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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2013-CA-002040-WC

RENE HAYES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-12-00313

AMERICAN SYNTHETIC RUBBER;
HONORABLE CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

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

CAPERTON, JUDGE: The Appellant, Rene Hayes, appeals the November 1,

2013, opinion of the Kentucky Workers' Compensation Board affirming the June

4, 2013, opinion and order of Administrative Law Judge (ALJ) Chris Davis

dismissing Hayes's workers' compensation claim against Appellee, American Synthetic Rubber, in its entirety based upon the finding that her right shoulder injury was not work related.

On appeal, Hayes argues that the ALJ and Board committed reversible error in finding that the injury was not work related, and that the ALJ misinterpreted the medical opinions based upon the totality of the evidence, and in not awarding any benefits for the temporary injuries which Hayes alleges that she sustained. Upon review of the record, the arguments of the parties, and the applicable law, we affirm.

Hayes is a forty-nine-year-old high school graduate. Her work experience has been as a receptionist, store manager, and factory worker. Hays began working for American Synthetic Rubber on May 4, 1998, as a balance operator. She later moved to the position of process dryer. In that position, Hayes rotated between several different work stations. One station required pulling rubber from under bales of rubber, another required cutting rubber, and a third included sweeping the floor under and around the machine. Other job duties included building metal and aluminum boxes for the finished rubber bales, changing the film on the wrapping machine, operating a forklift, operating the palletizer machine, and staging and loading rubber bales to be reprocessed. Hayes states that she had to lift 75 to 85 pounds. She was paid \$23.02 per hour, and she worked fifty-four hours per week. She is currently enrolled in college and studying health information technology.

Hayes sustained a hand and wrist injury on January 10, 2000, while cleaning out ribs in the reprocessing area. She treated with Dr. Harter for that injury and was off work for three months. Subsequently, on February 15, 2000, she reported recurrent shoulder and neck pain for which she treated with Dr. Gabriel. Hayes settled that claim and subsequently sustained a water burn while at work on January 26, 2001. She was unable to work for two months following that injury. Thereafter, on June 30, 2001, she slipped and fell injuring her right ankle.

Hayes also had right shoulder surgery in 2006 following an injury at work. Following that injury, Hayes treated with Dr. Frank Bonnarens and Dr. Mark Smith. She testified that her pain resolved following surgery, specifically, an arthroscopic right shoulder acromioplasty performed by Dr. Smith. Hayes was able to return to work following that surgery. Dr. Smith assessed a 3% impairment rating for that injury and released Hayes to full-duty work. Hayes subsequently reported right wrist and elbow injuries on February 2, 2009. Dr. Tuna Ozyurekoglu performed right wrist surgery on June 22, 2009, as well as a cubital tunnel release surgery in March of 2010.

On March 12, 2011, Hayes was working in the line dryer area, an area in which bales were placed on a conveyor belt. Two bales were too close together, and Hayes reached up with a pole to push one bale away from the other. Hayes stated that as she did so, she felt a pull in her forearm and shoulder accompanied by right shoulder and forearm pain. Hayes was able to finish her shift and thereafter sought medical attention at Occupational Physician Services where she

attended physical therapy. Hayes stated that the therapy did not improve her pain. Accordingly, she returned to the care of Dr. Ozyurekoglu and diagnostic studies were performed. Hayes underwent three epidural steroid injections but continued to have pain. She was then referred to Dr. Smith for her shoulder complaints.

Hayes continued working her normal job until October of 2011, at which time she was restricted to light duty. Dr. Ozyurekoglu performed right pronator release surgery on April 13, 2012, and Hayes was restricted from working at that time. Following the surgery, Hayes reported that the numbness and tingling in her fingers and the right forearm pain resolved. She asserted continued pain in her shoulder, as well as limited shoulder movement. Thereafter, on May 1, 2012, Dr. Smith performed right shoulder surgery. Hayes was then released to return to restricted work on October 24, 2012, with no lifting over ten pounds, no over the shoulder work, and no repetitive use of the shoulder. Hayes is currently receiving retirement disability benefits.

