

RENDERED: AUGUST 31, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001409-WC

CHRISTINA MOORE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-75716

USPIRITUS, INC.;
HON. JANE RICE WILLIAMS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: COMBS, KRAMER AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Christina Moore appeals from an opinion of the Kentucky Workers' Compensation Board affirming an opinion, award and order of the Administrative Law Judge (ALJ). The ALJ awarded temporary total disability (TTD) benefits, permanent partial disability (PPD) benefits increased by the three-

multiplier pursuant to Kentucky Revised Statutes (KRS) 342.730(1)(c)1, and medical benefits for injuries Moore sustained while employed by Uspiritus, Inc. Moore argues that the ALJ did not sufficiently state the evidentiary basis for her legal conclusion and her decision was not based on substantial evidence.

Specifically, Moore argues the ALJ did not state her reason for adopting the 4% impairment rating by Dr. Ronald Fadel pursuant to the 5th Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment (AMA Guides). Moore also argues that the ALJ's opinion does not discuss portions of surveillance videos favorable to her or state the basis for relying on one vocational expert's opinion over another. Further, she argues the ALJ erroneously imputed a psychosomatic component to her condition and did not consider that a spinal cord stimulator is an "assistive device" under the AMA Guides. Having reviewed the record and under the applicable standard of review, we affirm.

On July 15, 2014, Moore was in a training program on her second day of work for Uspiritus, Inc. when she fell down a flight of stairs and fractured her left foot. She subsequently developed symptoms in her pelvis, low back and pelvis. Since her injury, Moore has not returned to work.

Moore was born in 1981. She graduated from high school and earned her CNA certification, which has now expired. Her prior work experience includes working in fast food, as a cashier, a nursing home CNA, a retail assistance

manager, a bank teller and a machine operator. At the time of her fall at Uspiritus, Moore was training for a position as a youth care worker.

Moore testified that she has intense excruciating pain and has difficulty sitting due to a cyst. She testified she would not be able to perform her job duties as a youth care worker which would require her to walk, stand, balance, stoop, kneel, crouch and crawl. Moore also testified she cannot perform any of her past work. She spends most of the day in a chair and, while she has had relief after a spinal cord stimulator was implanted, her pain has become progressively worse. Since her fall, she has only occasionally grocery shopped with the assistance of a wheelchair. She admitted she did help one time at a bake sale fundraiser.

Surveillance videos were introduced, portions of which show Moore working at a bake sale and shopping at Walmart. Moore explained that she was having a “good day” at those times and was able to shop at Walmart using a cart for balance.

Dr. Navin Kilambi treated Moore from July 16, 2004 through November 4, 2014. Dr. Kilambi treated the fracture, recommended physical therapy and prescribed medication. On October 29, 2014, Dr. Kilambi referred Moore to pain management for evaluation of Complex Regional Pain Syndrome (CRPS).

Dr. Michael Cassaro treated Moore for reflex sympathetic dystrophy (RSD) from July 2015 to December 2015. Dr. Cassaro implanted a permanent stimulator on August 19, 2015, after which Moore continued to complain of low back pain, tailbone pain and lower left extremity symptoms of burning, swelling and discoloration. After additional treatment, Moore complained of worsening symptoms and was referred to a pain management physician.

The handwritten records from Dr. Lawrence Peters, who treated Moore in January 2016, were introduced. He diagnosed Moore with CRPS of the left leg and prescribed medications. Dr. Peters found Moore reached maximum medical improvement (MMI) on March 23, 2016. He assessed a 45% impairment rating under AMA Guides, which he attributed entirely to her work injury. He restricted Moore's physical activities and opined Moore is unable to return to her prior employment. He prescribed a quad cane and a wheelchair.

Dr. Keith Myrick conducted an independent medical evaluation on June 20, 2016. He agreed with Dr. Peters's assessment that Moore had reached MMI. He also agreed with Dr. Peters's impairment rating under the AMA Guides.

Uspiritus filed the October 5, 2016 report of Dr. Fadel, who conducted an independent medical evaluation. He diagnosed Moore with a calcaneal fracture of the left foot with resulting mild to moderate CRPS as a result of her July 15, 2014 injury. He opined that Moore did not sustain injuries to her pelvis, tailbone

or low back. He noted that the surveillance videos showed Moore stooping, lifting boxes, and bending without assistance and that Moore's subjective complaints are inconsistent with the objective findings. He assessed a 4% impairment rating based on the AMA Guides. In an addendum, Dr. Fadel opined that Moore could return to her former employment with restrictions of no lifting or moving over twenty-five pounds.

Moore filed the August 13, 2016 report of a vocational expert, Robert Piper. He opined that Moore is unable to perform full-time employment.

Uspiritus filed the vocational report of Dr. Luca Conte. He concluded that Moore could perform sedentary and light work. He opined that Dr. Peters's restrictions are inconsistent with Moore's physical abilities as well as her capabilities as demonstrated on the surveillance video.

The ALJ concluded that pursuant to KRS 342.730, Moore's disability was not permanent and total and that her impairment is 4%. As an evidentiary basis for her analysis and conclusion, the ALJ stated she relied on the opinion of Dr. Fadel. The ALJ stated that Moore's "condition from the broken foot has appeared to the ALJ to develop into something much greater in her mind than it really is." The ALJ also commented that the surveillance videos were irreconcilable with Moore's complaints stating that "it is not believable that the same physical condition claimed by [Moore] would allow the behavior displayed at

the bake sale.” The ALJ further found that Moore’s age would be an asset in finding employment and that although the vocational experts opinion differed, she was persuaded by Dr. Conte’s opinion that Moore could perform sedentary or light work.

