

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-001200-WC

KNOTT COUNTY BOARD OF EDUCATION

APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-71407

LOIS HAMILTON; HON. CAROLINE PITT CLARK,
ADMINISTRATIVE LAW JUDGE; and WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART
AND REVERSING IN PART

** ** * ** * ** *

BEFORE: VANMETER AND WINE, JUDGES; SHAKE,¹ SENIOR JUDGE.

SHAKE, SENIOR JUDGE: The Knott County Board of Education ("Knott County") appeals from the May 26, 2010, opinion of the Workers' Compensation Board ("Board"). That opinion reversed in part and vacated and remanded in part

¹ Senior Judge Ann O'Malley Shake sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

the October 26, 2009, award and order of Administrative Law Judge Clark (“ALJ”) regarding the disability claims of Lois Hamilton. We affirm in part and reverse in part.

Hamilton was employed by Knott County for ten years. On October 29, 2007, she was involved in an altercation with an 11-year-old autistic student. During the altercation, the student shoved, pushed, and grabbed at Hamilton on numerous occasions. At one point, it was also necessary for Hamilton to embrace the student in a bear hug from behind in order to restrain him. The altercation was captured by a surveillance video located in the school’s hallway. After the incident, Hamilton felt pain in her neck and right shoulder and sought medical treatment from her family physician.

On May 29, 2008, Hamilton filed a claim for workers’ compensation benefits, alleging extensive injuries to her neck, right shoulder, and arm as a result of her altercation on October 29, and while working for Knott County. She also alleged that she suffered from major depression, post traumatic stress disorder, and chronic pain syndrome. Hamilton sought enhanced total occupational disability benefits as well as coverage of related medical treatment, including surgery, and temporary total disability benefits. In response, Knott County argues that Hamilton did not sustain an injury as defined by the Workers’ Compensation Act, nor did she suffer any permanent impairment as a result of the October 29 incident. Knott County maintained that Hamilton’s symptoms were the result of an exacerbated preexisting, active and chronic condition for which she had previously

been treated. Knott County further argued that any psychological condition is unrelated to her employment and that her claims should be dismissed. In support of their arguments, both Hamilton and Knott County provided vast amounts of evidence regarding Hamilton's medical history, which resulted in ten volumes of record. The crux of that evidence is presented, as succinctly as possible, below.

Dr. Chandra Varia testified that she had treated Hamilton, as her OB-GYN, for approximately twenty-five years. She testified that Hamilton suffered from chronic premenstrual cycle ("PMS"), secondary to cholecystectomy, and had been prescribed Paxil to help alleviate her symptoms. She testified that Hamilton responded well to the Paxil and that it typically took her six months to go through a thirty-day supply. Dr. Varia also testified that the Paxil was prescribed only to treat Hamilton's PMS symptoms and that such treatment was acceptable in her profession.

Dr. Varia also opined that Hamilton's personality had changed dramatically after the October 29 incident. Specifically she noted that Hamilton was more withdrawn, was less engaging, failed to make eye contact, and appeared lifeless and void of enthusiasm. Dr. Varia further testified that Hamilton was previously successful at controlling her stomach problems with medication but since the work-related incident, medication was no longer working for her.

On December 4, 2007, Hamilton sought treatment with Dr. Thomas Menke. Dr. Menke's examination revealed a thirty-percent cervical decreased range of motion and positive impingement on the right shoulder. He diagnosed

Hamilton as suffering from cervicalgia and right shoulder pain with radicular symptoms to the right.

On March 20, 2008, Hamilton underwent rotator cuff surgery by orthopedic surgeon, Dr. Michael Kirk. That surgery included a right shoulder arthroscopic rotator cuff repair, right shoulder arthroscopic subacromial decompression, and right shoulder arthroscopic debridement of superior labral tear. The surgery was followed by physical therapy and medication. Hamilton was restricted, by Dr. Kirk, to light activities with no lifting over ten pounds and no over the shoulder work with the right dominant extremity. Hamilton reported a poor outcome from the surgery. She testified that she experiences a constant burning and aching pain in her neck and that, as a result, she has problems holding her head up. Hamilton also testified that she experiences constant pain in her right shoulder, extending to her elbow; her range of motion has decreased; and any physical activity increases her shoulder pain. She testified that the pain prohibited her from holding a hair dryer, shucking corn, washing windows, or throwing a comforter over her bed.

