In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-09-00293-CV

ELIZABETH LANGSTON, Appellant

V.

TEXAS MUTUAL INSURANCE COMPANY, Appellee

On Appeal from the 172nd District Court
Jefferson County, Texas
Trial Cause No. E-178,429

MEMORANDUM OPINION

In this workers' compensation case, we must decide whether the trial court properly granted the carrier's motion for summary judgment. Based upon the standards of review applicable to no-evidence and traditional summary-judgment motions, we conclude that the nonmovant produced sufficient evidence to defeat the insurance carrier's motion for summary judgment. Consequently, we reverse the trial court's judgment and remand the cause for further proceedings.

Background

Elizabeth Langston suffered an on-the-job injury on June 15, 2003. Langston received workers' compensation benefits from Texas Mutual Insurance Company, and she also pursued a third-party claim. In 2005, she settled her third-party claim. Under the terms of the third-party settlement agreement, Langston agreed that Texas Mutual was entitled to a "statutory credit for any future supplemental income benefits equal to $13,633.33."

Shortly after settling the third-party claim, Langston requested that Texas Mutual pay supplemental income benefits,[1] beginning October 13, 2005. Langston subsequently filed three additional requests for supplemental benefits, with the last of these ending as of October 11, 2006. Texas Mutual disputed each of Langston's four requests.

On October 2, 2006, following a benefit review conference, the benefits review officer with the Texas Department of Insurance ("Department") determined that Texas Mutual was not liable to Langston on her claims for supplemental income benefits. After exhausting her administrative rights of appeal, Langston filed suit in January 2007, seeking judicial review of the Department's decision to deny her claims for supplemental income benefits. *See* TEX. LAB. CODE ANN. §§ 410.251-.252 (Vernon 2006 & Supp. 2009), 410.301-.308 (Vernon 2006).

[1] *See* TEX. LAB. CODE ANN. § 408.142 (Vernon 2006) (providing conditions that must be met to qualify for Supplemental Income Benefits).

In May 2009, Texas Mutual filed a combined traditional and no-evidence motion for summary judgment. The no-evidence portion of Texas Mutual's motion asserts that Langston has no evidence to show that she meets the eligibility requirements for supplemental income benefits pursuant to section 130.102 of the Texas Administrative Code. *See* 28 TEX. ADMIN. CODE § 130.102 (2010). With respect to these regulatory requirements, Texas Mutual asserts that Langston failed to provide "the [Department] with an uncontroverted medical narrative report explaining why she was completely unable to work in any capacity." Texas Mutual also argues that the summary-judgment evidence demonstrated that Langston could do some type of work.

Standard of Review

In this case, the trial court's Final Summary Judgment does not specify the grounds upon which its summary judgment is based. In cases where the trial court's judgment does not specify the grounds upon which it decided the summary-judgment motion, the appealing party must show that each independent ground alleged in the movant's motion for summary judgment is insufficient to support the trial court's judgment. *See FM Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872-73 (Tex. 2000); *Star-Telegram, Inc. v. Doe*, 915 S.W.2d 471, 473 (Tex. 1995). On appeal, the reviewing court will affirm the summary judgment if any ground raised by the prevailing party has merit. *Bradley v. State ex rel. White*, 990 S.W.2d 245, 247 (Tex. 1999); *Star-Telegram*, 915 S.W.2d at 473.

With respect to the part of Texas Mutual's motion advancing no-evidence claims under Rule 166a(i), we note that "[a] no-evidence summary judgment is essentially a pretrial directed verdict . . . ." *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003). The nonmovant must produce more than a scintilla of evidence to defeat a no-evidence motion. *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598, 600 (Tex. 2004). "[M]ore than a scintilla of evidence exists if the evidence 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" *Id*. at 601 (quoting *Merrell Dow Pharm., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997); *Burroughs Wellcome Co. v. Crye*, 907 S.W.2d 497, 499 (Tex. 1995); *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 25 (Tex. 1994)). "We review a no-evidence summary judgment de novo by construing the record in the light most favorable to the nonmovant and disregarding all contrary evidence and inferences." *Oliphint v. Richards*, 167 S.W.3d 513, 515-16 (Tex. App.–Houston [14th Dist.] 2005, pet. denied). In reviewing the summary-judgment evidence, we indulge every reasonable inference and resolve all doubts in the nonmovant's favor. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 549 (Tex. 1985).

