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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002446-WC

NANETTE WILLIS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-99450

FAMILY HOME HEALTH CARE,
HON. R. SCOTT BORDERS, ALJ, AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

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BEFORE: DIXON AND NICKELL, JUDGES; AND KNOPF,¹ SENIOR JUDGE.

NICKELL, JUDGE: Nanette Willis ("Willis") appeals from a Workers' Compensation Board ("Board") opinion affirming in part, reversing in part, and remanding an Administrative Law Judge's ("ALJ") opinion granting Willis

¹ Senior Judge William L. Knopf 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.

benefits but reversing and remanding for additional findings as to application of the appropriate multiplier under *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003).

After reviewing the record, the arguments of counsel, and the applicable law, we affirm.

FACTS

Willis was born on August 31, 1960, stands five feet four inches tall, and weighs 350 pounds. She has an associate of arts degree in human resources, a bachelor's degree in social work, a master's degree in social work, and has completed six hours toward a doctoral degree in education.

Willis joined Family Home Health Care ("FHC") as a social worker in January 2005 as a full-time employee earning \$17.00 an hour. On September 16, 2005, while setting up a booth at a festival for FHC, she misjudged a curb and immediately felt severe pain in her right knee. She continued working for two weeks before seeking medical attention from Dr. Laura Reese ("Dr. Reese"), an orthopedic surgeon, on September 27, 2005.

Willis did not describe any arthritic-type discomfort during her initial consultation with Dr. Reese and provided no prior medical records to her for review. Based upon weight-bearing x-rays, an MRI and Willis's account of the injury, Dr. Reese diagnosed her with tricompartmental DJD arthropathy, a bucket handle tear of the lateral meniscus, and a partial ACL tear of the right knee, all stemming from her work-related injury. Dr. Willis also stated any degenerative

changes were a “dormant nondisabling condition” aroused into disabling reality by the work-related injury.

On January 4, 2006, Dr. Reese performed a right knee diagnostic and operative arthroscopy. Her operative report said Willis had experienced “some arthritic discomfort in her knees prior to this.” Willis was off work from December 28, 2005, until April 21, 2006, with one brief return to work in March with restrictions (no heavy lifting, no repetitive stair climbing, and icing and elevating the right knee as needed). When Willis finally returned to work, her hours had been reduced and instead of being paid hourly, she was paid each time she visited a client. On June 6, 2006, she was terminated for reasons unrelated to her injury.

Dr. Reese assigned Willis a whole body impairment rating of twenty-two percent which she attributed entirely to the work-related injury. Dr. Reese further stated Willis could probably sit six hours per day but would need freedom to move around. Dr. Reese stated Willis’s depression² had worsened since the injury.

Willis applied for workers’ compensation benefits related to her knee on August 7, 2006. On September 18, 2006, she moved to amend her application to include a claim for psychological injury saying her twisted knee had exacerbated her anxiety and depression.

² Willis was treated for various mental conditions for two decades as will be discussed later in this opinion.

Dr. David Jenkinson (“Dr. Jenkinson”), an orthopedic surgeon, performed an independent medical evaluation (“IME”) at FHC’s request on November 7, 2006. In addition to taking a history from Willis, he took x-rays which showed “signs of very advanced generalized osteoarthritis of the right knee” and evidence of less severe osteoarthritis in the left knee. Dr. Jenkinson was confident the main cause of Willis’s knee pain was advanced osteoarthritis which predated her September 16, 2005, injury, but acknowledged the meniscal tear may have been caused or exacerbated by her on-the-job injury. He assessed a twenty percent whole person impairment rating due to the severe osteoarthritis. He stated Willis would have difficulty performing any job requiring physical activity, but could do sedentary work requiring only minimal standing or walking.

In a follow-up letter dated December 11, 2006, Dr. Jenkinson stated he was certain Willis’s advanced osteoarthritis was active at the time she twisted her knee. He noted morbid obesity, from which Willis suffers, “is a frequent cause of premature osteoarthritic deterioration of the knee.” Because the meniscus tear may have occurred during the injury, he gave Willis a permanent four percent whole body impairment rating due to the partial medial and lateral meniscectomy, but remained firm in his “opinion that the vast majority of her present impairment is related to the pre-existing degenerative osteoarthritis of the knee.”

