

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-001461-WC

KING'S DAUGHTERS' MEDICAL CENTER

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-95-33201

PENELOPE S. CLARK; HON. BRUCE
COWDEN, JR., ADMINISTRATIVE LAW
JUDGE; SPECIAL FUND; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: EMBERTON, GUIDUGLI AND JOHNSON, JUDGES.

JOHNSON, JUDGE: King's Daughters' Medical Center petitions for review of an opinion of the Workers' Compensation Board rendered on May 12, 2000, which affirmed the decision of the Administrative Law Judge that found Penelope Clark to have a permanent partial occupational disability as the result of an injury she sustained to her back while employed by the Medical Center. Having reviewed the record and the applicable law and

having concluded that the Board's opinion is supported by substantial evidence, we affirm.

Penelope Clark, who was born in April 1948, had been employed by the Medical Center since 1985 in a variety of positions, including nurse's aid, rehabilitation technician, and dietary aide. She has a 10th grade education with some vocational training and prior employment as a cashier in a grocery store and a department store. On February 16, 1995, she injured her back while lifting a case of napkins from an upper shelf in the stockroom. She did not seek immediate medical treatment but reported the incident the next day and attempted conservative treatment at home. Approximately a week later, she was seen by a physician at the Medical Center's industrial medicine department, who prescribed physical therapy. Although Clark experienced increasing pain in her back and leg, she continued to work until March 10, 1995. However, she stopped working on that date and has not returned to work. The Medical Center paid Clark temporary total disability benefits from March 10 to August 31, 1995, and certain medical expenses on her behalf.

On March 28, 1995, Clark saw Dr. Phillip Shields, a neurosurgeon, complaining of pain in her lower back and left leg and some numbness in the her left foot. She indicated that she had been experiencing these problems since the date of her injury in February. Based on her description of the incident, Dr. Shields ordered an MRI, which revealed a concentric bulge and a small, left herniation of the disc at the L4-L5 level with left

radiculopathy impacting the nerve root. He initially prescribed physical therapy and epidural steroid injections; but later, when her symptoms did not improve, he recommended surgery. On May 30, 1995, a lumbar myelogram and CT scan also indicated a moderate degenerative bulge of the disc on the left side at the L4-L5 level. On June 27, 1995, Dr. Douglas Deitch performed a nerve conduction study and EMG (electromyography) upon referral from Dr. Shields. Dr. Deitch reported chronic denervation with reinnervation potentials on the left of the nerve root at the L4-L5 level, but no active denervation. He also noted that the study's results were consistent with radiculopathy at these levels and evidence of a stretch injury.

On July 12, 1995, Clark, upon referral by the workers' compensation carrier, was seen by Dr. John Gilbert, a neurosurgeon. He stated that his review of the previous MRI indicated a very small rupture of the disc at the L4-L5 level with perhaps some lateral recessed stenosis and hypertrophic change of the articular facet. However, he did not recommend surgery at that time since he did not believe that it would help Clark's back pain and since he believed there was only a 50% chance that it would relieve her left leg pain. He suggested that she learn to live with the pain and return to work if she could. Based on Dr. Gilbert's opinion, the workers' compensation carrier declined to pay for spinal surgery.

On August 11, 1995, Clark filed her workers' compensation claim seeking total disability benefits based primarily on the reports of Dr. Shields.¹

On August 30, 1995, Clark was examined by Dr. Paul Craig, an occupational medicine specialist, for purposes of offering a second opinion on her injury claim. He opined that his review of the myelogram indicated some mild radiculitis in Clark's left leg at the L4-L5 level but he questioned whether there was a rupture or herniation. He believed that Clark was exaggerating her symptoms and that she could still perform jobs in the light to medium physical exertion category consistent with her employment history. Dr. Craig suggested that Clark's physical complaints were influenced by her psychological condition of depression and were not supported by objective medical tests. He recommended a further functional capacity evaluation be conducted to determine the extent of her symptoms and her physical limitations.

A subsequent functional capacity evaluation conducted on September 12, 1995, indicated that Clark's lifting capacity fell within the sedentary (10 pound limit) physical demand level; her reaching and bending activities were performed at a slow rate with high levels of pain; she had decreased abdominal and hip musculature strength placing her at risk for re-injury; and, she scored high on the pain criteria. Based on these findings, the

¹The Special Fund was subsequently joined as a party based on Dr. Shields' testimony that Clark's degeneration disc condition was aroused into disabling reality by the February 1995 injury.

evaluator stated Clark could benefit from a work hardening program to facilitate her possible return to work.

On August 28, 1996, Clark was examined by Dr. Phillip Tibbs, a professor of neurosurgery, and Dr. David Gater, an assistant professor of physical medicine and rehabilitation, at the University of Kentucky. Clark told Drs. Tibbs and Gater that her symptoms had not been alleviated by the conservative treatment attempted by Dr. Shields. Dr. Tibbs reported that a lumbar myelogram and CT scan indicated Clark had a herniated disc at the L5-S1 level with cutoff at S1 and swelling at the nerve root at the S1 level. He recommended laminectomy surgery based upon a herniation of the disc on the left side at the L5-S1 level with left S1 radiculopathy.

