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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000522-WC

BLUEGRASS REGIONAL MENTAL HEALTH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-90505

TERESA BELLAMY; HON. EDWARD HAYS, ALJ;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; COMBS AND NICKELL, JUDGES.

NICKELL, JUDGE: Bluegrass Regional Mental Health appeals from a decision of the Workers' Compensation Board affirming the award of future medical and income benefits and temporary total disability (TTD) benefits to Teresa Bellamy.

Bluegrass Regional argues: (1) the finding of a work-related injury was not

supported by substantial evidence; (2) the award of TTD benefits was not supported by substantial evidence; and (3) the award of future medical benefits was not supported by substantial evidence. We affirm.

FACTS

On March 9, 2008, Bellamy slipped and fell on ice in the parking lot at Bluegrass Regional injuring her low back and left leg. Following the incident, she completed an accident report and returned home. The parties stipulated that Bellamy sustained a work-related injury on March 9, 2008, and that due and timely notice was provided.

Bellamy testified by deposition and at the hearing. She was born on May 13, 1964. Bluegrass Regional employed her as a registered nurse beginning in July 2004. In her testimony, Bellamy acknowledged a substantial history of low back problems preceding her employment at Bluegrass Regional, dating back to 1992 or 1993 when she was injured while lifting a patient. Following that earliest incident, Bellamy was placed on modified duty for one month and thereafter returned to full duty with no restrictions, though she did attempt to limit exertion involving her low back. Bellamy has since experienced occasional flare-ups and traumatic incidents impacting her low back, but indicated her symptoms had been managed with various treatments and prescription medications. In 1996, she began treating with Dr. Kimberly Dixon for, among other maladies, occasional back pain. In November 2007, Bellamy slipped and fell in the parking lot of a pharmacy, sustained a torn left hamstring and inflammation, was initially treated by Dr.

Deborah Tallio, and was subsequently referred to Dr. Ellen Flinchum for pain management treatment. At the time of her March 9, 2008, work-related slip and fall at Bluegrass Regional, Bellamy remained under Dr. Flinchum's care while continuing to work.

Bellamy indicated that prior to the March 9, 2008, incident at Bluegrass Regional, she was able to work her full shifts as scheduled; and had been able to manage her low back symptoms while at work with minimal pain medication, and after work by reclining, using ice or heat, and engaging in back exercises. However, Bellamy stated her pain had increased following the work-related slip and fall from simply radiating half way down her left leg to the point that it now radiates across both legs and into her buttocks, with numbness in both her legs and arms. She testified that she now lacks the capability to perform the full range of physical activities she engaged in prior to the March 9, 2008, slip and fall incident due to the severity of her ongoing painful low back symptoms, and that it takes much longer to recuperate following completion of her work shifts.

Bellamy testified that Bluegrass Regional would not allow employees return to work with any restrictions, and indicated Dr. Gregory T. Snider had ultimately released her with no restrictions but had instructed her to limit herself to activities she was capable of performing. She stated she is now capable of working fewer hours and is unable to perform the same duties as before the March 9, 2008, work-related incident. She now passes out medications and performs paperwork, but limits herself from lifting, tugging, and pulling. Even so, her pain at work

sometimes is such that she cries. Bellamy indicated that her prescription medications had been increased three times since her work-related injury, and that she now wears a TENS unit constantly while at work and must take larger and more frequent doses of prescription pain medication throughout the work day.

Following the March 9, 2008, incident, Bellamy was initially examined by Dr. Dixon, her “regular doctor,” who had treated her prior to the work-related injury at Bluegrass Regional. On February 3, 2006, Dr. Dixon had treated Bellamy for complaints of increased low back pain and a feeling of weakness in her left lower extremity. Over the course of her treatment of Bellamy, Dr. Dixon provided treatment for various other maladies, including a muscle tear, osteoarthritis, chronic back pain, foot pain and discoloration, allergic rhinitis, acute sinusitis, and gastritis. Treatment included referral to physical therapy and, ultimately, Dr. Snider.

Bellamy was seen by Dr. Snider on March 12, 2008. His notes indicate she demonstrated symptoms involving the lumbosacral region and left lower extremity. He determined Bellamy was already taking adequate medication for her complaints and restricted her to light duty. On March 19, 2008, he noted that Bellamy remained sore and had not returned to work because no limited duty work was available. In April 2008, he noted physical therapy improved Bellamy’s condition but traction tended to increase her pain. On May 12, 2008, he referred her for additional physical therapy and released her to return to limited duty, if available.

