

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000013-WC

NESCO, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-84119

IMOGENE RICKETT; HON. LAWRENCE
F. SMITH, ADMINISTRATIVE
LAW JUDGE; AND THE WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * **

BEFORE: CLAYTON, NICKELL, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Nesco, Inc. (Nesco) petitions this Court to review an opinion of the Workers' Compensation Board (Board) reversing the Administrative Law Judge's (ALJ) decision to dismiss Imogene Rickett's claim for benefits. We affirm.

Rickett was employed by Nesco and filed a claim for workers' compensation benefits on November 6, 2006. Rickett claimed that while lifting several sheets of plastic from a pallet she began experiencing a burning sensation in her lower back. Rickett claimed to have suffered a work-related back injury.

Following a hearing, the ALJ rendered an Opinion, Order and Award (original award) on May 28, 2007. Therein, the ALJ relied upon the medical evaluations of Dr. Timothy Kriss and Dr. James Templin. In the original award, the ALJ summarized Dr. Kriss's medical report by saying Rickett suffered a 5% permanent partial impairment but that her history of back pain extended back sixteen years. As to Dr. Templin's report, the ALJ noted Dr. Templin assessed an 8% permanent partial impairment with at least 50% attributable to a preexisting condition. The ALJ specifically noted that Dr. Templin opined he was "[s]till unable to say within reasonable medical probability that the alleged incident of May 7, 2006[,] was the sole or approximate [sic] cause of [Rickett's] current medical condition." The ALJ ultimately found that Rickett suffered a work-related back injury. The ALJ assessed an 8% permanent partial impairment to Rickett as a result of the work-related injury.

Thereafter, Nesco filed a petition for reconsideration. On July 24, 2007, the ALJ rendered an order granting Nesco's petition for reconsideration, "rescind[ing]" the original award and dismissing Rickett's claim. The ALJ concluded that he had "misread" the expert opinion of Dr. Templin. In particular, the ALJ believed Dr. Templin changed his opinion as to work-relatedness of

Rickett's back condition in a supplemental report. Consequently, the ALJ now found that Rickett's back condition was non-work related. Rickett sought review with the Board.

The Board ultimately reversed the ALJ's July 24, 2007, order and remanded to the ALJ with directions to reinstate the original award of May 28, 2007. The Board specifically concluded:

From the above, it is clear that this is not a situation in which the ALJ overlooked the supplemental report of Dr. Templin when he made his original findings. In fact, on Page 6 of his original opinion, the ALJ cites verbatim to a portion of Dr. Templin's supplemental report of April 24, 2007 in which Dr. Templin expresses his opinion on the causation of Rickett's injury. Moreover, contrary to the ALJ's finding that Dr. Templin changes his opinion in his supplemental report as to the cause of Rickett's current condition, it is clear that Dr. Templin merely asserts that the May, 2006 injury may not have been the sole or proximate cause of her condition and indeed acknowledges in the same supplemental report that he believed that the exacerbation/injury in May, 2006 did result in a permanent change in her condition. Dr. Templin's opinion contained in his supplemental report supports the original finding made by the ALJ. Moreover, Dr. Templin's supplemental report is not the type of evidence that compels a contrary finding. Because the ALJ's original finding is supported by substantial evidence, this Board feels that the ALJ lacked authority to change his position on the merits.

Our review follows.

Nesco contends that the Board erroneously reversed the ALJ's July 24, 2007, order dismissing Rickett's claim and erroneously ordered reinstatement of the original award of May 28, 2007. Nesco asserts that the ALJ properly

granted its petition for reconsideration and did not exceed the scope of authority as found in Kentucky Revised Statutes (KRS) 342.281. Additionally, Nesco maintains that the evidence does not compel a finding in favor of Rickett; thus, the ALJ's July 24, 2007, order was supported by sufficient evidence.

In this case, we are presented with two issues – one of law and one of fact. The issue of law presented is whether the ALJ erred by dismissing Rickett's workers' compensation claim in the July 24, 2007, order which granted Nesco's petition for rehearing, and the issue of fact presented is whether the ALJ's opinion is supported by a sufficient quantum of evidence. As resolution of the legal issue must necessarily precede resolution of the factual issue, we shall initially address the issue of law.

In this case, the ALJ granted Nesco's petition for rehearing and held, in part:

In summary, [Nesco] states that Dr. Templin's supplemental report concedes that he was unable within a reasonable degree of medical probability to state that the alleged incident of May 7, 2006[,] was the sole or proximate cause of [Rickett's] medical condition. [Nesco] also states that with Dr. Templin's apparent change of opinion there is no medical evidence to support [Rickett's] assertion of her work injury. That is because the medical evidence is uncontradicted on this issue.

[Rickett] argues that, first, even if correct, [Nesco] does not point out a patent error subject to correction by KRS 342.281. [Rickett] also states that, although Dr. Templin, in his supplemental report dated April 24, 2007, does appear to back away from the certainty he expressed in his earlier report, he continued in his opinion that

[Rickett's] work injury incident resulted in a permanent change in [Rickett's] condition.