In addition to her shoulder problems, Hamilton also testified that she now suffers from anxiety and depression as a result of her injuries. Her testimony indicated that she can no longer be around large crowds and suffers from frequent mood swings, short-term memory problems, panic attacks, failure to concentrate, excessive worrying, and flashbacks and nightmares regarding the incident.

Additionally, Hamilton testified that she suffers severe gastrointestinal problems

since her work-related injury, including severe cramping and diarrhea and an inability to control her bowel movements.

In July of 2008, Hamilton underwent a medical evaluation by Dr. James Templin. He diagnosed Hamilton with chronic right shoulder pain syndrome, partial right-side rotator cuff tear, and S/P right shoulder arthroscopic surgery with partial rotator cuff repair. He assessed a six-percent impairment to the right shoulder, a nine-percent impairment due to colonic and rectal disease; and a five-percent impairment to the cervical spine, for an eighteen-percent whole body impairment.

Also in July of 2008, Hamilton met with forensic psychiatrist, Dr. Robert Granacher, Jr. Dr. Granacher indicated that Hamilton complained of weight loss, fatigue, change in sleeping patterns, headaches, shortness of breath, stomach problems, menstrual irregularity, depression, nervousness, panic, poor concentration, loss of memory, word-finding difficulty, irritability, flashbacks, poor coordination, neck pain, right arm pain, right shoulder pain, joint pain, difficulty lifting, and sleep dysfunction. Dr. Granacher performed a series of standardized tests and concluded that Hamilton had a fifteen-percent whole body impairment. He also concluded that Hamilton suffered from anxiety disorder and panic attacks due to the October 29 incident, psychophysiological gastrointestinal disorder due to her anxiety disorder caused by her workplace injury, a current inability to work due to a profound dread of returning to the classroom, and rated

her then current GAF² at 41-50. Dr. Granacher indicated that Hamilton would require psychiatric restrictions upon her job performance; that she lacked the mental capacity to engage in the work that she had been trained, educated, and experienced to perform.

In August of 2008, Hamilton saw Dr. Douglas Ruth for a psychiatric evaluation. Dr. Ruth's assessment indicated that Hamilton showed physiological symptoms of anxiety, symptoms of depression, and cognitive difficulties. He diagnosed post traumatic stress disorder and assessed Hamilton with a ten-percent psychiatric impairment, related to the October 29 incident. He recommended that she limit performing duties that require a high level of mental acuity or focus and also recommended continued use of psychotropic medications and treatment.

Prior to the October 29 incident, Hamilton saw Dr. Grady Stumbo in September of 2001, complaining of bilateral shoulder pain for one year, which had worsened the last two to three weeks. Dr. Stumbo assessed Hamilton with bilateral shoulder synovitis and prescribed Celebrex. Dr. Stumbo's records also indicated that Hamilton needed an injection at that time.

Also prior to the October 29 incident, Hamilton was seen by Dr. Steven Spady in January of 2005, complaining of pain in her right shoulder for the past three years with no improvement. Dr. Spady's records were not entirely legible, but it was gleaned that Hamilton reported the severity of her pain to be moderate, affecting her daily activities, and exacerbated by movement. The

² Global Assessment of Functioning.

records also indicated that Hamilton had a limited range of motion and had received an injection with no positive results.

Knott County presented the report of Dr. R.K. Belhausen, of Cumberland Orthopedic and Sports Medicine, as substantive evidence. That report indicated that Hamilton had seen Dr. Belhausen in 2005, upon a referral from Dr. Kevin Davis, complaining of right shoulder pain. Dr. Belhausen noted that Hamilton had suffered from similar symptoms three years prior and was given a cortisone injection, which resolved her symptoms. He also reviewed a 2002 MRI of Hamilton and reported that it revealed “abnormal signal intensity at the insertion of the supraspinatus tendon, suggestive of a partial tear versus tendonitis.” Dr. Belhausen treated Hamilton with an injection of Depomedrol and indicated that occasional cortisone injections should be sufficient until she returned with new symptoms.

At the request of Knott County, Hamilton was evaluated by Dr. Michael Best in May of 2009, who diagnosed her to be suffering from a partial rotator cuff tear that pre-existed the October 29 incident, and chronic glenoid fraying. He gave her an excellent prognosis for her right shoulder injury, rated her at a two-percent whole body impairment, and assessed no permanent impairment related, either directly or casually, to the October 29 event.

