

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-000951-WC

COPAR, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-99-93138

SHERRI ROGERS; DONNA TERRY,
Administrative Law Judge; and
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: BARBER, BUCKINGHAM and HUDDLESTON, Judges.

HUDDLESTON, Judge: Copar, Inc., has appealed a decision of the Workers' Compensation Board which affirmed an Administrative Law Judge's decision finding Sherri Rogers to have sustained a permanent total disability as a result of a work-related physical injury and resulting psychological condition.

The facts of the case, as stated by the Board, are essentially as follows:

Rogers began working for Copar in 1997 as a factory production worker. Rogers testified she injured her back on January 25, 1999. She left the production area of the factory and headed into the main office. As she opened a glass door leading into the office area, a draft of air caught the door causing her to jerk and twist. She experienced a popping sensation in her low back followed by severe pain in her low back and right leg. Rogers immediately gave notice of the injury and was placed on light duty. She attempted to treat her condition by soaking in hot tubs of water after work. When her symptoms did not resolve, she sought treatment from Dr. Paul Taylor, her family physician. Rogers testified that prior to the work injury in 1999 she was physically active and participated in horseback riding, swimming and other vigorous activities in addition to working and caring for her children. Since the injury she has been in constant pain and has required increasing doses of pain medication to remain minimally functional. She indicated she had severe and constant left leg pain and somewhat milder right leg pain. She developed psychological problems as a result of the chronic pain and economic pressures caused by the loss of income. Rogers testified she attempted to commit suicide while her daughters were packing their clothes to go live with their father since she was unable to provide for or care for them.

On Appeal, Copar presents four questions for our review. Specifically,

- Did the Board and ALJ improperly allow Rogers to present the opinions of more than two doctors?
- Is the ALJ's award of permanent total disability benefits not supported by a valid impairment rating?
- In affirming the ALJ's finding that Rogers's psychological condition was a direct result of the work injury, did the Board misconstrue Coleman v. Family Enterprises, Inc.?¹
- Was Copar denied meaningful appellate review of the ALJ's granting of interlocutory relief?

The ALJ Did Not Err in Allowing the Admission of Hospital Records and Physician Opinions

As observed by the ALJ, a full summary of each piece of the voluminous record compiled in this case would result in the needless decimation of a small forest. Therefore, we need not present, as did the ALJ and the Board, recitations of all the medical evidence presented below.

Rogers offered into evidence the medical records of Dr. Paul M. Taylor, her treating physician; the deposition of Dr. Mark Awh, the radiologist who interpreted her MRI study; and the report of Dr. Wayne Naimoli. Rogers also submitted medical records from

¹ Ky., 58 S.W.3d 459 (2001).

Western State Hospital and Pennyroyal Center. Contained in the records from Western State and Pennyroyal Center were the opinions of Drs. Manuel DeLaRocha and Robert Sivley.

On appeal, Copar points to 803 Kentucky Administrative Regulations (KAR) 25:010 § 14(2), which provides as follows:

Any party may file as evidence before the administrative law judge pertinent material and relevant portions of hospital, educational, Office of Vital Statistics, Armed Forces, Social Security, and other public records. An opinion of a physician which is expressed in these records shall not be considered by an administrative law judge in violation of the limitation on the number of physician's opinions established in [Kentucky Revised Statutes (KRS)] 342.033.

KRS 342.033 limits medical proof in the following manner:

In a claim for benefits, no party may introduce direct testimony from more than two (2) physicians without prior consent from the administrative law judge. The motion requesting additional testimony shall clearly demonstrate the need for such additional testimony. A party may introduce direct testimony from a physician through a written medical report. The report shall become a part of the evidentiary record, subject to the right of an adverse party to object to the admissibility of the report and to cross-examine the reporting physician. The commissioner shall promulgate administrative regulations

prescribing the format and content of written medical reports.

There is no dispute that when Rogers sought to introduce the records from Western State and Pennyroyal Center, she did not seek the ALJ's permission through a demonstration of the need for additional medical testimony, as provided in KRS 342.033. Therefore, Copar argues, the opinions of Dr. DeLaRocha and Dr. Silvey contained in the hospital records should not have been considered by the ALJ because their introduction violates the two doctor limitation on direct testimony.

Rogers makes two arguments in response. Her first is that Copar misinterprets the language of 803 KAR 25:010 § 14(2). Specifically, Rogers contends that the language that a physician's opinion "shall not be considered . . . in violation of the limitation" means that opinions contained in hospital records are not to be counted against the total limit. Rogers interprets the regulation to mean that only direct doctor's testimony not contained within hospital records is limited by KRS 342.033, and that 803 KAR 25:010 Section 14(2) allows an ALJ to consider a potentially unlimited number of doctor's opinions if such opinions are contained within the records of a hospital or similar institution.

While a resolution of the above dispute would present a novel challenge, it is one we need not undertake to decide this case. As presented in Rogers's other argument and as decided by the Board, Copar has ignored 803 KAR 25:010 § 14(1), which provides that "[t]he Rules of Evidence prescribed by the Kentucky Supreme

Court shall apply in all proceedings before an administrative law judge except as varied by specific statute and this administrative regulation." Relevant here is Kentucky Rule of Evidence (KRE) 103, which provides in part:

(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected; and

(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, and upon request of the court stating the specific ground of objection, if the specific ground was not apparent from the context[.]