Despite the recommendations for surgical intervention by Dr. Shields and Tibbs, the Medical Center's workers' compensation carrier would not agree to pay for this treatment until sometime later. Clark continued to see Dr. Shields every six months with continued complaints of pain in her lower back and left leg, but his treatment of her was limited to prescribing pain medication. In a letter dated August 5, 1997, Dr. Shields stated that Clark suffered from moderate to severe left L4-L5 radiculopathy. He also said that under the American Medical Association guidelines using the DRE model, her condition constituted a 10% functional impairment. In November 1998, an updated MRI performed in conjunction with her visits to Dr. Shields indicated that Clark continued to have impingement on the

nerve root at the left L5 level due to a bulging disc at the L5-S1 level with central spinal and neural foraminal stenosis.

In May 1997, Clark also saw Dr. William Short, a family practitioner, for depression and insomnia. In December 1998, Dr. Short also treated Clark for swelling in her left leg, but he was unable to determine a cause at that time.

On September 24, 1999, Clark was evaluated by Dr. James Millison, a chiropractic specialist. He reviewed her past medical records and performed a physical examination. At that time, Clark identified constant pain in her lower back, left hip and leg, and cramping. Dr. Millison stated that Clark appeared to have good range of motion with no clinically demonstrable evidence of spinal stenosis. He concluded that she should be able to perform light to medium physical demand level jobs. He believed that she suffered from a musculoskeletal condition with pain localized to the L5-S1 level of the lower back that could possibly be treated with medication and physical therapy. Dr. Millison indicated, however, that Clark's subjective complaints were consistent with his findings and her description of the February 1995 injury.

Following the completion of discovery, which included Clark's deposition and the depositions of Drs. Shields, Tibbs, and Millison, the case was submitted to the ALJ without a formal hearing. On December 13, 1999, the ALJ rendered an opinion wherein he found that Clark had sustained a work-related injury and that she was suffering from a 50% occupational disability. The ALJ found that the evidence supported Clark's complaints of

physical pain from an injury to her lower back. He also found that Clark's testimony, the functional capacity evaluations, and medical evidence indicated that she was not permanently totally disabled, but that an occupational disability of 50% was appropriate given her age, education level, and prior work experience. On appeal, the Board found the ALJ's opinion to be supported by substantial evidence in the record and affirmed. This appeal followed.

In a workers' compensation action, the employee bears the burden of proving every essential element of a claim.² As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence.³ Similarly, the ALJ has the sole authority to determine the weight and inferences to be drawn from the evidence.⁴ The fact-finder also may reject any testimony and believe or disbelieve various parts of the evidence even if it came from the same witness.⁵ When the decision of the fact-finder is in favor of the party with the burden of proof, the issue on appeal is whether the ALJ's decision is supported by substantial evidence, which is defined

²Magic Coal Co. v. Fox, Ky., 19 S.W.3d 88, 96 (2000); Jones v. Newberg, Ky., 890 S.W.2d 284, 285 (1994); Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979).

³Square D Co. v. Tipton, Ky., 862 S.W.2d 308, 309 (1993); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

⁴Miller v. East Kentucky Beverage/Pepsico, Inc., Ky., 951 S.W.2d 329, 331 (1997); Luttrell v. Cardinal Aluminum Co., Ky.App., 909 S.W.2d 334, 336 (1995).

⁵Magic Coal, *supra* at 96; Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999); Halls Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327, 329 (2000).

as some evidence of substance and consequence sufficient to induce conviction in the mind of a reasonable person.⁶ The ALJ has broad discretion in determining the extent of occupational disability.⁷ Once the medical evidence establishes the existence of an injury, lay testimony of the claimant is competent on the extent of disability.⁸ Upon review of the Board's decision, the appellate court's function is limited to correcting the Board "only where the the [sic] 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."⁹

In the case sub judice, several diagnostic tests were performed to determine whether Clark's subjective complaints were caused by problems with her spine. The results of myelograms conducted in March 1995, May 1995, August 1996, and November 1998, all indicated that Clark suffered from a bulging or herniated disc impacting the left side of her spinal nerve root. The ALJ also referred to Dr. Millison's testimony that Clark's

⁶Whittaker, supra at 481-82; Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

⁷Cal Glo Coal Co. v. Mahan, Ky.App., 729 S.W.2d 455, 458 (1987); Thompson v. Fischer Packing Co., Ky.App., 883 S.W.2d 509, 511 (1994).

⁸Hush v. Abrams, Ky., 584 S.W.2d 48 (1979); Newberg v. Sleets, Ky.App., 899 S.W.2d 495, 498 (1995).

⁹Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). See also Huff Contracting v. Sark, Ky.App., 12 S.W.3d 704, 707 (2000); Duff Truck Lines, Inc. v. Vezolles, Ky.App., 999 S.W.2d 224, 227 (1999).

symptoms were consistent with an injury that she could have sustained given her description of the February 1995 incident.

