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Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002045-WC

FARAHNAZ MIRZAEE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-84215

UNITED PARCEL SERVICE; HON. HOWARD E. FRASIER, JR., ADMINISTRATIVE LAW JUDGE; AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: NICKELL AND TAYLOR, JUDGES; PAISLEY,[1] SENIOR JUDGE.

NICKELL, JUDGE: Farahnaz Mirzaee ("Mirzaee") has petitioned for review of the September 1, 2006, opinion of the Workers' Compensation Board ("Board"). The Board affirmed the April 10, 2006, opinion and order of Administrative Law Judge Howard E. Frasier, Jr. ("ALJ"), dismissing Mirzaee's claim for disability and medical benefits

[1] Senior Judge Lewis G. Paisley sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

against her employer, United Parcel Service ("UPS"), arising from an alleged July 24, 2002, work-related injury. We affirm.

I. FACTS

Mirzaee is a native of Iran. She was born on June 5, 1973, and is currently 35 years of age. She has resided in the United States since 1998 as a refugee, and lives in Louisville with her husband and two children. She obtained a high school education in Iran and attended banking management courses at Jefferson Community College. She was hired at UPS as a sorter in 2001. Her job duties were package handling and loading, which required lifting, standing and separating boxes. The weights she lifted varied.

On July 24, 2002, Mirzaee experienced the onset of pain in her hands and wrists while unloading packages weighing between sixty and one hundred pounds from a truck. She was initially seen in the emergency room at Baptistworx, where she reported a history of having experienced similar complaints since May 21, 2001. Later, she claims to have developed shoulder and neck pain. Even so, she continued to work at UPS from the alleged injury date until October 4, 2002.

Mirzaee filed her Form 101 Application for Resolution of Injury Claim ("Form 101") on September 29, 2003, alleging she suffered work-related injuries to her hands and neck on July 24, 2002. On January 15, 2004, an order granting her October 29, 2003, motion to amend her claim to include a shoulder injury was entered.

Though her Form 101 attributed the onset of her hand and neck complaints to a July 24, 2002, work-related lifting event, Mirzaee stated in deposition testimony that

her cervical complaints did not arise until just prior to her initial examination by Dr. Wayne Villanueva on December 28, 2002, some five months later. Records from Baptistworx indicated Mirzaee had complained of pain in the right forearm and hand since May 21, 2001. She had revisited the emergency room on several occasions between April 10, 2002, and the date of her alleged injury at UPS with similar complaints. Much later, while taking medication prescribed by Dr. Gary Reasor for her cervical pain, Mirzaee suffered a life-threatening drug overdose on February 24, 2004. The drug overdose resulted in serious chronic medical conditions and substantial medical expenses in excess of $39,000.00.[2]

The August 29, 2002, medical report of Dr. John Gormley was attached to the Form 101 in support of Mirzaee's claim. She had been referred to Dr. Gormley "for further evaluation of left shoulder pain." His medical history recorded that she "had a similar injury on April 10, 2002, that resolved. . . ." Dr. Gormley noted "her main complaint is pain at the left arm and neck," and diagnosed Mirzaee with "1. Left bicipital tendinitis with referred pain/rule out rotator cuff tear. 2. Status post right arm strain."

Dr. Gormley's August 29, 2002, medical report also documented that "she was noted to be very depressed" when initially evaluated at Baptistworx on July 24, 2002, following the alleged injury. However, Mirzaee filed no motion to amend her claim to include a work-related psychiatric impairment until December 20, 2005, some

[2] After being found non-responsive as the result of the drug overdose on February 24, 2004, Mirzaee was rushed to the hospital where she lapsed into a coma and was placed in intensive care. She remained non-responsive and hospitalized for some time. UPS' responsibility for payment of medical bills incurred for treatment of Mirzaee's drug overdose is contested in this appeal.

forty-one months later. UPS objected to this motion and it was denied by the ALJ because it was untimely and unsupported by the medical evidence offered by Mirzaee.

UPS filed its Notice of Claim Denial or Acceptance on December 16, 2003. It denied Mirzaee's alleged injuries had arisen from and in the course of her employment and asserted she had failed to meet her burden of establishing any "injury" as defined under the Workers' Compensation Act ("Act").[3] UPS admitted the alleged work-related lifting event was covered under the Act, but contended Mirzaee had suffered only a temporary aggravation. Even though it continued to contest Mirzaee's claim, UPS had already voluntarily paid $4,960.00 in temporary total disability ("TTD") benefits and $28,321.00 in medical expenses.[4] UPS also asserted entitlement to any period of overpayment of TTD.