During the course of litigation below, Hayes submitted medical evidence from Dr. Frank Bonnarens, Dr. Richard DuBou, Dr. Mark Smith, and Dr. Tuna Ozyurekoglu. That evidence indicates that Hayes treated with Dr. Smith from October 18, 2006, through March 28, 2007. On October 18, 2006, Hayes presented to Dr. Smith and reported a July 15, 2006, work-related shoulder injury as a result of cutting rubber. Dr. Smith noted that Hayes underwent an MRI arthrogram of the right shoulder which revealed mild to moderate supraspinatus/infraspinatus tendinopathy. On December 28, 2006, Dr. Smith

performed an arthroplasty of the right shoulder and an acromioplasty. On March 28, 2007, he assessed a 3% impairment rating under *The 5th Addition of the AMA Guides*.

Following the March 2011 incident, Hayes initially treated with Dr. Smith on February 15, 2012. She reported a history of the work incident. Dr. Smith reviewed the right shoulder MRI, and diagnosed right shoulder pain, biceps tendonitis, rotator cuff tendonitis, and AC arthritis. He recommended a right shoulder surgery consisting of an AC resection, decompression, and biceps tenodesis. On October 24, 2012, Dr. Smith assigned permanent restrictions of no work above shoulder level and no lifting greater than 10 pounds.

Hayes treated with Dr. Ozyurekoglul from May 20, 2011, through May 30, 2012. On May 20, 2011, Hayes reported right arm pain, biceps tendon pain, and shoulder pain. Full range of motion of the right shoulder was noted at that time. Dr. Ozyurekoglul diagnosed right biceps tendonitis, and right supraspinatus tendonitis. He administered Kenalog injections in the right shoulder and elbow. On July 6, 2011, Hayes reported recurrent right elbow and shoulder pain. Full range of motion was again found in the right shoulder. Repeat injections were provided and she was continued on regular duty. On September 21, 2011, Dr. Ozyurekoglul ordered an MRI of the right elbow and shoulder.

The October 3, 2011, right shoulder MRI revealed mild supraspinatus tendonitis without a tear, and mild AC joint arthropathy. The right elbow MRI

revealed mild tendinopathy versus partial tear of the distal biceps tendon with evidence of high grade injury.

Thereafter, on October 7, 2011, Hayes presented to Dr. Ozyurekoglu with a report of a March 2011 work injury to her right elbow while trying to move a bale of rubber that was lodged on an overhead belt. She reported that her right shoulder and elbow had been painful since the incident. Dr. Ozyurekoglu reviewed the right shoulder MRI, and diagnosed right biceps tendonitis, right supraspinatus tendonitis, and low grade tearing of the biceps tendon in the elbow. Repeat Kenalog injections were provided. On November 24, 2011, Dr. Ozyurekoglu recommended a right pronator teres release with exploration of the biceps tendon. He continued Hayes on light duty, and also referred her to Dr. Smith for her right shoulder. Subsequently, on February 24, 2012, Dr. Ozyurekoglu again recommended right arm surgery which he felt should be coordinated with the right shoulder surgery to be performed by Dr. Smith. On April 18, 2012, following surgery, Hayes reported resolution of the numbness and tingling, and on May 30, 2012, she was placed at maximum medical improvement and released to return to work at full duty. On July 5, 2012, Dr. Ozyurekoglu assessed a 0% impairment rating for the right forearm, and opined that Hayes retained the physical capacity to return to work at her regular job.

