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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000138-WC

BARBARA CRAWFORD — APPELLANT

V.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. 03-WC-98980

UNIVERSITY OF LOUISVILLE;
HONORABLE IRENE STEEN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: HENRY, McANULTY, AND MINTON, JUDGES.

MINTON, JUDGE: Barbara Crawford seeks review of an opinion of the Workers' Compensation Board affirming, in part, and reversing and remanding, in part, a decision of an administrative law judge (ALJ) awarding Crawford permanent partial disability benefits based upon an eight percent functional impairment rating. Finding no error in the Board's analysis or legal conclusions, we affirm.

On September 18, 2001, Crawford, who was employed by the University of Louisville as a library assistant, experienced pain and numbness in her right hand, arm and shoulder, as well as her neck, while she was at work preparing an exhibit for showing. Crawford reported her injury to her supervisor but missed only one day of work before returning with restrictions. She continued to work for the University, while simultaneously obtaining medical care, until October 2002. According to Crawford, the University would not let her return to work with her physician-imposed restrictions after October 1, 2002. And she has not worked in any capacity since that date.

Crawford submitted her application for Workers' Compensation benefits in September 2003. After each party had submitted evidence, a hearing on Crawford's claim was held before an ALJ in February 2004. The ALJ issued her opinion in April 2004 and denied Crawford's request for reconsideration in July 2004, whereupon Crawford appealed to the Board.

Crawford made the same arguments to the Board that she makes to this court. Namely, she contended that the ALJ erred in assigning only an eight percent functional impairment rating; erred in not applying the "3 multiplier" to her benefits; and erred in determining the date upon which she reached maximum medical improvement (MMI). In an opinion rendered in December 2004, the Board affirmed the ALJ's findings as to the date

Crawford reached MMI and the eight percent impairment rating. But the Board reversed and remanded the case to the ALJ for additional findings concerning the application of the correct multiplier. More specifically, the Board held that the ALJ failed to make a clear finding as to whether Crawford retained the physical capacity to perform the work she performed at the time of her injury.[1] Dissatisfied with the Board's opinion, Crawford filed the petition for review at hand.

Before the merits of Crawford's specific arguments are addressed, it is necessary to recite the permissible scope of this Court's review of a decision of the Board. It is well-established that our function "is to correct the Board only where the [] Court perceives 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."[2] Furthermore, Crawford, as the claimant, has the burden of proof and must prove every element of her claim.[3]

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[1] The Board's opinion states in relevant part that "[i]t is, therefore, necessary on remand for the ALJ to specifically find whether Crawford retains the physical capacity to return to the type of work she was performing at the time of injury. If the ALJ finds that Crawford lacks the physical capacity to return to that job, the ALJ must engage in an analysis pursuant to Fawbush v. Gwinn, 103 S.W.3d 5 ([Ky.] 2003) and Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 ([Ky.] 2003)." Board's Opinion, p. 23.

[2] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992).

[3] Magic Coal Co. v. Fox, 19 S.W.3d 88, 96 (Ky. 2000).

Because the ALJ's decision was not in Crawford's favor, the issue on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [Crawford's] favor."[4] In order to be compelling, evidence must be "so overwhelming that no reasonable person would fail to be persuaded by it . . . ."[5]

It must also be noted that the ALJ is the finder of fact in workers' compensation cases, meaning that the ALJ alone "has the authority to determine the quality, character . . . substance"[6] and weight of the evidence presented, as well as the inferences to be drawn from the evidence.[7] Thus, the ALJ "may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof."[8] Accordingly, given our limited scope of review, this Court may not "substitute its judgment" for that of the ALJ, nor may we render our own findings or direct the findings or conclusions the ALJ shall make.[9]

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[4] Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

[5] Magic Coal Co., 19 S.W.3d at 96.

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

[7] Miller v. East Kentucky Beverage/Pepsico., Inc., 951 S.W.2d 329, 331 (Ky. 1997).

[8] Magic Coal Co., 19 S.W.3d at 96.

[9] Wolf Creek Collieries, 673 S.W.2d at 736.

Bearing those principles in mind, we now turn to Crawford's arguments. Crawford first contends that the ALJ erred in determining the date Crawford reached MMI. The date a claimant reaches MMI is important because a claimant ceases to be entitled to Temporary Total Disability (TTD) payments once he or she has reached MMI.[10] Thus, although she does not couch it in such explicit terms, Crawford is actually arguing that she was entitled to TTD payments for a longer period of time than that found by the ALJ because, according to Crawford, the ALJ found that Crawford had reached MMI on a date earlier than that supported by the medical evidence.