Hamilton was evaluated by Dr. David Jenkinson, also at the request of Knott County. Dr. Jenkinson opined that Hamilton was exaggerating her symptoms and concluded that the extent of her condition could not be accurately

assessed. He also opined that Hamilton's injury was one that would not result from a single event, but rather years of wear and tear. He took the position that Hamilton required no restrictions. Also at the request of Knott County, Hamilton was evaluated by Dr. David Shraberg, who found a pre-existing psychological condition for which she had been prescribed the Paxil.

The parties participated in a formal hearing, in front of the ALJ, on August 25, 2009. As a result, the ALJ ordered that Hamilton recover temporary total disability benefits from the period of October 30, 2007, through February 18, 2009, and permanent partial disability thereafter, until Hamilton qualified for old-age Social Security retirement benefits. The ALJ also ordered that Hamilton recover her medical expenses incurred as a result of her work-related injury. Both parties filed motions for reconsideration which were summarily denied. Hamilton appealed to the Board and the Board reversed in part and vacated and remanded in part. More specifically, the opinion directed the ALJ to award Hamilton with permanent partial disability based on a five-percent impairment rating as it applies to Hamilton's cervical condition, including future medical expenses for the condition. The order also directed that the ALJ make further findings pursuant to the dictates of *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007), as it applies to Hamilton's right shoulder and intestinal problems and her entitlement, if any, to income and medical expenses as they apply to the same conditions. This appeal followed.

On appeal, our standard of review of a decision of the Workers' Compensation Board "is to correct the Board only where the . . . Court perceives 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The burden of persuasion is on the claimant to prove every element of a workers' compensation claim. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984).

On appeal, Knott County first argues that the Board erred by directing the ALJ to adopt its interpretation of the medical opinion of Dr. Best with respect to Hamilton's right shoulder condition. The portion of the Board's order to which Knott County refers reads:

. . . it is clear from a reading of the ALJ's findings of fact she relied on the opinions of Dr. Best and Dr. Jenkinson in determining no permanent impairment rating was generated from the work based injury . . . Dr. Best also noted the entirety of Hamilton's shoulder problems, treatment and ultimate surgical intervention was exclusively due to the affects of this pre-existing injury pathology in her right shoulder. However, Dr. Best also failed to give an opinion as to whether this condition was a pre-existing active impairment pursuant to the dictates of *Finley*.

This Board is not a fact finding body. For this reason, as it applies to Hamilton's shoulder condition, the ALJ's opinion is VACATED and this matter is REMANDED to the ALJ to make further findings pursuant to the *Finley* analysis. If, on remand, after conducting a *Finley* analysis, the ALJ determines Hamilton's right shoulder condition represents an arousal of a pre-existing dormant

condition into disabling reality, then the ALJ must find the condition compensable and select between the 2% functional impairment rating as assessed by Dr. Best or the 6% impairment rating as assessed by Dr. Templin and award income and future benefits accordingly. On the other hand, if the ALJ determines Hamilton's shoulder condition was entirely pre-existing active immediately preceding the injury, the ALJ is instructed to set out with specificity, the evidence she relies on in making this determination. Under such circumstances, an award under KRS 342.020 is not warranted. However, if the ALJ finds the shoulder condition was pre-existing and active and that the work-related trauma produced a temporary exacerbation resulting in the need for surgery, the ALJ shall award future medical benefits as to the shoulder condition in accordance with the dictates in *Joslin v. Active Transportation . . .* and *Ligon v. Kroger*

The Board returned the matter to the ALJ to make one of three findings, pursuant to *Finley*: 1) Hamilton's right shoulder condition represents a pre-existing dormant condition aroused into disabling reality by the work-related injury; 2) Hamilton's shoulder condition was entirely pre-existing, and active immediately preceding the work-related injury; or 3) Hamilton's shoulder condition was pre-existing and active and that the work-related trauma produced a temporary exacerbation resulting in the need for surgery. Under *Finley*, when the ALJ has determined the existence of a pre-existing condition, the ALJ must also determine whether the condition was active or dormant. *Finley*, 217 S.W.3d at 265. If the condition is determined to be dormant, then the ALJ must also determine whether it was aroused into disabling reality, and if so, whether it was done so temporarily or permanently. *Id.* If, however, the condition is considered

to be active, then the ALJ must determine whether a temporary exacerbation was created. *Id.* All of these factors play a significant role in determining to what, if any, compensation the claimant is entitled. *Id.*

Knott County argues that the Board made an impermissible finding of fact when it stated: “Dr. Best also failed to give an opinion as to whether this condition was a pre-existing active impairment pursuant to the dictates of *Finley*.” We disagree. Dr. Best’s opinion speaks for itself. Knott County has failed to show that the Board imposed its interpretation of Dr. Best’s opinion into the record as a factual finding. Instead, the Board merely stated that the opinion provided by Dr. Best failed to encompass all of the relevant factors of *Finley*, as outlined above. Although, as Knott County points out, the Board notes that Dr. Best “assessed no *permanent* impairment which was directly related and casually related to the effects of the work event on October 29, 2007,” he does not opine, pursuant to *Finley*, whether the pre-existing impairment was active or dormant at the time of the October 29 incident, or whether there was a *temporary* impairment which was directly related to incident. As outlined above, such information is relevant in determining what award Hamilton may be entitled. Accordingly, we find no error with the Board’s statement.

