

RENDERED: APRIL 26, 2002; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court Of Appeals

NO. 2001-CA-001871-WC

ROBERT L. WHITTAKER,  
DIRECTOR OF SPECIAL FUND

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
ACTION NO. WC-92-07327

KAY F. BROOKS;  
KENTUCKY TRANSPORTATION CABINET;  
JOHN EARL HUNT, ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

### OPINION AFFIRMING

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BEFORE: KNOPF, DYCHE, AND JOHNSON, JUDGES.

KNOPF, JUDGE. The Special Fund, through its director, Robert L. Whittaker, appeals from an August 1, 2001, opinion of the Workers' Compensation Board (Board) which affirmed in part, reversed in part, and remanded a December 21, 2000, opinion and award. In the December 21, 2000, opinion and award, Hon. John Earl Hunt, Administrative Law Judge (ALJ), granted Kay F. Brooks'

(Brooks) motion to reopen; found that Brooks had suffered a worsening of her physical condition; found that she suffered from a disabling psychological condition which became manifest as of the original settlement date, and found her totally occupationally disabled. The Board affirmed in part but reversed in part and remanded regarding the credit due the Special Fund and the employer, Kentucky Transportation Cabinet (the Cabinet), for Brooks' previous award. After review, we affirm.

Brooks worked for the Kentucky Transportation Cabinet as an executive secretary and later as an administrative manager. On March 6, 1991, Brooks injured her low back, left arm, and neck when she attempted to move a large executive desk. Brooks filed a workers' compensation claim that was settled on November 8, 1993. In the settlement agreement, Brooks received a lump sum payment of \$10,256.20 which represented a 10.4% permanent partial occupational disability for 425 weeks. The Cabinet paid \$5,538.35 of the lump sum and the Special Fund paid the remaining \$4,717.85.

On September 23, 1999, Brooks filed a motion to reopen her claim. Brooks claimed that she had been receiving treatment for her injured neck since 1991, and the Cabinet's insurance carrier had paid for the treatments. After Brooks moved to Georgia, she asked the insurance carrier to approve a new physician and to approve additional cervical treatment. However, the insurance carrier refused. The insurance carrier explained that Brooks' claim and her settlement agreement covered her low

back injury only; therefore, the carrier was not required to pay for her cervical treatment. Brooks moved to reopen her claim and argued that her cervical problems were covered by the settlement agreement and that the insurance carrier who had paid for cervical treatments for several years must continue to do so.

On August 14, 2000, Brooks filed another motion to reopen and moved to supplement her Form 101 to include psychological injury, including depression, that resulted from her physical injuries. The ALJ sustained the motion to supplement and both motions to reopen were consolidated and set for hearing. After the hearing and after both parties briefed the issues, the ALJ issued an opinion and award on December 21, 2000. The ALJ concluded that Brooks had suffered a cervical injury on March 6, 1991, and that she was entitled to medical treatment for it. The ALJ concluded that Brooks suffered from a psychological condition and that it was the result of the injuries sustained on March 6, 1991. The ALJ stated, "[a]t the time of the agreement, the plaintiff was a forty-four year old person who had 10.4% occupational disability." He then concluded that Brooks was now 100% permanently and totally disabled, pursuant to Osborne v. Johnson, Ky., 432 S.W.2d 800 (1968).

On December 28, 2000, the Special Fund filed a petition for reconsideration and argued that the ALJ failed to make a finding regarding Brooks' actual occupational disability at the time of the 1993 settlement as required by Whittaker v. Rowland, Ky., 998 S.W.2d 474 (1999). The Special Fund argued this was

important because the original award would have continued to July 25, 2000, and would have overlapped with the new award. Pursuant to Whittaker v. Rowland, the Special Fund asserted that it was entitled to a credit for the overlap. The Special Fund also requested specific findings regarding when Brooks' psychological condition became manifest because if it were present at the time Brooks filed her original claim, then she would be barred from raising it upon reopening pursuant to Slone v. Jason Coal Company, Ky., 902 S.W.2d 820 (1995).

The ALJ subsequently denied the Special Fund's motion and both the Special Fund and the Cabinet appealed to the Workers' Compensation Board. As noted above, the Board affirmed in part but reversed in part and remanded to the ALJ regarding the credit due the Special Fund and the Cabinet for Brooks' prior award from the date of the reopening through the date that the original award expired. The Special Fund, but not the Cabinet, appealed.

Upon appeal, the Special Fund raises two issues for our consideration: 1) whether Brooks met her burden of proving that a work-related psychological condition developed or increased since prior settlement and 2) whether the ALJ provided sufficient findings as to the extent of Brooks' prior occupational disability. We will address each in turn.