Both parties filed petitions for reconsideration.¹ The ALJ denied Moore’s petition stating as follows:

[Moore] requests that the ALJ reconsider the Opinion, Award and Order rendered April 20, 2017 arguing the ALJ failed to properly analyze the evidence and should change the outcome. Among other things, [Moore] takes issue with the statement in the opinion that Moore over estimates her condition in her own mind. This statement could certainly be eliminated from the opinion and was not intended as a psychological analysis but was intended to address the enormous disparity in the medical evidence. This disparity and potential outcomes were discussed at length as the proof left the choice of a 4% impairment or 45%. The potential for an opinion that did not offend one party simply did not exist. [Moore’s] petition essentially reargues the merits and asks for a change of the opinion.

Moore’s initial argument is that the ALJ’s finding and analysis are insufficient to permit meaningful review. KRS 342.275 states that the ALJ shall issue an opinion, award and order containing “a statement of the findings of fact, rulings of law, and any other matters pertinent to the question at issue[.]” In

¹ Uspiritus’s petition was granted for reasons not pertinent to this appeal.

Arnold v. Toyota Motor Mfg., 375 S.W.3d 56, 61–62 (Ky. 2012) (footnotes omitted), the Court explained:

[U]nlike the “old” Board, ALJs render formal opinions when deciding all workers’ compensation cases. Mindful that Chapter 342 and the Kentucky Constitution require review of decisions in post–1987 workers’ compensation claims by the Board, the Court of Appeals, and the Supreme Court, when requested, we conclude that KRS 342.275(2) and KRS 342.285 contemplate an opinion that summarizes the conflicting evidence concerning disputed facts; weighs that evidence to make findings of fact; and determines the legal significance of those findings. Only when an opinion summarizes the conflicting evidence accurately and states the evidentiary basis for the ALJ’s finding does it enable the Board and reviewing courts to determine in the summary manner contemplated by KRS 342.285(2) whether the finding is supported by substantial evidence and reasonable.

We disagree with Moore that the ALJ’s findings are insufficient for the Board or this Court to afford meaningful review. The ALJ was not required to recite all the evidence in a line-by-line manner or the details of her reasoning for finding some evidence more persuasive than other evidence. It is sufficient if the facts used to support her decision are set out sufficiently clearly so that the parties and a reviewing court can understand the basis for her decision. Here, the ALJ adequately summarized the conflicting evidence and the reasons for her decision.

As to questions of fact, “[t]he ALJ as fact finder has the sole authority to judge the weight, credibility, substance, and inferences to be drawn from the evidence.” *LKLP CAC Inc. v. Fleming*, 520 S.W.3d 382, 386 (Ky. 2017). “[A]n

ALJ 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 party's total proof." *Abel Verdon Const. v. Rivera*, 348 S.W.3d 749, 753-54 (Ky. 2011). Moreover, in order to reverse the findings of the ALJ unfavorable to a claimant, the evidence must be so overwhelming as to compel a finding in favor of the claimant. *Howard D. Sturgill & Sons v. Fairchild*, 647 S.W.2d 796, 798 (Ky. 1983).

The ALJ was confronted with widely differing opinions as to the extent of Moore's impairment. While Dr. Peters was Moore's treating physician, that does not require that his opinion be given more weight than Dr. Fadel's opinion. *Sweeny v. King's Daughters Medical Ctr.*, 260 S.W.3d 829, 833 (Ky. 2008). It was well within the ALJ's discretion to find Dr. Fadel's opinion more persuasive than Dr. Peters's opinion.

The ALJ concluded that Moore is not permanently and totally disabled based on Dr. Fadel's opinion and considering other factors including Moore's age, vocational skills, and the likelihood of her returning to some type of work. Additionally, the ALJ was free to find Dr. Conte's opinion that Moore could return to sedentary or light work to be more persuasive than Mr. Piper's opinion that Moore is unable to engage in full-time employment. Although Moore presented evidence supporting a different conclusion, the ALJ acted within her

discretion in determining which evidence to believe. It cannot be said that the evidence compels a different result.

Moore argues that the ALJ found a psychological component to her condition without medical evidence to support that finding when she commented that Moore's condition has developed into "something much greater" in Moore's mind. The ALJ clarified in the order on petition for reconsideration that her comment was not making a finding but was only an opinion given the disparity in the medical evidence and the surveillance videos. In light of the conflicting medical opinions, there was nothing unreasonable about the ALJ's conclusion that Moore might have exaggerated her symptoms.

Moore also argues that the ALJ erroneously relied on the bake-sale surveillance tape. However, the denial of permanent total disability benefits was not solely based on the videos. Instead, Moore's behavior on the videos was used by the ALJ in her determination of which medical assessments were reliable. It was within the ALJ's discretion to place greater weight on the assessments of Dr. Fadel and Dr. Conte, especially in light of the surveillance videos.

Finally, Moore argues that the ALJ was required to specifically address her spinal cord stimulator as an "assistive device" under the AMA Guides. She argues that the stimulator is a device that helps an individual with a functional

loss increase function the same way as do “reachers, grabbers, hearing aids, and telephone amplifiers” referred to in the AMA Guides as assistive devices.

We reject the notion that a spinal cord stimulator is an assistive device as used in the AMA Guides. A spinal cord stimulator is used to relieve symptoms, not to assist in performing a task. The ALJ noted that Moore has a spinal cord stimulator implanted and considered that fact, along with all the facts, in determining Moore’s impairment rating.

Finding no overwhelming evidence to disturb the ALJ’s findings, we affirm the opinion of the Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

Paul A. Brizendine
Jeffersonville, Indiana

BRIEF FOR APPELLEE:

Lyn Douglas Powers
Louisville, Kentucky