UPS also submitted a surveillance videotape recorded on September 12 and 13, 2002, and the deposition of Steven Thomas ("Thomas"), the private investigator who conducted the surveillance. In the tape, Mirzaee was observed driving her car and

[3] Kentucky Revised Statutes (KRS) 342.0011(1) defines "injury" as "any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings." The term does not include the effects of the natural aging process nor any "psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury." Objective medical findings are defined in KRS 342.0011(33) as "information gained through direct observation and testing of the patient applying objective or standardized methods[.]"

[4] KRS 342.020(1) states, in pertinent part, "In addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury or occupational disease the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability, or as may be reasonably required for the cure and treatment of an occupational disease."

grocery shopping. Thomas testified Mirzaee was able to load groceries into her car and then transfer those groceries into her residence without assistance. He also testified Mirzaee displayed no limited range of movement and no outward signs of pain.

Mirzaee attempts to mitigate the impact of the surveillance videotape by explaining it was obtained soon after she sustained her alleged work-related injuries and while she continued to work. She asserts the effects of her work-related injuries have worsened over time and now cause chronic, debilitating pain and physical limitations that prevent her from engaging in any work and severely limit her activities of daily living. In addition to filing this workers' compensation claim, she has applied for Social Security disability benefits.

Mirzaee has seen a constellation of medical care providers and specialists. Her Form 105, Plaintiff's Chronological Medical History, dated September 17, 2003, which was also attached to her Form 101, indicated her neck complaints had been treated by: Baptistworx (4/10/02-6/23/03); Dr. Gormley (8/29/02-12/26/02); Dr. Kittie George (9/16/02-12/26/02); Baptist Hospital East (9/24/02-1/26/03); Dr. Villanueva (10/28/02-1/22/03); C.M. Kleinert Institute (12/20/02-3/14/03); and Dr. Reasor (1/8/03-present). By the close of proof the record indicates she had also been treated or evaluated by numerous other medical care providers and specialists, including: Dr. Elizabeth Rouse (08/21/02); @Work Physical Therapy (9/17/02-10/7/02); Dr. Charles Hargett (9/23/03); Baptist Hospital East (9/24/02-present); Dr. Darius Ghazi (2/27/03); Dr. Jeffrey Frank (2/24/04); Dr. Charles Bensenhaver (2/24/04-3/6/04); Dr. Frank Wood (4/1/04 and

5/17/04); Healthsouth (1/10/05); Dr. Ellen Ballard (9/15/04; 12/13/04; 3/15/05); and Dr. David Changaris (7/11/05-10/7/05).

After numerous extensions of time for the submission of proof, a final hearing was held on February 21, 2006. The ALJ entered his forty page opinion and order on April 10, 2006, dismissing Mirzaee's claim. Twenty-five pages were devoted to a detailed summary of the voluminous record.[5] He then painstakingly explained the rationale for his findings of fact and conclusions of law with exhaustive citations to the contradictory lay and medical evidence. Specifically, the ALJ's extensive findings of fact included:

> (a) Mirzaee's Credibility.
>
> "The undersigned finds that the Plaintiff's testimony is not credible in light of the medical evidence and the videotape evidence."
>
> (b) Weight of Medical Evidence.
>
> "The undersigned finds that the medical reports of Dr. Wood, Dr. Ghazi, and Dr. Ballard are more credible than the opinions of Dr. Reasor and Dr. Changaris."
>
> (c) Injury.
>
> "The type of part-time work done by the Plaintiff for UPS could certainly result in a traumatic or repetitive motion injury to her neck, shoulders, and hands. However, the Plaintiff has not met her burden of proof to show any objective medical findings that her activities of July 24, 2002, have resulted in any permanent injury."
>
> "The undersigned finds that the Plaintiff has failed to meet her burden of proof of a work-related injury based upon

[5] Neither party challenged the accuracy of the ALJ's summary of the evidence.

objective medical findings to her neck, arms, back, or hands on July 24, 2002."

(d) Temporary Medical Condition.

"At best, based upon the medical evidence close in time to the date of injury, the Plaintiff may have had a temporary, muscle strain of some type to her arms and hands. The undersigned finds that any muscle strain caused by her injury of July 24, 2002, has resolved by the date that she reached MMI on May 19, 2003."