However, Dr. Snider's March 27, 2008, note indicated Bellamy reported not being allowed to return to work. He diagnosed her as having an acute lumbar strain superimposed on pre-existing chronic low back pain. He noted she was being treated by Dr. Flinchum for the chronic low back pain. Dr. Snider stated he would permit Bellamy to return to the level of work she was performing at Bluegrass Regional immediately prior to the slip and fall incident, with no new medical restrictions. Specifically, he noted that prior to her work injury Bellamy "was not technically on any restrictions" but limited herself from transferring or lifting patients, and allowed others to intervene when patients fell. He opined she was able to return to her work at Bluegrass Regional by avoiding such strenuous activities. Bellamy did return to work on May 31, 2008, but after working two days she reported she could barely walk and Dr. Snider took her off work for three additional weeks.

On June 3, 2008, Dr. Snider obtained an x-ray examination of Bellamy's lumbar spine which was interpreted as revealing severe degenerative disc disease. Follow-up examination and nerve conduction studies suggested evidence of radiculopathy. Dr. Snider increased work restrictions to no lifting in excess of ten pounds and directed that Bellamy be able to change positions as needed. He also increased Bellamy's pain prescriptions. On December 23, 2008, Dr. Snider obtained an MRI study of Bellamy's low back which was interpreted as revealing that her condition was unchanged from a prior MRI performed on November 13, 2007. Dr. Snider noted his belief that the work-related slip and fall

on March 9, 2008, did not produce any permanent harmful change in Bellamy's lumbar spine.

Dr. Snider last examined Bellamy on January 16, 2009. At that time, he noted her pain prescription medications had again been adjusted and that Bellamy reported her employer would not accept any restrictions.

Dr. Snider released Bellamy to full duty work at Bluegrass Regional with no hard and fast medical restrictions, stating only "Ms. Bellamy had physical limitations prior to this work injury but was able to accommodate herself by judging what she could do and obtaining help of her co-workers. In my opinion, Ms. Bellamy could return to that environment if permitted to do so."

In a letter dated October 23, 2008, Dr. Snider opined the March 9, 2008, slip and fall incident did not produce any permanent harmful change in Bellamy's lumbar spine, but merely represented a temporary exacerbation of Bellamy's pre-existing condition. Based on the *AMA Guides to the Evaluation of Permanent Impairment*, 5th Edition (*AMA Guides*), he assigned a 5% whole body impairment rating, which he apportioned entirely to a pre-existing active condition. Though he suggested ongoing restrictions for her baseline condition, he opined Bellamy required no additional restrictions relative to the March 9, 2008, work injury.

During her course of treatment, Bellamy also underwent two independent medical examinations, the first from Dr. James Templin and the second from Dr. Henry Tutt. Dr. Templin reviewed Bellamy's medical records

and performed a physical examination on September 12, 2008. He diagnosed chronic low back pain, degenerative lumbar disc disease, and a torn left hamstring. Based on reasonable medical probability, he opined that the injury of March 9, 2008, was the cause of Bellamy's complaints, which he attributed to an "exacerbation of a chronic lumbosacral degenerative disc disease."

Though Dr. Templin did not believe Bellamy had reached maximum medical improvement (MMI), if an impairment rating were assigned in accordance with the *AMA Guides*, he opined she would qualify for an 8% whole person impairment rating due to her low back condition. He would apportion 50% of her condition and impairment rating to the effects of the March 9, 2008, slip and fall at Bluegrass Regional and 50% to active conditions pre-existing that injury. He would allow Bellamy to return to her previous position at Bluegrass Regional but would restrict her in regard to work activities requiring prolonged standing or walking, frequent or repetitive bending, stooping, crouching, kneeling, lifting, carrying, climbing, or riding in or on vibratory vehicles for any extended distances or time.

Dr. Tutt reviewed Bellamy's medical records and performed a physical examination on October 7, 2008. Dr. Tutt diagnosed Bellamy as suffering with "[c]hronic low back pain and left leg pain secondary to lower lumbar degenerative osteoarthritis disease, well-documented;" and "[s]train/sprain, transient myofascial injury, superimposed on above, possible." He opined that the March 9, 2008, work incident produced a temporary exacerbation of a pre-existing

condition but no new permanent harmful change or injury, and that Bellamy had returned to her pre-injury baseline state of health.

