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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000267-WC

CHERYL BLAINE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-01057

DOWNTOWN REDEVELOPMENT
AUTHORITY, INC., ET AL.;
HON. J. LANDON OVERFIELD, FORMER
CHIEF ADMINISTRATIVE LAW JUDGE;
HON. ROBERT L. SWISHER, CURRENT
CHIEF ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, J. LAMBERT, AND MAZE, JUDGES.

JONES, JUDGE: This is an appeal as a matter of right from the January 12, 2015, order of the Workers' Compensation Board ("Board") affirming in part, vacating in part, and remanding an opinion by the former Chief Administrative Law Judge ("CALJ"), J. Landon Overfield.[1] On appeal, the Appellant, Cheryl Blaine, asserts that the Board erred in concluding that both paragraphs 1 and 2 of KRS[2] 342.730(1)(c) were potentially applicable mandating an analysis pursuant to *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). She argues that no substantial evidence supported the CALJ's finding that she returned to work at a wage equal to or greater than her pre-injury average weekly wage. Accordingly, Blaine argues that paragraph 2 of KRS 342.730(1)(c) is not applicable entitling her to benefits under paragraph 1. For the reasons set forth below, we AFFIRM.

I. Procedural and Factual Background

The litigation leading up to this appeal was unusually protracted and contentious. The record is voluminous. Many of the initial issues, however, have been whittled down as a part of the proceedings below such that the issues before us are rather straightforward. While we have reviewed the entire record, we summarize it only to the extent necessary to place this appeal in the proper procedural and factual context.

[1] As noted by the Board, Chief Judge Overfield retired while this matter was pending before the Board. The Honorable Robert L. Swisher succeeded him as the Chief Administrative Law Judge.

[2] Kentucky Revised Statutes.

Blaine, a fifty-four-year-old resident of Bowling Green, Kentucky, began working for the Downtown Redevelopment Authority, Inc. ("the Authority") in September of 1995. Ultimately, she became the Authority's Executive Director. On June 26, 2007, Blaine was working for the Authority when she injured her low back picking up a suitcase during an overnight conference. Blaine eventually had surgery on her back. Following her surgery, she returned to work for the Authority on January 28, 2008. In December of 2009, Blaine filed a Form 101 Application for Resolution of Injury Claim with the Department of Workers' Claims ("Department") seeking benefits as a result of her 2007 injury. Blaine's claim was placed in abeyance pending additional treatment and settlement discussions.

On April 28, 2011, while Blaine's first claim was still pending, Blaine again injured her back at work while picking up trash from a former employee's office. Blaine underwent surgery for this injury as well. She did not return to work after this injury. Blaine filed a claim with the Department as related to this second injury. Blaine's two claims were consolidated so that they could be heard together before the CALJ. Following an extensive discovery period, the CALJ conducted a benefit review conference ("BRC"), which was followed by a final hearing.

In an Opinion, Order and Award, rendered May 27, 2014, the CALJ determined that Blaine was entitled to permanent partial disability benefits for the June 26, 2007, work-related injury payable in the amount of $166.17 per week. This amount represented the CALJ's finding that the first injury resulted in Blaine

having a 26% functional impairment to the body as a whole. The CALJ did not award any multipliers for the first injury. The CALJ determined that the second injury rendered Blaine totally and permanently occupationally disabled, and awarded her benefits accordingly.

Blaine filed a petition to reconsider, which the CALJ denied. Blaine then appealed to the Board. The Board affirmed in part, vacated in part, and remanded the claim to the CALJ for further findings. Specifically, the Board concluded that the CALJ failed to address whether Blaine's first injury rendered her totally and permanently disabled. Additionally, the Board concluded that the CALJ failed to conduct a proper analysis under *Fawbush v. Gwinn*, *supra*.

The Board remanded Blaine's claim to the CALJ as follows:

> This claim is REMANDED for entry of an amended opinion and award determining Blaine's entitlement to PTD benefits due to the June 26, 2007, injury. Should the CALJ or ALJ as designated by the CALJ determine Blaine is not entitled to PTD benefits as a result of the June 26, 2007, injury, the CALJ or ALJ must then conduct an appropriate analysis of the third prong of the *Fawbush* analysis in conformity with the views expressed herein.

On appeal, Blaine asserts that the Board's remand order is in error. She maintains that if it is determined on remand that she is not entitled to permanent total disability benefits for the first injury, the evidence mandates that she be awarded benefits pursuant KRS 342.720(1)(c)1. In other words, Blaine does not believe that any *Fawbush* analysis is necessary on remand.