In a supplemental report dated January 19, 2007, Dr. Jenkinson clarified his twenty percent impairment was based solely on the x-ray of the knee which showed a “complete loss of cartilage joint space.” He confirmed there was

no way the degenerative change captured on the x-rays taken by Dr. Reese could have occurred in just two weeks, the time between the knee injury and the initial consultation with Dr. Reese. Dr. Jenkinson reiterated the major cause of Willis's degenerative arthritis was her gross morbid obesity. He disagreed with Dr. Reese's opinion that none of Willis's impairment was related to pre-existing arthritis and further stated Willis would have been symptomatic with or without the workplace injury and would have qualified for the twenty percent assessment when Dr. Reese initially saw her. Dr. Jenkinson repeated "the degenerative change in [Willis's] knee was one hundred percent pre-existing the minor work-related injury of September 2005."

Dr. Betsy Evans ("Dr. Evans"), a clinical psychologist, had treated Willis for at least fifteen years for mood disorder, post traumatic stress disorder ("PTSD"), and anxiety. She testified Willis sometimes satisfied the criteria for obsessive-compulsive disorder and a couple of times she was suicidal and close to requiring hospitalization. According to Dr. Evans, Willis's depression and PTSD were exacerbated significantly by the September 16, 2005, injury. She did not conduct any objective tests before assigning Willis a pre-injury impairment rating of fifteen percent based on some active, psychological disability, and a post-injury impairment rating of seventy-five percent.

Dr. Robert Granacher ("Dr. Granacher"), board certified in both psychiatry and neurology, evaluated Willis at the request of FHC on November 8, 2006. After conducting various tests he found no evidence of any psychiatric

impairment due to Willis's workplace injury. He concluded Willis had the mental capacity to perform any work for which she was trained, educated or experienced. He disagreed with Dr. Evans's assessment of a seventy-five percent whole body impairment because one cannot have that great an impairment and hold a job. His testing revealed Willis was fabricating and magnifying much of her symptomatology and was malingering. According to Dr. Granacher, if true, some of Willis's test results would have required her to be institutionalized. He stated Willis's daily impairment, stemming from depression and being sexually abused as a child, was probably about twenty percent before she injured her knee.

At the benefits review conference on March 22, 2007, the parties stipulated to a pre-injury average weekly wage ("AWW") of \$689.76 and a post-injury AWW of \$702.89. Willis testified she was currently earning \$34,000.00 annually as a therapist at Pathways, Inc., where she had worked since January 8, 2007. She previously worked as a manager trainee at a gas station and worked with teenagers at a training center but resigned both positions because of her physical limitations. Willis described the Pathways staff as being extremely accommodating to her and said she intended to remain in the employ of Pathways.

Despite having been in three motor vehicle accidents and being in traction as a young child, Willis testified she had no knee problems prior to her workplace injury nor had she received any prior treatment for her knee. She did, however, admit taking antidepressants for several years before the injury; claim

she had been stable at least a year before the injury; and reveal she was considering filing a wrongful discharge or harassment suit against FHC.

In an opinion and order dated May 18, 2007, the ALJ found Willis proved her knee injury was work-related but not her psychological claim because it was active and pre-existed her injury. In calculating the benefits to which Willis was entitled, the ALJ found Dr. Jenkinson's assessment of a twenty percent rating was the most convincing, but only four percent of the rating was attributed to the knee injury; the remaining sixteen percent was the result of prior active osteoarthritis. Pursuant to KRS 342.730(1)(b), the ALJ multiplied the four percent rating by a factor of sixty-six and two-thirds percent. Then, pursuant to KRS 342.730(1)(c)(1), he applied the three-multiplier because even though Willis was currently earning more money in a less physically demanding job with accommodations, she lacked the physical ability to do the job she had performed before her injury.³ Based upon the AWW of \$689.76 stipulated by the parties, Willis was awarded a weekly benefit of \$35.52.