The Medical Center argues, as it did before the Board, that Clark did not sustain her burden of proving work-relatedness. It points to apparent discrepancies in the medical evidence concerning the exact location of any injury to the discs in Clark's spine that was caused by the February 1995 incident. More specifically, it notes that the earlier 1995 myelograms and Dr. Shields's reports discuss a radiculopathy at the L4-L5 level, while Dr. Tibb's report and Dr. Millison's report refer to radiculopathy at the L5-S1 level. The Medical Center contends that any alleged injury Clark may have sustained in 1995 is now asymptomatic and any injury at the L5-S1 level is not work-related.

While we agree that there may be some discrepancies in terminology used by the various medical experts, we do not believe that the medical evidence should be interpreted to involve two separate, unrelated conditions. As Dr. Millison stated in his testimony, "there is an objectively known disc present. To what level bulge or herniation is (sic) matter of interpretation, it appears, between the doctors." While the interpretations as to the disc bulge or herniation sometime vary between the L4-L5 and L5-S1 level, they consistently diagnose impingement of the nerve root on the left side at the L5 level. In fact, a November 1998 myelogram indicated bulging discs at both the L4-L5 and L5-S1 levels with central spinal and neural foraminal stenosis. While Dr. Gilbert disagreed with the

recommendation for surgery, he still opined that Clark had a small ruptured disc at the L4-L5 level. In addition, Clark's subjective symptoms of left extremity sciatica remained consistent from the date of the February 1995 incident.

The Medical Center also contests the ALJ's decision that based on Clark's medical history that Clark's injury was work-related. It maintains that the records of Clark's family physician, Dr. Michele Bagley, from 1992 and 1993 reveal that she had chronic problems with her left leg, suggesting that the February 1995 incident did not cause her sciatica. We disagree. Dr. Bagley's records indicate that Clark complained of swelling and pain in her leg but that it subsided with no clear etiology. Clark's complaints of left hip and leg pain radiating to her foot with some numbness are different in degree and description from the earlier complaints. Merely because she experienced pain in her left leg some three years prior to the work incident does not conclusively establish that the previous problems and the problems following the work incident were due to the same cause. In fact, Dr. Shields testified that Clark's spinal radiculopathy would not have caused swelling in her leg. Given the ALJ's authority to determine the weight and credibility of the evidence, we cannot say that his decision that Clark had sustained her burden of establishing work-relatedness was not supported by substantial evidence.

The Medical Center also challenges the ALJ's finding as to the extent of Clark's disability. It asserts that all the medical experts opined that Clark can return to her previous

employment or other employment at the same physical demand level, but that she has made no effort to return to work.

In his decision, the ALJ relied on Clark's testimony, her age, education and prior work experience, and the medical evidence that she suffers from a small herniated disc with radiculopathy. Clark testified that she is able to regularly walk approximately 1.5 miles and to perform light housework. However, she stated that she experiences constant low back and leg pain, must take frequent breaks to rest, and cannot stand or sit for very long periods. Although Dr. Millison indicated that Clark should be able to perform light to medium level jobs, he also stated that her subjective complaints were consistent with the type of injury she sustained. A functional evaluation report in September 1995 indicated decreased trunk range of motion, decreased strength in the bilateral shoulder musculature, decreased sensation in the L4 dermatome, and decreased strength and postural changes that may place her at a risk for re-injury. The Dynamic Physical Capacity Evaluation indicated a sedentary physical demand level, which was below the lifting requirements of her job at the Medical Center. Furthermore, Dr. Shields assigned Clark a functional impairment rating of 10% for the whole body based on the DRE model of the AMA guidelines and stated that the delay had lessened the benefits of any surgical treatment.

As the Court stated in Rowland, "[a]llthough a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for

reversal on appeal.”¹⁰ In the current case, the evidence of the extent of Clark’s disability was conflicting. However, her testimony was relevant and the ALJ has the authority to believe or disbelieve any portion of the evidence. The ALJ concluded that while Clark was not permanently totally disabled, her limitations justified an occupational disability rating of 50%. The ALJ can “translate medical estimates of functional impairment into smaller or larger percentages of occupational disability”¹¹ Again, we believe this finding is supported by substantial evidence. In conclusion, we are not persuaded that the Board overlooked or misconstrued controlling statutes or precedent, or committed a flagrant error in assessing the evidence sufficient to cause gross injustice.

For the above stated reason, we affirm the opinion of the Workers’ Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Pamela H. Potter
Ashland, Kentucky

BRIEF FOR APPELLEE, PENELOPE CLARK:

No brief filed.

BRIEF FOR APPELLEE, SPECIAL FUND:

Joel Zakem
Frankfort, Kentucky

¹⁰998 S.W.2d at 482 (citing McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974)).

¹¹Commonwealth, Department of Highways v. Gay, Ky., 472 S.W.2d 508, 510 (1971).