

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-000045-WC

CAROL HARGAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-96-91482

GREEN COUNTY BOARD OF EDUCATION;  
SPECIAL FUND; HON. DONNA H.  
TERRY, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING  
\*\* \*\*

BEFORE: GUDGEL, Chief Judge; BUCKINGHAM, and McANULTY, Judges.

McANULTY, JUDGE: Appellant, Carol Hargan ("Hargan"), appeals from a December 6, 2000 opinion by the Kentucky Workers' Compensation Board ("Board"). The Board affirmed an opinion and award rendered by the Hon. Donna H. Terry, Administrative Law Judge ("ALJ") that awarded Hargan medical benefits for injuries suffered while employed by the Green County Board of Education.

When reviewing decisions of the Workers' Compensation Board, our function "is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence

so flagrant as to cause gross injustice." Daniel v. Armco Steel Company, et al., Ky. App., 913 S.W.2d 797, 798 (1995). After careful review of the record, the relevant case law, and both appellant's and appellees' briefs, we find that the ALJ did not abuse her discretion and that the ALJ's opinion and award was supported by substantial evidence. Therefore, we affirm.

Carol Hargan worked for the Green County Board of Education ("Board of Education") as a cafeteria worker. Hargan served food and washed dishes as part of her duties as a cafeteria worker. On May 14, 1996, while at work, Hargan lifted a box of fruit and experienced pain in the left side of her neck, her left shoulder and low back. Hargan continued to work for the Board of Education from May, 1996, to December, 1999.

On May 21, 1996, Hargan began treatment for her injuries with Dr. Jerome Dixon, D.O., an osteopath. Dr. Dixon diagnosed Hargan with left sacroiliac strain/torsional somatic dysfunction; left greater trochanteric bursitis; left shoulder myositis/tendonitis and left lateral epicondylitis (mild). Dr. Dixon treated Hargan with medication and osteopathic manipulation. He placed temporary work restrictions upon Hargan of no lifting greater than ten pounds and no pushing or pulling. On August 14, 1996, Dr. Dixon opined that Hargan had reached maximum medical improvement ("MMI") and released her to return to work without restrictions. Dr. Dixon continued to treat Hargan who continued to complain about pain in her neck and shoulder as well as occasional pain in her low back. Although, Dr. Dixon felt that Hargan was responding well to conservative treatment,

on October 18, 1996, he placed new work restrictions upon Hargan of no lifting greater than thirty-five pounds, no reaching and no working above shoulder level. These restrictions remained in place, and Hargan continued to work in the cafeteria, until December, 1999. On December 15, 1999, Dr. Dixon placed more stringent permanent work restrictions upon Hargan: no repetitive lifting of greater than five pounds; no lifting greater than thirty-five pounds on occasion; no reaching or working above shoulder level and no repetitive use of hands below shoulder level. Dr. Dixon opined that Hargan had reached MMI and that she was thirty-seven percent disabled according to AMA Guides. After December, 1999, Hargan did not return to work.

As part of her workers' compensation claim against the Board of Education, Hargan was required to submit to an independent medical examination. On July 6, 1999, Dr. Vickie C. Whobrey, a specialist in physical medicine and rehabilitation, examined Hargan. Prior to the examination, Hargan completed a questionnaire to help Dr. Whobrey better diagnose Hargan. The questionnaire contained a diagram of the human body for Hargan to indicate and to describe where she felt pain. Hargan circled the left side of the neck and the left shoulder but did not circle the low back. Hargan explained to Dr. Whobrey that she had pain in the left side of her neck and left shoulder and occasional pain in her low back and hips that was not bad. In her independent medical report, Dr. Whobrey stated that Hargan's low back symptoms had been resolved with conservative treatment. In both her report and later in her deposition, Dr. Whobrey agreed

that Dr. Dixon's original restrictions upon Hargan were appropriate. However, after examining Hargan, Dr. Whobrey found nothing that would justify Dr. Dixon's last and most stringent work restrictions. Dr. Whobrey diagnosed Hargan with chronic myofascial pain of the left shoulder girdle muscle. She did not diagnose Hargan's low back since Hargan did not report any pain there at the time of the examination. Further, Dr. Whobrey opined, according to the AMA Guides, that Hargan had suffered no permanent impairment.

Hargan presents two assignments of errors for our review. First, Hargan argues that the ALJ ignored uncontradicted medical evidence regarding her low back injury. Second, Hargan argues that the ALJ abused her discretion and was clearly erroneous by finding that Hargan had suffered no occupational disability. We will take each assignment of error in turn.