(e) Causation (Work-Relatedness).

"In regard to causation, the undersigned finds that the Plaintiff has not met her burden of proof to show a permanent, work-related injury to her neck, arms, and hands as a result of the work activities of July 24, 2002."

(f) Notice.

"The undersigned finds that the Plaintiff has failed to give timely notice of any possible injury to her cervical spine. While Mrs. Mirzaee did give timely notice of a possible injury to her arms and hands, no credible evidence exists that any injury to the neck was of a type of gradual injury that would not have been known to the Plaintiff until revealed by a physician."

(g) Medical Expenses.

"As a result, the undersigned finds that the drug overdose for taking medications prescribed for a non-work related cervical condition is also nonwork-related and therefore not compensable. . . . Moreover, the undersigned also finds that the drug overdose of the Plaintiff was not a result of a miscommunication with Dr. Reasor, but an affirmative act of Mrs. Mirzaee to take vastly more pills than she was prescribed. . . . The undersigned is not making any finding regarding whether the Plaintiff had a suicide attempt, only that Plaintiff's failure to follow medical advice was intentional and not accidental."

> "Consequently, in addition to the fact that the Plaintiff was taking medication for a nonwork-related condition, the medical expenses for the drug overdose are not compensable because such action was an intentional act by the Plaintiff."
>
> "The only specific medical expenses sought by the Plaintiff were the expenses related to her drug overdose. Having found that such expenses are not compensable, and finding no injury as defined by the Act, the undersigned finds that the Plaintiff is not entitled to an award for medical expenses."

No petition for reconsideration was filed by either party.[6] Instead, Mirzaee appealed the ALJ's opinion to the Board. As in her current appeal before this Court, she argued the ALJ had failed to consider the entire medical record of her treating physicians and objective diagnostic studies.

In its opinion issued on September 1, 2006, the Board affirmed the ALJ's dismissal of Mirzaee's claim. In so doing, the Board correctly limited its review of the ALJ's findings of fact and conclusions of law to a consideration of the record as a whole to determine whether his decision was supported by substantial evidence. *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334 (Ky. 1985); *Hall's Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky.App. 2000).[7] This appeal followed.

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[6] KRS 342.285(1) provides "[a]n award or order of the administrative law judge as provided in KRS 342.275, if petition for reconsideration is not filed as provided for in KRS 342.281, shall be conclusive and binding as to all questions of fact, but either party may in accordance with administrative regulations promulgated by the executive director appeal to the Workers' Compensation Board for the review of the order or award." Therefore, the ALJ's aforementioned findings of fact are conclusive and binding on this Court.

[7] Substantial evidence has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F.*

Before this Court, Mirzaee merely recites evidence favorable to her position and contends the ALJ erred in finding she did not suffer an injury, cervical or otherwise, as defined by the Act. For the following reasons, we affirm the Board's September 1, 2006, opinion affirming the ALJ's April 10, 2006, dismissal of her claim.

II. ANALYSIS

Mirzaee first argues that the ALJ erroneously found she did not suffer a work-related injury to her cervical spine. Specifically, she claims that the ALJ's findings were not supported by substantial evidence of probative value; that is, the ALJ's opinion was not supported by objective medical findings within the record. We disagree.

In a workers' compensation proceeding, the employee bears the burden of proving every essential element of a claim. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925, 928 (Ky. 2002); *Gibbs v. Premier Scale Co./Indiana Scale Co.*, 50 S.W.3d 754, 763 (Ky. 2001); *Jones v. Newberg*, 890 S.W.2d 284, 285 (Ky. 1994). As the fact-finder, the ALJ has the authority to determine the quality, character, and substance of the evidence. *Burton*, 72 S.W.3d at 928; *Square D. Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). Similarly, the ALJ has sole authority to determine the weight and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977); *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334, 336 (Ky.App. 1995). The fact-finder may also reject any testimony and believe or disbelieve various parts of the evidence, even if the

Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

evidence is derived from the same witness. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000); *Whittaker v. Rowland*, 998 S.W.2d 479, 481 (Ky. 1999); *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 329 (Ky.App. 2000). The ALJ has broad discretion in determining the extent of occupational disability. *Commonwealth, Transportation Cabinet v. Guffey*, 42 S.W.3d 618, 621 (Ky. 2001); *Cal Glo Coal Co. v. Mahan*, 729 S.W.2d 455, 458 (Ky.App. 1987); *Thompson v. Fischer Packing Co.*, 883 S.W.2d 509, 511 (Ky.App. 1994).