With respect to the grounds advanced by Texas Mutual's traditional summary-judgment motion, Rule 166a(c) of the Texas Rules of Civil Procedure provide that "[s]ummary judgment is appropriate only when there are no disputed issues of material fact and the moving party is entitled to judgment as a matter of law." *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002); *see also* TEX. R. CIV. P. 166a(c). In reviewing the

evidence presented, we "must resolve every doubt and indulge every reasonable inference in the nonmovant's favor. All evidence favorable to the nonmovant will be taken as true." *Id*. (citation omitted). The question on appeal is "whether the summary judgment proof *establishes as a matter of law that there is no genuine issue of fact* as to one or more of the essential elements of the plaintiff's cause of action." *Gibbs v. Gen. Motors Corp*., 450 S.W.2d 827, 828 (Tex. 1970); *see also* TEX. R. CIV. P. 166a(c). We review the decision of the trial court to grant a traditional motion for summary judgment under a de novo standard. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

Application of Law to Facts

First, we address whether the trial court properly resolved Texas Mutual's claim asserting that Langston had no evidence to support her claim for supplemental income benefits that it advanced as a no-evidence motion. A person's eligibility to receive supplemental income benefits is governed by several different requirements found within section 408.142 of the Texas Labor Code. *See* TEX. LAB. CODE ANN. § 408.142 (Vernon 2006). In this case, Texas Mutual's summary-judgment motion challenged whether Langston met the requirements of Section 408.142(a)(4).[2] *See id.* § 408.142(a)(4). By

[2] "(a) An employee is entitled to supplemental income benefits if on the expiration of the impairment income benefit period computed under Section 408.121(a)(1) the employee:

. . .

(4) has complied with the requirements adopted under Section 408.1415."

TEX. LAB. CODE ANN. § 408.142(a)(4).

reference, section 408.142(a)(4) incorporates section 408.1415 of the Texas Labor Code, and in section 408.1415, the Texas Legislature permitted the Commissioner of Insurance to adopt compliance standards applicable to claimants seeking to receive supplemental income benefits. *See* TEX. LAB. CODE ANN. § 408.1415 (Vernon 2006). The Department then promulgated rules used to determine whether a claimant for supplemental income benefits is entitled to receive them. *See* 28 TEX. ADMIN. CODE §§ 130.100-.109 (2010).

Both Texas Mutual's no-evidence motion and Langston's response address whether Langston produced evidence to meet the requirements of administrative rule 130.102(d)(1)(E). *See* 28 TEX. ADMIN. CODE § 130.102(d)(1)(E) (2010). That administrative rule requires the following:

> (d) Work Search Requirements.
>
> > (1) An injured employee demonstrates an active effort to obtain employment by meeting at least one or any combination of the following work search requirements each week during the entire qualifying period:
>
> . . . .
>
> > (E) has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work.

Id. In response to Texas Mutual's assertion that she had no evidence to support her claim, Langston filed a summary-judgment response and attached the following evidence: (1) a medical report from Langston's treating physician, Dr. Wilson, dated August 17, 2005; (2) a medical report from Dr. Wilson, dated August 30, 2006; and (3) Langston's affidavit,[3] dated May 15, 2009.

