

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-001739-WC

SHELLEY MYERS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-09-00155

BEST BUY; HON. OTTO D. WOLFF, IV
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART, REVERSING IN PART
AND REMANDING

** ** * * * **

BEFORE: NICKELL AND VANMETER, JUDGES; SHAKE,¹ SENIOR JUDGE.

NICKELL, JUDGE: Shelley Myers petitions for review of a Workers'

Compensation Board (Board) decision affirming in part, reversing in part and

¹ Senior Judge Ann O'Malley Shake 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.

remanding an opinion of Administrative Law Judge Otto D. Wolff, IV (ALJ) regarding her claim for income benefits against Best Buy. Myers argues the ALJ erred: in finding she did not meet her burden of proof concerning concurrent wages; in relying on a prospective date for maximum medical improvement (MMI) and in refusing to award temporary total disability (TTD) payments; and in failing to provide sufficient analysis and findings relative to her incontinence and myelopathy conditions to support affirmance of the award based on a seven percent permanent partial impairment (PPI). Following a careful review, we affirm the Board in part, reverse in part, and remand for further proceedings.

Myers was employed by Best Buy as a shipping and receiving clerk. On August 13, 2008, Myers suffered a work-related injury to her mid-back. At the time of her injury, Myers was also employed as a delivery person for a local newspaper. She testified she believed Best Buy was aware of her concurrent employment because she had included that information in her employment application for Best Buy on March 18, 2008. She continued this additional employment for approximately two weeks post-injury.

Following her injury, Myers was initially seen by Occupational Health Partners, where she was treated with medication and epidural injections, restricted to light-duty work, underwent an MRI of the thoracic spine, and received a referral to Dr. Greg Nazar, a neurosurgeon. She was restricted to light-duty work and

continued in that capacity for a short period of time. Dr. Nazar treated Myers with medications, pain management and a TENS unit before referring her to Dr. Richard Holt, a spine surgeon. Dr. Nazar took Myers off work during his treatment of her spinal condition. He found no signs of acute radiculopathy or myelopathy.

Dr. Holt subsequently treated Myers, remains her treating physician, and has continued to restrict her from work. In July 2009, Dr. Holt recommended surgery and requested Myers contact him when she was ready to proceed. Myers had not scheduled the surgery at the time of entry of the ALJ's opinion, order and award. Dr. Holt diagnosed Myers with disc herniations at the T7-8, T8-9, and T9-10 levels, as confirmed by two MRIs. In his deposition taken on February 18, 2010, he opined any preexisting conditions were dormant and asymptomatic, and that the work incident aroused them into symptomatic reality. He found no neurological deficit, no bladder incontinence and no evidence of myelopathy. Dr. Holt would permit Myers to return to work as long as she could avoid overhead work. He assessed no impairment ratings.

Myers underwent three independent medical examinations (IME) in 2009. She was first examined approximately five months post-injury by Dr. Martin Schiller, who opined Myers was suffering from a thoracic muscle strain rather than a disc herniation. He attributed the strain to Myers' work incident. He found evidence of degenerative changes but no evidence of a herniated disc. He stated there was no physiological explanation for Myers' claimed bladder

dysfunction. Dr. Schiller believed Myers suffered from symptom magnification. He found her to be at MMI and assessed a zero percent impairment rating.

In October 2009, Myers was evaluated by Dr. Timir Banerjee. In addition to his examination, Dr. Banerjee reviewed Myers' medical records and MRI scans. He felt "the thoracic discs that had been found on MRI scan are red herrings. They have been present for a long time, and are incidental findings." He diagnosed Myers with a thoracic sprain with no evidence of progressive neurological deficit. Dr. Banerjee stated Myers' "bodily ailments are not physiologically explainable at this time with our knowledge base." He placed Myers at MMI and opined she did not qualify for an impairment rating.