Copar did not object to Rogers's proffer of the hospital records in question (i.e., to introduce the opinions of Drs. DeLaRocha and Sivley) until after the ALJ had already made an award. While Copar is correct that it did not have to object to Rogers's intention to present the records,² that duty manifested itself at the hearing when Rogers's use of the opinions contained therein became apparent. KRE 105(a) provides that evidence which may only be admitted for a limited purpose shall not, by its unlimited introduction or use, form a basis for reversal unless the complaining party requested that the evidence be restricted to its

² Copar contends that it did not know the purpose for which Rogers intended to enter the records. Although we have reservations about the reliability of this argument, we will accept it as true for present purposes.

proper use. By not objecting to Rogers's use of hospital records which may have been admissible for other purposes but not for reliance on the medical opinions contained therein,³ Copar lost its ability to complain on appeal. Therefore, we hold this issue is not properly preserved for our review and accordingly affirm the ALJ and the Board.⁴

The ALJ's Award Of Permanent Disability Benefits is
Supported By a Valid Impairment Rating

In making an award, the ALJ stated that she could rely on either the five percent impairment rating assessed by Dr. Gregory Gleis or the fifteen percent impairment rating assessed by Dr. Taylor. Copar argues that this alternate impairment scheme violates the requirement in KRS 342.0011(36) that a permanent impairment rating be calculated using the permanent impairment rating selected by the ALJ. Also, Copar posits that it would be impossible in the future to determine if Rogers were entitled to benefits upon reopening should her condition change. The conclusion of this argument is that the case must be remanded to the ALJ, who must then finally select one of the two possible impairment ratings.

As fact-finder, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be

³ We repeat that we have not decided whether or not the opinions, in the face of a proper objection, should have been ruled inadmissible.

⁴ See also Ky. R. Civ. P. (CR) 76.12(4)(c)(v), requiring an argument to have been initially presented to the original adjudicator before it may be raised on appeal.

drawn from the evidence.⁵ The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof.⁶ Furthermore, the Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence in questions of fact.⁷ Furthermore, a finding of fact cannot be disturbed on appeal if there is substantial evidence to support it.⁸ "Substantial evidence has been . . . defined . . . as that which, when taken alone or in light of all the evidence, has probative value to induce conviction in the mind of a reasonable person."⁹ This Court's function in reviewing the Board's decision is "to correct the Board only where [we perceive that] 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."¹⁰

Here, there is evidence to support either possible impairment rating, such that we would not disturb either finding.

⁵ Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

⁶ Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

⁷ See KRS 342.285(2).

⁸ Jackson v. General Refractories Co., Ky., 581 S.W.2d 10, 11 (1979).

⁹ Bowling v. Natural Resources & Environmental Protection Cabinet, Ky. App., 891 S.W.2d 406, 409 (1994) (citing Kentucky State Racing Commission v. Fuller, Ky., 481 S.W.2d 298, 308 (1972)). See also Blankenship v. Lloyd Blankenship Coal Co., Inc., Ky., 463 S.W.2d 62 (1970).

¹⁰ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

As the ALJ explained, either impairment rating supports the award. Therefore, because we would have affirmed had the ALJ reached either conclusion, it would be futile to remand for a more specific determination. While we would caution ALJs against using this sort of alternate conclusion-making in the future, we see no need to disturb this award. Copar's claim that the award creates too much uncertainty with respect to reopening is too speculative to address at this time.¹¹ Should the case be reopened and an actual controversy arise with respect to a change in Rogers's impairment, it may be decided at that time.

The Board Did Not Misconstrue Coleman v. Family Enterprises, Inc. In Affirming the ALJ's Finding That Rogers's Psychological Condition Was a Direct Result of the Work Injury

Copar argues that the ALJ erred in attributing Rogers's psychological condition to her work injury and that it therefore should not have been compensable. Both parties cite Coleman v. Family Enterprises, Inc.¹² for the proposition that "[t]he general rule is that all of the injurious consequences that flow from a work-related physical injury and that are not attributable to an unrelated cause are compensable."¹³ Essentially, then, our review must focus on whether the ALJ's decision regarding the work-

¹¹ See Dixie Fuel Co. v. Commissioner of Social Sec., 171 F.3d 1052 (6th Cir. 1999).

¹² Supra, n. 1.

¹³ Id. at 462.

relatedness of Rogers's psychological condition is supported by substantial evidence.

In reaching her conclusion, the ALJ relied on Rogers's own testimony, her lack of need for psychiatric care prior to her injury, and Dr. Sivley's assessment that Rogers's emotional distress is a result of her back injury and resulting loss of income. Copar, however, points to evidence that Rogers's emotional distress and psychological problems are the result of developments in her personal life unrelated to her work injury.

As we stated above, the ALJ has the sole authority to determine the weight, credibility, substance and inferences to be drawn from the evidence.¹⁴ The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof.¹⁵ Therefore, it was uniquely within the province of the ALJ to evaluate the evidence presented and decide what to conclude therefrom. We cannot disturb that decision when, as here, it is supported by substantial evidence.

Copar Has Not Been Denied Review
of the ALJ's Interlocutory Award

As decided by the Board,
we believe Copar's arguments concerning interlocutory relief are rendered moot. The ALJ indicated Copar shall take credit for any payment of such compensation previously made, including payments of temporary

¹⁴ Paramount Foods, Inc. v. Burkhardt, supra, n. 5.

¹⁵ Caudill v. Maloney's Discount Stores, supra, n. 6.

disability benefits already made. Since all payments by Copar fall within that period of total disability and since a credit for payments was granted, Copar has already received the credit asked for on appeal.

Conclusion

Because Copar did not adequately preserve its objection regarding the introduction of medical opinions contained within Rogers's proffered hospital records, that argument may not be reviewed. The ALJ's decision was supported by substantial evidence; accordingly, we affirm the Board's decision upholding the ALJ's award.

ALL CONCUR.

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