RENDERED: OCTOBER 6, 2017; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2017-CA-000529-WC

LAUREL CREEK HEALTH CARE CENTER — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 15-WC-64134

AILENE FRYMAN; HON. STEPHANIE KINNEY, ADMINISTRATIVE LAW JUDGE; And WORKERS' COMPENSATION BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JOHNSON, AND D. LAMBERT, JUDGES.

COMBS, JUDGE: Appellant, Laurel Creek Health Care Center (Laurel Creek), seeks review of an opinion of the Workers' Compensation Board (the Board) affirming an award of an Administrative Law Judge (ALJ) of temporary total

disability (TTD) benefits and the three-multiplier to Appellee, Ailene Fryman (Fryman). Finding no error, we affirm.

We refer to the record only as necessary to resolve the issues before us. Fryman, a CNA (Certified Nurse's Aide), started working for Laurel Creek in 1997. On October 19, 2015, she sustained an injury to her low back and bladder while lifting a patient. She was fifty-five years of age at the time, and she has not worked since the injury date. Laurel Creek voluntarily paid TTD benefits from October 20 through November 20, 2015, and stipulated the occurrence of a lumbar injury, but it contested work-relatedness/causation of all the other injuries alleged. Medical records reflect a history of genito-urinary problems. About a month after the injury date, on November 17, 2015, Fryman underwent a hysterectomy.

On August 31, 2016, following submission of proof and a hearing, the ALJ rendered an Opinion, Award, and Order. The ALJ concluded that Fryman's uterine prolapse was not work-related. The ALJ found that Fryman was entitled to TTD benefits for her lumbar injury and that she reached maximum medical improvement (MMI) on May 3, 2016, the date of Dr. Ballard's Independent Medical Exam (IME). The ALJ found that Fryman was unable to perform her customary work before reaching MMI based solely upon her low back condition. The ALJ explained that it was obvious that Fryman experienced severe low back pain immediately after the subject injury, that she was seen in the emergency room and was diagnosed with acute low back pain and chronic osteoarthritis, that she underwent a lumbar MRI approximately five months later, and that she did not feel

capable of returning to her job due to the lifting requirements. The ALJ awarded TTD benefits from October 20, 2015, through May 3, 2016.

The ALJ also awarded permanent partial disability (PPD) benefits based upon Dr. Ballard's 5% whole person impairment rating, DRE Lumbar Category II, 5th Ed. AMA Guides. Upon concluding that Fryman does not retain the physical capacity to return to her pre-injury job duties, the ALJ enhanced the PPD award by the 3.4 multiplier[1] under KRS[2] 342.730(1)(c), which provides as follows:

> KRS 342.730(1)(c)(1) provides in relevant part that: 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) ….

Subsection 3 of the statute provides that:

> an education and age factor, when applicable, shall be added to the income benefit multiplier set forth in paragraph (c)1. of this subsection … if the employee was age fifty-five (55) or older, the multiplier shall be increased by four-tenths (0.4)[.]

Laurel Creek appealed to the Board and argued that the award of TTD benefits and the 3.4 multiplier are not supported by substantial evidence. By Opinion rendered on March 3, 2017, the Board affirmed the ALJ. With respect to the TTD award, the Board explained as follows:

---

[1] The ALJ initially awarded a 3.2 multiplier, which was an apparent typographical error. That error was corrected to a 3.4 multiplier by Order on reconsideration rendered on December 1, 2016.

[2] Kentucky Revised Statutes.

The records of Willowbrook, Fryman's testimony, the restrictions of Dr. Hughes,[3] and Dr. Ballard's assessment of MMI at the time of her May 3, 2016, report constitute substantial evidence supporting the award of TTD benefits. Laurel Creek's argument to the contrary, the ALJ was permitted to conclude Fryman reached MMI as of May 3, 2016, when Dr. Ballard examined her. Notably, Dr. Ballard did not express an opinion MMI occurred prior to the date of her report. Thus, the ALJ was free to conclude Dr. Ballard believed Fryman attained MMI as of the date she saw her. That being the case, Fryman satisfied the first of the two prongs necessary to receive TTD benefits.[4]

Regarding the second prong, Willowbrook's records establish Fryman continued to experience low back problems through December 30, 2015, when Dr. Sink released her from treatment of her gynecological problems. Dr. Hughes' report demonstrates Fryman experienced substantial low back problems when he examined her on March 29, 2016. At that time, Dr. Hughes noted Fryman had ongoing back problems which limited her abilities to do the tasks of ordinary life including taking care of her house. She relied upon her daughter to accomplish that chore. Dr. Hughes also noted Fryman had problems with low back pain which was worse with movement and prolonged sitting. He elaborated on the low back problems Fryman was currently experiencing. He imposed permanent physical restrictions which he opined prevented her from performing "the work of a CNA." Dr. Hughes' restrictions and opinions demonstrate Fryman's low back condition would not permit a return to employment as defined by the relevant case law.

---

[3] Dr. Hughes saw Fryman for evaluation at her attorney's request.

