawer slid out and hit her on the head and neck. After the accident, Smith returned to teaching and finished out the school day. Smith was examined at the Pikeville Medical Center on the night of the accident. Smith completed the remainder of the school year without missing more than a couple of days even though she was still in pain.

Smith continued experiencing pain and headaches from the stress in her neck and back. She had difficulty performing tasks at home and began to visit Dr. Hager, her family physician. Dr. Hager ordered an MRI and prescribed pain medication and muscle relaxers. Eventually, he referred Smith to Dr. Gilbert at the Spine & Brain Neurological Center in Lexington. Dr. Gilbert diagnosed Smith with neck sprain, cervalgia, lumbar degenerative disc disease, shoulder pain, lumbago, lumbar sprain, and muscle spasms. Following the evaluation, Smith began visiting Dr. Upadhyay at the Spine & Brain Center in Pikeville. As part of her treatment, Smith received epidural injections, which eased the pain, but not the headaches. Dr. Upadhyay also prescribed Lidoderm patches and Valium. Dr. Hager also referred Smith to Dr. Forester because of depression and anxiety she was displaying in the course of treatment.

Smith stopped teaching completely in February 2006. She qualified for disability teacher retirement and brought workers' compensation claims for both physical and psychological injuries. Smith filed a motion before the Administrative Law Judge (ALJ) to appoint a university evaluator to assess both claims. The ALJ stated that he wanted to review the medical evidence and Smith's testimony before ruling on the motion. The ALJ conducted a hearing. The ALJ concluded Smith's physical injuries would not entitle her to permanent income benefits, but she did have a permanent condition sufficient to award future medical benefits for the cervical spine claim.

Regarding the psychological claim, the ALJ considered the reports of Dr. Johnson and Dr. Ruth. Dr. Johnson examined Smith on April 21, 2008. He reported Smith suffered from major depression and anxiety disorder. He noted Smith had experienced depression from 1999 to 2002, prior to the work-related injury, but these episodes had subsided. Dr. Johnson concluded the injury at school had caused the current major depression. Dr. Ruth examined Smith on May 31, 2007. Dr. Ruth concluded Smith had provided an accurate medical history but was malingering and had a preexisting depressive disorder.

The ALJ concluded a university evaluation was needed and entered a referral order pursuant to Kentucky Revised Statutes (KRS) 342.315. Dr. Allen, the university evaluator, concluded Smith did not have an active psychological impairment prior to the injury, but acknowledged her clinical presentation was exaggerated. The ALJ concluded Smith was permanently and totally disabled and

awarded benefits accordingly. Pike County filed a motion for reconsideration, which the ALJ denied. The Board affirmed. This appeal followed.

Pike County first argues the award of total disability benefits based solely on a psychological injury was erroneous. This argument was not brought before the Board and has been raised for the first time before this Court. “Any party who seeks to appeal a decision of the Board to the court system must have preserved an assertion of error by having raised it first to the Board.” *Breeding v. Colonial Coal Co.*, 975 S.W.2d 914, 916 (Ky. 1998). This argument was not brought before the Board; therefore, we will not consider it.

Pike County next argues the award of total disability benefits was not supported by substantial evidence. KRS 342.0011(11)(c) defines total disability as “the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury.” The standard of review for appeals from a decision of the Board is well-established:

KRS 342.285(2) provides that the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Although a party may note evidence

which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.

*Ira A. Watson Dep't Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000).

Based upon his examination, Dr. Allen concluded Smith had a 10 percent impairment. He also concluded Smith's depression was unrelated to her previous episodes of depression. Dr. Allen's conclusions were consistent with the findings of Drs. Johnson and Forester. Smith testified she could not return to work and was unable to perform tasks at home. Pike County is asking this Court to reweigh the evidence and reexamine the credibility of witnesses. As stated above, these are questions within the province of the ALJ as fact-finder. Pike County also alleges Smith has returned to work and, as such, the award of total disability is erroneous. Pike County has filed a motion to reopen the award. The motion has not been ruled upon and it is outside the province of this Court to make factual findings upon evidence not in the record. We conclude the award of total disability was supported by substantial evidence.

Accordingly, the decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

Todd P. Kennedy  
Pikeville, Kentucky

BRIEF FOR APPELLEE,  
THERESA SMITH:

R. Roland Case  
Pikeville, Kentucky