Pursuant to the *AMA Guides*, Dr. Tutt categorized Bellamy's condition as a DRE Category III, qualifying her for a 10% to 13% whole person impairment rating. He apportioned her condition and impairment entirely to her pre-existing active conditions. Likewise, Dr. Tutt opined that any ongoing work restrictions would be the result of her pre-existing and previously active lumbar condition. At the least, Dr. Tutt opined Bellamy had reached MMI within a few weeks following the March 9, 2008, work event, and had thereafter remained capable of continuing her customary employment activities. He also opined Bellamy's complaints were disproportionate to her physical findings. Dr. Tutt subsequently reviewed additional medical records pertaining to Bellamy's treatment and filed addendums dated October 26, 2008, and December 7, 2009, indicating his previous opinions remained unchanged.

After conducting a hearing on the matter, the Administrative Law Judge (ALJ) considered the lay and medical evidence and awarded Bellamy permanent partial disability benefits based upon an 8% impairment rating, apportioning 5% to a pre-existing active condition and the remaining 3% to an increase resulting from the effects of the March 9, 2008, work-related traumatic incident at Bluegrass Regional. More particularly, the ALJ held:

[t]he ALJ finds that Teresa Bellamy did sustain a work-related “injury” as defined in KRS¹ 342.0011(1) and that she did sustain additional permanent impairment to her body as a whole as a result of the work related incident on March 9, 2008. The Defendant/Employer has argued that the work incident caused only a temporary exacerbation of Plaintiff’s symptoms and that she had returned to a baseline level. However, the ALJ is not convinced. The testimony of the claimant as to the details of her pain, the extent and the severity of the pain and the efforts which she has made to work despite the pain is found to be credible and persuasive. It is true that Ms. Bellamy has a history of chronic low back pain prior to the work related accident. However, the intensity of the pain has increased and she is on higher dosages of pain medication. According to Dr. Templin, the most recent NCV study of the left lower extremity reveals evidence of a mild left S1 radiculopathy, which condition was never present in any of the pre-injury examinations or studies. Dr. Snider seems to acknowledge that the more recent EMG/NCV study indicates that Plaintiff may suffer from radiculopathy in the left leg. Dr. Snider’s progress notes reflect a worse situation for the Plaintiff than do his answers to certain questions posed to him on later occasions. Interestingly, Dr. Snider placed her on restrictions which prevented claimant from being able to work but Dr. Snider attempted to categorize these restrictions as baseline restrictions and specifically stated in his notes that they were not new restrictions. Nevertheless, she does not appear to have been under such restrictions prior to the incident in question. In any event, the ALJ is not persuaded by either Dr. Snider or Dr. Henry Tutt on this particular issue, both of whom deny that Plaintiff has suffered any increase in permanent impairment as a result of the incident in question.

The ALJ finds that claimant, Teresa Bellamy, now has a permanent impairment under the AMA Guidelines of 8%

¹ Kentucky Revised Statutes.

to the body as a whole, based on the evidence submitted by Dr. James Templin.

...

Accordingly, the ALJ finds that claimant had a pre-existing active impairment of 5% prior to this work related incident. This opinion is based upon the findings and opinions of both Dr. Gregory Snider and Dr. Henry Tutt, both of whom assign a 5% pre-existing active impairment. Both Dr. Tutt and Dr. Snider provide persuasive explanation of their opinions and the ALJ is persuaded by these opinions that an appropriate amount of pre-existing active impairment is 5%. Thus, the Plaintiff is entitled to compensation for an increase in her impairment from 5% to 8% and she shall be compensated accordingly.

Having found the Plaintiff to have sustained an injury as defined under the Act and also having found Plaintiff to have sustained permanent impairment under the AMA Guidelines, the Plaintiff is entitled to medical benefits as provided in KRS 342.020.

(Footnote added).

The ALJ also awarded Bellamy TTD benefits for the period between April 8, 2008, through January 16, 2009, with credit for the two days she attempted to return to work when released by Dr. Snider in May 2008. The ALJ denied Bluegrass Regional's petition for reconsideration, and Bluegrass Regional appealed to the Board which affirmed the ALJ's award. This appeal followed.

