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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000813-WC

YORK COMPANIES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-66877

TERRI HIBBS; HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART,
VACATING IN PART,
AND REMANDING

** ** * ** * ** *

BEFORE: COMBS, J. LAMBERT AND VANMETER, JUDGES.

COMBS, JUDGE: York Companies, Inc., a temporary employment contractor, petitions for review of an opinion of the Workers' Compensation Board that affirmed in part, vacated in part, and remanded the decision of the Administrative Law Judge (ALJ). The ALJ awarded temporary, total disability benefits and

medical benefits for an injury sustained by Terri Hibbs, York's employee; but she dismissed Hibbs's claim for permanent benefits. York contends that the Board erred by remanding: (1) for an express finding that Hibbs suffered only a temporary injury and (2) for additional findings regarding Hibbs's entitlement to temporary total disability benefits. After our review, we affirm in part, vacate in part, and remand for further proceedings.

Terri Hibbs was assigned by York to work as a temporary employee of the Geek Squad at a Best Buy location in Louisville. On April 5, 2013, Hibbs suffered a work-related injury when a pile of boxes that she was unloading from a skid fell and struck her neck and left shoulder. Following a medical examination, she was taken off work for one week. After that week, she was hired by Geek Squad to light duty work. However, she was eventually terminated by Geek Squad due to a lack of work. Hibbs received unemployment insurance benefits for 26 weeks. At the time of the final hearing, she was again employed by a temporary staffing agency, but she was between assignments.

Hibbs was treated by Dr. Ellen Ballard on May 9, 2013. Dr. Ballard noted pain at the side of her neck and left shoulder upon palpation. Dr. Ballard observed normal cervical range of motion but decreased shoulder abduction.

Hibbs was evaluated by Dr. Thomas A. Becherer on June 14, 2013, who diagnosed Hibbs with cervical strain superimposed upon degenerative changes. He recommended physical therapy and a course of pain management.

Hibbs underwent an independent medical examination, including a medical records review, on July 13, 2013. Dr. Michael Best reported that Hibbs's physical examination was normal. He observed that Hibbs demonstrated sub-maximal and inconsistent efforts on functional testing and that her subjective complaints were "far in excess of objective findings." Dr. Best determined that Hibbs had reached maximum medical improvement. He found no lasting impairment and determined that she could return immediately to the type of work that she had performed at the time of her injury without further treatment or medication.

Hibbs underwent another independent medical examination by Dr. Anthony McEldowney on September 19, 2013. Dr. McEldowney also reviewed Hibbs's MRI reports. He diagnosed Hibbs with cervical radiculopathy as a result of the contusion to her left neck and reported that pre-existing disc protrusions at the C4-5 and C5-6 regions were exacerbated as a result of the work injury. Dr. McEldowney suggested that Hibbs might require a discectomy and cervical fusion in the future. He assigned a 15% impairment rating.

A third independent medical examination was conducted by Dr. Michael Doyle on February 28, 2014. Dr. Doyle concluded that Hibbs had suffered a mild cervical strain superimposed upon pre-existing cervical degenerative disease with multiple level disc protrusions. He was not persuaded that Hibbs suffered with radiculopathy as a result of the disc protrusions. He agreed with Dr. Best that Hibbs had achieved maximum medical improvement;

that she suffered no disability as a result of her work injury; and that there was no reason to impose any work-related restrictions.

On October 10, 2013, Hibbs filed an Application for Resolution of Injury Claim. York accepted the claim as compensable. By the time of the evidentiary hearing, York had paid temporary total disability benefits at a rate of \$207.58 per week (based upon an average weekly wage of \$369.25) for the period of June 25, 2013, through July 31, 2013. It had paid medical expenses in the amount of \$12,734.92.

After summarizing the entirety of the medical evidence, the ALJ found the opinions of Dr. Doyle and Dr. Best to be most persuasive. She found that Hibbs had suffered only a temporary strain and concluded that she had failed to meet her burden of proving a work-related harmful change to the human organism. The ALJ observed that Dr. Doyle and Dr. Best agreed that Hibbs's subjective complaints did not correlate with the degenerative changes revealed on her MRI. The ALJ expressly rejected Dr. McEldowney's medical opinion. In her order entered on November 24, 2014, the ALJ awarded temporary total disability income benefits from June 25, 2013, through July 31, 2013, and medical benefits as paid, but she dismissed Hibbs's claim for additional benefits.

On December 9, 2014, Hibbs filed a petition for reconsideration. In an order entered on January 7, 2015, the ALJ confirmed that Hibbs was not entitled to future medical benefits since she had suffered only a temporary injury that had successfully resolved. She cited to the analysis provided by the Supreme Court of

Kentucky in *Robertson v. United Parcel Serv.*, 64 S.W.3d 284 (Ky. 2001), and *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007).

