

RENDERED: May 27, 2005; 10:00 a.m.  
NOT TO BE PUBLISHED

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2004-CA-002046-WC

PATTY G. WILLIAMS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION  
OF THE WORKERS' COMPENSATION BOARD  
NO. WC-03-00394

UNITED PARCEL SERVICE;  
HON. SHEILA C. LOWTHER,  
ADMINISTRATIVE LAW JUDGE;  
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION  
AFFIRMING

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BEFORE: HENRY AND VANMETER, JUDGES; MILLER, SENIOR JUDGE.<sup>1</sup>

VANMETER, JUDGE: Patty G. Williams petitions for review from an opinion of the Workers' Compensation Board affirming a decision of the Administrative Law Judge (ALJ) awarding permanent partial disability (PPD) benefits for work-related injuries to Williams'

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<sup>1</sup> Senior Judge John D. Miller sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

arms, shoulders, neck, and back sustained during her employment with United Parcel Service (UPS) as a package handler. She argues that the ALJ erred by failing to also award her total temporary disability (TTD) benefits. For the reasons stated below, we affirm the Board's decision.

Williams, who was born in 1967, has a GED, but no specialized vocational training. She began her employment with UPS in 1993, was laid off in 1995, and returned to work in 1996. Williams' duties as a package handler required her to repetitively lift packages weighing up to seventy pounds and to use pushing, pulling, bending, and twisting motions. Although she reported to her supervisor that she felt pain in her arms, shoulders, neck, and back on September 17, 2001, she was not referred to the company doctor at that time.

Williams continued to work until January 25, 2002, around which time she sought medical attention from a chiropractor. She then consulted a neurosurgeon who administered epidural blocks to her lower back and recommended fusion surgery to alleviate pain. Williams was also treated by a pain management specialist, and she sought treatment from another orthopedic surgeon, Dr. William Moss, who recommended bilateral carpal tunnel surgery. After obtaining a second opinion and attempting more conservative treatment in an effort to avoid surgery, Williams underwent bilateral carpal tunnel

surgery in March and June 2002. She further underwent a left lateral epicondylitis surgery in August 2002. According to UPS wage records, during 2002 Williams did not work between January 26 and April 26; between June 15 and August 16; and her final day of employment was on September 20, 2002. During her absences from work Williams received short-term disability benefits from Kemper National Services, which were fully funded by UPS.

Williams filed an injury report, on February 26, 2003, stating that the injury occurred on September 17, 2001. She subsequently filed a medical report from Dr. S. Pearson Auerbach, who assigned her a 5% functional impairment rating. After a hearing the ALJ determined that Williams had a 3.25% permanent disability rating, but he was not persuaded that Williams had a "complete and permanent inability to perform any type of work as a result of her injury." Thus, he awarded Williams medical benefits plus PPD benefits of \$14.51 per week for a period of 425 weeks beginning on September 18, 2001, but he denied any award of TTD benefits. UPS was credited for its payment of sickness and accident benefits during the period of PPD.

Both parties petitioned for reconsideration. Williams asserted that she was entitled to TTD benefits for January 18 through April 15, 2002; April 20 through April 22, 2002; April

26 through May 14, 2002; and August 18, 2002, through January 21, 2003. UPS sought additional findings of fact regarding Williams' physical work capacity after January 25, 2002 and requested the ALJ reduce its award of PPD benefits from \$14.51 to \$9.68 per week if her capacity was normal after that date. The Chief Administrative Law Judge denied Williams' petition but granted UPS' petition finding that Williams "retained the physical capacity to perform her regular employment," and reducing her PPD benefits to \$9.68 per week. Williams appealed to the Workers' Compensation Board (Board), which affirmed the ALJ's opinion and award. This petition for review followed.

William's sole contention on appeal is that the ALJ erred by denying TTD benefits. We disagree.

An ALJ's finding in favor of a claimant must be based on substantial evidence.<sup>2</sup> As stated in *Smyzer v. B.F. Goodrich Chemical Co.*,<sup>3</sup> "[s]ubstantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." An ALJ's finding may be overturned only if upon review, the Board determines that the ALJ acted outside the scope of his power, was clearly

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<sup>2</sup> *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

<sup>3</sup> 474 S.W.2d 367, 369 (Ky. 1971).

erroneous in his decision, or rendered a decision which was arbitrary or capricious.<sup>4</sup>

Here, the Board determined that the ALJ's decision was supported by substantial evidence and, indeed, that Williams had utterly failed to meet her burden of proof. After reviewing the evidence, we cannot say that the evidence compelled a different conclusion.

The dates during which Williams claims she was eligible for TTD benefits vary from pleading to pleading. Williams' failed to submit any medical records from her treating physicians to substantiate the reasons for her absences from work during the debated periods of 2002. Further, we are not persuaded by Williams' contention that "[t]he medical evidence confirm[s] such periods of TTD," since the only medical report submitted was that of Dr. Auerbach, who did not account for Williams' work absences. Additionally, the dates listed on the Return to Work Status forms issued by Dr. Moss do not coincide with the dates for which Williams claims TTD benefits. Due to these inconsistencies and Williams' failure to meet her burden of proof we cannot say that the ALJ abused his discretion<sup>5</sup> by denying the award of TTD benefits, or that the Board erred by

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<sup>4</sup> KRS 342.285(2)(a), (d), and (c).

<sup>5</sup> *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985).

failing to find that the evidence compelled a different conclusion.

For the foregoing reasons the Board's decision is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings  
Louisville, Kentucky

BRIEF FOR APPELLEE:

Thomas L. Ferreri  
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