

RENDERED: OCTOBER 10, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002359-WC

SILDRA JORDAN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-02-01606

TELERENT LEASING INCORPORATED;
HON. GRANT S. ROARK, ADMINISTRATIVE
LAW JUDGE; WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND TAYLOR, JUDGES.

CLAYTON, JUDGE: This is an appeal from a decision of the Workers' Compensation Board ("Board") affirming a decision of the Administrative Law Judge ("ALJ") dismissing the Appellant's motion to reopen her case due to an alleged worsening of her condition.

FACTUAL SUMMARY

Appellant, Sildra Jordan, worked for Appellee, Telerent Leasing Incorporated (“Telerent”) in Pineville, Kentucky. Telerent is an operation which leases televisions to patients at local hospitals. Ms. Jordan collected lease payments from and moved televisions for patients at Pineville Community Hospital for Telerent.

Ms. Jordan was injured on February 24, 2002, when a patient kicked a table into her while she was in the process of removing a television set from the patient’s room. Ms. Jordan stated that she had a popping sensation at the base of her neck at the time of the injury and that the pain radiated all the way down her back.

As a result of the injury, Ms. Jordan filed a workers’ compensation claim. She asserted that the accident caused permanent injuries to her neck, back and right shoulder. After a hearing, the ALJ awarded Ms. Jordan benefits based on a finding of a five percent (5%) permanent whole body impairment. The ALJ did not find that Ms. Jordan was incapable of returning to her work with Telerent.

On February 28, 2006, Ms. Jordan moved to reopen her claim based on a worsening of her physical condition. She also claimed entitlement to an increase in her permanent partial disability benefits and/or total disability. As part of the reopening of the case, Ms. Jordan was examined by Dr. William Lester who had originally diagnosed lumbar and cervical strain, as well as a rotator cuff inflammation.

In the reopening of Ms. Jordan's case, Dr. Lester performed a comparison between her original medical records and those performed after her award. Based upon his examination, Dr. Lester gave his opinion that there was no change in Ms. Jordan's impairment rating regarding her lumbar complaints. As to her cervical issues, he also found that nothing would warrant a change in her impairment rating in his opinion.

On April 19, 2007, a final hearing was held and on June 18, 2007, the ALJ found that Ms. Jordan's physical condition had not significantly worsened since her original award and declined to award her any additional or increased income benefits. Ms. Jordan appealed this finding to the Board which affirmed the ALJ's determination. Ms. Jordan has now brought her appeal with this Court.

STANDARD OF REVIEW

As a reviewing Court, we must decide, in light of the record, whether the evidence is so overwhelming as to compel a finding in favor of the appellant. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). 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).

"It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim," *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky.

2000). We recognize that it is within the broad discretion of the ALJ “to believe part of the evidence and disbelieve other parts of the evidence whether it came from the same witness or the same adversary party’s total proof.” *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15-16 (Ky. 1977).

DISCUSSION

Ms. Jordan argues on appeal that the Board erred in upholding the ALJ’s decision. She contends that the opinion of her treating physician, Dr. Valencia, is that her condition has worsened. She also asserts that the treating physician, rather than one brought in as an expert witness, is in the best position to make decisions regarding impairment.

An ALJ is in the best position to weigh the evidence of claims brought before him. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418-19 (Ky. 1985). As set forth above, reversal of an ALJ’s decision must be based on evidence so overwhelming that no reasonable person could reach the decision that the ALJ did in his findings. *REO Mechanical v. Barnes*, 691 S.W.2d 224, 226 (Ky. App. 1985).

Kentucky courts have specifically chosen not to have a “treating physicians rule.” *Wells v. Morris*, 698 S.W.2d 321 (Ky. App. 1985). Of the physicians who testified at the hearing, only Dr. Lester had observed Ms. Jordan both at the time of her original injury and at the reopening due to a worsening condition. As found by the Board, the ALJ acted within his authority in choosing which of the physicians’ testimony was most credible. *Paramount Foods*, 695

S.W.2d at 418-19. There was sufficient evidence in the record to support the ALJ's finding that Ms. Jordan's impairment had not worsened since her original award. Thus, we will affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Susan Turner Landis
Harlan, Kentucky

BRIEF FOR APPELLEE:

Patrick J. Murphy, II
Lexington, Kentucky