Langston's affidavit states that she had "received Social Security disability benefits since February 2006 in connection with the neck injury [she] suffered on [June 15, 2003]." Dr. Wilson's August 17, 2005 report describes Langston's on-the-job injury, and then explains that Langston was diagnosed with a ruptured cervical disc, that she had surgery, and that her surgeon recommended additional surgery but "at this time nothing further has managed to be approved." According to Dr. Wilson, Texas Mutual arranged for Langston's examination by another physician, Dr. George, who recommended that Langston be referred to a psychologist or psychiatrist to evaluate her for depression. Dr. George's recommendation was denied, according to Dr. Wilson, because Texas Mutual "feel[s] that [Langston]'s psychiatric problems are not directly caused by her [on-the-job] injury." Thus, Dr. Wilson's report explains that Langston continued to suffer symptoms that he felt were related to her on-the-job injury, and he recommended that Langston be admitted for treatment to a pain management program. Dr. Wilson describes Langston's

[3]The signatory on the affidavit is "Faye Murphy," but it appears undisputed that Elizabeth Faye Langston Murphy is the claimant, the person that signed the affidavit attached to the response to Texas Mutual's motion for summary judgment, and the appellant.

complaints of pain in his August 2005 report as "chronic intractable pain." Dr. Wilson's August 2005 report also states that Langston attempted to find work in a different field but had been unable to "complete a full workday due to her pain."

Dr. Wilson's second report, dated August 30, 2006, states:

> Ms. [Langston] suffered multiple cervical intervertebral disc herniations with subsequent nerve damage. Surgical intervention was attempted, but failed to relieve her symptoms.
>
> At this time, Ms. [Langston] remains totally and permanently unable to work. Although she has tried to return to the workplace in some capacity, she has been unable to fulfill even entry-level positions. Currently, she takes multiple medications for pain relief, including morphine, which themselves exempt Ms. [Langston] from many employment opportunities. In addition, constant pain prevents her from physical work and impairs mental capacity; diminished strength precludes any nursing or hand-on tasks; and muscular imbalances cause postural deficiencies that prevent Ms. [Langston] from a "desk-work" position.
>
> Ms. [Langston]'s condition has not shown improvement over the past year. In fact, if anything she has worsened. She currently exhibits symptoms of permanent nerve and spinal cord damage. Although I have recommended further surgical intervention and pain management programs, these have been denied by the insurance carrier. Without these interventions, nerve damage may be permanent and she is not likely to improve.
>
> In short, Ms. [Langston] remains totally and permanently unable to work.

First, we must address whether Dr. Wilson's August 2006 report is relevant, as Texas Mutual challenges the relevancy of the report in its brief. Specifically, Texas Mutual argues that Dr. Wilson's report only addressed Langston's ability to work "[a]t

this time," and concludes that the report fails to address her inability to work during the relevant qualifying periods,[4] the last of which started March 31, 2006, and ended June 29, 2006. According to Texas Mutual, Dr. Wilson's August 2006 report "does *not* state how long Langston had been unable to work or whether she was unable to work ***during the qualifying periods***." In summary, Texas Mutual argues that Dr. Wilson's August 2006 report does not address the relevant periods at issue.

While Dr. Wilson's report might have been more specific about the respective dates to which his opinion applied, in reviewing a trial court's decision to grant a no-evidence motion for summary judgment, we are required to construe summary-judgment evidence in the light most favorable to the nonmovant, "'crediting evidence favorable to that party if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.'" *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009) (quoting *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006)). Construed in that light, we conclude that reasonable jurors could reasonably infer from Dr. Wilson's reports that Langston was unable to perform any type of work in any capacity for the qualifying periods at issue. Dr. Wilson's August 2006 report specifically mentions that Langston had not shown improvement over the last year, and if anything, she had worsened. Further, from Dr. Wilson's statement that Langston "remains totally

[4]The term "qualifying period" is defined as: "A period of time for which the employee's activities and wages are reviewed to determine eligibility for supplemental income benefits. The qualifying period ends on the 14th day before the beginning date of the quarter and consists of the 13 previous consecutive weeks." 28 TEX. ADMIN. CODE § 130.101(4) (2010).

and permanently unable to work," a reasonable juror could infer that the disability from her injury was ongoing; in other words, the disability that Dr. Wilson felt Langston suffered was not something she had recently acquired. The inference that her condition was longstanding is further reinforced by reading Dr. Wilson's 2005 and 2006 reports together. We disagree that Dr. Wilson's August 2006 report is irrelevant to the issue of Langston's disability during the relevant qualifying periods.

