

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000080-WC

COBB-VANTRESS, INC.

APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
v. ACTION NO. WC-13-00217

KATINA KIDD;
HONORABLE WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, NICKELL, AND THOMPSON, 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) that Appellee Katina Kidd suffered a total disability. Based upon the following, we affirm the decision of the Board.

PROCEDURAL HISTORY

In an opinion and order rendered September 3, 2013, the ALJ found Kidd was permanently totally disabled due to a work-related low back injury and a psychological condition caused by repetitive bending at work. The ALJ awarded Kidd temporary total disability (“TTD”) benefits, permanent total disability (“PTD”) benefits, and medical benefits. He also referred Kidd for a vocational rehabilitation evaluation. Appellant, Cobb-Vantress, Inc., did not file a petition for reconsideration with the ALJ.

Cobb-Vantress appealed the ALJ’s decision to the Board, arguing that the award of PTD benefits should be reversed because the ALJ’s decision was not based upon substantial evidence. Cobb-Vantress argued that the ALJ erroneously relied upon medical opinions regarding causation which were based upon inaccurate facts or history, and, that pursuant to *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004), should have been disregarded. The Board affirmed the ALJ’s decision, finding that it was in accordance with *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000), and supported by substantial evidence. Cobb-Vantress then brought this appeal.

BACKGROUND SUMMARY

Kidd began working for Cobb-Vantress on October 17, 2011. During her employment, she performed various jobs involved in the gathering and shipping of eggs, including feeding and caring for chickens. Her last job with Cobb-Vantress required repetitive bending twelve to fourteen hundred times per day.

On February 11, 2013, Kidd injured her low back and both legs while working. She stated that, due to her injury, she became depressed and anxious, due to cumulative trauma from repetitive lifting, bending and stooping. The pain began on March 14, 2011. Kidd sought medical treatment two weeks after her pain began, and was informed that her condition resulted from the repetitive activities involved in her work with Cobb-Vantress. Kidd stated that she had experienced previous bouts of back pain in 2000, 2004, 2006 and 2009, all of which were eventually resolved. She stated that she had taken antidepressants, including Prozac, in the past for female health issues, but no longer needed to take it after having tubal ligation surgery in 2009.

Kidd first sought treatment with Dr. Michael Cummings, her family physician. Dr. Cummings advised her that her low back pain resulted from the repetitive lifting she performed at work. He prepared a statement indicating that she could perform light duty, and outlined her restrictions. Kidd presented this statement at work and was placed in a light duty position where she continued to work until May 18, 2011. That date was her last date of employment. Kidd subsequently received TTD benefits for approximately five and a half months.

Cobb-Vantress paid for her medical treatment until she was evaluated by Dr. Timothy Kriss on October 17, 2011. She has received no additional TTD benefits, nor have any of her medical bills been paid by or on behalf of Cobb-Vantress since that date.

Kidd stated that her symptoms continued to worsen despite being off work since May 18, 2011. She has had conservative treatment in the form of medications, epidural steroid injections, and physical therapy, but no surgery has been recommended. At her hearing, Kidd stated her current complaints consist of constant pain in her back and legs, tingling and numbness in the lower extremities, as well as confusion, fatigue, and an inability to sleep.

Kidd introduced the treatment records of Dr. Richard Meyer for her treatment from March 21, 2011, through September 19, 2011. Those records reflected treatment for low back pain, including physical therapy, and a referral for a lumbar MRI. Dr. Meyer diagnosed disc desiccation and herniation at L3-L4 and disc desiccation at L4-L5 and L5-S1.

Kidd also introduced treatment records from Dr. Amr El-Naggar for treatment from July 25, 2011, through January 26, 2012. Dr. El-Naggar treated her for complaints of low back pain, disc herniation and bilateral leg pain. He diagnosed a lumbar sprain/strain, degenerative disk disease, spinal stenosis, and radiculopathy. He opined that surgery was not her best option, but noted she had exhausted all other measures. He stated that she could not return to her previous work. Dr. El-Naggar recommended restrictions of no lifting, pushing or pulling

greater than ten pounds; no repetitive bending or twisting of the back; and alternate standing, sitting or walking every half hour.

Kidd also supported her disability claim with a report from Dr. Warren Bilkey who evaluated her on November 13, 2012. In his report, Dr. Bilkey stated that Kidd had sustained work-related injuries in March of 2011 which resulted from the repetitive activities of her work on the poultry farm. He diagnosed a lumbar strain and chronic back pain due to her work injury. He opined that she had reached maximum medical improvement (“MMI”), and assessed a 7% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). Dr. Bilkey recommended the use of analgesic medications and home exercise for Kidd. He agreed with the restrictions imposed by Dr. El-Naggar.

