

Commonwealth Of Kentucky

Court Of Appeals

NO. 1998-CA-000794-WC

TROVER CLINIC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
ACTION NO. 94-044877

ANNIE J. MOORE;
ROBERT L. WHITTAKER, Director of
SPECIAL FUND; RONALD W. MAY,
Administrative Law Judge; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: HUDDLESTON, KNOX and MILLER, Judges.

HUDDLESTON, Judge. Trover Clinic seeks review of a March 2, 1998, opinion of the Workers' Compensation Board affirming the decision of an Administrative Law Judge that Trover Clinic is responsible for Annie J. Moore's psychological condition as the result of a physical injury she sustained while in its employment. We have reviewed the arguments advanced on appeal in accordance with the standard established in Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 735 (1992). Since the Board has adequately set forth the salient facts and correctly applied pertinent law, we adopt the Board's opinion as our own.

The Trover Clinic ("Trover") appeals from the decisions of Hon. Ronald W. May, Administrative Law Judge

("ALJ"), rendered September 29, 1997 and from his order dated October 29, 1997 overruling its petition for reconsideration. The issues on appeal are the compensability of Annie J. Moore's ("Moore") psychological condition and whether the ALJ abused his discretion at the hearing when he reached a diagnosis of a psychological condition and reopened discovery.

Moore is 42 years of age with an 11th grade education and has obtained a GED. She has no specialized or vocational training. Her work history includes employment as an x-ray assistant and as a machine operator in sewing factories. Since 1976, Moore has worked for Trover as a surgical assistant scheduling patients for x-rays and surgery, supply clerk, and physician's assistant assisting in examinations and carrying supplies to and from patient rooms.

On September 2, 1994, Moore experienced a pain in her low back and into her left hip while assisting in lifting a patient. She later began to experience numbness and pain into her right leg. She continued working and, on October 2, 1994, she was lifting another patient and experienced a worsening of her pain. She saw a physician and was taken off work and was referred to Dr. Dominguez, who performed back surgery on December 14, 1994. Moore returned to work as a central supply clerk from June 19, 1995 through July 7, 1995 and as an

appointment clerk on July 10, 1995 for 2 ½ days. She again worked from October 27, 1995 through November 3, 1995 as a clerk scheduling surgeries and organizing files. She has not worked since November 3, 1995. In April 1996, Moore was hospitalized for psychological problems.

This claim originally came on for hearing at Madisonville, Kentucky on May 1, 1996. Based upon the ALJ's observations of Moore at the hearing and the fact that she had been hospitalized in the month prior thereto, the ALJ permitted Moore to amend her application to allege psychological injuries and evidence was reopened on that issue as well as causation and work-relatedness of any psychological problems. A supplemental pre-hearing conference was held by telephone following which the parties were given to and including May 26, 1997 in which to file concurrent briefs with the case standing submitted effective May 30, 1997.

Medical records of Trover were filed dating back to December 28, 1972 when Moore was seen for evaluation concerning anxiety with depression and hyperventilation syndrome when she was 17 years of age. The examining physician thought her problem was one of inadequate personality development. Moore was seen in 1984 for multiple complaints and anxiety was noted. She was seen on August 24, 1994 for stomach and abdominal pain and her

diagnoses included probable anxiety/depressive disorder which was clinically improved. Notes from Trover following the injuries included a May 3, 1995 treatment note stating anxiety improving, a December 15, 1995 note listing chronic back pain resulting in depression, a January 15, 1996 note indicating improving depression, and a February 13, 1996 note including the diagnoses of back pain with a chronic nature and gastritis and those same diagnoses were repeated in a visit of March 11, 1996. On April 23, 1996, the assessment was (1) history of depression with anxiety; (2) chronic back pain; and (3) esophagitis with gastritis.