Texas Mutual states that Dr. Wilson's August 2006 report was not provided to the hearing officer before she rendered her opinion, but we are also not persuaded that the August 2006 report is not relevant for that reason. In its brief, Texas Mutual cites no evidentiary rule or statutory provision that would prevent a trial court from considering all relevant reports of treating physicians in deciding whether to render summary-judgment evidence. Additionally, Texas Mutual secured no ruling on its relevance objection.

The trial court's judgment recites that it reviewed "the pleadings and evidence." In our de novo review, we consider Dr. Wilson's August 2006 report to be relevant to her claim for supplemental income benefits, as it tends to prove that Langston suffered an inability to work during the qualifying periods that are at issue. In the absence of a ruling sustaining an objection to the summary-judgment evidence, and in light of the language in the trial court's final judgment, we presume the trial court also considered the August 2006 report in determining whether to grant summary judgment. *See Util. Pipeline Co. v.*

Am. Petrofina Mktg., 760 S.W.2d 719, 722-23 (Tex. App.–Dallas 1988, no writ) (holding that, in the absence of an order sustaining an objection to a report as summary-judgment evidence, the report was proper evidence included in the record). Because the August 2006 report is relevant, and because the August 2006 report supports a reasonable inference that Langston was disabled during the relevant qualifying periods, we conclude that Langston presented more than a scintilla of summary-judgment evidence to meet Texas Mutual's no-evidence motion for summary judgment. We hold that the trial court, to the extent the decision to grant Texas Mutual's motion was based on Texas Mutual's no-evidence motion, erred by granting the motion.

Next, we evaluate whether the trial court's summary judgment can be affirmed based on Texas Mutual's traditional motion for summary judgment. *See Star-Telegram*, 915 S.W.2d at 473; *Carr v. Brasher*, 776 S.W.2d 567, 569 (Tex. 1989). To obtain a traditional summary judgment, Texas Mutual has the burden of proving that no issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *SAS Inst., Inc. v. Breitenfeld*, 167 S.W.3d 840, 841 (Tex. 2005). The movant has the burden of proof, and we resolve all doubts in favor of the nonmovant. *See Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997); *Friendswood Dev. Co. v. McDade + Co.*, 926 S.W.2d 280, 282 (Tex. 1996).

Texas Mutual's traditional motion argued that Dr. Wilson's reports are insufficiently specific, and that his August 2006 report is irrelevant to the qualifying

periods that are at issue. For the same reasons we have previously explained, we conclude that Dr. Wilson's reports are sufficiently specific to raise an issue of material fact regarding Langston's inability to perform any work for the periods relevant to her four claims for supplemental income benefits. We have also explained why, based upon the appropriate summary-judgment standards, Dr. Wilson's August 2006 report is relevant to the qualifying periods used to determine Langston's claim for supplemental income benefits.

Texas Mutual's traditional motion for summary judgment additionally asserts that Langston's own testimony established that she could work in some capacity. Texas Mutual points to Langston's testimony at the benefit review conference in which Langston discussed her daily activities, a transcript of which was attached to Texas Mutual's motion for summary judgment. During the benefit review conference, Langston testified that she could answer phones, use a computer (depending on the length of the task and the type of computer work), do laundry, clean, cook, shop, drive, walk, lift ten to fifteen pounds, and do stretching exercises. As additional support for its claim that Langston could work in some capacity, Texas Mutual also relies on a functional capacity evaluation, dated December 2006, that Texas Mutual included as part of its summary-judgment proof.