Dr. Robert Sprague, a psychiatrist, evaluated Kidd on March 12, 2013. Dr. Sprague diagnosed her with Depressive Disorder NOS, Anxiety Disorder NOS, and pain disorder associated with a general medical condition. He assessed a 10% impairment rating pursuant to the AMA Guides, 2nd Edition, all of which he attributed to her work injury. Dr. Sprague noted previous bouts of low back pain, as well as other injuries and health conditions. He recommended mental health intervention and treatment. Dr. Sprague also stated that Kidd’s work-related mental condition would have a moderate impact on her daily activities.

Kidd introduced her treatment records from Dr. David Webber for September 21, 2011, through October 13, 2011. Dr. Webber noted complaints of

low back pain radiating to her feet and toes, with tingling and numbness. He administered epidural steroid injections which Kidd stated provided no relief.

Both Kidd and Cobb-Vantress introduced the treatment records of Dr. Cummings from 1990 through 2009. These records document periodic treatment for low back and neck pain, but do not reflect ongoing treatment for her low back prior to the alleged accident. Records from March 14, 2011, through August 12, 2012, reflect continuous complaints of low back pain and depression which Dr. Cummings treated with medication.

Dr. Kriss evaluated Kidd on October 17, 2011, at Cobb-Vantress's request. Dr. Kriss diagnosed persistent musculoskeletal strain, and lower extremity complaints which he found non-anatomic. He stated that Kidd does have some legitimate back pain. He also noted that she had some symptom magnification, although earlier in his report he indicated he detected none. He assessed a 5% impairment rating pursuant to the AMA Guides, which he found unrelated to the work injury. He stated any restrictions were attributable to the natural aging process rather than the work injury. He also indicated she had been actively treated for depression prior to the work injury.

Dr. Chris Stephens evaluated Kidd on June 19, 2013, also at the request of Cobb-Vantress. Dr. Stephens noted Kidd's complaints of low back pain radiating into both legs. He diagnosed chronic low back pain secondary to degenerative disc disease. He assessed no impairment rating due to the work

injury. He stated her condition had plateaued and that she was stable. He stated that she needed no treatment, and surgery was not indicated.

A Benefit Review Conference (“BRC”) was held on July 19, 2013. The BRC order and memorandum reflects the contested issues were benefits per Kentucky Revised Statutes (KRS) 342.730; work-relatedness/causation; unpaid/contested medical expenses; injury as defined by the Act; TTD; and whether Kidd is permanently totally disabled.

Before the ALJ, Cobb-Vantress introduced a surveillance report and copies of pages from Kidd’s Facebook account, along with pages of a listing from Fine Art America, an art website. Kidd testified that she was not the person identified in the surveillance report. She also testified that she had not sold any artwork or photographs through either of the internet sources identified by Cobb-Vantress.

In his decision rendered September 3, 2013, the ALJ found Kidd was entitled to TTD benefits from May 19, 2011, to October 25, 2011. Considering the criteria set forth in *Ira Watson Department Store v. Hamilton, supra*, the ALJ found Kidd permanently totally disabled. He also found Cobb-Vantress responsible for medical benefits pursuant to KRS 342.020. Finally, the ALJ referred Kidd for a vocational evaluation in accordance with KRS 342.710. Cobb-Vantress did not file a petition for reconsideration, but did file an appeal with the Board.

In affirming the decision of the ALJ, the Board held as follows:

After reviewing the evidence, and the ALJ's decision, we cannot conclude any of the physicians here were provided a history so inaccurate or incomplete as to render it lacking in probative value. The ALJ's determination Kidd is permanently totally disabled was in accordance with the Kentucky Supreme Court's holding in *Ira A. Watson Department Store v. Hamilton*, *supra*.

Taking into account Kidd's age, education and past work experience, in conjunction with her post-injury physical status, along with the opinions of Drs. Bilkey, El-Naggar and Sprague, the ALJ was persuaded due to the effects of the work-related injury, she is totally disabled. While Drs. Kriss and Stephens express a different point of view, the ALJ's determination is sufficiently supported by the record. Because the outcome selected by the ALJ is supported by substantial evidence, we are without authority to disturb his decision on appeal. See KRS 342.285; *Special Fund v. Francis*, *supra*. For that reason, we cannot say the outcome arrived at by the ALJ finding Kidd entitled to an award of PTD benefits is so unreasonable under the evidence the decision must be reversed.

Additionally, no petition for reconsideration was filed. Therefore, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated differently, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record that supports the ultimate conclusion. *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334 (Ky. 1985).

We emphasize Kidd's testimony regarding her post-injury ability to work and her level of pain is substantial evidence, as an injured worker's credible testimony is probative of his ability to labor post-injury. See *Hush v. Abrams*, 584 S.W.2d 48 (Ky. 1979); See also *Carte v. Loretto Motherhouse Infirmary*, 19 S.W.3d 122 (Ky. App. 2000).

We believe the ALJ's findings are sufficient. An ALJ's decision must effectively set forth adequate findings of fact from the evidence upon which his or her ultimate conclusions are drawn so the parties are reasonably apprised of the basis of the decision. However, he or she is not required to engage in a detailed explanation of the minutia of his or her reasoning in reaching a particular result. *Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526 (Ky. 1973); *Shields v. Pittsburg and Midway Coal Mining Co.*, 634 S.W.2d 440 (Ky. App. 1982). While Cobb-Vantress is able to

identify evidence which could have supported a finding in its favor, such evidence is insufficient to require reversal on appeal.

