

Commonwealth Of Kentucky

Court Of Appeals

NO. 2001-CA-002679-WC

LINDA SIZEMORE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-97-96402

UNITED PARCEL SERVICE; IRENE
STEEN, ALJ; WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING
** **

BEFORE: DYCHE, EMBERTON, MILLER, JUDGES.

DYCHE, JUDGE: The Administrative Law Judge (ALJ) determined that Linda Sizemore suffered work-related injuries and that, as a result, she sustained a 60 percent occupational disability. Sizemore appealed to the Workers' Compensation Board (Board), arguing, among other things, that she was totally occupationally disabled as a result of the work-related injuries, and that the ALJ erred in failing to find that she suffered a work-related injury to her right elbow. As to the issues relevant in this

appeal, the Board affirmed the ALJ's decision,¹ and we now affirm the Board.

In 1996, Sizemore was employed as an air package handler by United Parcel Service (UPS). On March 30, 1996, while in the course of her employment, Sizemore was injured when, while engaged in loading packages onto an airplane, a tug of dollies rolled over her. As a result of the accident, Sizemore incurred various injuries. According to the hospital records, Sizemore suffered, in addition to other minor injuries, a comminuted fracture of the left tibia and fibula; a comminuted fracture of the right ankle with slight displacement of fragments; and an injury to the pelvis. Sizemore's right elbow was also injured as she was being pulled from the accident scene by co-workers. Sizemore reinjured her right elbow in the summer of 1998 in a bicycle accident.

On May 4, 1999, Sizemore filed an Application for Resolution of Injury Claim with the Department of Workers Claims. Following a hearing, on April 30, 2001, the ALJ issued an opinion and award determining that Sizemore had an occupational disability of 60 percent. The opinion and order awarded Sizemore benefits of \$72.71 per week for a period not to exceed 520 weeks. Sizemore subsequently appealed the ALJ's decision to the Board; on November 14, 2001, the Board entered a decision affirming the ALJ's decision as to the issues relevant in this appeal.

¹The Board remanded the case to the ALJ on the issue of whether Sizemore was entitled to additional temporary total disability benefits.

First, Sizemore contends that the ALJ erred in determining that she was not entitled to occupational disability benefits as a result of the injuries she sustained to her right elbow in conjunction with the March 30, 1996, accident.

It is uncontroverted that Sizemore suffered a dislocated right elbow while she was being pulled from the accident scene by her coworkers. The X-rays at the initial intake indicated that Sizemore suffered a dislocation of the elbow, but there appeared to be no definite fractures at that time. The preliminary radiology report indicated right elbow posterior dislocation of the radius/ulna with respect to the humerus, and that a fracture was suspected but not identified. The dislocation was reduced, and a good alignment was obtained. X-rays subsequent to the reduction of the posterior dislocation indicated that no definite fracture was identified.

In October 1998, Sizemore was bicycling for exercise purposes and sustained a fall, landing on her outstretched right hand and reinjuring her right elbow. Medical examinations of the elbow subsequent to the bicycle accident disclosed a fracture and post-traumatic arthritis of the radial head. The radial head fracture of Sizemore's right elbow was first documented by treating physician Dr. Arthur L. Malkani subsequent to the bicycle fall. The ALJ addressed the issue as follows:

Based upon the record herein, . . . it is the finding of this ALJ that Plaintiff has failed in her burden of proof and risk of non-persuasion to show that the current right elbow problems are indeed work-related as it relates to the radial head fracture. Although, admittedly, Plaintiff did have a dislocated elbow at the time of the injury by

