

RENDERED: SEPTEMBER 21, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2017-CA-001558-WC

LEXINGTON FAYETTE URBAN COUNTY
GOVERNMENT, LFUCG

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-68494

HARRY ASHBY;
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: MAZE, TAYLOR AND THOMPSON, JUDGES.

THOMPSON, JUDGE: The Lexington Fayette Urban County Government

(LFUCG) appeals from an opinion of the Workers' Compensation Board affirming

an opinion, award and order of the Administrative Law Judge (ALJ) awarding Harry Ashby temporary total disability (TTD) benefits, permanent partial disability benefits (PPD) and medical expenses for a work-related injury to the thoracic spine sustained on September 3, 2015. LFUCG argues the ALJ erroneously relied on Dr. Anthony McEldowney's medical opinions because Dr. McEldowney did not consider that Ashby suffered a nonwork-related injury on February 18, 2015, when he fell down steps at Good Samaritan Hospital.

Ashby was born in 1968 and is a high school graduate. He began working for LFUCG in 2009 in the public works department. On February 7, 2014, Ashby incurred a work-related injury when he slipped and fell on ice and injured his tailbone. He returned to work in July 2014 with the only restriction of lifting no more than 25 to 35 pounds and was placed in a different job, collecting recycling.

As a result of the 2014 work-related injury, a Form 110 settlement agreement was entered into between Ashby and LFUCG and approved by order dated March 13, 2015. Pursuant to that agreement, Ashby received a lump sum of \$10,424.94.

Ashby filed a second claim alleging that on September 3, 2015, he injured his back while at work.¹ After a benefit review conference, a hearing was

¹ Ashby also filed a motion to reopen his 2014 claim, but it was later withdrawn.

held. The contested issues were benefits pursuant to Kentucky Revised Statutes (KRS) 342.730, whether the injury was work related and causation, unpaid medical expenses, exclusion for pre-existing disability or impairment and TTD.

Ashby testified that on September 3, 2015, he and a co-worker were cleaning out recycling bins. He felt pain in his middle back when he was pushing a large container into an elevator. The co-worker reported the injury and Ashby was taken to Concentra Urgent Care where he was diagnosed with chronic back pain, thoracic sprain and lumbar sprain. He later sought treatment at UK HealthCare. Ashby was specifically questioned regarding his fall at Good Samaritan Hospital on February 18, 2015:

Q. Did you also have problems with your mid back from the injury at Good [Samaritan]?

A. No

Q. Any problems with any part of your back from that injury at Good [Samaritan]?

A. No.

Ashby introduced the Independent Medical Examination (IME) report of Dr. McEldowney who diagnosed a thoracic spine sprain/strain. Dr. McEldowney assessed a DRE Thoracic Category II and a 6% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. The report reflects that Dr.

McEldowney was aware of Ashby's "previous lower back injury." He stated that Ashby "had a long history of lower back problems, of which I performed [an IME] for him on October 25, 2014." However, the report makes no mention of Ashby's fall at Good Samaritan in February 2015.

Regarding causation, Dr. McEldowney opined that within a reasonable medical probability, Ashby's work-related injury on September 3, 2015, was the cause of his condition. He opined that Ashby does not have the ability to lift or carry, or push or pull with bending, and has lost the ability to perform any sustainable labor-type activity. He opined that Ashby reached maximum medical improvement (MMI) on March 3, 2016. Although Dr. McEldowney opined that Ashby had an active impairment to his lower back prior to September 3, 2015, he stated that there was no history of middle back pain or injury and noted that Ashby was performing his full work activities on September 3, 2015.

Dr. Rick Lyon conducted an IME on July 28, 2016. He diagnosed lumbar myalgias and lumbar spondylosis and determined Ashby reached MMI in September 2015. Dr. Lyon found no new impairment or harmful change to the human organism as result of the September 3, 2015 injury.

Dr. Henry Tutt conducted an IME on November 24, 2015. He diagnosed lumbar and thoracic strain/sprain. He opined Ashby was at MMI and could return to his prior employment unrestricted.

Various medical records were introduced from both before and after September 3, 2015, which indicate that Ashby was treated for various conditions, including back pain. Medical records of UK HealthCare were introduced and reflect that on August 20, 2015, Ashby was seen for ankle and back pain. That same report indicates that Ashby's back pain was in his lower back.

The ALJ relied on Dr. McEldowney's opinion in awarding Ashby TTD benefits, PPD benefits and medical expenses. The ALJ stated as follows:

The ALJ is convinced by the opinion of Dr. McEldowney as he has appropriately accounted for the effects of both injuries to [Ashby] and has successfully isolated the thoracic injury from the lumbar. Dr. McEldowney also persuadably discussed the restrictions that he imposed and pointed out that [Ashby] was working within his prior restrictions upon occurrence of the subject injury. This opinion has convinced the ALJ.

LFUCG argues that Dr. McEldowney and the ALJ ignored Ashby's fall at Good Samaritan on February 18, 2015, and that Ashby's medical records establish he received ongoing treatment for his back pain prior to September 3, 2015. It asserts that because Dr. McEldowney was unaware of the fall at Good Samaritan, his medical opinion cannot constitute substantial evidence to support the ALJ's decision.

“The claimant in a workman's compensation case has the burden of proof and the risk of persuading the board in his favor.” *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky.App. 1979). “When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did.” *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986). Furthermore, the ALJ, “as the finder of fact, and not the reviewing court, has the authority to determine the quality, character, and substance of the evidence[.]” *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985).

Although LFUCG concedes that the ALJ as the fact-finder is free to accept or reject a medical opinion, it argues that the ALJ's discretion is limited to those medical opinions that are based on the claimant's accurate medical history. LFUCG argues this case is similar to *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004). In *Cepero*, the Court quoted the Board with approval:

[W]here it is irrefutable that a physician's history regarding work-related causation is corrupt due to it being substantially inaccurate or largely incomplete, any opinion generated by that physician on the issue of causation cannot constitute substantial evidence. Medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable.

Id. at 842.

Contrary to LFUCG's assertion, *Cepero* does not prohibit an ALJ from relying on a medical expert whose report contains an incomplete or erroneous history but does so only if that opinion is based on such a history and "unsupported by any other credible evidence." *Id.* While nothing in Dr. McEldowney's report indicates he knew of Ashby's fall at Good Samaritan, there is no evidence that Ashby did not disclose that information to deceive Dr. McEldowney. To the contrary, according to Ashby's testimony, the fall resulted in no injury at all and, therefore, he believed it to be insignificant.

LFUCG argues that because Ashby was seen at the UK HealthCare for back pain as late as August 2015, his thoracic condition was pre-existing on September 3, 2015. There is no dispute that Ashby was treated for back pain in his lumbar spine prior to September 2015. However, as noted by the Board, "no physician of record opined Ashby had an active and impairment ratable condition of the thoracic spine at the time of the September 3, 2015 injury. Only the lumbar spine was identified in the various medical opinions regarding the presence of a pre-existing condition." As the ALJ found, Dr McEldowney appropriately distinguished Ashby's prior injury to his prior lumbar spine injury from his September 3, 2015 thoracic injury.

We conclude the ALJ properly considered Dr. McEldowney's medical opinion and did not err in relying on that opinion. There was substantial evidence to support the ALJ's finding that Ashby suffered a work-related injury as defined by KRS 342.0011(1) on September 3, 2015.

For the reasons stated, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

Theresa Gilbert
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