Where the party shouldering the burden of proof is unsuccessful before the ALJ, the issue on appeal is whether the evidence favoring that party is so compelling that no reasonable person could fail to be persuaded by it. *Carnes v. Tremco Manufacturing Co.*, 30 S.W.3d 172, 176 (Ky. 2000); *Bullock v. Peabody Coal Co.*, 882 S.W.2d 676, 678 (Ky. 1994); *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky.App. 1984). Moreover, a party challenging the ALJ's factual findings must do more than simply present evidence supporting a contrary conclusion to justify reversal. *Transportation Cabinet v. Poe*, 69 S.W.3d 60, 62 (Ky. 2001); *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000); *McCloud v. Beth-Elkhorn Corp*., 514 S.W.2d 46 (Ky. 1974). As long as the ALJ's opinion is supported by any evidence of substance, it cannot be said that the evidence compels a different result. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). When reviewing the Board's decision, the function of this Court is limited to correcting the Board only where we perceive the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error so

flagrant in assessing the evidence that gross injustice results. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). *See also Phoenix Manufacturing Co. v. Johnson*, 69 S.W.3d 64, 67 (Ky. 2001); *Huff Contracting v. Sark*, 12 S.W.3d 704, 707 (Ky.App. 2000).

In the case at bar, the ALJ found Mirzaee did not sustain a cervical "injury,"as defined under the Act, as a result of the July 24, 2002, lifting incident. In making this finding, the ALJ drafted a well-supported opinion, containing a twenty-five page detailed summary of the medical and lay evidence. Contrary to Mirzaee's contention, in reaching his findings of fact and conclusions of law, the ALJ carefully weighed all of the voluminous findings and opinions expressed by the numerous physicians who had evaluated and/or treated Mirzaee. He then exercised his authority, as the finder of fact, to determine the weight and inferences to be drawn from the contradictory lay and medical evidence, and ultimately found Mirzaee had failed to meet her burden of proving she had sustained a statutory "injury" related to her cervical condition, or any other permanent "injury."

More particularly, in concluding that the objective medical findings supported the ALJ's determination that Mirzaee had not sustained injury to her cervical spine, the Board reasoned as follows:

> Mirzaee's arguments on appeal largely deal with the weight and credibility to be assigned to the evidence. Such matters are for the ALJ to decide and not this Board. It is evident the ALJ thoroughly reviewed the record in this matter and was not convinced as to Mirzaee's credibility concerning her current symptoms or that Mirzaee sustained anything

> more than a temporary muscular strain to her hands and arms as a result of the July 24, 2002[,] incident. In the ALJ's analysis, he provided reasons for accepting the opinions of certain doctors while rejecting the opinions of others.
>
> Ordinarily the determination of causation is one properly within the province of medical experts. *Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc.*, Ky. App., 618 S.W.2d 184 (1981), 618 S.W.2d 184, 186 (Ky.1981). Where, as here, the ALJ is faced with conflicting evidence, the fact finder has the sole authority to determine whom and what to believe. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). Unfortunately for Mirzaee, the ALJ was more persuaded by the medical reports of Drs. Wood, Ghazi and Ballard. . . .
>
> The evidence from Drs. Wood and Reasor permitted the ALJ to find that Mirzaee reached maximum medical improvement from her temporary muscle strain on May 19, 2003. Similarly, the opinions of Drs. Wood, Ballard and Ghazi permitted the ALJ to conclude Mirzaee failed to prove her cervical condition was related to the July 24, 2002[,] work activities. Since Mirzaee's first complaints of neck pain occurred long after the work injury, the evidence falls far short of compelling a finding that the cervical condition was related to those work activities. . . .