The ALJ found that Crawford reached MMI on March 6, 2003, based upon office notes from Dr. Richard Holt, an orthopedic surgeon. Dr. Holt's March 6 office note states in its entirety: Ms. Crawford is feeling better. She has refused to have her MRI scan for a variety of reasons—claustrophobia, etc. Plan Return to work with restrictions of no overhead work and no heavy lifting."[11] Based upon that note, the ALJ found that "it appears from the record that Dr. Holt felt the Plaintiff [Crawford] would have reached MMI around 3/6/03 when

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[10] Kentucky Revised Statute 342.0011(11)(a) defines TTD as "the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment."

[11] Administrative Record, p. 171.

she returned to his office feeling better and having refused the MRI scan and he returned her to work with restrictions of no overhead work and no heavy lifting."[12]

Crawford contends that nothing in Dr. Holt's office notes contains a definitive opinion as to the date when she reached MMI. In addition, Crawford notes that she did undergo an MRI in April 2003, meaning that Dr. Holt's office note was based on incomplete medical evidence. Finally, Crawford notes that Dr. Holt was not deposed so that he could elaborate on his office notes. Thus, according to Crawford, she did not reach MMI until at least May 19, 2003, the date which the University terminated her TTD benefits.

First, Crawford points to nothing that prevented her from deposing Dr. Holt, had she deemed such a deposition to be necessary. Thus, any error in not deposing Dr. Holt would lie with Crawford's own strategic decision, not with the ALJ. Next, the law is clear that the ALJ, as the finder of fact, may make reasonable inferences from the evidence.[13] Based upon the fact that Crawford felt better, had refused further treatment (i.e., an MRI), and had been released to work with restrictions on overhead work and heavy lifting, the ALJ's inference based upon Dr. Holt's notes that Crawford reached MMI on March 6, 2003, is

[12] Administrative Record, p. 391.

[13] Miller, 951 S.W.2d at 331.

reasonable.[14] Finally, Crawford points to nothing in the record which links her undergoing an MRI to her reaching MMI. Thus, the fact that she had an MRI after the date when the ALJ found her to have reached MMI is irrelevant to a determination of the date she reached MMI. Accordingly, as the ALJ's decision regarding the date Crawford reached MMI is supported by substantial evidence, it must be affirmed.

Crawford next argues that the ALJ erred by assessing only an eight percent impairment rating based on findings of Dr. Mark Schuler, a chiropractor. According to Crawford, the ALJ should have found her to be fifteen percent disabled based upon findings of Drs. Scheker and Wood, who made their findings after Dr. Schuler offered his opinions and after her MRI. Furthermore, Crawford argues that the ALJ's assessed impairment

[14] The record would also support a finding that Crawford reached MMI prior to March 2003, or that she did not reach MMI until later in 2003. For example, Dr. Frank Wood found that Crawford reached MMI in November 2001. Administrative Record, p. 183. Conversely, Dr. Luis Scheker noted Crawford's permanent work restrictions on July 14, 2003. Administrative Record, p. 138. However, like Dr. Holt's office notes, Dr. Scheker's July 14, 2003, written work restrictions, do not specifically mention any date at which Crawford reached MMI. Regardless, even if an inference could be drawn that Dr. Scheker believed Crawford did not reach MMI until July 14, 2003, the ALJ's decision would be affirmed because the ALJ has the sole discretion to determine which testimony to credit and what inferences to draw from the record. In other words, the fact that some evidence supports Crawford's contention that she did not reach MMI until after March 6, 2003, is insufficient to merit reversal of the Board and ALJ's decisions. *See e.g.,* Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 929 (Ky. 2002) ("Although a party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal.").

rating is inconsistent with her finding that Crawford's injuries caused a herniated disc and radiculopathy.[15]

First, as noted by the University, the ALJ never expressly found Crawford to be suffering from radiculopathy. Second, as noted by the Board and the ALJ, Dr. Schuler treated Crawford both before and after her September 2001 work injury, meaning that he was quite familiar with the changes in Crawford's condition attributable to the September 2001 injury. Dr. Scheker, on the other hand, was apparently unaware that Crawford had been receiving treatment for neck and shoulder pain since 1996, well before the injury in question occurred. However, Dr. Wood was provided copies of Crawford's medical history pertaining to her neck and shoulder pain, which caused him to opine that Crawford was fifteen percent disabled but that all of that disability was due to her pre-existing cervical spondylosis and the natural aging process and that **none** of her impairment was caused by the September 2001 work injury.[16]

As with many cases, the medical experts offered divergent views of the extent and cause of Crawford's disability. The ALJ looked at all the evidence and chose to accept Dr. Schuler's impairment rating as it pertains to

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[15] Radiculopathy is defined as "disease of the nerve roots." DORLAND'S POCKET MEDICAL DICTIONARY, p. 583 *(*23rd Ed. 1982*).*

[16] Administrative Record, p. 183.