The Special Fund contends that Brooks failed to meet her burden on reopening of proving that her psychological disability increased and that the increase was related to the March 6, 1991,

injury. The Special Fund argues that a person cannot claim a psychological condition upon reopening if the condition existed at the time of the original claim but was not litigated. Slone v. Jason Coal Company, supra. Further, the Special Fund argues that the only medical evidence that supports the finding with regard to Brooks' psychological condition was the report of Dr. Richard Sheridan, an orthopedic surgeon. The Special Fund contends that Dr. Sheridan's report is insufficient because: 1) he is an orthopedic surgeon not a psychiatrist; 2) it does not contain findings as to when Brooks' psychological condition manifested; 3) it does not contain findings that Brooks' psychological condition was connected to her occupational disability and 4) it does not contain findings that Brooks' occupational disability has increased due to her psychological condition. In conjunction with Brooks' own testimony, however, Dr. Sheridan's report is more substantial than the Special Fund contends.

When reviewing decisions of the Workers' Compensation Board, this Court's 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, Ky, App., 913 S.W.2d 797, 798 (1995).

Furthermore, where an ALJ has found in favor of the claimant, who bears the burden of proof, which in this case is Brooks, we must determine whether the ALJ's findings were

supported by substantial evidence. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986); See Wolf Creek Collieries v. Crum, Ky. App. 673 S.W.2d 735 (1984). The Kentucky Supreme Court has defined substantial evidence as, "some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people." Smyzer v. B.F. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369 (1971). Furthermore, the ALJ, not the Board or this Court, has the sole discretion to determine the quality, character, and substance of the evidence before it. Whittaker v. Rowland, Ky., 998 S.W.2d 479, 481 (1999), quoting Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985); See Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). Also, 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).

In Dr. Sheridan's report, he stated:

In reference to her psychological impairment, I think that according to the Table on Page 301 in the **1993 AMA Guides Fourth Edition**, she is most appropriately a Class III, which is moderate impairment. I think she requires restrictions in the workplace and I have outlined those on the enclosed forms.  
Transcript of the Record, page 551.

Furthermore, Dr. Sheridan opined that Brooks suffered a 23% permanent whole-body impairment according to the AMA Guides to Evaluation of Permanent Impairment.

In support of her motion, Brooks testified at the

hearing before the ALJ. She stated that she was once a very active person but at the time of the hearing she was no longer active and felt very depressed. She testified that she felt so depressed that she could not get excited about the birth of her new granddaughter. Furthermore, she testified that the pain that she experienced had emotionally wrecked her life. Brooks explained that she rarely left her home; that she did not wish to see or be seen by anyone nor would she answer the telephone. She quite frankly admitted that most of the time she felt that she did not want to live. She further testified that she could no longer concentrate enough to read or carry on a simple telephone conversation. Transcript of the Record, pages 855-859.

As stated above, the ALJ had sole discretion to weigh the evidence and judge the credibility of witnesses. Furthermore, the Supreme Court of Kentucky has held that where medical evidence shows the actual bodily condition, lay testimony can be used to show the extent of occupational disability. Hush v. Abrams, Ky., 584 S.W.2d 48, 50-51 (1979). ALJ Hunt was within his discretion to infer from Dr. Sheridan's report that Brooks suffered a psychological condition and to infer from Brooks' own testimony that it was caused by the March 6, 1991, injury and it, along with her physical problems, caused an increase in her occupational disability.

The Special Fund also argues that Slone v. Jason Coal Company, supra, bars Brooks psychological claim. In Slone, the appellant moved to reopen his workers' compensation claim due to

a psychological condition. However, this condition existed at the time he filed his original claim, although he inexplicably did not include it. The Supreme Court of Kentucky held that a claimant could not base a reopening on a psychological condition known to the claimant during the original action but which was not litigated. Id. at 822. The case *sub judice* is distinguishable in that there is no evidence that Brooks suffered from a psychological condition at the time she filed her original claim. Rather, this case is more like Fischer Packing Co. v. Lanham, Ky., 804 S.W.2d 4 (1991), where claimant's psychological condition became manifest after the original claim and the Supreme Court found that it was a proper basis for a motion to reopen.

The Special Fund also argues that the ALJ did not comply with Whittaker v. Rowland, supra. The Special Fund contends that the ALJ did not make a finding regarding Brooks' actual degree of occupational disability as it existed at the time of the original settlement. However, as stated above, the ALJ in one sentence stated, "[a]t the time of the agreement, the plaintiff was a forty-four year old person who had 10.4% occupational disability." The Board on appeal held that this statement complied with Whittaker v. Rowland, although the Board noted that the ALJ could have stated more clearly that he found Brooks' actual degree of occupational disability to be the same as the amount for which she settled. We agree with the Board on both points.



Since the Board did not misconstrue controlling law or commit an error in assessing the evidence, and since the ALJ's decision was based on substantial evidence, we affirm the Workers' Compensation Board and the Administrative Law Judge.

ALL CONCUR.

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