

RENDERED: APRIL 11, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-001653-WC

KINGS DAUGHTER'S MEDICAL CENTER.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 2009-86730

SARA RUNYON; HON. EDWARD D.
HAYS, ADMINISTRATIVE LAW
JUDGE; AND WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, CHIEF JUDGE; CAPERTON AND VANMETER, JUDGES.

ACREE, CHIEF JUDGE: Kings Daughter's Medical Center (KDMC) petitions

this Court for review of the August 23, 2013 opinion of the Workers'

Compensation Board. That opinion affirmed the April 8, 2013 opinion, award, and

order of an Administrative Law Judge (ALJ) which found that appellee Sara Runyon did not have a preexisting condition and was entitled to compensation benefits. The Board affirmed the ALJ's decision. We likewise affirm.

Runyon was employed by KDMC as a licensed practical nurse. On April 26, 2009, Runyon sustained a work-related injury while assisting a patient. Runyon filed a claim for workers' compensation benefits and a formal hearing was held on February 6, 2013. As part of its defense, KDMC argued that Runyon had a preexisting active condition and was thus ineligible for benefits. On April 8, 2013, the ALJ issued his opinion, award, and order, in which he found that Runyon was entitled to benefits for her injury. With regard to Runyon's alleged preexisting condition, the ALJ stated:

Although the ALJ has considered the opinions of Dr. Travis and Dr. Scott [who opined Runyon had a preexisting active condition], and has considered the argument by [KDMC] that Dr. Owen [who found no preexisting active condition] did not have an accurate history of [Runyon's] medical treatment, the ALJ is still most persuaded by the evidence presented by Dr. Owen. It must be remembered that the Kentucky Supreme Court has determined that to characterize a previous condition as "active," it must be both symptomatic and impairment ratable under the AMA Guides, 5th Edition, immediately prior to the occurrence of the work-related event. Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007). The defendant has the burden of proof as to the existence and the rating of the pre-existing condition. The ALJ agrees with Plaintiff that the "carving out" of an existing impairment for a pre-existing active condition is not really sufficient. The ALJ believes that Finley, supra, requires that Defendant show proof of an actual pre-existing impairment that was active and in existence prior to the work injury. There should be proof of a ratable

impairment of the condition that is claimed to be pre-existing “active” by the Defendant-Employer. Although the evidence is clear that Claimant had complained of prior shoulder pain and had received treatment for both shoulder and low back pain, there is no evidence that the existence of such pain rose to the level of an actual impairment. The Plaintiff was fully and successfully performing all of her job duties prior to the work-related incident. She was under no restrictions or limitations in the performance of her duties.

Further, it must be remembered that our Kentucky Supreme Court has determined that a dormant, non-disabling, pre-existing condition is compensable under the Act if a work-related injury causes it to become symptomatic. McNutt Construction/First General Services v. Clifford F. Scott, et al., 40 S.W.3d 854 (Ky. 2001).

(R. at 314).

KDMC filed a petition for reconsideration, claiming the ALJ applied the wrong legal standard to the preexisting condition inquiry. More precisely, KMDC argued that the ALJ improperly required it to show that Runyon was on work restrictions to prove an active preexisting condition. The ALJ denied KDMC’s reconsideration motion, explaining:

Respectfully, the ALJ strongly disagrees with Defendant-Employer’s interpretation of the Opinion. The ALJ cited Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. 2007) for the proposition that the defendant has the burden of proof as to the existence and the rating of a pre-existing active condition. In order for an impairment to be “active” it must be both symptomatic and impairment ratable under the AMA Guides, 5th Edition. The finding that: “[Runyon] was fully and successfully performing all of her job duties prior to the work-related incident. She was under no restrictions or limitations in the performance of her duties.” (p. 10 of the Opinion), is

merely one of the factors the ALJ considered in determining whether or not the pre-existing condition was symptomatic and impairment ratable. ***The ALJ did not state, or even suggest, that [Runyon] must be under work restrictions or working limited duty due to the prior condition at the time of the work event in order to be found to have an “active” impairment.***

(R. at 333-34)(emphasis added).