Crawford's cervical problems and to reject the remainder of Dr. Schuler's impairment rating,[17] as well as the impairment ratings assigned by other physicians. As noted previously, an ALJ is permitted to choose which evidence to believe.[18] As the ALJ's impairment rating is based on substantial evidence, it may not be disturbed by this Court.

Finally, Crawford contends that this Court should order the ALJ on remand to use the "3 multiplier" found in KRS 342.750(1)(c)(2), rather than the "2 multiplier" found in KRS 342.730(1)(c)(1) and used by the ALJ.[19] Instead of arguing

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[17] Dr. Schuler's handwritten impairment rating assesses Crawford as having a nineteen percent impairment, apportioned among several different factors, one of which (the cervical problem) was relied upon by the ALJ. Administrative Record, p. 55.

[18] Magic Coal Co., 19 S.W.3d at 96.

[19] KRS 342.730(1)(c) provides, in relevant part:

> 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or
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> 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision shall not be construed so as to extend the duration of payments.

the merits of Crawford's contention, the University contends that the Board's decision in this area is interlocutory because it does not meet the definition of a final and appealable order found in Kentucky Rule of Civil Procedure (CR) 54.01.[20]

The University's argument regarding finality is unfounded, however, as CR 54 clearly does not apply to decisions of the Board.[21] Rather, the Kentucky Supreme Court has stated that an opinion of the Board is final only if it "sets aside an ALJ's decision and either directs or authorizes the ALJ to enter a different award upon remand[.]"[22] In contrast, a Board's opinion is interlocutory only if it remands the case to the ALJ "with directions to comply with statutory requirements without authorizing the taking of additional proof or the entry of a different award[.]"[23]

In the case at hand, the Board remanded the matter to the ALJ to determine whether Crawford retained the physical capacity to perform her past work after the date she reached

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[20] CR 54.01 provides in relevant part that "[a] final or appealable judgment is a final order adjudicating all the rights of all the parties in an action or proceeding, or a judgment made final under Rule 54.02."

[21] *See* Davis v. Island Creek Coal Co., 969 S.W.2d 712, 713 (Ky. 1998); Whittaker v. Morgan, 52 S.W.3d 567, 569 (Ky. 2001).

[22] Whittaker, 52 S.W.3d at 569.

[23] Davis, *969* S.W.2d at 714.

MMI.[24] The Board further noted that if the ALJ found that Crawford lacked the physical capacity to return to her prior job, then the ALJ must decide which multiplier found in KRS 342.730(1)(c) to utilize, in accordance with the principles announced in Fawbush v. Gwinn*, supra*.[25] Thus, the Board set aside the ALJ's decision to apply the "2 multiplier" and authorized the ALJ on remand, after making additional findings, to apply the "3 multiplier" if she believed it to be appropriate. So the Board's opinion was final and appealable as it expressly authorized the ALJ to make a different monetary award to Crawford on remand.[26]

But Crawford seeks to take the Board's opinion one step further by asking this Court to direct the ALJ to apply the "3 multiplier." As stated before, this Court is not authorized to act as a finder of fact, nor can it properly direct the ALJ to make any specific factual findings.[27] Thus, we affirm the

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[24] Board's Opinion, p. 22.

[25] 103 S.W.3d 5. Fawbush and its progeny provide that where the evidence in a case supports applying both the "2 multiplier" and the "3 multiplier" found in KRS 342.730(1)(c), an ALJ has the authority to determine which multiplier is more appropriate. The "3 multiplier" found in section (c)1 is appropriate only if the evidence shows that the claimant is unlikely to be able to earn a salary in the future equal to or greater than the salary the claimant earned at the time of the injury. *See* Kentucky River Enterprises, 107 S.W.3d at 211; Adkins v. Pike County Bd. Of Educ., 141 S.W.3d 387, 389 (Ky.App. 2004).

[26] Whittaker, 52 S.W.3d at 569.

[27] *See, e.g.,* Yocom v. Conley, 554 S.W.2d 416, 417 (Ky.App. 1977); Wolf Creek Collieries, 673 S.W.2d at 736.

Board's decision to remand the matter to the ALJ for a determination of whether Crawford can return to her former employment and, assuming that the ALJ finds that she cannot, which multiplier is most appropriate.

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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