

RENDERED: March 7, 2003; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2002-CA-001820-WC

JUDY COX

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-01-00630

MARY BRECKINRIDGE HOSPITAL;
HON. JAMES L. KERR,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * *

BEFORE: BAKER, GUIDUGLI, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: Judy Cox ("Cox") petitions for review of a decision of the Workers' Compensation Board (the "Board") which affirmed an order of the Administrative Law Judge ("ALJ") dismissing her claim for workers' compensation benefits. We affirm.

Cox was employed by Mary Breckinridge Hospital as a surgical technician. Her duties as a surgical technician

included cleaning and sterilizing instruments, mopping, cleaning lights and walls, and lifting items weighing no more than twelve pounds. Cox usually worked an average of 38 hours per week, earning \$9.70 per hour.

On June 2, 1999, Cox slipped on a wet floor and fell on her left side while engaging in her normal employment duties. At the time of this accident, Cox claimed that she injured her neck, left shoulder, and back. She was taken to her employer's emergency room where x-rays were taken of her back, left shoulder, and neck. The x-rays revealed no injuries to these areas. Cox returned to work and did not seek any further medical treatment concerning these injuries at this time, even though she claimed to have taken over-the-counter medications to control the pain. Cox testified that, in December 1999, she felt extreme pain in her left shoulder to her fingers, her neck, down her back, into the left hip to the knee, and across the lower back. This pain caused her to see an emergency room doctor during her lunch break to receive a shot. After receiving this shot, Cox did not seek any further medical attention until February 2000, when she sought treatment from doctors at Mary Breckinridge Hospital for complaints of elbow and left shoulder pain. In April 2000, Cox sought treatment for muscle spasms and headaches. While seeking such treatment, Cox continued her normal employment duties.

In November 2000, Cox was referred to Dr. Mukut Sharma for treatment of her back, neck, and shoulder pain. Dr. Sharma recommended physical therapy as treatment for Cox's complaints. Cox did not avail herself of physical therapy treatments. Based upon Cox's complaints of increased pain, Dr. Sharma excused Cox from work on April 12, 2001. This was the first time Cox missed work due to the June 1999 accident. After being excused from work, Cox filed a workers' compensation claim.

Dr. David Muffly evaluated Cox on June 28, 2001. From his evaluation, Dr. Muffly found that Cox's cervical spine had tenderness on the right side of the neck. Further, Dr. Muffly discovered tenderness in Cox's left trapezius down to the shoulder. After reviewing x-rays of Cox's back and an MRI of her shoulder, Dr. Muffly diagnosed Cox with cervical disc herniation C4-5 with spinal stenosis and radiculopathy, as well as lumbar degenerative disc disease without disc herniation. Dr. Muffly assessed a 15% category DRE II cervical impairment related to the neck condition and a 5% whole body DRE II lumbar impairment. As for restrictions, Dr. Muffly prohibited Cox from lifting over 20 pounds, repeated bending, stooping, reaching or turning of the neck, as well as any type of left upper extremity work. Dr. Muffly also directed Cox to lie down for pain relief and recommended that she alternate between standing and sitting each hour. Based upon his examination, Dr. Muffly believed the June 1999 injury aroused a degenerative disc condition of Cox's lumbar

spine that could be treated through physical therapy, medications and, if necessary, surgery.

On July 5, 2001, even though Cox had not been cleared to return to work, she was terminated from her employment after her medical leave time expired. After being terminated, Cox became depressed and began taking Prozac. Dr. Kathleen Riggs, a psychiatrist, diagnosed Cox with major depression, generalized anxiety disorder with panic attacks, and chronic pain caused by both psychological factors and existing medical conditions. Dr. Riggs opined that Cox would not be able to perform daily work activities due to her psychiatric condition and assessed a 45% impairment rating.

In defense of Cox's claim, Mary Breckinridge Hospital submitted medical reports from Dr. Russell Travis and Dr. David Shraberg. Dr. Travis, a neurosurgeon, evaluated Cox on September 18, 2001. During his examination, Dr. Travis discovered inconsistencies in Cox's complaints and found nothing significant from the MRI scans. Dr. Travis did observe some mild degenerative changes, but believed these changes did not cause Cox's complaints. Based upon these findings, Dr. Travis assessed a 0% impairment rating for both the lumbar and cervical spine. However, Dr. Travis admitted that, due to Cox's pre-existing conditions, he could assign a 5% DRE II cervical impairment. Dr. Travis opined that Cox could effectively complete daily work-related activities and assigned no restrictions.

Dr. Shraberg, a psychiatrist, evaluated Cox on November 1, 2001. As part of his examination, Dr. Shraberg reviewed Cox's medical history, conducted a mental status examination, and administered psychological testing. Dr. Shraberg found symptom magnification and determined that Cox did not require Valium or Prozac. Further, Cox's consumption of five Codeine tablets a day nullified the effect of Prozac or Valium and reinforced her chemical dependency. Based upon this diagnosis, Dr. Shraberg assessed a 0% psychiatric impairment and further opined that Cox was psychologically and physically capable of returning to work as a surgical technician.