Hargan contends that both the ALJ and the Board erroneously concluded that her low back injury had been resolved because both based their conclusions upon Dr. Whobrey's examination, and Dr. Whobrey never examined nor diagnosed her low back. Therefore, the ALJ's conclusion regarding Hargan's low back was not supported by substantial evidence, and the ALJ had ignored Dr. Dixon's uncontradicted testimony regarding Hargan's low back injury. We disagree.

As claimant, Hargan bore the burden of proof before the fact-finder, the ALJ. Wolf Creek Collieries V. Crum, Ky. App., 673 S.W.2d 735 (1984); See Whittaker v. Rowland, Ky., 998 S.W.2d 479 (1999). Since Hargan, as claimant, appealed from both the

ALJ and the Board, our standard of review is whether the evidence was so overwhelming, upon review of the entire record, to have compelled a finding in the claimant's favor. Id.; See Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986); Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Further, the ALJ, not the Board and not this court, had the sole discretion "to determine the quality, character, and substance of evidence." Whittaker v. Rowland, supra at 481, quoting Paramount Foods, Inc. v. Burkhardt, supra; See Snawder v. Stice, supra. As fact-finder, the ALJ may choose to believe or disbelieve any part of the evidence presented, regardless of its source. Whittaker v. Rowland, supra at 481, quoting Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

Upon review of the record, we find that Dr. Dixon's testimony regarding Hargan's low back injury was contradicted by Dr. Whobrey. Dr. Whobrey testified that it was unnecessary for her to examine and diagnose Hargan's low back since Hargan did not indicate any pain there at the time. Dr. Whobrey reasonably relied upon Hargan's assertion that her low back pain had greatly improved under Dr. Dixon's care; therefore, Dr. Whobrey concluded, in her independent medical report, that Hargan's low back pain had been resolved through conservative treatment.

To prevail on appeal, Hargan must show that the evidence presented to the fact-finder, the ALJ, was so overwhelming that the ALJ's finding against her was unreasonable, and the evidence compelled a finding in her favor. Special Fund,

et al. v. Francis, supra at 643. As fact-finder, the ALJ had sole discretion to weigh all the evidence presented. The ALJ found Dr. Whobrey's testimony more credible than Dr. Dixon's. Given the evidence, the ALJ's opinion and award was reasonable and was supported by substantial evidence. Further, while Hargan presented evidence that may support a contrary conclusion, she presented no evidence that overwhelmingly compelled a contrary conclusion. Absent such evidence, we cannot and will not substitute our judgment for that of the ALJ's regarding the weight and character of the evidence as to questions of fact. Whittaker v. Rowland, supra at 481.

Hargan also argues that the ALJ abused her discretion and was clearly erroneous by finding that Hargan had suffered no occupational disability. Hargan contends that the ALJ misread the evidence because in the ALJ's April 27, 2000 opinion and award on page five, the ALJ stated, "it is found that Ms. Hargan could return to virtually all jobs which she performed on the date of injury."

In support of her argument, Hargan contends that Dr. Dixon's work restrictions precluded her from operating the cafeteria's dishwasher, one of her duties as a cafeteria worker. Further, since Dr. Whobrey testified she agreed that Dr. Dixon's original work restrictions were appropriate and these restrictions kept her from doing one of her duties as a cafeteria worker, Hargan could not possibly "return to virtually all jobs which she performed on the date of injury." Therefore, the ALJ conclusion was not supported by the evidence. We disagree.

As stated above, for Hargan to prevail, she must show that the evidence compelled a finding in her favor. Special Fund v. Francis, supra at 643. Hargan fails to do so. According to the record, Dr. Dixon placed work restrictions upon Hargan of no lifting greater than thirty-five pounds, no pushing or pulling and no working above shoulder level, and these restrictions remained in place until December, 1999. Hargan testified that she returned to work immediately after her injury and continued to work from May, 1996, until she left in December, 1999. Hargan testified that she performed all of her cafeteria duties, except those excluded by Dr. Dixon's restrictions, for over three years. From the evidence presented, the fact-finder determines whether a claimant has suffered any occupational disability and to what degree. Kilgore v. Goose Creek Coal Company, Ky., 392 S.W.2d 78, 79 (1965). Furthermore, the fact-finder has "great leeway" in doing so. Seventh Street Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469, 471 (1976). In the case sub judice, the ALJ's finding that Hargan had suffered no occupational disability was within the ALJ's discretion and was supported by substantial evidence since Hargan testified that she, in fact, returned "to virtually all jobs which she performed on the date of injury." Therefore, the ALJ's finding that Hargan suffered no occupational disability was not clearly erroneous.

Since Hargan presented no evidence that compelled a contrary conclusion, we cannot substitute our judgment for the ALJ's; therefore, we are compelled to affirm the opinion of the

Workers' Compensation Board and the opinion and award of the  
Administrative Law Judge.

ALL CONCUR.

BRIEF FOR APPELLANT:

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