Both parties petitioned the ALJ to reconsider his opinion and make additional findings of fact. Willis asked the ALJ to specify the portion of her impairment that pre-existed her injury and to explain the factual basis for his decision. FHC asked the ALJ to determine whether Willis would likely continue

³ Citing KRS 342.730(1)(c)(2), FHC argues a multiplier of two should be used because Willis returned "to work at a weekly wage equal to or greater than the average weekly wage" she was earning at the time she twisted her knee.

earning an AWW equal to or greater than the amount she was earning before she twisted her knee and to state the factual basis for that finding.

The ALJ denied FHHC's request, but granted Willis's request for an additional finding on whether she had an active impairment before injuring her knee. The ALJ adopted Dr. Jenkinson's opinion that Willis had a twenty percent functional impairment rating for pre-existing active osteoarthritis.

Willis appealed to the Board and FHHC filed a cross-appeal. On November 2, 2007, the Board issued an opinion affirming in part, vacating in part and remanding. The Board stated whether Willis qualified for an impairment rating for her knee prior to her September 2005 knee injury was strictly a medical question under the AMA Guides. *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 210 (Ky. 2003). Dr. Jenkinson stated Willis would have qualified for a twenty percent impairment due to severe arthritis in the knee before the knee injury. Based on Dr. Jenkinson's opinion, the Board found FHHC had offered substantial evidence of prior active knee impairment and there was no reason to disturb the ALJ's finding. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). The Board went on to say the ALJ was not required to believe Willis's testimony that she had no pre-injury knee pain, nor testimony from Dr. Reese that Willis's current pain was the sole result of a work-related injury. As the fact-finder, the ALJ was authorized to pick and choose the evidence it believed and discard the rest. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985).

While rejecting Willis's claim, the Board agreed with FHHC and reversed and remanded the ALJ's opinion for a determination of the likelihood Willis could continue earning the same as or more than her pre-injury AWW for the foreseeable future before applying a multiplier to the benefits calculation. Willis's benefits could have been enhanced by the three-multiplier because she no longer had the "physical capacity to return to the type of work" she performed at the time of her knee injury. KRS 342.730(1)(c)(1). Alternatively, her benefits could have been enhanced by the two-multiplier because she returned "to work at a weekly wage equal to or greater than the" AWW she earned at the time of her knee injury. KRS 342.730(1)(c)(2). Only one of these multipliers could be applied, and the ALJ had to determine which was the most appropriate. To do that, he had to first decide whether, in the foreseeable future, Willis would likely earn as much as or more than she was earning prior to her knee injury. Since both multipliers were supported by substantial evidence, the Board reversed and remanded the matter to the ALJ to perform the full analysis described in *Fawbush, supra*. Willis has now appealed to us.

ANALYSIS

Willis first alleges the Board erroneously affirmed the ALJ's finding that she had a pre-existing ratable impairment before injuring her right knee on September 16, 2005. Willis claims the finding was not supported by substantial evidence. We disagree.

Dr. Jenkinson's medical opinion, supported by x-rays, as well as notes

from Drs. Reese and Evans, provided substantial evidence Willis suffered from

active osteoarthritis before she twisted her knee on September 16, 2005. While

Willis testified she had no complaints about her knee and received no treatment

prior to twisting her knee at work, and Dr. Reese testified Willis's degenerative

changes were a pre-existing, dormant, nondisabling condition aroused into

disabling reality by the workplace injury, only the ALJ decides what evidence and

testimony to believe and what to reject. *Caudill v. Maloney's Discount Stores*, 560

S.W.2d 15, 16 (Ky. 1977). Here, the ALJ found Dr. Jenkinson's opinion to be the

most convincing evidence, as was his prerogative.