Dr. Warren Bilkey performed an IME on September 29, 2009. He likewise diagnosed Myers with a thoracic sprain, but added she suffered from myofascial pain involving scapular musculature. He found no evidence of a disc herniation. Dr. Bilkey could not explain Myers' bladder symptoms based on the information and medical records he had been provided. Dr. Bilkey would impose lifting, bending and twisting restrictions were Myers to return to work. He assessed a seven percent impairment rating based on her back injury. He further opined that if Myers did have a related bladder incontinence issue, he would assess an additional nine percent whole person impairment. He did not believe Myers had attained MMI. He concurred with Dr. Holt that any preexisting condition Myers may have had was asymptomatic and dormant prior to the work-related incident.

Following a Benefit Review Conference the ALJ entered an opinion, order and award on March 26, 2010, finding Myers sustained a compensable seven percent whole person impairment as a result of her work-related injury, and was entitled to the three multiplier set forth in KRS 342.730(1)(c)(1) because she was unable to return to her previous employment. The ALJ found Myers was entitled to payment of medical benefits necessary for the treatment of her injury and was entitled to permanent partial disability (PPD) benefits of \$48.81 for 425 weeks beginning on February 15, 2009, the date she attained MMI. Myers petitioned for reconsideration alleging the ALJ erred in failing to include her concurrent wages in calculating her average weekly wage (AWW), failing to award TTD benefits, failing to consider her incontinence and myelopathy in making the award, and failing to include any analysis or discussion concerning permanent total disability (PTD) benefits. The ALJ denied her petition to reconsider on April 21, 2010, and Myers appealed to the Board.

Myers raised the same issues before the Board as in her petition for reconsideration. On August 23, 2010, the Board entered an opinion affirming the ALJ on all of the substantive issues raised. However, the Board believed the ALJ had incorrectly established the commencement date for PPD benefits as of the date Myers reached MMI. It therefore reversed that portion of the ALJ's opinion, order and award and remanded for entry of an amended opinion, order and award utilizing the date of injury and disability as the commencement date. This appeal followed.

Before this Court, Myers contends the Board erred in affirming the ALJ's holding that she failed in her burden of proof concerning her concurrent wages. She also argues the Board misconstrued her argument relating to the date she attained MMI and the failure to award TTD benefits. Finally, Myers alleges the Board's affirmance was infirm because of the ALJ's lack of analysis concerning her incontinence and myelopathy. We disagree.

When reviewing Board decisions, this Court "is limited to correction of the ALJ when the ALJ has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice." *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009) (citing *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)). To review the Board's decision, we must first study the ALJ's decision because the ALJ, as the fact-finder,² has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc., v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). As explained in *Roark v. Alva Coal Corp.*, 371 S.W.2d 856, 857 (Ky. 1963); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984); *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979), the burden is on an injured worker to prove every element of a claim. The court determined in *Burkhardt* that the finder of fact has the sole discretion to determine the quality, character, and substance of evidence. Although conflicting evidence may be presented, the ALJ, as fact-finder, "may

² KRS 342.285 designates the ALJ as the finder of fact.

reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000) (citation omitted).

Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986), explains that if the party with the burden of proof fails to convince the finder of fact, that party's burden on appeal is to show that the favorable evidence was so overwhelming as to compel a favorable finding; that is, to show that no reasonable person would have reached the same conclusion as the finder of fact. Having reviewed the evidence and the arguments of the parties, we conclude that the favorable evidence was not so overwhelming as to compel the findings Myers urges upon us.

Myers first argues the ALJ improperly refused to include her concurrent wages in calculating her AWW upon concluding she had not met her burden of proof. Pursuant to KRS 342.140(5), if an injured employee is working for two or more employers "and the defendant employer has knowledge of the employment prior to the injury," the wages from all employment are to be "considered as if earned from the employer liable for compensation."