It is clear that the ALJ set forth the medical evidence he found constituted objective medical evidence of impairment. Since the evidence relied upon by the ALJ is evidence of substance that supports his opinion, the Board was without the authority to conclude otherwise. *Francis*, 708 S.W.2d at 641. Likewise, this Court may not substitute its judgment for that of the ALJ's, nor can this Court render findings of its own. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). "In order to reverse the findings of the Board unfavorable to a claimant, the evidence must be so overwhelming as to compel a finding in his favor of occupational disability." *Paramount Foods, supra*,

695 S.W.2d at 419 (citations omitted). The objective medical evidence relied upon by the ALJ and the Board in their findings were of substantial quality, and we are thus bound by the record. *Armco Steel Corp. v. Mullins*, 501 S.W.2d 261 (Ky. 1973). Mirzaee's argument merely indicates conflicting testimony between the physicians. The ALJ, as the finder of fact, had sufficient evidence to determine Mirzaee had no "injury" to her cervical spine. Nothing in the record would compel a finding of permanent occupational disability. We agree with the Board that substantial evidence supported the ALJ's finding, and it will therefore not be disturbed on appeal.

Accordingly, Mirzaee's next argument must also fail because it follows that since there was substantial evidence to support the ALJ's finding that Mirzaee did not sustain a work-related injury to her cervical spine, she was not entitled to payment for any medical treatment related to the cervical condition. Furthermore, she was not entitled to payment of medical treatment received in relation to her drug overdose as the medication ingested had been prescribed to treat her non-work related cervical condition and was intentionally taken in quantities contrary to medical advice. As we are affirming the Board's decision that the ALJ was correct in finding Mirzaee's cervical condition was not work-related, her arguments relating to notice and causation of the injury to the cervical spine are moot and warrant no further discussion.

Mirzaee's last argument is that the ALJ abused his discretion in denying her last minute motions to appoint a university evaluator and to amend her Form 101 to allege psychiatric impairment. We find Mirzaee's argument unpersuasive.

First, KRS 342.285(1) directs that absent the filing of a petition for reconsideration, all facts found by the ALJ are conclusive and binding on a reviewing court. No petition for reconsideration of the ALJ's opinion was filed in this case. Thus, we are bound by the ALJ's recitation of facts which included the following paragraph:

> The Plaintiff next filed a Motion to Amend the Form 101 on December 20, 2005, to add a claim of psychiatric impairment. This motion was based on the same report of Dr. Changeris [sic] that was previously relied upon for the motion for appointment of a psychiatric evaluator. Again, the undersigned found that such report did not support a finding of causation for psychiatric impairment, and while the report might support an extension of time for more investigation about possible psychiatric impairment, the numerous prior extensions of time did not justify any additional delay. The only prior evidence of possible psychiatric symptoms related to the overdose of February 24, 2004. The Motion to Amend was denied by Order of January 23, 2006.

Since Mirzaee failed to file a petition for reconsideration, we have no factual basis upon which to conclude the ALJ abused his discretion in denying the motions to amend and to appoint a university evaluator.

Moreover, we must agree that the ALJ was extremely tolerant and generous in granting Mirzaee's many requests for additional time to muster her evidence. Under the timetable set forth in 803 Kentucky Administrative Regulation (hereinafter "KAR") 25:010 Section 8(2), discovery should be completed within 105 days. "In the absence of compelling circumstances, only one (1) extension of thirty (30) days shall be granted to each side for completion of discovery or proof by deposition." 803 KAR 25:010 Section 15(4). Discovery in this case spanned more than two years. Much of that time was

directly attributable to Mirzaee, and it was far more than the maximum 135 days contemplated by the regulation. Thus, we cannot say the ALJ abused his discretion in denying yet another request for delay, especially when there was no explanation for not filing a more timely motion.[8] As a trial court judge bears responsibility for directing the efficient flow of litigation through the judicial process, the ALJ, not the parties, must control the progression of a workers' compensation claim as it courses through the administrative process, ensuring against the impediment of unreasonable delays which might otherwise dam the timely delivery of justice. Based upon the facts found by the ALJ, which Mirzaee did not contest by filing a petition for reconsideration, we find no abuse of discretion and affirm the ALJ's opinion.

For the foregoing reasons, the September 1, 2006, Board opinion affirming the April 10, 2006, opinion and order of the ALJ is affirmed.

ALL CONCUR.

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[8] Again, Dr. Gormley's August 29, 2002, medical report noted Mirzaee "was noted to be very depressed" when admitted to Baptistworx on July 24, 2002, the date of her alleged work-related injury. Further, while hospitalized following her suspicious drug overdose on February 24, 2004, Mirzaee was referred for psychiatric assessment. Nonetheless, she delayed until December 20, 2005, to file her motion to amend her claim to include a psychiatric impairment.