Contrary to Willis's position, *Roberts Bros. Coal Co. v. Robinson*,

113 S.W.3d 181 (Ky.App. 2003) is the controlling case⁴ and there was substantial

evidence from Dr. Jenkinson supporting the ALJ's finding that Willis had an active

impairment and would have qualified for an impairment rating before she twisted

⁴ In *Roberts Bros, supra*, while working without medical restrictions, Robinson, a coal miner, injured his back. He had no pre-existing active disability, but medical testimony established one-quarter to one-half of his impairment was due to the natural aging process. As a result, the ALJ reduced Robinson's award by twenty-five percent but still attributed his total disability to his on-the-job injury. As stated in *Roberts Bros.*,

an exclusion from a total disability award must be based upon pre-existing disability, while an exclusion from a partial disability award must be based upon pre-existing impairment. For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a).

Id., at 183.

her knee at work. Since FHHC argued Willis suffered from pre-existing active osteoarthritis, the ALJ had to determine whether Willis had a ratable impairment before twisting her knee. Whether, when and why she had an impairment rating was strictly a medical question under the AMA Guides. *Kentucky River Enterprises, Inc. v. Elkins, supra*. Dr. Jenkinson's medical opinion was based on the AMA Guides and x-rays of Willis's knee. Merely presenting some evidence suggestive of a contrary result does not require reversal. *Transportation Cabinet v. Poe*, 69 S.W.3d 60, 61 (Ky. 2001).

Additionally, Willis's citation to *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky.App. 2007), does not persuade us a different result is required. *Finley* distinguishes active and dormant impairments. A pre-existing disease or condition which is symptomatic *and* impairment ratable under the AMA Guides immediately before a work-related injury is considered active, whereas a dormant pre-existing condition is one that is asymptomatic immediately before the injury *and* all permanent impairment is “medically determined to have arisen after” the injury. *Id.*, at 265.

While Dr. Jenkinson assigned Willis a twenty percent whole body impairment rating, he attributed only four percent of it to tears resulting from her work-related injury. He attributed the remaining sixteen percent to pre-existing osteoarthritis. Willis denied prior knee problems, but Dr. Reese's operative report noted pre-injury “arthritic discomfort in [Willis's] knees;” as did records from Dr. Evans. Furthermore, after reviewing Willis's November 2006 x-rays, Dr.

Jenkinson said her advanced osteoarthritis could not have developed within one year of Dr. Reese's surgery and noted even Dr. Reese's report had indicated the x-rays she took two weeks after the injury showed degenerative changes. Finally, Dr. Jenkinson stated Willis qualified for an impairment rating during her initial consultation with Dr. Reese and due to the severity of her arthritis she could have been assessed an impairment rating with or without symptoms.

As a reviewing Court, our role is to decide, in light of the record, whether the evidence is so overwhelming as to compel a finding in favor of Willis. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). Since it is the sole discretion of the ALJ to judge the inferences to be drawn from the evidence, we will not substitute our judgment for his. KRS 342.285(2); *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky.App. 1985). When this Court reviews a decision of the Board, its function is to correct the Board when we believe it "has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The record before us does not demonstrate error. Therefore we affirm the Board's reliance upon *Roberts Bros., supra*, and Dr. Jenkinson's medical opinion and we will neither reverse and require Willis's benefits to be calculated upon Dr. Reese's impairment rating of twenty-two percent, nor remand for additional findings of fact about Willis's pre-injury symptoms and/or treatment.

Willis's other complaint is the ALJ properly applied the three-multiplier and there is no need to send the opinion back to the ALJ for a *Fawbush, supra*, analysis. Again, we disagree.

The three-multiplier referenced in KRS 342.730(1)(c)(1) applies to the benefit calculation only if it is unlikely Willis is able to continue earning more than her pre-injury AWW. While it is undisputed Willis lacks the physical capacity to perform her old job with FHHC, she has held better-paying post-injury jobs which would mean the two-multiplier referenced in KRS 342.730(1)(c)(2) would apply instead. Because only one of the multipliers may be used to enhance Willis's benefit calculation, the Board correctly found the ALJ must make an additional determination as to whether and why Willis will likely continue earning as much as or more than she earned prior to her injury and then apply the most appropriate multiplier.

For the foregoing reasons, the opinion of the Board is affirmed *in toto*.

ALL CONCUR.

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BRIEF FOR APPELLEE, FAMILY
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