The ALJ determined Myers failed to prove Best Buy was aware of her concurrent employment at the local newspaper at the time of her injury. The only proof Myers offered concerning notice to Best Buy were copies of her employment application and résumé submitted when seeking employment with Best Buy listing

her current employer as “Pioneer News.” The Board found there was “nothing in the record indicating Best Buy was aware Myers’ employment at Pioneer News *continued* during her employment at Best Buy.” The ALJ was in the best position to weigh and judge the evidence, yet he was unpersuaded by Myers’ allegation. The evidence presented was not so overwhelming as to compel a finding in Myers’ favor as to her concurrent wages. *Francis*. Thus, we will not disturb the determination of the ALJ.

Myers next contends the Board misconstrued her argument on appeal relative to the date she achieved MMI and the failure to award TTD benefits. She alleges the ALJ improperly relied upon an MMI date which was set prospectively by Dr. Schiller based on statistics rather than actual observation or examination. Myers contends that since other physicians opined she did not attain MMI until a later date, the ALJ—and subsequently the Board—erred in utilizing Dr. Schiller’s opinion to set the MMI date and then deny her TTD benefits upon finding she did not miss work between the date of injury and MMI. However, Myers cites no authority supportive of her position. As the Board correctly held, the ALJ is authorized to choose which of differing medical opinions to believe. *Jones v. Brasch-Barry General Contractors*, 189 S.W.3d 149, 153 (Ky. App. 2006). The ALJ exercised his discretion in opting to rely on Dr. Schiller’s opinion to the exclusion of Myers’ other physicians. We find nothing in the record to compel us to declare this decision to be an abuse of discretion. Further, because the ALJ found Myers continued to work between the date of injury and reaching MMI, it

was proper to deny TTD benefits. *See* KRS 342.0011(11)(a); *Magellan Behavioral Health v. Helms*, 140 S.W.3d 579 (Ky. App. 2004).

Third, Myers argues the ALJ's lack of analysis and discussion of her alleged incontinence and myelopathy precluded the Board from affirming the opinion, order and award. We disagree. In discussing the differing medical opinions relating to Myers' condition—which spanned approximately seven pages of the opinion, order and award—the ALJ noted several times that her claims of incontinence and myelopathy were refuted by the records and statements from her treating physicians. The ALJ made specific findings that Myers had “no neurological deficits, or myelopathy” and no bladder incontinence stating “her treating physician would have noted such, if she did.” As we have previously stated, as the finder of fact, the ALJ was in the best position to personally observe all aspects of the instant litigation and has the authority to determine the weight, credibility and inferences to be drawn from the evidence presented. *Burkhardt; Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). The ALJ properly exercised his discretion in evaluating the medical and lay evidence and in making a choice of which evidence to believe or disbelieve. *Magic Coal Co.*, 19 S.W.3d at 96. We find no error.

Finally, we note that in its order, the Board remanded this matter to the ALJ to fix the appropriate date upon which to begin PPD benefits. We agree that pursuant to the mandates set forth in *Sweasy v. Wal-Mart Stores, Inc.*, 295 S.W.3d 835, 836 (Ky. 2009), the compensable period for PPD benefits begins on

the date that the impairment and disability arise, without regard to the date of MMI, the worker's disability rating, or the compensable period's duration.

However, our review of the Board's order indicates the Board utilized incorrect dates. The Board concluded the ALJ improperly awarded benefits "beginning on August 13, 2009, the MMI date upon which the ALJ relied, instead of February 15, 2009, the date Myers sustained the work-related injury." Our review of the record indicates Myers was injured on August 13, 2008, and the MMI date chosen by the ALJ was February 15, 2009. Thus, the Board's order contains a patent error and we must reverse in part and remand this matter to the Board for entry of an amended opinion utilizing the correct dates of injury and MMI as found in the record.

Therefore, for the foregoing reasons, the order of the Board is affirmed in part, reversed in part, and remanded for further proceedings consistent with this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Ched Jennings
Louisville, Kentucky

BRIEF FOR APPELLEE,
BEST BUY:

Walter E. Harding
Louisville, Kentucky