

Commonwealth of Kentucky
Court of Appeals

NO. 2012-CA-000335-WC

BRENDA K. ELKINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-72699

LKLP CAC, INC.; HON.
JOHN B. COLEMAN,
ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, MAZE, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Brenda K. Elkins petitions this Court to review a January 20, 2012, Opinion of the Workers' Compensation Board (Board) affirming the Administrative Law Judge's (ALJ) award of permanent partial disability benefits

due to a lumbar spine injury and dismissing Elkins' claims of cervical spine and psychological injuries. We affirm.

Elkins was employed as a nonemergency medical transport driver for LKLP CAC, Inc. (LKLP). Her job duties included transporting passengers to and from various medical appointments and assisting them in and out of the transport vehicle. On September 27, 2007, Elkins was transporting two passengers when her van was struck from behind by a utility truck. The impact broke Elkins' seat, and both of her passengers were taken to the hospital by ambulance. Elkins did not go immediately to the hospital; rather, she reported back to work and submitted to a mandatory drug screen.

Thereafter, Elkins proceeded directly to the office of her family physician, Summit Medical Group, (Summit) and was seen by Dr. Michelle Willoby. There it appears that Elkins complained primarily of low back pain and leg pain. Thereafter, Elkins was treated for her low back injury and eventually for a cervical spine condition and psychological condition.

Ultimately, Elkins filed a workers' compensation claim against LKLP. As a result of the work-related traffic accident, Elkins alleged work-related injuries to her lumbar spine and cervical spine. She also claimed to have suffered a work-related psychological injury. The ALJ ultimately found that Elkins suffered a work-related injury to her lumbar spine and assigned a 24.15 percent permanent partial disability rating. As to Elkin's cervical spine condition, the ALJ found it to be nonwork related. And, the ALJ also found that Elkins did not suffer any

psychological injury caused by the work-related accident. So, the ALJ dismissed Elkins' claims of psychological injury and cervical spine injury. Being dissatisfied with the ALJ's award, Elkins sought review with the Board. By Opinion entered January 20, 2012, the Board affirmed the ALJ, thus precipitating our review.

Elkins claims that the ALJ erred by dismissing her claim of a work-related psychological injury. Elkins maintained that she suffered a psychological injury due to the trauma of the traffic accident and due to chronic and severe pain. Elkins points to the expert opinion of Dr. Peter Ganshirt. Dr. Ganshirt stated that Elkins suffered from depression and post-traumatic stress disorder and believed both psychological conditions were caused by the work-related traffic accident. He assessed a 45 percent permanent impairment rating. Elkins stresses that the ALJ erred by not relying upon the expert opinion of Dr. Ganshirt and instead relying upon the expert opinion of Dr. David Shraberg. Elkins believes that Dr. Shraberg was unqualified to render "psychological opinions." Elkins Brief at 7.

As Elkins was unsuccessful before the ALJ upon this issue, she must demonstrate that the evidence compels a finding in her favor. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). And, it is well within the sole province of the ALJ, as fact-finder, to weigh the credibility of evidence. *A.K. Steel Corp. v. Adkins*, 253 S.W.3d 59 (Ky. 2008).

Herein, it is undisputed that Dr. Ganshirt and Dr. Shraberg submitted differing opinions upon Elkins' alleged psychological injury. Dr. Ganshirt, a licensed psychologist, believed that the work-related accident directly caused

Elkins to suffer post-traumatic stress disorder, depression, and cognitive disorder. On the other hand, Dr. Shraberg, a board-certified psychiatrist, did not believe Elkins suffered any appreciable psychological injury as a direct result of the motor vehicle accident. As Dr. Shraberg was a board-certified psychiatrist, we believe the ALJ was well within his discretion to rely upon Dr. Shraberg's expert opinion. *See Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615 (Ky. 2004). In our estimation, the ALJ simply viewed Dr. Shraberg's testimony more credible, and such determination was well within the ALJ's role as fact-finder. *See Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000). Thus, we conclude that the ALJ did not err by dismissing Elkins' claim for psychological injury.

Elkins also argues that the ALJ erred by finding that her cervical spine condition was not work related. Specifically, Elkins maintains that the ALJ erred by rejecting the expert opinion of the university evaluator, Dr. Craig Roberts. Dr. Roberts opined that Elkins cervical spine condition was caused by the motor vehicle accident and was work related.

In the workers' compensation field, causation (or work relatedness) constitutes a factual issue. *Dravo Lime Co., Inc. v. Eakins*, 156 S.W.3d 283 (Ky. 2005). And, the ALJ cannot simply disregard the expert opinion of an university evaluator. KRS 342.315(2) specifically mandates:

[T]he clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome

such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

Rather, the expert opinion of a university evaluator must be “afforded presumptive weight,” and if rejected, the ALJ must specifically set forth a “reasonable basis” for rejection of such opinion. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 94, 97 (Ky. 2000).

In this case, the ALJ rejected the university evaluator’s opinion and set forth the reasons underlying such rejection:

In this particular instance, I note the university evaluator’s opinion in regards to causation did not have the benefit of the medical records which were produced between September 27, 2007[,] and January 25, 2009. It appears the university evaluator relied upon the history of continuous cervical complaints given to him by [Elkins]. This history is called into question by the complete absence of complaints in the medical records from the period of September 27, 2007[,] through March 6, 2009. If a physician relies on an incorrect history, an Administrative Law Judge may disregard his expert opinion which was based upon that history. In this particular instance, the history relied upon by the university evaluator is simply not supported in the medical records. As such, the opinion of the university evaluator is rejected. (Citations omitted.)

Based upon the above reasoning, we believe the ALJ adequately set forth a reasonable basis for rejecting the university evaluator’s opinion in accordance with KRS 342.315. *See Magic Coal Co.*, 19 S.W.3d 88. The failure of a medical

expert to receive an adequate patient history may certainly affect that medical expert's opinion.

Moreover, the evidence does not compel a finding that Elkins' cervical spine condition was caused by the motor vehicle accident. Dr. Joseph Zerga opined that Elkins' cervical spine condition was not related to the motor vehicle accident but rather a degenerative condition. Hence, we conclude that the ALJ did not err by dismissing Elkins' claim that her cervical spine condition was work related.

In sum, we hold that the Board properly affirmed the ALJ's award.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

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