Further, Mary Breckinridge Hospital introduced Cox's medical records from its own files as well as from Harlan Appalachian Regional Hospital. These records show that, throughout the years prior to the June 1999 accident, Cox was seen for a variety of physical complaints. Cox first complained of lower back pain in 1982 and right shoulder pain in 1986. In the early 1990s, she was treated for pain in her neck and shoulders. She sustained an ankle injury in 1996 and suffered headaches in 1997. Her treatment for the June 2, 1999 work injury indicated x-rays were taken of her left shoulder, left elbow, and left hip with no fractures or dislocations present. In February 2000, Cox complained of left shoulder and elbow pain and was diagnosed with probable osteoarthritis of these areas. In April 2000, she was seen for complaints of headaches and

muscle spasms of her neck. The medical records confirmed that Cox suffered from muscle spasms from time to time. On November 15, 2000, Cox reported left neck and left shoulder pain, providing a history of the June 1999 accident. However, in December 2000, she again complained of lower back pain, but did not relate this pain to the June 1999 incident.

The ALJ reviewed the evidence contained within the record in considerable detail. The ALJ noted that the parties stipulated that Cox sustained an injury to her left shoulder on June 2, 1999, but preserved the issue of causation. The ALJ found Cox's testimony to be especially dispositive. Cox testified that while her injuries occurred in June 1999, she did not obtain additional treatment until February 7, 2000, for her left shoulder, elbow, and hip complaints. Furthermore, Cox's first complaints of neck and back pain did not occur until April 12, 2000. Cox made no psychiatric complaints until after her employment was terminated. The ALJ also noted that, based upon the medical records submitted by the employer, Cox possessed a long history of multiple complaints for her neck, back, and hip. Based upon all of the evidence, the ALJ concluded that Cox failed to meet her burden of proof that her neck, back, and psychiatric problems were related to her June 2, 1999 fall. Additionally, since no physician assessed a permanent impairment rating for the left shoulder and elbow problems, the ALJ held that Cox did not sustain a harmful change to the human organism. The ALJ

dismissed her claim in its entirety and the Board affirmed that decision. This petition for review followed.

Kentucky law is extremely clear concerning the scope of our review of decisions from the Workers' Compensation Board. The function of our review is to correct the Board only where it has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause injustice. Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992). In pursuing workers' compensation benefits, the claimant bears the burden of proof and risk of nonpersuasion with regard to every element of the claim, with the decision of the ALJ being conclusive and binding as to all questions of fact. KRS 342.285; Carnes v. Tremco Mfg. Co., Ky., 30 S.W.3d 172, 175-176 (2000), citing Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984). When the party with the burden of proof is unsuccessful before the ALJ, the issue on appeal is whether the evidence in that party's favor is so compelling that no reasonable person could have failed to be persuaded by it. Carnes, 30 S.W.3d at 176. Where there exists evidence of substance supporting the ALJ's finding, the conclusion cannot be labeled "clearly erroneous." Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Despite this high standard, Cox presents us with the argument she unsuccessfully maintained before the Board. Cox argues that she sustained her burden of proving she suffered an

injury of appreciable proportions as a result of the June 1999 accident, which rendered her totally occupationally disabled. She argues that the reports submitted by Dr. Muffly and Dr. Riggs support her claim. Further, Cox characterizes her own testimony as unrebutted that she did not seek formal treatment for these alleged injuries for approximately nine months because she worked with pain since the date of her fall. We disagree.

The record contains substantial evidence to support the ALJ's conclusion that Cox's alleged injuries were not work-related. The emergency room notes from June 2, 1999, only revealed complaints relative to the left elbow and left shoulder. Further, according to Cox's own testimony and medical records, she did not first complain of shoulder, elbow, and hip problems until February 7, 2000, with her first complaints of back and neck problems being made on April 12, 2000. The record reveals that Cox first associated these physical impairments with the June 1999 incident during her visit to Dr. Sharma in November 2000. Finally, Cox complained of lower back pain in December 2000, but never indicated that the June 1999 incident was the source of this pain. Despite all of these complaints, Cox continued working without any restrictions until April 2001. Finally, Cox did not complain of any psychiatric conditions until after her employment with Mary Breckinridge Hospital was terminated in July 2001. Thus, when all of this medical evidence is considered with the opinions of Dr. Travis and Dr. Shraberg,

which concluded that Cox's injuries were not related to the June 1999 accident, we agree with the ALJ and the Board that Cox did not carry her burden of proving that she was injured during the course of her employment.

Cox contends that the ALJ placed too little emphasis on the reports and findings of the physicians who supported her claim, most notably Dr. Muffly and Dr. Riggs. Cox argues that the physical restrictions imposed by Dr. Muffly and the psychological impairment rating assigned to her by Dr. Riggs compel a finding that she is, in fact, totally occupationally disabled. We reject this contention.

The ALJ, as finder of fact, has the authority to determine the quality, character, and substance of the evidence presented. Miller v. East Kentucky Beverage/Pepsico, Inc., Ky. App., 951 S.W.2d 329 (1997). The weight given to the evidence and the credibility accorded to the witnesses are matters within the sole province of the fact-finder. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Likewise, the ALJ, as finder of fact, has the right to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the adversary party's total proof. Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

Clearly, the ALJ acted within his discretion in placing more weight on Cox's own testimony and the medical records submitted by the employer than on the reports submitted by Dr.

Muffly and Dr. Riggs. While Cox is free to point out evidence that would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48 (2000). Therefore, we conclude that the ALJ's findings were supported by evidence of substance, and that the other evidence of record did not compel a different result.

Accordingly, the decision of the Board upholding the ALJ's dismissal of Cox's claim that she is entitled to workers' compensation benefits is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ronald C. Cox
Harlan, Kentucky

BRIEF FOR APPELLEE,
MARY BRECKINRIDGE HOSPITAL:

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