

RENDERED: DECEMBER 8, 2006; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2006-CA-001058-WC

DENISE BELL

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-77452

GENERAL ELECTRIC; HON. IRENE
STEEN, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER, JUDGE; HUDDLESTON AND PAISLEY, SENIOR JUDGES.¹
BARBER, JUDGE: Appellant, Denise A. Bell, petitions for review
of a decision of the Workers' Compensation Board (WCB) that
affirmed a dismissal by the Administrative Law Judge (ALJ) of
her workers' compensation claim against Appellee, General
Electric. Bell's appeal focuses on her occupational disease

¹ Senior Judges Joseph R. Huddleston and Lewis G. Paisley sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

claim and repetitive trauma injury claim.² The ALJ dismissed Bell's claims. The WCB affirmed. Following a review of the record, we agree.

BACKGROUND

Bell first began working for GE in April 1990 as a remote site computer operator. She was laid off in March 1993 and moved to Las Vegas, Nevada, where she held various positions before returning to Kentucky. She again worked for GE beginning in June 1996.

Bell worked in the laser room. The laser would drill holes into different types of aircraft engine parts. She had to pin check every hole with a wire to make sure that the hole was open. Bell began having pain and swelling in her right hand and thumb around 1997 or 1998. She further claimed that due to overcompensation for her right hand and thumb, she developed problems with her left upper extremity. Bell testified it developed gradually and she first notified a company nurse about this condition in June 2002.

Bell additionally claimed she developed breathing problems as a result of chemicals and solvents used in the plant. In the laser room, she also worked on the advanced vapor

² Bell made claims for occupational asthma; right hand, wrist and left upper extremity repetitive injury; vocal cord dysfunction; and psychological injury. She did not appeal the dismissal of her claims related to vocal cord dysfunction and psychological injury. Therefore, they will not be discussed in this opinion.

degreaser (AVD).³ She became very sensitive to the fumes and became ill on several occasions. As a result, Bell was moved to the electronic drilling machine (EDM) area on May 20, 2003. She still had episodes from odors at the EDM. The last day Bell worked in the plant was June 2003. Bell filed for workers' compensation benefits for her alleged injuries and occupational disease in December 2003.

A hearing was held on Bell's claims on August 4, 2005. In her opinion, the ALJ dismissed all of Bell's claims. Bell filed a petition for reconsideration, but it was overruled. Upon appeal to the WCB, it affirmed. Bell now appeals to our court.

Bell makes the following arguments in her appeal: (1) proper weight was not given to the report of the university evaluator in her occupational disability claim and (2) error occurred in the dismissal of her repetitive trauma injury claim.

STANDARD OF REVIEW

It is well-established that the function of this Court in reviewing the WCB "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."

³ The AVD was a machine that Bell loaded parts into to clean out wax after they had been through the laser machine.

AK Steel Corp. v. Childers, 167 S.W.3d 672, 675 (Ky.App. 2005), (citing Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992)).

LEGAL AUTHORITIES AND ANALYSIS

The claimant bears the burden of proof and the risk of non-persuasion before the fact-finder with regard to every element of a workers' compensation claim. Magic Coal Company v. Fox, 19 S.W.3d 88, 96 (Ky. 2000). In order for that burden to be sustained, no less than substantial evidence of each element of the claim must be introduced. Id. Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the mind of reasonable people. Id. Although substantial evidence is sufficient to support an essential finding of fact, it will not necessarily require a favorable ruling, even in instances where the contrary evidence is less than substantial. Id. Only evidence which is compelling warrants a particular finding.

Compelling evidence is defined as evidence so overwhelming that no reasonable person could fail to reach the conclusion of the ALJ. Webster County Coal Corp. v. Lee, 125 S.W.3d 310, 316 (Ky.App. 2003). The ALJ has the sole authority to determine the weight, credibility, and substance of the evidence and to draw reasonable inferences from the evidence. Transportation Cabinet v. Poe, 69 S.W.3d 60, 62 (Ky. 2001), see

also KRS 342.285. The ALJ has the discretion to choose whom and what to believe. Id., (citing Pruitt v. Bugg Brothers, 547 S.W.2d 123, 125 (Ky. 1977)). The ALJ, as fact-finder, 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. Burton v. Foster Wheeler Corp., 72 S.W.3d 925, 929 (Ky. 2002), (citing Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977)). Although a party may note evidence which would have supported a conclusion contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. Whittaker v. Rowland, 998 S.W.2d 479, 482 (Ky. 1999).