Dr. Lawrence Katz, a psychiatrist, first saw Moore in the hospital on April 11, 1996 when she was admitted because of anxiety and depression. Moore was hospitalized from April 11 to April 13, 1996. Dr. Katz stated Moore's earlier records indicated some previous problems with depression and anxiety but there was nothing in those records to indicate she was suffering from any major depression prior to her work-related injury. It was his opinion that at that time Moore was suffering from major depression being between moderate to severe and was unable to perform her activities of daily living. He felt Moore's work-related injury and resulting pain and inability to work exacerbated her mental state to the point of major depression which was disabling. He noted

during her hospitalization she was in denial of having anything psychologically wrong with her. He indicated with proper treatment Moore's psychological symptoms should get better but it was difficult to say when. The usual course of a major depression is about six months but it may go into years and it can become recurrent.

Dr. Robert Granacher, a psychiatrist, examined Moore on June 12, 1996. MMPI testing revealed a classic chronic pain pattern and no evidence of mental illness. He noted Moore did seem to have painful condition [sic] but it was not presently translated into a mental problem. Dr. Granacher stated he found no evidence of mental disorders as a result of the alleged work-related injury and was unable to identify any personality disorder. He did not believe Moore's mental condition would prevent her from working in any way. He stated Moore's records document at least one and one-half years of mental illness prior to her work-related injury. He thought Moore was suffering from mental disorder earlier but had no significant mental disorder at the time of his examination. He thought a more proper description of her condition would be a somatization disorder rather than major depression. Moore's tests on MMPI produced a valid result and the pattern was consistent with chronic pain syndrome.

Wayne Fuller, a psychologist, reviewed the report of Dr. Granacher and his test results and conducted a clinical interview with Moore on October 3, 1996. It was his impression that Moore suffered from a dysthymic disorder for quite some time and had periods in which she had an adjustment disorder with depressed mood and possibly and [sic] adjustment disorder with mixed emotional features as an overlay to her dysthymia. It was his opinion that Moore's depression was related to her injury. He felt her prior condition was dysthymia because she had been able to work with that condition. It was his opinion that Moore was not able to function occupationally due to the combination of her pain disorder and her major depression.

After summarizing the evidence, the ALJ entered the following finding relevant to this appeal:

16. The ALJ is persuaded that prior to the injuries of September 2, 1994 and October 2, 1994, plaintiff was suffering from a pre-existing dysthymic disorder and/or somatization disorder that was episodic in nature but was not vocationally disabling. The ALJ is further persuaded that the work related injuries, surgery and resulting pain exacerbated the pre-existing disorder resulting in a major depression that complicated and interfered with plaintiff's ability to cope with the physical effects of her injuries and contributed to and prolonged the course of her recovery and her period of temporary total disability. The evidence is further persuasive that plaintiff has responded favorably to treatment and while continuing further treatment may be necessary to prevent a recurrence of her depression, that her depression was no longer contributing to her vocational disability as of June 12, 1996 being the date she was examined by Dr. Granacher. Accordingly, the ALJ finds that

plaintiff was temporarily totally disabled from October 5, 1994 to June 8, 1995 (being the date Dr. Dominguez reported plaintiff was at maximum medical recovery from the physical effects of her injury) and again from November 3, 1995 to June 12, 1996.

In response to Trover's petition for reconsideration, the ALJ entered the following:

A person may suffer from anxiety and mild depression that can be considered medically active but not vocationally disabling. Indeed, psychiatrists often tell us that a person may have a psychiatric impairment of up to 10% whole body but still be considered normal within the context that there is no vocational disability. Such a person may suffer from some unusual or greater stress which aggravates the pre-existing "medically active" but non-disabling condition into a major depression until appropriately treated. The ALJ believes this is what occurred to plaintiff as indicated in paragraph 16 of the decision dated September 29, 1997.

On appeal, Trover argues the ALJ did not use the proper standard in determining whether the psychological condition was compensable. Trover argues the ALJ found Moore's psychological condition pre-existed her alleged physical injury and was either exacerbated or aggravated by that injury and, therefore, the ALJ implicitly found the psychological condition was not compensable. Trover argues Moore must prove that the alleged psychological condition was the direct result of her alleged injury and not merely an exacerbation or aggravation [sic] an existing condition. Trover contends the evidence indicated the psychological condition was not work-related and therefore even the award of medical benefits was improper.