However, the issue for review under a traditional summary-judgment standard is not whether the evidence presented at the hearing conflicted; instead, we are to determine

whether the summary judgment is such that there exists a genuine issue of material fact regarding Langston's inability to perform any work. While Langston's testimony supports a reasonable inference that she can work in some capacity, it is not dispositive. First, Langston's testimony about being able to engage in activities around her home does not amount to an admission that she can work, nor did Langston admit that she could work in some capacity. The summary-judgment evidence included evidence from which a reasonable juror could conclude that Langston could not have performed any work during the quarterly periods at issue, despite her ability to perform the activities that she described she was able to perform around her home. Further, indulging evidentiary inferences in Langston's favor, as required by the summary-judgment standards of review, a reasonable juror could have discounted the probative value of the functional capacity evaluation, as it wholly fails to address Langston's ability to work during the qualifying periods at issue. Importantly, because the summary-judgment evidence includes Dr. Wilson's opinion that Langston is unable to work, opinions to the contrary merely raise genuine issues of material fact. Finally, a reasonable juror might infer that the limitations Langston described at the benefit review conference were sufficient to prevent her from performing any actual work in any capacity in which she could have found employment during the periods that were in question. In summary, we conclude that the summary-judgment record demonstrates a genuine issue of material fact as to Langston's inability to work in any capacity for the periods at issue.

Texas Mutual also argues that the December 2006 functional capacity evaluation is a record that shows that Langston is able to return to work. Texas Mutual contends that because the functional capacity evaluation is a record showing that the injured employee can return to work, Langston cannot meet the last requirement of section 130.102(d)(1)(E) because she cannot show that "no other records show that the injured employee is able to return to work." 28 TEX. ADMIN. CODE §130.102(d)(1)(E).

We are not persuaded that the functional capacity evaluation addresses Langston's ability to work in the qualifying periods at issue, as the report concerns Langston's ability to work in December 2006, more than five months after the last qualifying period relevant to Langston's four claims ended. We are not persuaded that records that relate to periods outside the relevant qualifying periods are the type of "record" that the administrative rule contemplates as sufficient to disqualify a claim for supplemental income benefits.[5]

To sustain the summary judgment, Texas Mutual is required to demonstrate that there are no genuine issues of material fact based on the summary-judgment evidence. *SAS Inst.*, 167 S.W.3d at 841. Having applied the proper standards of review to the

[5] It is also not clear what types of "records" section 130.102(d)(1)(E) contemplates as sufficient to overcome a claim for supplemental income benefits. For instance, we doubt the Commissioner of Insurance would consider a report on the claimant's ability to work by an adjuster handling the claim as a "record" that would be sufficient to defeat the claim. We are also skeptical whether the employer could create such a "record." On the other hand, a treating physician's return to work slip would seem to be the type of record upon which it might be reasonable to rely to defeat a claim for supplemental income benefits, if such "record" reflects that the claimant can return to work during the qualifying periods that are being considered.

relevant qualifying periods, we find some evidence to support Langston's claim that she suffered an inability to perform any work during the periods that are at issue. We further conclude that Langston provided a sufficient doctor's report. Finally, we conclude that the summary-judgment record does not contain a "record" as required by section 130.102(d)(1)(E) of the Texas Administrative Code showing that Langston could work during the qualifying periods for the quarters in question. Consequently, the trial court erred in granting Texas Mutual's motion on traditional summary-judgment grounds.

We conclude that Texas Mutual's combined no-evidence and traditional motion for summary judgment should have been denied. We reverse the trial court's final summary judgment and remand the cause for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

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HOLLIS HORTON
Justice

Submitted on April 26, 2010
Opinion Delivered May 20, 2010
Before McKeithen, C.J., Gaultney and Horton, JJ.