Occupational Disability Claim

Bell argues appropriate weight was not given to the report of the university evaluator, Dr. Steve S. Kraman, M.D., in her occupational disability claim. [T]he clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by ALJs and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. KRS 342.315(2). When ALJs reject the clinical findings and opinions of the designated evaluator, they shall specifically state the reasons for rejecting that evidence in the order. Id.

Kentucky Revised Statute 342.315(2) creates a rebuttable presumption that is governed by KRE 301 and, therefore, does not shift the burden of persuasion. Bright v. American Greetings Corp., 62 S.W.3d 381, 383 (Ky. 2001). The provision does not restrict the ALJ's authority to weigh conflicting medical evidence and to choose which evidence to believe. Id. An ALJ can choose to disregard the clinical findings and opinions of the university evaluator but must state a reasonable basis for doing so. Id.

The ALJ stated the following in her opinion, in relevant part:

With regards to her pulmonary problems and in spite of the presumptive weight given to a university evaluator, it is nevertheless my finding that Dr. Powell's evidence is more persuasive. Dr. Kraman evaluated [Bell] on April 8, 2004 and had reviewed no prior medical records and was relying only on the information [Bell] gave him at that time. [Bell] failed to inform Dr. Kraman of her previous diagnosis of reactive airway disease, which was made already when [Bell] was in the Army, and also did not mention that she had had previous pulmonary aggravations and was restricted from areas involving Codex in 1992 through 1993. [Bell], additionally, denied a prior history of pneumonia. Her pulmonary study indicated only a moderate expiratory obstruction, based upon which Dr. Kraman had assigned the class 2 impairment. However, when [Bell] was evaluated by Dr. Powell on October 29, 2004, [Bell] had no evidence of a respiratory problem, having produced a FVC of 120% and a FEV1 of 90% of predicted and thus an impairment rating was

not warranted. All that having been said, it nevertheless appears that [Bell] does have a reactive airway disease, such as she had been diagnosed while in the Army and as a consequence, [Bell] has exhibited symptoms when she comes in contact with certain chemicals or fumes and does have that problem. However, I am not persuaded that her underlying asthmatic condition is at all work related and such was the opinion of the more persuasive evidence from Drs. Powell and Rosenberg, upon whom this ALJ will rely.

We believe the ALJ did state a reasonable basis for disregarding the university evaluator. Where it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence. Cepero v. Fabricated Metals Corp., 132 S.W.3d 839, 842 (Ky. 2004).

Medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never be reasonably probable. Id.

Dr. Kraman testified at his July 21, 2004 deposition that the patient history was from Bell and that she gave no history prior to 1999. He also testified he reviewed none of Bell's medical records. Dr. Robert W. Powell, M.D., examined Bell on October 20, 2004 and reviewed her medical records.⁴ Dr.

⁴ Dr. Powell wrote he was provided "voluminous medical records" from David Rosenberg, M.D.; S. Kraman, M.D.; Army medical records; Trover Clinic records; Multicare Specialists records; Doug Simmons, M.D.; G.E. Medical records; and Regional Medical Center records.

David M. Rosenberg, M.D., M.P.H., reviewed Bell's records, but did not perform an examination.⁵ Each concluded Bell's condition was not work related.

Bell contends that at his deposition, Dr. Kraman was informed of her history and maintained his findings. Dr. Kraman made the following statements during his deposition:

- 1) Q: All right. And when you -- in causation, you stated that within medical probability pulmonary impairment is caused, in part, by exposure to the chemicals, occupational exposure?
- A: Right.
- Q: What basis -- what did you base that on, what chemicals?
- A: Based on the consistency of the story, her dating this back to a large chemical exposure, unknown chemicals but many of them. And the whole history that she gives is consistent with someone who develops reactive airways disease after a chemical exposure.
- Q: But basically --
- A: Basically, I have no reason -- I had no reason to attribute it to anything else.
- Q: Based on her history?
- A: Right. Based on her history, right, and the fact that she does have evidence of having asthma in the pulmonary function test.
- Q: You stated in part. Does that mean part of her condition may not be caused by the workplace?

