

Commonwealth Of Kentucky

Court Of Appeals

NO. 1999-CA-002228-WC

JENNIFER STEBBINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-095972

JEFFERSON COUNTY BOARD OF EDUCATION;
HON. THOMAS A. NANNEY, ADMINISTRATIVE
LAW JUDGE; ROBERT L. WHITTAKER,
DIRECTOR OF SPECIAL FUND; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: HUDDLESTON, JOHNSON AND SCHRODER, JUDGES.

JOHNSON, JUDGE: Jennifer Stebbins has filed a petition for review of a decision of the Workers' Compensation Board claiming that the Board erred in ruling that her claim for permanent disability benefits was not supported by evidence that compelled the ALJ to find in her favor. Having concluded that the Board has not

committed error in assessing the evidence so flagrant as to cause gross injustice,¹ we affirm.

Stebbins sustained a work-related injury on May 22, 1996. At the time of her injury, she was 51 years old and held a masters degree in education. Stebbins was employed by the Jefferson County Board of Education for nearly thirty years. During the first nine years of her employment she worked as a elementary school teacher and thereafter, as a diagnostic and educational tester for disabled students. The conditions of her employment required that she travel between schools in order to administer the students' tests. Although the position required that she remain seated most of the time, she was required to carry materials from location to location.

While traveling between two elementary schools for the purpose of delivering some papers, Stebbins's vehicle was rear-ended while stopped at a traffic light. Several hours after the collision, Stebbins went to the Baptist East Hospital emergency room. The radiographs taken at that time were negative and Stebbins was released with a prescription for pain pills and muscle relaxers.

On May 28, 1996, Stebbins visited her general practitioner, Dr. Robert Ellis, who recommended that she remain home from work, and rest, for a week or so. Thereafter, on July 11, 1996, Dr. Ellis had a CT scan performed on Stebbins's lumbar spine. Dr. Dennis Jankowski interpreted the results and opined

¹Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

that she had an annular disc bulging at L4-5 and broad base bulging or protrusion and spinal stenosis at L5-S1.

Dr. Ellis then referred Stebbins to neurosurgeons, Dr. Paul Forrest and Dr. David Changaris. Following three or four visits, the doctors released Stebbins from their care.

At the commencement of the 1996-97 school year, Stebbins returned to work and continued to work until late October 1996. On January 14, 1997, Stebbins was examined by Dr. John Guarnaschelli, who was of the impression that the motor vehicle accident precipitated radioculopathy involving both the cervical and lower lumbosacral spine. He recommended conservative treatment without surgical intervention. Dr. Guarnaschelli referred Stebbins to Dr. Ellen Ballard, and released her after one visit. From October 1996, through April 1997, Stebbins continued to receive workers' compensation benefits in the form of temporary total disability payments.

Throughout 1997, Stebbins was treated by both Dr. Ellis, her general practitioner, and Dr. Ballard, a psychiatrist. Dr. Ballard's records indicate that Stebbins had attained maximum medical improvement on July 7, 1997. At that time, Dr. Ballard assessed a 10% impairment to Stebbins's lumbar spine and a 5% impairment to her cervical spine. Accordingly, Dr. Ballard diagnosed Stebbins as having sustained a total impairment of 15% under the AMA guidelines.

Stebbins returned to work at the commencement of the 1997-98 school year and worked a fairly regular schedule until January 1998, when she injured herself at home while bending over

to pick up a crate. As a result of this incident, Stebbins remained off work for two weeks. Thereafter, she returned to work until March 1998, at which time she suffered from what she perceived to be heart-related problems.² She has not returned to work since that time.

On April 22, 1998, a lumbar MRI was performed on Stebbins. Dr. Robert Elliott interpreted the results and concluded: "Negative lumbar MRI exam, except for minor degenerative changes in the L4-5 and L5-S1 discs. No focal disc herniation and/or spinal stenosis is evident." An addendum report by Dr. Robert Buse, comparing the 1998 results with an October 1996 study, found no significant change since the earlier exam other than perhaps a slight interval increase in the L5-S1 disc bulge.

At Dr. Ballard's request, an FCE was performed on Stebbins in May 1998. The results of this exam indicated that Stebbins could perform work in the light to medium categories. The FCE report further indicated that Stebbins's job classification with the School Board was listed as "light work."

At the School Board's request, Stebbins was evaluated on August 5, 1998, by Dr. James Harkess, an orthopaedic surgeon. Dr. Harkess performed an extensive review of Stebbins's medical records in addition to performing a physical examination and reviewing all radiographs, CT scan and MRI film. The sum of his evaluation found "no evidence of significant organic disease" in

²Stebbins conceded that her heart symptom was not work-related.

either Stebbins's hips or spine. The doctor opined that, at most, the motor vehicle accident may have triggered Stebbins's underlying psychiatric disease. Although, Dr. Harkess concluded that her condition was partially due to the arousal of a pre-existing, dormant, non-disabling psychoneurosis, he found her impairment to be zero-percent (0%) and stated that there was no need to restrict her work activities as a result of the injury or its residual effects. Rather, Dr. Harkess recommended that Stebbins be seen by a psychiatrist.

Stebbins testified that she suffers from chronic headaches in the back of her cranium, as well as constant neck, lower back, hip and leg pains. She stated that she is capable of driving, performing light house chores, and cooking.

In a March 28, 1998, opinion, the administrative law judge (ALJ), having evaluated this evidence, concluded that Stebbins did not suffer an injury of appreciable proportions, to wit:

1. There is no doubt that the plaintiff was involved in a motor vehicle accident on May 22, 1996. I further believe that for a limited period of time after this accident, the plaintiff would certainly have suffered from some low back and cervical discomfort. However, based upon my overall review of the record, including plaintiff's extensive medical history with Dr. Ellis, I am unpersuaded that she has sustained any significant injury as a result of the motor vehicle accident.