[4] KRS 342.0011(11) (a) defines "'Temporary total disability' [as] the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]"

> Even though the ALJ did not expressly allude to Dr. Hughes' restrictions, she did conclude, based on Fryman's inability to perform heavy lifting due to her lower back condition, [that] she was unable to perform her customary work prior to the time she reached MMI. Significantly, we note the ALJ relied upon Dr. Hughes' restrictions in concluding Fryman did not retain the capacity to perform her job as a CNA. We believe the ALJ extended TTD benefits beyond the date Dr. Hughes saw Fryman in reliance upon Fryman's testimony and the permanent restrictions of Dr. Hughes. Thus, the second prong of KRS 342.0011(11)(a) was met by Fryman. This finding by the ALJ is not unreasonable in light of Fryman's testimony and the work restrictions Dr. Hughes imposed.

The Board "[s]imilarly … [found] no merit in Laurel Creek's second argument" that the ALJ erred in enhancing Fryman's PPD award by the 3.4 multiplier in KRS 342.730(1)(c)(1). The Board explained that Fryman's testimony alone (*i.e.*, that she lifted and moved patients weighing 180 pounds or more multiple times a day and could not return to work because of her difficulty lifting):

> constitutes substantial evidence supporting the ALJ's determination to enhance her benefits by the three multiplier. In addition, the restrictions imposed by Dr. Hughes and his opinion Fryman does not have the ability to perform the work of a CNA constitute substantial evidence supporting …the three multiplier.

On April 3, 2017, Laurel Creek filed a Petition for Review on appeal to this Court. Where, as here, "the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination." *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 52 (Ky. 2000). Our function is to correct the Board only

where we perceive that "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).

First, Laurel Creek contends that the Board erred in determining that the TTD award was supported by substantial evidence.

> [A]s defined by [KRS 342.0011(11)(a)], there are two requirements for an award of TTD benefits: first, the worker must not have reached MMI; and, second, the worker must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work.

Bowerman v. Black Equipment Co., 297 S.W.3d 858, 874 (Ky. App. 2009).

Laurel Creek disagrees with the ALJ's finding that Fryman reached MMI on May 3, 2016 – the date of Dr. Ballard's IME – and contends that it is not supported by treatment records or IME reports. Laurel Creek contends that the last treatment Fryman received for her back was on October 22, 2015. However, Dr. Ballard noted that she had reviewed Dr. Lester's records, which reflect that Fryman was treated for her back in November and December 2015 -- although it is not apparent that Dr. Lester's records were filed as evidence. Dr. Ballard also reviewed the report of a March 21, 2016, lumbar MRI, which Fryman related was ordered by her primary care provider.

In her IME report, Dr. Ballard responded "Yes" to a question asking if Fryman had reached MMI with respect to the work-incident injury of October 19, 2015. The Board aptly noted, "Dr. Ballard did not express an opinion MMI occurred prior to the date of her report. Thus, the ALJ was free to conclude Dr. Ballard believed Fryman attained MMI as of the date she saw her." We agree with that assessment by the Board.

Next, Laurel Creek argues that the evidence does not satisfy the second prong of the TTD test -- that Fryman had not reached a level of improvement that would permit her to return to the type of work she was performing when injured or to other customary work. Laurel Creek contends that Dr. Hughes failed to differentiate between Fryman's low back pain and her gynecological condition in assessing work restrictions. It also contends that Fryman's testimony fails to differentiate as to whether her inability to work is due to her back or gynecological condition. Thus, Laurel Creek claims that the ALJ's award of the 3.4 multiplier is not supported by substantial evidence. We disagree with both contentions.

Dr. Hughes opined that "the incident of October 19, 2015, … caused a recurrence of urinary incontinence and also worsened [Fryman's] back pain leading to the limitations that she now experiences and leading to the necessity for hysterectomy." In her May 9, 2016 deposition, Fryman was asked about any primary care physicians she sees for conditions other than her bladder. Fryman

testified that she had been seeing Ms. Roberts at the Garrard clinic monthly for about four months and that she prescribes Tramadol for back pain. Fryman was no longer seeing Dr. Sink, who had performed the hysterectomy. He released her on December 31, 2015. At the July 26, 2016, hearing, Fryman testified that she was still seeing Ms. Roberts monthly and that she continues to prescribe Tramadol. Fryman also testified that she continues to experience pain and discomfort in her low back, which is worse with activity, *including lifting,* and that her job as a CNA required lifting throughout the day. Fryman testified that she could not go back to work at Laurel Creek because she cannot lift as she did.

This Court summarized the deference to be accorded to an ALJ upon our review as follows:

> 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. In that regard, an ALJ is vested with broad authority to decide questions involving causation.

Miller v. Go Hire Employment Development, Inc., 473 S.W.3d 621, 629 (Ky. App. 2015) (internal citations omitted). Moreover, the claimant's testimony is deemed to be competent evidence concerning his or her condition and the ability to perform work duties following the injury. *Watson v. Hamilton,* at 52.

We are satisfied that both prongs of the TTD test have been met and that the ALJ's award of TTD benefits and the award of the 3.4 multiplier are

supported by substantial evidence. Therefore, we affirm the March 3, 2017, Opinion of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Rodney J. Mayer
Louisville, Kentucky

BRIEF FOR APPELLEE:

McKinnley Morgan
London, Kentucky