⁵ Dr. Rosenberg wrote that he reviewed Multicare Specialists records; Regional Medical Center records; Trover Clinic records; GE records; medical chronology; Bell's workers' compensation application; and Dr. Kraman's evaluation.

A: I don't know. She could have had mild -- she could have had a predisposition to this. She could have had mild asthma and didn't know it. I really have no way of telling. I think at least in part. (pp. 20-21)

2) (Discussing Bell's AMA impairment rating)

Q: Based on her spirometry?

A: Yeah, no question. That's a pretty hard -- I mean regardless of what the causation is, the spirometry puts her in that category.

Q: But if she had some kind of other evidence of asthma before working at GE before she --

A: She'd still be the same category, but it's another -- but that would change the causation. (p.26)

Bell submitted no evidence other than Dr. Kraman's report to support her occupational disease claim. The ALJ chose to rely upon the reports of Drs. Powell and Rosenberg. In instances where the medical evidence is conflicting, the sole authority to determine which witness to believe resides with the ALJ. Staples, Inc. v. Konvelski, 56 S.W.3d 412, 416 (Ky. 2001). Further, we do not believe Dr. Kraman's deposition resulted in his opinion rising to the level of compelling evidence. Based on the foregoing, we believe the ALJ provided a reasonable basis for disregarding the university evaluator and relying upon other medical reports in support of her decision. Therefore, we affirm the WCB.

Repetitive Trauma Injury Claim

Bell claims the ALJ erred in summarily dismissing her injury claim based upon the statute of limitations. The ALJ stated in her opinion "[Bell's] hand/wrist problems have been discussed above and shall be dismissed based upon a violation of the Statute of Limitations." However, when the opinion is read in its entirety, the basis for the ALJ's dismissal of Bell's injury claim was due to her lacking an AMA impairment rating in support of her claim.

The burden was on Bell to prove every element of her claim. Robertson v. United Parcel Service, 64 S.W.3d 284, 286 (Ky. 2001). Claimants are required to prove that a harmful change resulted in a permanent disability as measured by an AMA impairment. Id.

The ALJ struck the medical report of Dr. Timothy Scott Prince⁶ from the record. Bell first presented Dr. Prince's report at the Benefit Review Conference (BRC) in July 2005. The ALJ struck the report because it was not timely. This was the only evidence submitted in support of her repetitive trauma injury claim. As a result, Bell had no AMA impairment rating for her repetitive trauma injury claim.

An ALJ has broad discretion to control the taking and presentation of proof in a workers' compensation proceeding.

⁶ Dr. Prince completed a Form 107-I.

New Directions Housing Authority v. Walker, 149 S.W.3d 354, 358 (Ky. 2004). Any tribunal which is vested by law with the power to hear evidence and make decisions thereon, has the power to compel the taking of evidence before it within reasonable limits of time and this power should not be subject to the control of courts unless such tribunal acts in an arbitrary or unreasonable manner such as to indicate an abuse of discretion. Elkhorn Coal Co. v. Bates, 236 S.W.2d 946, 949 (Ky. 1951).

Extensions of proof time were given throughout the proceedings by the ALJ. Some of the extension requests were made by Bell. However, she made no requests to extend the proof time related to the BRC in July 2005. It is possible to take additional proof between the BRC and the hearing, but the request must be made upon motion with good cause shown. 803 KAR 25:010, Section 13 (15). Bell did not file such a motion.

The ALJ repeatedly stressed the need for Bell to get an impairment rating related to her injury claim. At the BRC, Bell's claim was more than two years old. Also, Dr. Prince signed his report on April 27, 2005. Bell waited until the final hour to submit her proof. GE was given no opportunity to rebut Dr. Prince's report before the BRC. Based on totality of the circumstances, we do not believe the ALJ abused her discretion in striking Dr. Prince's report. Therefore, we affirm the WCB.

Conclusion

The ALJ stated sufficient reason for disregarding the university evaluator related to Bell's occupational disease claim. Also, the ALJ did not abuse her discretion when she struck the report of Dr. Prince related to Bell's repeated trauma injury claim. Both claims were properly dismissed. Based on the foregoing, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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