From my review of the evidence, it is clear that I have based my decision on the opinions of Dr. Templin. To the extent that I may have misread those opinions, it would present a patent error. . . .

. . . .

Dr. Templin's supplemental report after reviewing the records from the Southern Ohio Regional Medical Center clearly represents a change in his opinion as it relates to the cause of [Rickett's] medical condition. His statement that he was unable to say within reasonable medical probability that the alleged incident was the sole or approximate cause of her medical condition substantially reduces the strength of [Rickett's] proof. Although I reviewed both reports in the original order, my decision been [sic] represented a clear oversight of Dr. Templin's opinions in the supplemental report. Now, I must find it with Dr. Templin's change of opinion [Rickett] has not carried her burden of proof and risk of nonpersuasion. Accordingly, I find that her medical condition was not caused by the work injury incident of May 7, 2006. Therefore, the claim must be dismissed.

In its July 24, 2007, order, the ALJ clearly reconsidered the medical opinion of Dr. Templin and found that Rickett's "medical condition was not caused by the work injury." Consequently, the ALJ dismissed Rickett's claim. By contrast, in the ALJ's original award, the ALJ found that Rickett suffered a work-related back injury and specifically considered Dr. Templin's medical opinion, including the supplemental report.

Under KRS 342.281, the ALJ may correct errors "patently appearing" upon the face of the award in a petition for rehearing. Additionally, the ALJ is

permitted to make additional findings of fact upon unresolved factual issues.

Wells v. Ford, 714 S.W.2d 481 (Ky. 1986). It is, however, well-established that KRS 342.281 provides a clear statutory limitation upon the authority of an ALJ, and the ALJ does not have authority to reconsider the merits of a claim or to change factual findings when ruling upon a petition for reconsideration. *Beth-Elkhorn Corp. v. Nash*, 470 S.W.2d 329 (Ky. 1971); *Wells v. Beth-Elkhorn Coal Corp.*, 708 S.W.2d 104 (Ky.App. 1985).

The issue of work-related causation is an issue of fact. *Coleman v. Emily Enterprises, Inc.*, 58 S.W.3d 459 (Ky. 2001). As the ALJ specifically found that Rickett suffered a compensable work-related back injury in the original award, we do not think it proper for the ALJ to change that finding of fact in his order ruling upon the petition for rehearing. Simply put, we agree with the Board that the ALJ exceeded his authority under KRS 342.281 by changing a factual finding in his July 24, 2007, order. *See Wells*, 708 S.W.2d 104. Consequently, we conclude that the ALJ erroneously granted the petition for reconsideration and that the original award should be reinstated. Having so concluded, we now consider whether the original award rendered on May 28, 2007, was supported by substantial evidence.

When reviewing an opinion and award of the ALJ, we defer to the factual findings made by the ALJ. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). As Rickett prevailed before the ALJ, the factual findings of the ALJ will be upheld if supported by substantial evidence of a probative value.

See McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Of course, the weight and credibility of evidence is within the sole province of the ALJ, as fact-finder. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). In this role as fact-finder, the ALJ is free to “reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). However, it has also been recognized that “[w]here the question at issue is one which properly falls within the province of medical experts, the fact-finder may not disregard the uncontradicted conclusion of a medical expert and reach a different conclusion.” *Id.* at 96. And, of course, we review issues of law *de novo*. *Finley v. DBM Techs.*, 217 S.W.3d 261 (Ky.App. 2007).

In the original award, the ALJ found that Rickett suffered a work-related back injury and assessed an 8% permanent partial impairment rating. Considering the particular facts of this case, we believe the issue of work-related causation presented a question that “properly falls within the province of medical experts.” *Magic Coal Co.*, 19 S.W.3d at 96. In the original award, the ALJ relied upon the medical opinion of Dr. Templin. Dr. Templin assessed an 8% permanent partial impairment rating and opined that Rickett’s back condition was work-related as being caused by the lifting injury. Dr. Templin issued a supplemental report on April 24, 2007. Nesco contends that in the supplemental report Dr. Templin changed his opinion upon work relatedness after reviewing additional medical records of Rickett. In particular, Nesco maintains that Dr. Templin stated

he could not say Rickett's back condition was work related. Thus, Nesco believes that Dr. Templin's opinion upon work relatedness does not constitute substantial evidence of a probative value to support the ALJ's finding upon causation. We disagree.

In the original opinion, the ALJ considered the totality of Dr. Templin's medical opinions including those expressed in the April 24, 2007, supplemental report. Although Nesco contends that the April 24, 2007, supplemental report may only be read as a complete change in Dr. Templin's medical opinion upon the issue of work relatedness, we are not so convinced. Indeed, the Board's interpretation of the supplemental report differs from that of Nesco. The Board did not believe that Dr. Templin changed his opinion upon work relatedness in the supplemental report but that he merely opined that the work injury "may not have been the sole or approximate [sic] cause of her condition." As it is within the province of the ALJ to weigh evidence and to determine its import, we are of the opinion that the ALJ properly relied upon the medical opinion of Dr. Templin on the issue of work relatedness. Thus, we hold that substantial evidence of a probative value supports the ALJ's original award.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE
IMOGENE RICKETT:

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