II. Standard of Review

Pursuant to KRS 342.285, the ALJ is the sole finder of fact in workers' compensation claims. Our courts have construed this authority to mean that the ALJ has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth–Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). Moreover, an ALJ has sole discretion to decide whom and what to believe, and may 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. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

On review, neither the Board nor the appellate court can substitute its judgment for that of the ALJ as to the weight of evidence on questions of fact. *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 441 (Ky. App. 1982). A reviewing body cannot second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Medley v. Bd. of Educ., Shelby County*, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused only when an ALJ's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001). To demonstrate an abuse of discretion, "[a] party who appeals a finding that favors the party with the burden of proof must show that no substantial evidence supported the finding, *i.e.*, that the finding was unreasonable under the evidence." *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 754 (Ky. 2011).

Statutory interpretation is a matter of law reserved for the courts, and courts are not bound by the ALJ's or the Board's interpretation of a statute. *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327, 329-30 (Ky. App. 2000). Indeed, the appellate court's province is to ensure that ALJ decisions, and the Board's review thereof, are in conformity with the Workers' Compensation Act ("the Act"). KRS 342.290; *Whittaker v. Reeder*, 30 S.W.3d 138, 144 (Ky. 2000). *Bowerman v. Black Equip. Co.,* 297 S.W.3d 858, 874-75 (Ky. App. 2009). Therefore, we review issues of statutory interpretation *de novo*.

III. ANALYSIS

As amended effective July 14, 2000, KRS 342.730(1)(c) provides, in pertinent part, as follows:

> 1. If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments; or
>
> 2. If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection. This provision

> shall not be construed so as to extend the duration of payments.

Id.

In determining whether the claimant is entitled to the application of a multiplier with respect to an award for a partial permanent disability, the first question an ALJ must answer is whether the employee retains "the physical capacity to return to the type of work that the employee performed at the time of injury." *Id.*; *Miller v. Square D Co.*, 254 S.W.3d 810, 813 (Ky. 2008). This requires the ALJ to weigh "the evidence to determine what job(s) the claimant performed at the time of injury and to determine from the lay and medical evidence whether she retains the physical capacity to return to those jobs." *Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (Ky. 2004).

In this case, the CALJ extensively discussed the evidence in the record. After weighing the medical and lay testimony, the CALJ made a factual determination that Blaine lacked the physical capacity to return to the type of work that she was performing at the time of injury.[3] This finding would entitle Blaine to triple benefits *unless* KRS 342.730(1)(c)2 also applies. *See Fawbush*, 103 S.W.3d at 12 ("[A]n ALJ is authorized to determine which provision is more appropriate on the facts. If the evidence indicates that a worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of injury for the indefinite future, the application of paragraph (c)1 is appropriate.").

[3] The Authority did not contest this finding on appeal before the Board.

Accordingly, the CALJ proceeded to examine KRS 342.730(1)(c)2. The CALJ determined that Blaine had returned to work at an equal or greater wage following her first injury making both paragraphs (c)1 and (c)2 applicable. As such, the CALJ performed a *Fawbush* analysis.[4] Blaine argues that the CALJ, and in turn the Board, erred in concluding that paragraph (c)2 is applicable to her.

First, Blaine takes issue with the Board's interpretation of the word "work" in this section of the Act. Although somewhat difficult to follow, Blaine's argument appears to be that an employee has not actually returned to "work" if the employer must make accommodations to allow the employee to perform his or her job. Blaine explains that "work" is defined elsewhere in the Act as "providing services to another in return for remuneration on a regular and sustained basis in a competitive economy." KRS 342.0011(34). According to Blaine, a disabled worker who requires some level of accommodation cannot "perform in competition with a non-disabled worker," and therefore, cannot be said to have returned to "work." Thus, Blaine maintains that even though she resumed performing services for the Authority for pay, she cannot be said to have returned to "work" under the Act because the Authority had to provide her with accommodations to allow her to be able to perform those services.

[4] The Board concluded that the CALJ was correct to undertake a *Fawbush* analysis, but that he incorrectly performed that analysis. Neither Blaine nor the Authority complains about the Board's determination with respect to the proper factors to consider when performing a *Fawbush* analysis. Thus, our review is limited to the question of whether a *Fawbush* analysis was required, not whether it was correctly performed.