Knott County also maintains that the Board’s decision is unsupported by the video that captured the student altercation which forms the basis of this claim. Knott County argues that Hamilton’s description of the altercation is inconsistent with what is portrayed on the video. More specifically, Knott County

states “[i]t is difficult to fathom that a fact-finder could review that video in the context of Hamilton’s testimony describing the work event in question and maintain the posture evident in the Board’s decision.”

This Court has reviewed the video in question. The altercation, which lasts approximately 30 minutes, involves the student pushing, shoving, and using his entire body to push against Hamilton. At several times Hamilton is pressed against a door by the student and continuously shoved into it. At one point Hamilton is required to physically restrain the student by means of a bear hug from behind. It is established that the Board “shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact[.]” KRS 342.285. However, that is exactly what Knott County appears to be requesting. Having reviewed the video tape, we do not believe there was an abuse of discretion, on behalf of the ALJ, to accept that the altercation could have produced the injury of which Hamilton suffers. Accordingly, it was proper for the Board to refrain from disputing the ALJ’s finding that an injury occurred.

Knott County next argues that the Board construed the *Finley* decision too broadly and shifted the burden of proof to the employer. In support of this argument, Knott County alleges that the Board impermissibly requires Knott County, the employer, to first offer affirmative proof of a prior ratable impairment without first requiring Hamilton, the employee, to have proven an injury as defined

by KRS³ 342.0011(1). Once again, we do not agree. KRS 342.0011(1) defines

“injury” as:

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. “Injury” does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. “Injury” when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury.

In her October 26, 2009, opinion, award, and order, the ALJ made the following relevant findings:

there is no question [Hamilton] suffered physical injuries when she was repeatedly pushed into the door/doorway by the unruly child, and then kicked and stomped. . . the undersigned finds [Hamilton] also sustained psychological injuries due to the work incident.

Because the ALJ has already found that an injury, pursuant to KRS 342.0011(1) exists, there would be no reason for Hamilton to once again bring forth such evidence. Likewise, the Board is not requesting further evidence from Knott County, but rather that the ALJ make further factual determinations with the evidence already before her. We agree that the ALJ failed to find any permanent impairment as a result of the work incident. However, as we have already explained, it is relevant to Hamilton’s award whether her pre-existing impairment

³ Kentucky Revised Statutes.

was active or dormant at the time of the work incident. To require that the ALJ make such a determination in no way places additional evidentiary requirements upon Knott County nor shifts the burden.

Knott County's final argument is that the Board erred in directing the ALJ to award benefits for Hamilton's alleged cervical injury. In its order, the Board noted that Dr. Templin opined that Hamilton suffered a five-percent whole body impairment related to injuries sustained by her cervical spine as a result of the work incident. The Board also noted that such opinion was unrebutted and therefore warranted an award of income benefits based on the rating. For the following reasons, we agree that such a conclusion was improper.

The ALJ clearly indicated that she chose to accept the opinions of Dr. Jenkinson and Dr. Best over that of Dr. Templin regarding Hamilton's permanent impairment rating. Neither Dr. Best nor Dr. Templin assigned any of Hamilton's total body impairment to her alleged cervical injuries. It can be assumed that their failure to do so was not an oversight, but rather a testament to their opinions that the alleged injury failed to contribute to Hamilton's total body impairment. It is within the ALJ's discretion to accept or reject testimony and the Board "shall not substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact[.]" KRS 342.285. Simply because evidence existed which would have supported a different decision does not provide adequate grounds to reverse the ALJ's opinion. *Id.* Although the Board could require further findings to

determine why an award based on the cervical condition was denied, it cannot find that the cervical condition existed and therefore warranted an award.

Accordingly, that portion of the Board's opinion which holds that Hamilton is entitled to an award for her cervical condition is reversed. The remainder of the Board's opinion is affirmed.

ALL CONCUR.

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