On December 12, 2011, September 5, 2012, and January 18, 2013, Hayes was evaluated by Dr. Frank Bonnarens, who testified by deposition on February 26, 2013. Dr. Bonnarens noted a history of the prior 2006 right shoulder

injury and surgery. He also noted the history of the March 12, 2011, work incident followed by a bicep repair procedure in April 2012 by Dr. Ozyurekoglu, as well as a May 2012 right shoulder surgery performed by Dr. Smith. Dr. Bonnarens testified that Hayes exhibited evidence of symptom magnification on physical examination of the right shoulder, as she had marked discrepancy between active and passive range of motion. Further, he noted that when Hayes was distracted she exhibited a significant increase in her active range of motion in the shoulder. Dr. Bonnarens found full strength in the right upper extremity. He did not believe that Hayes's work activities on March 12, 2011, caused a permanent injury to the right shoulder, or precipitated the need for the May 2012 right shoulder surgery.

In support of his opinions, Dr. Bonnarens noted that the right shoulder MRI performed on October 3, 2011, revealed no acute findings and, further, that the description of Hayes's bicep tendonitis on both the May 1, 2012, and prior December 28, 2006, operative reports by Dr. Smith were identical. Dr. Bonnarens attributed the right shoulder condition and need for surgery to the natural aging process and placed Hayes at maximum medical improvement at least by the time of his evaluation on January 18, 2013. He assessed a 6% impairment rating for the distal clavicle resection performed by Dr. Smith, but emphasized that the rating was not work related. Dr. Bonnarens specifically disagreed with the 16% impairment rating assessed by Dr. Warrant Bilkey, whose independent medical examination is discussed herein, *infra*. He did not believe that Hayes required any

permanent restrictions, and felt that from an objective standpoint Hayes retained the physical capacity to return to work at her regular job.

Hayes was also evaluated by Dr. Richard DuBou on January 19, 2012. Dr. DuBou diagnosed a small tear of the right biceps tendon with possible pronator compression. He recommended repeat EMG/NCV testing prior to consideration for surgery. He opined that Hayes's right upper extremity treatment following the March 2011 work incident was related to that incident. On February 16, 2012, Dr. DuBou reviewed the EMG/NCV testing and found it to be normal. He recommended a repeat right elbow MRI, which was conducted on March 7, 2012. That MRI revealed severe tendinosis versus partial-thickness tearing of the distal biceps tendon with moderate degenerative changes. In March 2012, Dr. DuBou reviewed the right elbow MRI to reveal a right biceps tendon tear. He recommended a right elbow surgery consisting of a pronator teres release and biceps tendon release.

During the course of litigation, Hayes submitted evidence from CMKI Hand Therapy, Dr. Ellen Balard, and Dr. Warren Bilkey. Dr. Bilkey performed an Independent Medical Evaluation at Hayes's request on August 21, 2012. He diagnosed Hayes with a right biceps tendon tear, pronator syndrome, right shoulder strain, rotator cuff tendonitis, biceps tendonitis, and AC arthritis. Dr. Bilkey related the entirety of Hayes's diagnosis to the work injury of March 12, 2011. Based upon *The 5th Edition of the AMA Guides*, Dr. Bilkey assessed a 16% whole person partial impairment rating for the upper extremity injuries, as well as a 3%

permanent partial impairment rating to the body as a whole for residual right elbow pain. He recommended restrictions of left-handed duty, no right-armed lifting or carrying, no pushing, pulling, or crawling, pinching and grasping of less than one hour per day, and limited fine manipulations of two to four hours per day.

In an addendum report, Dr. Bilkey noted that Hayes had finished her physical therapy and had reached maximum medical improvement for the right shoulder. He opined that Hayes's impairment rating remained unchanged from his initial evaluation, and agreed with Dr. Smith's permanent restrictions of no work above shoulder level and no lifting above ten pounds. Dr. Bilkey placed Hayes at maximum medical improvement and opined that she was medically disqualified from returning to her pre-injury work activities as a process worker for American.

Hayes received short-term disability at a rate of approximately \$200 per week from mid-May through November 1, 2012. Thereafter she applied for retirement disability. Hayes states that her permanent restrictions are no lifting greater than ten pounds, no repetitive use of the right shoulder, and no over the shoulder work. She asserts that she continued to be symptomatic in her right upper extremity and that this interferes with her daily activities.

