RENDERED: SEPTEMBER 16, 2005; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-000678-WC

PHYLLIS JUSTICE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-01-66638

COMMUNITY TRUST BANK;
HONORABLE MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MINTON, SCHRODER, AND TAYLOR, JUDGES.

MINTON, JUDGE: Phyllis Justice seeks review of an opinion of the Workers' Compensation Board affirming a decision of an administrative law judge ("ALJ") denying Justice's claim for benefits. Finding no error in the Board's opinion, we affirm.

In November 2001, Justice sustained a fall on some steps at work. As a result of that fall, she broke the long metacarpal bone in her left hand. She also claimed to have pain

in her head, neck, and back, as well as carpal tunnel syndrome. Justice returned to work for a short time but had ceased working before filing her claim for disability benefits in May 2003.

As is typical in Workers' Compensation cases, medical and expert opinions were marshaled on each side. From those opinions, the ALJ chose to rely upon the conclusions of Dr. Joseph Zerga. And based on Dr. Zerga's conclusions, the ALJ found that Justice did sustain a work-related fracture to her metacarpal but that the fracture had healed. The ALJ also agreed with Dr. Zerga's conclusion that Justice's carpal tunnel syndrome was not work-related. Finally, the ALJ was persuaded by Dr. Zerga's opinion that any of Justice's headaches, neck pain, or back pain that stemmed from her fall had been resolved. So, in essence, the ALJ found that none of Justice's complaints were related to her fall at work, except for her already healed metacarpal fracture. The Board affirmed the ALJ's findings in February 2005 and Justice filed this appeal.

Before Justice's specific argument is 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 in workers' compensation cases "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."[1] Furthermore, Justice, as the claimant, has the burden of proof and must prove every element of her claim.[2] Because the ALJ's decision was not in Justice'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 [Justice's] favor."[3] In order to be compelling, evidence must be "so overwhelming that no reasonable person would fail to be persuaded by it . . . ."[4]

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[,]"[5] and weight of the evidence presented, as well as the inferences to be drawn therefrom.[6] 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."[7] Accordingly, given

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[1] Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992).

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

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

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

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

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

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

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.[8]

Bearing those principles in mind, we now turn to Justice's argument. Dr. Zerga opined that any pain Justice currently felt in her head, back, or neck did not stem from her work-related fall. Specifically, Dr. Zerga's amended report, in the form of a letter to Justice's employer's counsel, states as follows: "Ms. Justice related to me on her January 6, 2004, appointment, that her symptoms of headaches, neck pain and back pain had resolved. . . . Therefore, in my opinion, she has no condition ratable for post-traumatic cervical strain, post-traumatic tension type headaches with superimposed migraine, or post-traumatic thoracolumbar strain."[9] Justice's sole argument before us is that the ALJ erred in relying on Dr. Zerga's conclusion because that conclusion was based upon only an alleged statement by Justice, not on medical examination.

Justice's argument is unavailing for several reasons. First, she cites to absolutely no authority to support her

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

[9] Record, p. 311.

position.[10] Next, her argument ignores the fact that Dr. Zerga did perform a physical examination of Justice.[11] Third, Justice's argument runs afoul of the fact that the statements of a claimant are competent evidence in a workers' compensation proceeding.[12] Indeed, a physician acts properly in taking into account a claimant's statements regarding her condition when assessing a claimant's alleged impairment. The fact that a physician's opinion is based, at least in part, upon the claimant's statements, does not render the physician's opinion inadmissible.[13] Finally, it must be noted that Justice chose not

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[10] In fact, Justice's terse brief does not contain a single citation to any authority.

[11] Dr. Zerga's report of that examination is several pages long. *See* Record, p. 381-386. Within that report is the following statement: "The patient complained of headaches to Dr. Ahmed. She did not make that complaint today. . . . This patient fell down the steps on November 30, 2001, suffering contusion with resulting headaches, neck pain and back pain. Her headaches, neck pain and back pain have resolved." *Id.* at 383.

[12] *See, e.g.,* Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48, 52 (Ky. 2000). ("A worker's testimony is competent evidence of his physical condition and of his ability to perform various activities both before and after being injured."). Justice's argument is unique in that unlike a claimant's typical complaint that the ALJ failed to give weight to his or her statements, she essentially wants the ALJ to discount her statements to Dr. Zerga.

[13] *See, e.g.,* Department of Economic Security v. Sizemore, 471 S.W.2d 733, 736 (Ky. 1971). ("The employer insists that the history for medical purposes, as given by Sizemore and upon which Dr. Leatherman partly based his opinion, contained self-contradictory statements and the history is contrary to other evidence presented. Therefore, says the employer, the opinion of Dr. Leatherman is not competent and should be excluded. It would prolong this opinion unduly to recite the pertinent evidence. In our opinion the objections go to the weight of the evidence rather than its competency and it appears

to depose Dr. Zerga, thereby foregoing the opportunity to test his perception that her work-related injuries had been resolved.[14]

Clearly, Dr. Zerga's opinions are at odds with those of other physicians. But, as previously noted, Dr. Zerga's conclusions are admissible and, therefore, constitute substantial evidence to support the ALJ's findings. Thus, as the ALJ has the unfettered right to choose which evidence to believe[15] and as the ALJ's decision is supported by the conclusions of Dr. Zerga, we cannot say that the evidence is so overwhelming as to compel a finding in Justice's behalf.[16] Accordingly, we must affirm.

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

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Randy G. Clark Pikeville, Kentucky	Ronald J. Pohl P. Gregory Richmond Lexington, Kentucky

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to us the evidence contains sufficient probative value to place it properly within the area of decision by the Board.")

[14] Such a deposition could have also afforded Justice the opportunity to shed light on why Dr. Zerga reported that Justice was not suffering from headaches, despite the fact that she told other physicians that she did suffer from headaches.

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

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