

Commonwealth of Kentucky
Court of Appeals

NO. 2008-CA-000594-WC

LORETTA WRIGHT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-96276

WALGREENS;
HONORABLE J. LANDON OVERFIELD,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, LAMBERT, AND STUMBO, JUDGES.

STUMBO, JUDGE: Loretta Wright appeals from an opinion of the Workers' Compensation Board affirming the decision of the Administrative Law Judge. The ALJ awarded permanent partial occupational disability benefits for a work-related knee injury sustained in the employ of Walgreens. Wright contends that the Board

erred in failing to determine that she also sustained work-related head and neck injuries resulting in her total disability. For the reasons stated below, we affirm the opinion in appeal.

On January 23, 2005, Wright sustained a work injury in the course of employment with Walgreens. Wright, who was a cashier and stock clerk, was helping a customer locate an item in the store at about 5:00 a.m. when she slipped and fell on a wet tile floor. She attempted to stop her fall with her left arm but landed on the tile floor striking the left side of her body. Wright would later testify that she immediately had rib pain and a bad headache.

Wright sought medical attention the following day at an immediate care center. Her left knee was x-rayed, resulting in a referral to an orthopedic specialist who recommended surgery. After an initial attempt at surgery was unsuccessful due to an inability to intubate, Wright's left knee was surgically repaired and she began a regimen of physical therapy. She did not return to work, and would later state that her knee continued to hurt and that she could not fully bend it, resulting in an inability to return to normal usage.

Wright gave timely notice of her knee injury to Walgreens and filed an Application for Resolution of Injury Claim (Form 101). Walgreens subsequently paid temporary total disability benefits to Wright at the rate of \$477.33 per week from January 31, 2005, through January 10, 2006, for a total of \$23,021.19. Walgreens also paid Wright's medical bills in the amount of \$28,033.46. Walgreens denied compensability of Wright's claim of injuries to her

head, neck and back resulting from the fall. Walgreens also contested the extent and duration of Wright's occupational disability.

The matter proceeded before the ALJ on the issues of the extent and nature of Wright's injuries, and proof was taken. Wright introduced medical records from the immediate care center dated January 23, 2005, which diagnosed a left knee contusion. She also produced medical records from the University of Louisville hospital showing a neck CT performed on December 27, 2005. That scan showed no evidence of acute abnormality, and she was later diagnosed with chronic neck pain. A cervical MRI scan and lumbar MRI scan showed mild degenerative disc disease, and Wright was later diagnosed with degenerative disc disease and myofascial pain syndrome.

A functional capacity evaluation was performed at Healthsouth, and an FCE report dated November 11, 2005, indicated that Wright was limited to lifting 10 pounds. On June 29, 2006, Wright was evaluated at the Pain Management Center of University of Louisville Hospital. She complained of neck pain and left arm pain, and was prescribed medication and an epidural steroid injection.

Wright was evaluated on March 5, 2007, by Dr. Warren Bilkey. He diagnosed a left knee contusion with partial ACL tear which had been treated with arthroscopic debridement surgery. He also diagnosed chronic pain involving Wright's back, neck, and left shoulder, and noted Wright's complaints of headaches. He opined that Wright's left knee injury resulted from the January 23,

2005, slip and fall, but that the left side chronic pain was not related to the fall. Based on the AMA Guidelines, he assigned a 10% functional impairment rating arising from the left knee injury. He also assigned a 3% impairment for the left side chronic pain which was not associated with the work injury. He later amended the assessment to include a 5% functional impairment for the cervical strain arising from the work injury, for a total body impairment (arising from the work injury) of 15%.

Walgreens introduced the medical records of Drs. Roberts and Reutlinger. Dr. Reutlinger noted that Wright's left knee x-rays were normal except for mild osteoarthritis. He further indicated that a February 10, 2005, MRI scan of the left knee showed what appeared to be a small tear of the medial meniscus as well as an old healed ACL sprain. Dr. Roberts was deposed, and indicated that he believed Wright had a 4% functional impairment rating for the left knee injury based on AMA Guidelines, and that she could return to work if she were allowed to perform her cashier job sitting down. He also stated that "I don't see any record of neck or back pain here."

Dr. Bart Goldman evaluated Wright on April 26, 2007. He noted the early onset of knee pain subsequent to the slip and fall, and that Wright's medical record showed no complaints of neck pain until an emergency room visit on December 27, 2005. He also recognized that the first time Wright mentioned neck or back pain to Dr. Roberts was March 25, 2006. He concluded that Wright's pain was so global and followed neither anatomic or psychiatric patterns that it was

likely unexplainable scientifically. He stated that Wright was at maximum medical improvement, and that he had no reasonable basis for assessing an impairment rating because Wright's symptoms were so far out of proportion to the described injury.

The matter proceeded before the ALJ, who noted that while Wright appeared credible at the hearing, the medical evidence called her credibility into question. Most damaging to Wright was his observation that while it was plausible that one health care provider might mistakenly fail to record that Wright complained of head, neck and back pain, it was not plausible that every one of the several health care providers employed between January 23, 2005, and December, 2005, would make such omissions.