ANALYSIS

KRS 342.285 provides that the ALJ's decision is "conclusive and binding as to all questions of fact" and that the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact." KRS 342.290 limits the scope of review by the Court of Appeals to that of the Board and also to errors of law arising before the Board. *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999). We note the standard of appellate review of a Board decision "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009) (citing *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). We review an award by the ALJ to determine whether its findings were reasonable under the evidence. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

The "ALJ, as the finder of fact, and not the reviewing court, 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) (citation omitted). When the claimant prevails before the ALJ, an appellate court will not disturb the findings of fact if they are supported by substantial evidence of a probative value. *Transportation Cabinet v. Doe*, 69 S.W.3d 60, 62 (Ky. 2001). "Substantial evidence" has been defined as evidence of relevant consequence having the fitness

to induce conviction in the minds of reasonable persons. *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). It is also within the province of the ALJ to believe one part of an expert's opinion and to disbelieve other parts of such opinion. *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334, 337 (Ky. 1985). It is not enough for reversal of an ALJ's factual finding to show that there is merely some evidence that would support a contrary conclusion. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). If there is substantial evidence in the record to support the fact-finder's determination, the findings will be upheld, even though there may be conflicting evidence in the record. *Kentucky Commission on Human Rights v. Fraser*, 625 S.W.2d 852, 856 (Ky. 1981).

Bluegrass Regional first argues that the ALJ's finding of a compensable injury as defined by KRS 342.0011 was not supported by substantial evidence and that the conclusions of Dr. Templin did not constitute objective medical findings. We disagree. KRS 342.0011(1) defines "injury" as follows:

"Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. . . .

KRS 342.0011(33) defines "objective medical findings" as follows:

"Objective medical findings" means information gained through direct observation and testing of the patient applying objective or standardized methods.

In *Gibbs v. Premier Scale Co./Indiana Scale Co.*, 50 S.W.3d 754, 761-62 (Ky. 2001), the Supreme Court of Kentucky explained the requirements of KRS 342.0011(1) and KRS 342.0011(33):

[t]hus, the plain language of KRS 342.0011(33) supports the view that a diagnosis is not an objective medical finding but rather that a diagnosis must be supported by objective medical findings in order to establish the presence of a compensable injury. The fact that a particular diagnosis is made in the standard manner will not render it an “objective medical finding.” We recognize that a diagnosis of a harmful change which is based solely on complaints of symptoms may constitute a valid diagnosis for the purposes of medical treatment and that symptoms which are reported by a patient may be viewed by the medical profession as evidence of a harmful change. However, KRS 342.0011(1) and (33) clearly require more, and the courts are bound by those requirements even in instances where they exclude what might seem to some to be a class of worthy claims. A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33). Therefore, we must conclude that a diagnosis based upon a worker's complaints of symptoms but not supported by objective medical findings is insufficient to prove an “injury” for the purposes of Chapter 342.

The court in *Gibbs* further noted that “a wide array of standardized laboratory tests and standardized tests of physical and mental function [are] available to the medical practitioner” that are “capable of confirming the existence and extent of a number of symptoms” and

[w]e know of no reason why the existence of a harmful change could not be established, indirectly, through information gained by direct observation and/or testing applying objective or standardized methods that demonstrate the existence of symptoms of such a change. Furthermore, we know of no reason why a diagnosis which was derived from symptoms that were confirmed by direct objective and/or testing applying objective standardized methods would not comply with the requirements of KRS 342.0011(1).

Gibbs, 50 S.W.3d at 762.

We agree with the Board that the ALJ's decision was both supported by the evidence and in conformity with the Act. In this case, the ALJ exercised his discretion to pick and choose from the medical evidence presented. Because the result chosen by the ALJ is supported by substantial evidence in the record, we are without authority to disturb his decision on appeal. Obviously, the record contains evidence that would support a decision contrary to that reached by the ALJ.

Specifically, both Dr. Tutt and Dr. Snider characterized the harmful affects of the March 9, 2008, work event as transient and temporary in duration. However, Dr. Templin disagreed, stating his medical opinion that the work-related slip and fall resulted in harmful changes producing permanent impairment under the AMA *Guides* superimposed over a pre-existing active condition. The differing medical opinions of Dr. Tutt and Dr. Snider merely represent conflicting evidence that, as a matter of law, do not compel any particular result and are insufficient for reversal.