This appeal followed.

STANDARD OF REVIEW

“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).

As a reviewing court in workers’ compensation cases, our 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). With this standard in mind, we examine the merits of the appeal.

DISCUSSION

On appeal, Cobb-Vantress first argues that the ALJ’s decision was not supported by substantial evidence contained in the record. It contends that the decision of the Board ignored the fact that the ALJ misunderstood the nature of Kidd’s injury. Cobb-Vantress also asserts that the evidence relied upon by the ALJ was based upon an inaccurate history, and should have been disregarded.

KRS 342.0011(1) provides that the claimant in a workers’ compensation proceeding has the burden of proving each of the essential elements of her cause of action, including the extent of her occupational disability. See also *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Since Kidd was successful, the question on appeal is whether substantial evidence supports the ALJ’s decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). “Substantial evidence” is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky. 1971).

In making a determination either granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. *Seventh Street Road Tobacco Warehouse v. Stillwell*, 550 S.W.2d 469 (Ky. 1976); *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 grants an ALJ, as fact-finder, the sole discretion to determine the quality, character, and substance of

evidence in rendering his decision. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. *Jackson v. General Refractories Co.*, 581 S.W.2d 10 (Ky. 1979); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977). He may also reject, 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 (Ky. 2000). While there may be evidence supporting an outcome different than that reached by the ALJ, this is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974). In order for a court to have grounds to reverse, it must be shown that there was no evidence of substantial probative value to support the ALJ's decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

In reviewing an ALJ's decision, the Board and an appellate court are limited to determining whether the ALJ's findings were so unreasonable, given the evidence, that they must be reversed as a matter of law. *Ira A. Watson Department Store v. Hamilton, supra*. An appellate court may not usurp the ALJ's role as fact-finder by weighing and determining the credibility of evidence set forth in the record. Nor may we give credence to other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999).

In this case, the Board found that the medical records and Kidd's own testimony clearly established that she had no ongoing issues with low back pain or depression prior to the date of the accident. While Kidd had experienced bouts of back pain due to specific episodes in the past, these had all been resolved prior to her injury. Also, while she had been treated with antidepressant medication in the past for issues unrelated to her back, she was no longer required to take the medication after her 2009 tubal ligation surgery.

While Cobb-Vantress contends that in the opinion and order the ALJ's summary of evidence indicated that Kidd had denied any treatment for psychological symptoms prior to her work injury, the report of Dr. Sprague, Kidd's psychiatrist, was weighed by the ALJ in making his determination regarding Kidd's psychological symptoms. Thus, there was sufficient evidence and the Board did not err in affirming the ALJ's opinion and order on this issue.

As to Cobb-Vantress's arguments regarding Kidd's lack of openness with her physicians, there is sufficient evidence within the record to show that the ALJ weighed the reports of the physicians (including the ones for Cobb-Vantress) as well as the testimony of Kidd in making his determination. Thus, we hold the Board did not err in affirming the ALJ's decision based on substantial evidence in the record.

Cobb-Vantress next argues that the ALJ's decision ignored the lack of substantiating objective medical findings. The doctors' opinions, however, were supported by objective medical evidence produced in the form of an MRI and

Kidd's physical examination by the physicians. Thus, we hold the Board's decision affirming the ALJ's opinion and order based on objective medical evidence was not in error and affirm the Board's decision.

Cobb-Vantress's last assertion on appeal is that the ALJ's finding of total disability was not based on relevant case law. Specifically, it argues that the factors set forth in *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000), were not linked to the specific facts set forth at the hearing in this case.

In upholding the ALJ's decision on this issue, the Board noted that while some of the physicians expressed a different conclusion as to Kidd's total disability, the ALJ's finding was supported by the record. We agree. KRS 342.0011(c) defines permanent total disability as "the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury." In determining Kidd had a total disability, the ALJ held as follows:

In this case, I considered the severity of the Plaintiff's work injuries, both physical and psychological, her age, her work history, her education, the credible and convincing testimony of the plaintiff and the specific opinions of Dr. Bilkey, Dr. El-Naggar and Dr. Sprague regarding her physical and psychological impairment and her occupational disability. Based upon all of those factors, which are covered in detail above, the factual determination that Ms. Kidd cannot find work consistently under regular work circumstances and work dependably. I, therefore, make the factual determination that she is permanently and totally disabled.

See Opinion and Order at p. 10.

Based upon these findings, the Board affirmed the ALJ's holding and determined that it was in accordance with the holding in *Hamilton*. We agree and hold that the Board did not err in determining that the ALJ's opinion and order was supported by substantial evidence in the record.

Thus, we affirm the decision of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Walter E. Harding
Louisville, Kentucky

BRIEF FOR APPELLEE:

Mark D. Knight
Somerset, Kentucky