

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000659-WC

TAMORA McCARTY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 93-WC-38814

DYNA ELECTRIC; WILLIAM O. WINDCHY,
Acting Director of SPECIAL FUND;
IRENE C. STEEN, Administrative Law
Judge; and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: COMBS, EMBERTON AND GUIDUGLI, JUDGES.

EMBERTON, JUDGE: The single issue in this appeal from a decision of the Workers' Compensation Board is whether the evidence before the Administrative Law Judge compelled a finding that the claimant, Tamora McCarty, was entitled to an award of benefits for total permanent occupational disability. Having considered McCarty's arguments for reversal in light of the evidence of record, we find no basis for disturbing the Board's decision and affirm.

While in the employ of the appellee, Dyna Electric, McCarty sustained a back injury when she tripped on a hose causing a propane tank she was pulling to fall upon her. She experienced lower back pain and immediately reported the accident. McCarty subsequently underwent a number of surgical procedures including an October 1993, surgery by Dr. Phillip Hylton for a herniated disc; a repeat discectomy with posterior spinal fusion by Dr. Werner in April 1995; a repeat fusion in September 1995 by Dr. Brooks Morgan; and finally, a March 1996 surgery to remove a previously implanted EBI stimulator. In the proceeding for compensation benefits, the ALJ received evidence indicating that McCarty had established a consistent pattern of conveying to all the physicians testifying about her claim that she was in constant unbearable pain and that the various treatment modalities had afforded her no relief. When she reported to the various physician's offices, McCarty consistently exhibited an extreme limp and slowness of gait and reliance upon a cane to assist in ambulation. There was also evidence of additional subjective complaints including sleeplessness and severe pain radiating into her neck and arms. McCarty testified that some days she could manage light housework, but that her daughter had to help her with such simple matters as lifting a laundry basket.

The employer offered the testimony of a private investigator who introduced two video tapes which purported to show McCarty on various occasions when she was unaware that she was being observed. The tapes showed McCarty meticulously

washing her car, bending, stooping and wielding an overhead power hose. The tapes also demonstrated her physical demeanor while shopping and carrying various large items which she loaded in her car without any apparent discomfort. Summarizing the testimony of McCarty's treating physicians and therapists after they had been shown these tapes, it is fair to say that their consensus of opinion was that she had exaggerated her symptoms and that she was a malingerer.

The ALJ, after reviewing all of the evidence presented, concluded that McCarty did not sustain a permanent occupational disability as a result of the work-related accident. As support for her decision, the ALJ noted the following factors:

It is clear from Dr. Hylton's testimony that Plaintiff had a good result from that [the October 1993] surgery and 'mobilized without complications.' He could find no objective evidence to support her growing complaints after that time. I find that subsequent to that surgery Plaintiff had no occupational disability and thereafter fraudulently misrepresented her physical condition to gain workers' compensation benefits, even to the point that she underwent additional and unnecessary surgeries. All of the physicians herein have found evidence of symptom exaggeration, which is evident from the video tapes.

The ALJ dismissed McCarty's claim for permanent disability benefits, denied her claim for medical expenses after the first surgery on the basis that they were unreasonable and unnecessary, and referred her claim to the fraud division of the Labor Cabinet for further investigation.

McCarty now argues in this forum, as she did in her appeal to the Board, that the medical evidence in this case

clearly establishes that she sustained an occupational disability stemming from the work-related accident entitling her to an award of permanent occupational disability. Like the Board, we disagree. Having been unsuccessful before the ALJ, McCarty was required to demonstrate on appeal that the evidence before the fact finder was so overwhelming as to compel a decision in her favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Well-established case law dictates that a factual decision supported by substantial evidence may not be disturbed on appeal. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). It is not enough that McCarty can point to substantial evidence supporting her claim. In fact, McCarty credibly argues that she would not have undergone four additional surgeries had the first surgery by Dr. Hylton resolved her physical problems. However, there is also credible evidence that McCarty exaggerated and misrepresented her physical problems. On conflicting evidence, the ALJ, as trier of fact, has the sole authority to determine the weight, quality, credibility, substance and inferences to be drawn from the evidence. Burkhardt, supra. We are not free to substitute our judgment for her decision in this case.

McCarty's petition is in reality a request that we do just that. The Kentucky Supreme Court, in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992), clearly defined the scope of our review:

The function of further review of the WCB [Board] in the Court of Appeals is to correct the Board only where the Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or has

committed an error in assessing the evidence
so flagrant as to cause gross injustice.

Because we cannot say that any of these conditions
apply under the facts of this case, there is no basis for
disturbing the well-reasoned opinion of the Board and it is
therefore affirmed.

ALL CONCUR.

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