McCloud, 514 S.W.2d at 47. Dr. Templin's medical opinions, when considered

together with Bellamy's unrefuted testimony concerning the mechanism of injury that occurred on March 9, 2008, qualify as substantial evidence sufficient to support the ALJ's decision. Thus, we conclude the ALJ's finding of a compensable injury was supported by substantial evidence.

Further, we agree that Dr. Templin's medical opinion regarding the existence of a compensable injury represented "objective medical evidence" as defined in KRS 342.0011(33) and explained in *Gibbs*. Dr. Templin physically examined Bellamy, taking into account a detailed history of her complaints, treatment, and various injuries dating back ten years. He observed Bellamy and conducted standardized range of motion studies, pinprick studies, strength measurements, and motor, reflex and pulse testing. He also reviewed Bellamy's medical records, which included the results of lumbosacral x-ray examinations performed in 2007 and 2008, a lumbosacral CT scan performed in 2006, a lumbar NCV study from 2008, and lumbosacral MRI scans performed in 2007 and 2008. Based on this information, Dr. Templin expressed his medical opinion that the March 9, 2008, incident caused a harmful change in Bellamy's physical condition resulting in additional permanent impairment superimposed on her pre-existing active condition and impairment. As such, and contrary to Bluegrass Regional's contention, Dr. Templin's medical conclusions were not based solely upon Bellamy's subjective complaints, but represented sound objective medical

evidence pursuant to KRS 342.0011(33) and *Gibbs* upon which the ALJ could rely in reaching his decision.

Bluegrass Regional next argues that the award of TTD benefits was not supported by substantial evidence. Again, we disagree. KRS 342.0011(11)(a) defines “temporary total disability” as:

the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

In *Double L Const., Inc. v. Mitchell*, 182 S.W.3d 509, 513 (Ky. 2005), the Supreme Court of Kentucky stated:

[a]s defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. *See Magellan Behavioral Health v. Helms*, 140 S.W.3d 579, 581 (Ky. App. 2004) Yet, implicit in the *Central Kentucky Steel v. Wise*, [19 S.W.3d 657 (Ky. 2000)], decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability to perform “any type of work.” See KRS 342.0011(11)(c).

In the present case, the uncontroverted evidence demonstrates that Dr. Snider placed Bellamy on work restrictions in March 2008, which were increased in July 2008. Bellamy’s uncontroverted testimony was that Bluegrass Regional would not permit her to return to work with any restrictions placed upon her activities. Dr. Templin stated that as of September 12, 2008, Bellamy was not at

MMI although he assigned an impairment rating. While Bluegrass Regional argues the *AMA Guides* requires MMI before an impairment rating may be assigned, this argument goes to the weight and credibility of Dr. Templin's conclusions and ignores the authority of the ALJ to believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof. *See Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Dr. Snider's progress notes established that the work restrictions he recommended were not lifted until January 16, 2009, and it is undisputed that Bellamy returned to her former work duties at Bluegrass Regional on January 17, 2009. Because Bellamy was unable to return to the type of work she was customarily performing at the time of her work-related injury during this period, the ALJ did not err in awarding TTD benefits. *Central Kentucky Steel*, 19 S.W.3d at 659; *Magellan Behavioral Health*, 140 S.W.3d at 580-581; *Double L Const., Inc.*, 182 S.W.3d at 513-514. Though, again, there was conflicting evidence presented concerning this issue, we conclude the ALJ's award of temporary total disability benefits was supported by substantial evidence. *McCloud*, 514 S.W.2d at 47; *Fraser*, 625 S.W.2d at 856.

Finally, in its brief, Bluegrass Regional concedes that, should we uphold the ALJ's finding that Bellamy sustained a compensable work-related injury with corresponding impairment, then, based upon our opinion in *Max &*

Erma's v. Lane, 290 S.W.3d 695 (Ky. App. 2009), Bellamy would, as a matter of law, be entitled to retain the ALJ's award of future medical benefits. Having so concluded, the issue is moot, and the ALJ's award of future medical benefits to Bellamy shall stand.

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

ALL CONCUR.

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