This logic is out of touch with our modern-day understanding of disability. Once an accommodation is provided, a "disabled" worker might actually be able to perform the core functions of a job better than his or her "able-bodied" counterpart. Accommodations make our workforce more competitive, not less so. Additionally, the Act should be construed to promote and encourage employees returning to work. Construing the Act as Blaine requests would provide a disincentive to accommodating injured workers and allowing them to reenter the workforce, which runs counter to the very purpose of the Act. *See AK Steel Corp. v. Childers*, 167 S.W.3d 672, 676 (Ky. App. 2005) ("The statute's provisions encourage an employer to return an injured employee to work at the same or greater wages, since an employee who cannot return to work because he is not physically able receives benefits enhanced by the 3 multiplier under KRS 342.730(1)(c)1.").

Following her first injury Blaine provided "services" to the Authority "in return for remuneration." This fact is undisputed. Therefore, we agree with the Board that, accommodations notwithstanding, the CALJ correctly determined that Blaine returned to "work" following her first injury.

This brings us to the second requirement necessary to make paragraph (c)2 applicable. The return to work must be "at a weekly wage equal to or greater than the average weekly wage at the time of injury." The CALJ concluded that Blaine's initial return to work was at a wage equal to or greater than her pre-injury average weekly wage. Blaine argues this finding was in error and contradictory to

the evidence, which shows that by the time of her second injury Blaine was earning less than before her first injury.

We agree with the Board that the CALJ did not err in this regard. Like the Board, we believe that Blaine's own stipulations precluded the CALJ from making any other finding. Among the stipulations, which the parties agreed to at the BRC, is stipulation No. 8: "Plaintiff returned to work after the June 26, 2007 work-related injury on January 28, 2008, ***at a wage equal to or greater than her average weekly wage*** and worked through April 28, 2011. Plaintiff has not worked since April 28, 2011." The CALJ provided the parties with an opportunity to correct or modify the stipulations at the hearing. Blaine offered no clarification or modification in relation to this stipulation.

The purpose of having stipulations in workers' compensation matters is to expedite the processing of claims and avoid having hearings on issues the parties can agree on. And, in our opinion, it cannot be disputed that the purpose of this stipulation was for the parties to agree for the purposes of KRS 342.730(1)2 that following the first injury Blaine "returned to work at a weekly wage equal to or greater than [her] weekly wage at the time of injury." The stipulation tracks the language of KRS 342.730(1)2 almost exactly and we can conceive of no other purpose for including such a stipulation.

If Blaine wished to be removed from the burden of this stipulation, the Regulations provided her with a mechanism for relief. Under the Regulations,

Blaine could have filed a motion with the ALJ seeking relief. *See* 803 KAR[5] 25:010, Sec. 16. Blaine did not file a motion to be relieved of this stipulation. Notwithstanding her failure to do so, Blaine argues that the ALJ should have looked past this stipulation because the employer produced pay records indicating that while Blaine initially returned to work at an equal or greater average weekly wage, her wage was subsequently reduced so that by her last day, she was making less than her pre-injury average weekly wage. Blaine's approach would require the ALJ to confirm whether each stipulation comports with the evidence filed by the parties and to reject stipulations if not supported by the evidence. This approach is untenable and contrary to the Regulations. To allow one party to disregard the stipulation would negate the purpose of limiting the issues at the BRC and would contravene the intent of the Regulations. Thus, Blaine was bound by her stipulation that she returned to work following the first injury at a wage equal to or greater than her pre-injury average weekly wage making paragraph (c)2 applicable.

Because both paragraphs (c)1 and (c)2 were potentially applicable, the the CALJ was required to weigh the evidence "to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." *Kentucky River Enterprises, Inc. v. Elkins*, 107 S.W.3d 206, 211 (Ky. 2003). In doing so, the Board properly noted that the CALJ must consider whether "the evidence indicates that the worker is unlikely to be able to continue earning a wage that equals or exceeds the wage at the time of the injury for the indefinite future."

[5] Kentucky Administrative Regulations.

Id. Thus, while an award pursuant to (c)1 would be *permissible* depending on the ALJ's findings, it is *not required* as Blaine argues on appeal.

IV. CONCLUSION

For the reasons set forth above, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Norman E. Harned
Bowling Green, Kentucky

BRIEF FOR APPELLEES:

Richard Wade Hartsock
Bowling Green, Kentucky

Dwight T. Lovan
Frankfort, Kentucky

J. Landon Overfield
Frankfort, Kentucky

Robert L. Swisher,
Lexington, Kentucky