Moore had the burden of proving each of the essential elements of her claim. Snawder vs. Stice, Ky. App., 576 S.W.2d 276 (1979). Where the party who does not bear the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the ALJ's decision is supported by substantial evidence. Wolf Creek Collieries vs. Crum, Ky. App., 673 S.W.2d 735 (1984). Substantial evidence is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer vs. B. F. Goodrich Chemical Co., Ky., 474 S.W.2d 367 (1971). It is not enough for Trover to show that there is some evidence that would support a contrary conclusion. McCloud vs. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). As long as the ALJ's decision is supported by substantial evidence, we may not reverse. Special Fund vs. Francis, Ky., 708 S.W.2d 641 (1986).

The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence. Paramount Foods, Inc., vs. Burkhardt, Ky., 695 S.W.2d 418 (1985). Where the evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt vs. Bugg Brothers, Ky., 547 S.W.2d 123 (1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total

proof. Caudill vs. Maloney's Discount Stores, Ky., 560 S.W.2d 15 (1977). Furthermore, this Board may not substitute its judgment for that of the ALJ in questions of fact. KRS 342.285(2).

The definition of injury in KRS 342.0011(1) which applies to this claim excludes psychological, psychiatric, or stress-related changes in the human organism unless they are the direct result of a physical injury. The question here is whether there is substantial evidence of record to find Moore's major depression was a direct result of the work injury and/or its residuals. Dr. Katz found no evidence of major depression prior to her work-related injury. Wayne Fuller, the psychologist, indicated Moore's prior condition was dysthymic disorder, which is a different diagnosis from major depression. Fuller indicated Moore has been able to work with dysthymia but was unable to function occupationally due to the combination of her pain disorder and her major depression. We believe the evidence from Fuller and Dr. Katz is substantial evidence which would support a finding that the major depression was the result of the work injury and its residuals. Although the ALJ did not use the words "direct result," it is sufficiently clear from his Opinion and from the order concerning the petition for reconsideration that he considered the major

depression to be the direct result of the physical injury and its residuals. We therefore affirm.

Trover also argues the ALJ abused his discretion at the hearing when he reached a diagnosis of a psychological condition in the absence of any evidence to support that finding. Following Moore's testimony at the hearing, the ALJ conferred with the attorneys. The ALJ indicated it was obvious to him that Moore had an emotional condition and was totally disabled on that day but he was unable to determine how much of it was the result of physical causes and how much was the result of emotional causes. The ALJ indicated he did not wish to require Trover to pay any amount of disability that Moore's physical disabilities would be enhanced by the psychological condition if it was not work-related nor did he wish to grant Moore an award of benefits less than she might be entitled to if the condition were work-related. The ALJ has wide discretion in controlling the taking of proof and the flow of cases before him. Cornett vs. Corbin Materials Inc., Ky. 807 S.W.2d 56 (1991). Abuse of discretion has been defined, in relation to the exercise of judicial power, as that which "implies arbitrary action or capricious disposition under the circumstances, at least in unreasonable and unfair decisions." See Kentucky National Park Commission vs. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945). Clearly,

the ALJ did not wish either party to be prejudiced with relation to the psychological claim. The ALJ crafted what he believed to be the most expeditious means of handling the psychological claim by reopening discovery. We find no abuse of discretion by the ALJ in this claim.

Accordingly, the decision of Hon. Ronald W. May, Administrative Law Judge, is hereby **AFFIRMED** and this appeal is **DISMISSED**.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

John C. Morton
Samuel J. Bach
MORTON & BACH
Henderson, Kentucky

BRIEF FOR APPELLEE
ANNIE MOORE:

Thresa N. Taylor
VAUGHN & HINTON
Madisonville, Kentucky

BRIEF FOR APPELLEE
SPECIAL FUND:

Joel D. Zakem
LABOR CABINET
Louisville, Kentucky