On appeal to the Workers' Compensation Board, Hibbs argued that the ALJ erred by failing to find that she had sustained a permanent injury and by failing to award future medical benefits. The Board concluded that although the ALJ had engaged in the appropriate analysis, she failed to “clearly say” that she had found that Hibbs’s work-related injury was temporary. The Board remanded and requested the ALJ to “clearly state she found Hibbs sustained a temporary injury which occurred on April 5, 2013.” The Board further advised that “as part of her analysis, the ALJ must also determine whether Hibbs is entitled to future medical benefits pursuant to *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007).”

Finally, the Board, *sua sponte*, addressed another issue. After evaluating the stipulated value of Hibbs’s average weekly wage, the Board was convinced that her temporary, total disability income benefit had been underpaid by nearly \$40.00 per week. It ordered the ALJ to re-calculate the value of the weekly benefit due. Additionally, the Board (with one member dissenting) believed that the ALJ had failed to conduct an appropriate analysis regarding the time period during which Hibbs was entitled to temporary, total disability benefits since there was “no evidence she ever returned to the customary job she performed for York.” On remand, the ALJ was instructed to properly analyze Hibbs’s entitlement to temporary, total disability benefits.

As the claimant, Hibbs had the burden of proving each of the essential elements of her claim. If the party with the burden of proof and risk of persuasion is unsuccessful before the ALJ, the question on appeal becomes whether the evidence compels a finding in her favor. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). In order to be compelling, evidence must be so overwhelming that no reasonable person could reach the same conclusion as did the ALJ. *REO Mech. v. Barnes*, 691 S.W.2d 224 (Ky.App. 1985). The Board must determine whether the ALJ's finding “is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law.” KRS 342.285; *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000). When reviewing the Board's decision, we may reverse only where it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685 (Ky. 1992).

We reverse the Board’s conclusion that the ALJ failed to “clearly say” that she had found Hibbs’s work-related injury to be only temporary. In her opinion and order, the ALJ observed that “[t]he credible medical evidence does not support anything more than a finding of a temporary strain.” Opinion and Order dismissing at 11. She clearly and specifically stated that “Hibbs suffered only a temporary strain, now resolved.” *Id.* at 10. The ALJ dismissed Hibbs’s claim for permanent partial disability benefits because she found “no permanent injury . . . herein.” *Id.* at 12. In the order on reconsideration, the ALJ reiterated that she had found that Hibbs had sustained only a temporary injury that had now resolved. She

reaffirmed that the “medical evidence did not produce a finding of a permanent injury.”

In unequivocal and oft-repeated terms, the ALJ soundly and specifically rejected the contention that Hibbs had suffered a permanent injury. Moreover, she was not persuaded by the evidence that Hibbs was entitled to an award of future medical benefits. Her decision was reasonable in light of the evidence and the applicable law. The evidence did not compel a finding that Hibbs was entitled to an award based upon a permanent impairment — including an award of future medical benefits. While the ALJ could have relied upon the testimony of Dr. McEldowney to find that Hibbs suffered a work-related injury resulting in permanent disability, she elected not to rely upon his diagnosis. As the finder-of-fact, the ALJ had the sole authority and prerogative to judge the weight, credibility, substance, and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt, supra.*

Furthermore, we also reverse the Board’s conclusion that the findings of fact with respect to an award of future medical benefits were not legally sufficient. Despite the Board’s conclusion to the contrary, the ALJ clearly indicated her finding that Hibbs sustained a *temporary* injury on April 5, 2013. Referencing the analysis outlined by the court in *FEI Installation, Inc. v. Williams*, 214 S.W.3d 313 (Ky. 2007), the ALJ determined that Hibbs was not entitled to future medical benefits since her injury and its effects were merely temporary. Because the ALJ found that the work-related injury did not result in any permanent

disability and that the pain and limitations initially associated with the injury had since resolved, we cannot conclude that an award of future medical benefits was warranted. We conclude that the ALJ's findings of fact were legally sufficient.

Finally, we agree that the Board was within its authority to determine that Hibbs's temporary, total disability benefit as paid from June 25, 2013, through July 31, 2013, was undervalued with reference to her average weekly wage and that a remand to the ALJ for an accurate calculation was necessary. However, the Board erred by remanding for further findings with respect to the period for which temporary, total disability benefits were payable. The evidence presented was sufficient to support the ALJ's finding that Hibbs was entitled to income benefits for the period from June 25, 2013, until July 31, 2013, when she reached maximum medical improvement and was able to return to her customary work. There is no indication that the ALJ misunderstood or failed to apply the correct standard for determining Hibbs's entitlement to temporary, total disability benefits.

Consequently, we affirm the opinion of the Workers' Compensation Board insofar as it required a re-calculation of Hibbs's weekly income benefit from June 25, 2013, until July 31, 2013. However, we vacate the remainder of the opinion of the Board and remand for entry of an opinion and order consistent with our opinion.

ALL CONCUR.

Louisville, Kentucky

BRIEF FOR APPELLEE, TERRI

HIBBS:

John W. Spies
Louisville, Kentucky