While there may be some room for argument in the medical testimony as to exactly what resulted from the motor vehicle accident, I find that the report of Dr. Harkess appears to be most persuasive, even though he saw [plaintiff] for the purpose of evaluation only. Nevertheless, he indicates

that he finds no basis for any finding of a significant organic disease or condition in the plaintiff's spine or hips. While there was some evidence of mild degenerative changes in the lumbar spine and cervical spine, Dr. Harkess did not believe that the motor vehicle accident produced any impairment and was certainly not the cause of her continuing complaints. He essentially believed that plaintiff is suffering from conditions which are psychogenically determined and that her psychoneurosis is of a long-standing nature.

Having determined that the plaintiff has sustained no significant impairment under the AMA Guidelines, I am unpersuaded that she has sustained any permanent occupational loss as a result of the motor vehicle accident of May 22, 1996. She has received temporary total disability benefits and has been paid medical for what I consider to be a temporary condition in the nature of a low back and cervical strain resulting in no permanent occupational disability. I find no basis for the award of further benefits.

Stebbins appealed the ALJ's adverse decision to the Board, which in a 2-1 decision affirmed. In her petition for review, Stebbins, essentially, raises the same issues before this Court as were raised before the Board. She believes the medical evidence requires a determination that the ALJ's decision was arbitrary. In support of her position that the ALJ erred in adopting Dr. Harkess' opinion, Stebbins maintains Dr. Harkess' conclusions regarding the source, extent, and nature of her injuries are solely subjective. She claims that in light of her medical history and the opinions of her treating physicians, Dr. Harkess' conclusions are not supported by the record.

It is this Court's duty is to determine whether "the Board has overlooked or misconstrued controlling statutes or

precedent, or committed error in assessing the evidence so flagrant as to cause gross injustice.”³ In affirming the ALJ, the Board correctly observed that the ALJ, as the sole arbiter of the weight and credibility to be accorded testimony, may rely in whole or in part upon any party’s proof, and, may in fact, pick and choose from the evidence even within a given witness’s testimony.⁴ We accept the Board’s summary of the law in this regard:

When, as here, the party with the burden of proof is unsuccessful before the ALJ, we must view the evidence to determine whether it compelled a contrary result. Special Fund vs. Francis, Ky., 708 SW2d 641 (1986). . . . Compelling evidence is evidence that is so overwhelming that no reasonable person could [] fail[] to be persuaded by it. Reo Mechanical vs. Barnes, Ky.App., 691 SW2d 224 (1985). Stebbins believes that this is just such a circumstance. She argues that it is totally unreasonable for the ALJ to have relied upon the findings of Dr. Harkess in reaching a conclusion that there is no permanency related to the work-related automobile accident. Stebbins directs our attention to the fact that she was seen for approximately two years by a variety of physicians prior to having been seen by Dr. Harkess, none of whom considered the condition to be psychologically related.

In spite of Stebbins’s arguments and recognizing that another ALJ may have reached a different conclusion, our evaluation must be limited to determining whether the ALJ was within his authority in relying upon the testimony of Dr. Harkess. Smyzer vs. B.F. Goodrich Chemical Co., Ky. 474 SW2d 367 (1971)

³Western Baptist Hospital, supra.

⁴Caudill v. Maloney’s Discount Stores, Ky., 560 S.W.2d 15 (1977).

Stebbins also questions the ALJ's reliance upon an evaluating physician as opposed to her treating physicians and further questions the authority of Dr. Harkess to even offer opinions concerning psychoneuroses. However, the courts have consistently held that physicians may offer [an] expert opinion which constitutes substantial evidence and that no greater emphasis should be placed upon a treating physician than an evaluating physician. See Yocum vs. Emerson [Electric], Ky.App., 584 SW2d 744 (1979) Further, while Dr. Harkess indicated that there may have been some triggering of Stebbins's pre-existing problems as a result of the automobile accident, the aggravation of an already existing condition need not be considered compensable. Calloway County Fiscal Court vs. Winchester, Ky., 577 SW2d 216 (1977). Here, the ALJ acknowledged that there was some relationship between the automobile accident and the need for Stebbins to be off work for a period of time. He confirmed the payment of temporary total disability benefits. However, it is clear that the ALJ's opinion was to the effect that Dr. Harkess[,] in stating that the work event resulted in no occupational impact[,] was persuasive. Within the ALJ's right to pick and choose from the evidence and determine that which he believes to be more credible in reaching his conclusion, it cannot be said that there was compelling evidence to the contrary. McCloud vs. Beth-Elkhorn Corp., Ky., 514 SW2d 46 (1974) As we frequently note, when there is conflicting evidence it generally cannot be said that there is compelling evidence for a specific conclusion. Pruitt vs. Bugg Bros., Ky., 547 SW2d 123 (1977).

We believe the Board accurately reviewed and summarized the ALJ's decision. As the Board acknowledged, the ALJ, as fact-finder, retains the sole authority to ascertain the weight, credibility, substance and inferences to be drawn from the

evidence.⁵ Where the medical evidence is conflicting, the ALJ has the exclusive authority to determine whom to believe.⁶ Moreover, the probative value of the evidence is by no means determined by the number of doctors espousing either one theory or another.⁷ The Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward A. Mayer
Louisville, Kentucky

BRIEF FOR APPELLEE, JEFFERSON
COUNTY BOARD OF EDUCATION:

Michelle Turner
Louisville, Kentucky

BRIEF FOR APPELLEE, SPECIAL
FUND:

David R. Allen
Frankfort, Kentucky

⁵Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985).

⁶Pruitt, supra.

⁷McCloud, supra.