having her co-workers pull her by the right arm from under the wagons, there is no indication of a definite diagnosis of a fracture of her elbow at that time. It appears that Plaintiff was not complaining of right elbow problems during the time she sought treatment of her right ankle and left tib/fib fracture, and it was not until she had the accident with the bicycle in late 1998 that she started complaining of right elbow problems. Plaintiff takes the position that if the radial head was not fractured at the time of the 1996 accident, it should still be covered because she was exercising on a bicycle in 1998 and as a sequela of the 1996 accident, the right elbow should, therefore, be covered. I do not find this position to be tenable inasmuch as I find no directives which clearly establish that Plaintiff was to engage in bicycle riding on the streets as a form of physical therapy for her injuries. Even Dr. Malkani's office initially did not consider the right elbow injury to have been caused by the 1996 injury herein as is evidenced by correspondence from his office. I find persuasive Dr. Gleis' statement which indicates that just because Plaintiff had a dislocated elbow at the time of the 1996 injury, it in and of itself would not render her elbow more susceptible to a subsequent radial head fracture. Thus, Plaintiff's elbow problems are found to be unrelated to her initial elbow injury.

The fact-finder, the ALJ, rather than the reviewing court, has the sole discretion to determine the weight, credibility, quality, character, and substance of evidence and the inference to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). The ALJ has the discretion to choose whom and what to believe. Addington Resources, Inc. v. Perkins, Ky. App., 947 S.W.2d 421, 422 (1997). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it came from the same witness or the same adversary party's total proof.

Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977) . Although 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. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974).

There was conflicting evidence regarding whether the elbow fracture was related to the March 1996 work-related accident, or the October 1998 bicycle accident. In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123, 124 (1977). The ALJ resolved the issue against Sizemore, who had the burden of proof on the issue. Where, as here, the party with the burden of proof was unsuccessful before the ALJ, the issue on appeal is whether the evidence compels a finding in his favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985); Daniel v. Armco Steel Co., L.P., Ky. App., 913 S.W.2d 797, 800 (1995). To be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as the ALJ. REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985). In light of the October 1998 bicycle accident and the initial X-rays, the evidence is not so overwhelming that the elbow fracture was a result of the work-related accident so as to compel a finding in favor of appellant.

Second, Sizemore contends that the ALJ erroneously concluded that she is 60 percent occupationally disabled and

should have, instead, determined that she is 100 percent occupationally disabled.

Again, there was a conflict in the medical evidence regarding the impairment suffered by Sizemore as a result of the accident. Sizemore's treating physician, Dr. Malkani, assessed Sizemore with an overall bodily impairment of 27 percent based upon the AMA Guidelines. Certified Independent Medical Examiner Dr. Daniel Wolens, on the other hand, assessed a 6 percent whole body rating and made specific criticisms of Dr. Malkani's conclusions. The ALJ accepted Dr. Wolens's testimony and rating over Dr. Malkani's. Again, it was within the sole province of the ALJ to resolve this conflict, and we are without authority to disregard the ALJ's determination and substitute our own.

Having accepted Dr. Wolens's impairment rating, it was then the ALJ's responsibility to translate the rating into an occupational disability rating. Pruitt v. Bugg Brothers, supra, at 124. Permanent partial disability is to be assessed on the basis of the probability of future impairment of earning capacity as indicated by the nature of the injury, the age of the workman, and other relevant factors. Osborne v. Johnson, Ky., 432 S.W.2d 800, 804 (1968). The ALJ is granted considerable discretion in translating functional disability into occupational disability. Seventh St. Road Tobacco Warehouse v. Stillwell, Ky., 550 S.W.2d 469, 471 (1976). In so doing, the ALJ has the discretion to rely on a claimant's lay testimony regarding the extent of the disability. Hush v. Abrams, Ky., 584 S.W.2d 48, 50 (1979).

In light of the ALJ's considerable discretion in the matter, we cannot say that the evidence compels a conclusion that the ALJ's 60 percent occupational disability rating was erroneous.

Although the evidence concerning the severity and permanency of Sizemore's injuries was subject to a different interpretation, we cannot say that the evidence was so overwhelmingly contrary that no reasonable person could reach the same conclusion as the ALJ. As the medical evidence does not compel a finding contrary to the decision of the ALJ, the decision will not be disturbed on appeal. Moreover, the Board has not "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

The decision of the Board is affirmed.

ALL CONCUR.

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