KDMC appealed to the Board. On appeal, KDMC again argued that the ALJ applied the incorrect legal standard when determining whether Runyon had a preexisting condition. The Board found no merit in KDMC’s argument:

We believe the ALJ applied the correct standard in determining whether Runyon had a pre-existing active condition. The ALJ’s statement he “agrees with [Runyon] that the ‘carving out’ of an existing impairment for a pre-existing active condition is not really sufficient” is somewhat confusing. However, the ALJ correctly stated KDMC must show proof of an actual pre-existing impairment that was active and in existence prior to the work injury. Additionally, the ALJ correctly stated there should be proof of a ratable impairment for the claimed active condition. In determining a carve out for a pre-existing condition was not required, the ALJ concluded there was no evidence Runyon’s pain “rose to the level of an actual impairment” and she was “fully and successfully performing all of her job duties” and “was under no restrictions or limitations in the performance of her duties” prior to the work injury. Those factors are appropriate considerations in determining whether Runyon’s condition was both symptomatic and impairment ratable immediately prior to the April 26, 2009, injury. The ALJ concluded Runyon’s condition was not symptomatic prior to the injury; therefore, she did not have an active condition as defined by Finley v. DBM Technologies, *supra*.

(R. at 399). This appeal followed.

Our task when reviewing a decision of the Board “is to correct the Board only where the Court perceives the Board 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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). The ALJ, not the Board, is empowered “to determine the quality, character and substance of the evidence.” *American Greetings Corp. v. Bunch*, 331 S.W.3d 600, 602 (Ky. 2010) (footnote omitted). The ALJ is free to reject testimony, *id.*, and “to believe part of the evidence and disbelieve other parts of the evidence[.]” *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Neither the Board nor this Court is permitted to substitute its judgment for that of the ALJ “as to the weight of evidence on questions of fact.” KRS¹ 342.285; *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007).

We review *de novo* questions of law. *Bowerman v. Black Equip. Co.*, 297 S.W.3d 858, 866 (Ky. App. 2009).

KDMC’s sole argument on appeal is that the Board failed to apply the appropriate legal standard in determining whether Runyon had a noncompensable preexisting condition. KDMC continues to argue that *Finley* does not require an employer to show that an employee was working under restrictions or on limited duty at the time of injury to satisfy its burden of proof that the employee suffered from a preexisting and active condition. We agree with KDMC thus far.

¹ Kentucky Revised Statutes

However, neither the ALJ nor the Board construed *Finley* in this incorrect way. Both the ALJ and the Board correctly recognized that, under *Finley*, a preexisting condition that is both symptomatic and impairment ratable is not compensable under Kentucky's Workers' Compensation scheme. *Finley*, 217 S.W.3d at 265. This is the legal standard the ALJ and the Board applied in this case. And it is the correct legal standard.

Simply put, contrary to its position on appeal, KDMC was not assigned the inappropriate evidentiary requirement of showing that Runyon was under restricted work duties. In its order denying reconsideration, the ALJ explained that KDMC misunderstood the ALJ's statements regarding Runyon's unrestricted work duties. The ALJ did not require KDMC to prove that Runyon was under restricted work duties. Instead, the ALJ considered multiple factors, including competing medical evidence and Runyon's work capabilities, in determining whether Runyon suffered from a symptomatic and impairment ratable preexisting condition. What KDMC has identified as a legal standard is actually just the weighing of evidence, a role which is well within the discretion of the ALJ. KRS 342.285; *Williams*, 214 S.W.3d at 316. Given the ALJ's plain clarification of his factual findings and legal standards he applied, we find no error in the Board's decision to affirm the ALJ's opinion.

For the foregoing reasons, the August 23, 2013 opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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RUNYON:

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