As noted, this claim was decided by the ALJ on June 4, 2013. In that opinion, order, and award, Hayes was awarded temporary total disability benefits for the right forearm condition. The right shoulder condition was dismissed in its entirety, based upon a finding that it was not work related. Hayes appealed to the

Board, which entered a November 1, 2013, opinion affirming the decision of the ALJ. Therein, the Board stated that:

Contrary to Hayes' assertions, the opinions expressed by Dr. Bonnarens in his deposition and reports constitute substantial evidence upon which the ALJ was free to rely in reaching a decision on the merits ... Because the ALJ's decision is supported by substantial evidence, we are without authority to disturb this decision on appeal.

November 1, 2013, Opinion of the Kentucky Workers' Compensation Board.

(Internal citations omitted). It is from that opinion that Hayes now appeals to this Court.

Prior to reviewing the arguments of the parties, we note that when reviewing a decision of the Board, we will affirm the Board absent a finding that the Board has misconstrued or overlooked controlling law, or has so flagrantly erred in evaluating the evidence that gross injustice has occurred. *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992). With this in mind, we now turn to the arguments of the parties.

On appeal, Hayes makes two arguments: (1) That her shoulder injury should have been found by the ALJ to be a work-related injury as defined by the Kentucky Workers' Compensation Act (Act), and accordingly, the ALJ and Board committed reversible error in dismissing her claim; and (2) At a minimum, she should have been awarded appropriate medical benefits for at least a "temporary injury." We address these arguments in turn.

As her first basis for appeal, Hayes argues that her shoulder injury should have been found by the ALJ to be a work-related injury as defined by the Act. She asserts that the overwhelming weight of the medical and lay evidence compelled a finding that the right shoulder injury was work related, and that both the ALJ and the Board have erred in finding otherwise. Specifically, Hayes argues that the ALJ misinterpreted the medical records of Dr. DuBou in stating that Dr. Bilkey was the only doctor of record to relate the right shoulder diagnosis to the work injury of March 12, 2011. Hayes asserts that Dr. Dubou related both the right arm and right shoulder injuries to the March 2011 work incident.

Hayes asserts that the ALJ, in finding that the right shoulder injury was not work related, relied solely upon the opinions of Dr. Bonnarens, and did so in error. Hayes asserts that the opinions of Dr. Bonnarens are in direct contradiction to the other medical evidence and with Hayes's history of injury. Hayes also argues that in finding as he did, the ALJ completely disregarded the proof and testimony presented by Hayes even though there were no negative implications as to her veracity.

In response to the arguments made by Hayes concerning the ALJ's evaluation of the evidence, American argues that the decision of the ALJ was supported by substantial evidence of record, that there was no evidence to the contrary of a nature compelling enough to warrant reversal, and that the ALJ is free to choose which evidence to rely upon when the evidence is conflicting in nature. We agree.

Below, Hayes was unsuccessful before the ALJ. Accordingly, the question on appeal becomes whether the evidence presented to the ALJ was so overwhelming as to compel a finding in Hayes's favor. *Paramount Foods, Inc. v. Burkhart*, 695 S.W.2d 418 (1995). Compelling evidence has been defined as that which is so persuasive that it was clearly unreasonable for the ALJ not to be convinced by it. *Hudson v. Owens*, 439 S.W.2d 565 (Ky. 1969). Further, neither the Board nor this Court may substitute its judgment for that of the ALJ on matters involving the weight to be accorded the evidence on questions of fact. Kentucky Revised Statutes (KRS) 342.285.