The ALJ concluded that Wright sustained a 4% functional impairment to the body as a whole due to the knee injury. This assessment was based in part on Dr. Roberts' evaluation. He also concluded that the three multiplier should be employed based on his determination that Wright did not retain the physical capacity to return to the type of work performed at the time of injury. As to the complaint of head, neck and back injury, the ALJ found that Wright failed to sustain her burden of proof based on her failure to give a history of an injury to her head, neck or back to any medical provider prior to December, 2005. After petitions for reconsideration were filed by each party, the ALJ ultimately awarded permanent partial disability benefits beginning November 23, 2005, in the amount of \$35.53 per week. The amount was based on \$455 times 2.6% times the 3

multiplier. Wright appealed to the Workers' Compensation Board, which affirmed the ALJ's decision. This appeal followed.

Wright now argues that the Board erred in determining that the ALJ properly found that Wright failed to demonstrate the work-relatedness of her head, neck and back pain. She claims that the evidence compels a finding that those injuries were work related. Specifically, Wright notes that she complained of head and neck pain only eleven months after the slip and fall - a time frame which she maintains demonstrates a causal connection between the fall and the head and neck pain. She also claims that Dr. Bilkey found a "smoking gun" which demonstrates the connection between the fall and Wright's head, neck and back pain. This smoking gun was Dr. Bilkey's determination that Wright had previously suffered a left clavicle dislocation. Wright contends that this dislocation must have occurred at the time of her slip and fall, and that it explains her head, neck and back pain.

Wright also argues that the evidence compels a finding of total disability. As a basis for this argument, Wright notes that Dr. Bilkey limited her to lifting 10 pounds and confined her to sedentary work. Given her age of 50, 8th grade education with GED, and vocational background, Wright contends that she is incapable of performing any work and is entitled to a finding of total disability.

We have closely examined the written arguments, the record and the law, and find no error in the Board's determination that the ALJ correctly found that Wright sustained a 4% functional impairment to the body as a whole due to the knee injury, nor that she failed to demonstrate a nexus between her fall and the

head, neck and shoulder pain. Wright directs our attention to the report of Dr. Bilkey, who she maintains found evidence - in the form of a March, 2005, x-ray showing that Wright had suffered a dislocated clavicle - which demonstrates a nexus between her fall and subsequent complaints of head, neck and back pain. Neither the ALJ nor the Board addressed this finding, and Wright does not cite to it in the record. It appears at page 227 of the record, where Dr. Bilkey addressed Wright's medical history and stated that,

Subsequent evaluations noted that chest x-ray dated March 2005, a post-op film after the first failed surgical attempt, demonstrated left clavicle dislocation with atelectasis of the left lung base. These were thought to be part of the reason for complaints of shortness of breath and chest pain that she was continuing to have after the first failed surgery.

It is noteworthy that Dr. Bilkey did not conclude that the dislocation resulted from the January 23, 2005, fall, nor that it caused the head, neck and back pain of which Wright would later complain. He went on to state that, "She underwent subsequent x-ray 9/1/06 which demonstrated no evidence of fracture or dislocation of the clavicle. CT scan of the chest 9/15/06 demonstrated no evidence for clavicle dislocation or subluxation or fracture." Since Dr. Bilkey did not find a nexus between the fall and the clavicle dislocation, and because he noted that the dislocation later resolved, we cannot conclude that the Board erred in failing to make note of this event as a "smoking gun". That is to say, while the dislocation is medically noteworthy, nothing in the record connects it to Wright's fall nor her subsequent pain.

Of more relevance is Dr. Bilkey's recognition that the medical record "documents the onset of symptoms of the neck and upper back as having occurred approximately 1/1/06." This clearly supports the ALJ's finding that the record was void of any complaints of neck and back pain until eleven months after Wright's fall, and further supports the ALJ's determination that Wright failed to demonstrate by reference to the medical record a nexus between the fall and the neck and back pain.

As the parties properly note, Wright has the burden on appeal of establishing that the evidence was so overwhelming as to compel a finding in her favor. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming as to compel a certain result. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985). Our review of the medical record supports the Board's determination that Wright has not demonstrated evidence so overwhelming as to compel a finding in her favor on this issue.

Wright's related argument is that the Board erred in failing to determine that she was entitled to a finding of total disability. Wright refers to KRS 342.0011(11), which defines permanent total disability as a condition of an employee, due to injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of the injury. She briefly argues that based on Dr. Roberts' assessment that she should be limited to

sedentary work, combined with her age of 50 years and GED education, it is clear that she is unable to perform any work of any type.

We do not find this argument persuasive. While Dr. Roberts' assessment that she should be limited to sedentary work is certainly a limitation on the kind of employment in which she may engage, it is by no means a bar to any employment. The consideration of a total disability award depends on the many factors set out in *Osborne v. Johnson*, 432 S.W.2d 800 (Ky. 1968), which include the worker's post-injury physical, emotional, intellectual and vocational status and how these factors interact. Ultimately, it falls within the broad authority of the ALJ to translate an impairment rating into partial or total disability. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). Given the totality of the record, including the numerous medical evaluations, Wright's age, education and work experience, and our recognition that her claim of head, neck and back pain did not present itself in the medical record until eleven months after the accident, we cannot conclude that the Board erred in determining that the ALJ acted squarely within his broad authority to translate the impairment ratings into a finding of partial disability. Accordingly, we find no error on this issue.

For the foregoing reasons, we affirm the opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE,
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