Upon review of the June 4, 2013, opinion and order of the ALJ, we note the ALJ's finding that:

As for the work-relatedness of the shoulder injury, only one physician providing evidence, that being Dr. Bilkey, has affirmatively stated that the shoulder condition is work-related. Dr. Smith, the treating shoulder surgeon, has not provided a causation statement. Dr. Bonnarens has stated that the shoulder condition is not work-related. The record demonstrates that the plaintiff has had prior shoulder conditions, injuries, surgeries, and settlements. It is true that she returned to work following these incidents and the undersigned is not making a finding of a pre-existing, active exclusion. Rather, based on the evidence as a whole, or sufficient lack thereof, the Administrative Law Judge is making the finding that the right shoulder condition is not work-related. Specifically, in reliance on Dr. Bonnarens, the right shoulder condition is dismissed, whether for temporary or permanent income and medical benefits, as not being work-related or even a temporary exacerbation of a work-related condition.

June 4, 2013, *Opinion, Order and Award* of the ALJ, pp. 11-12.

Upon review of the record, we are in agreement with the Board that the opinions expressed by Dr. Bonnarens in his deposition and in his medical reports constitute substantial evidence upon which the ALJ was free to rely in rendering his opinions. Upon review of the record, it is clear that Dr. Bonnarens made the determination that in light of Hayes's history of previous rotator cuff problems and minimal findings on MRI that the changes were far more consistent with age-related changes than "anything that is post-traumatic." Repeatedly, in his deposition testimony and medical reports, Dr. Bonnarens indicated his opinion that the shoulder condition was not work related and that there was no evidence of a harmful change to the shoulder as a result of the incident.

Ultimately, this Court is in agreement with the Board that while Hayes correctly asserts that there is evidence in the record upon which the ALJ could have relied to support an outcome in her favor, however, in light of the record, the evidence represents only conflicting evidence compelling no particular result. *Copar, Inc. v. Rogers*, 127 S.W.3d 554 (Ky. 2003). As previously stated, where the evidence is conflicting, the ALJ as fact-finder is vested with the discretion to pick and choose whom and what to believe. *Caudill v. Maloney's Disc. Stores*, 560 S.W.2d 15 (Ky. 1977). Accordingly, we find no error in the Board's affirmation of the ALJ, and we likewise affirm.

As her second and final basis for appeal, Hayes argues that even if the ALJ's opinion is affirmed with respect to the "permanent" right shoulder injury

being unrelated to the March 12, 2011, work incident, the overwhelming weight of the lay and medical evidence of record establishes that there was an uncontroverted work incident on that date, which required medical treatment and loss of time from work. In support of that argument, Hayes asserts that Dr. Bonnarens opined that the March 12, 2011, work incident was the precipitating event that caused Hayes to go to the doctor for right shoulder treatment and surgery. Accordingly, Hayes asserts that she met her burden of proof and persuasion that she sustained a work-related “injury” as defined by the Act, and is entitled to additional findings and award provisions on whether the “injury” is temporary or permanent.

In response, American Synthetic Rubber argues that the Board did not err in affirming the ALJ’s decision to dismiss the claim for TTD and medical benefits insofar as the right shoulder was concerned. American asserts that Hayes’s argument is based on the erroneous assertion that Dr. Bonnarens described the work event as the precipitating event that prompted Hayes to seek medical treatment for her right shoulder. In support of that assertion, American directs this Court to the deposition testimony of Dr. Bonnarens, wherein counsel asked:

Hayes’s Counsel: In terms of absent another injury history to the contrary, do you believe that was the event or precipitating event that brought her to the doctor’s for medical treatment?

Dr. Bonnarens: I think that [was] what she told me ... was the case, but beyond that, I don’t know.

Thus, American argues, and we agree, that Dr. Bonnarens did not affirmatively testify that the work event in question caused the right shoulder

injury – Rather, he testified that this was what Hayes reported to him and that, beyond that, he did not know. Accordingly, and for the foregoing reasons, as the ALJ conclusively found that the May 12, 2011, work incident did not result in an injury to the right shoulder, Hayes is not entitled to temporary total disability or medical benefits for same. We affirm.

Wherefore, for the foregoing reasons, we hereby affirm the November 1, 2013, opinion of the Kentucky Workers' Compensation Board, affirming the June 4, 2013, opinion and order of Administrative Law Judge Chris Davis.

ALL CONCUR.

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