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NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2018-CA-000879-WC

EVELYN EAGLE

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-15-73950

SOURCEHOV HOLDINGS, INC.;
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: DIXON, KRAMER, AND J. LAMBERT, JUDGES.

KRAMER, JUDGE: The appellant, Evelyn Eagle, sought workers' compensation benefits from her former employer, appellee Sourcehov Holding, Inc., alleging a June 11, 2015 work incident had caused her to sustain injuries to her neck and

lower back, as well as bilateral carpal tunnel syndrome. In her Form 101, she described the incident as follows: “The Plaintiff was lifting boxes weighing 35-40 pounds all day. The Plaintiff attempted to lift a box of similar weight and felt immediate pain in her neck and back; had numbness and tingling in the upper extremities and hands.” Ultimately, an administrative law judge (ALJ) dismissed her claim, and the Worker’s Compensation Board found no error relevant to this appeal.¹ Upon review we likewise affirm.

The primary focus of Eagle’s appeal is upon the ALJ’s use of the term “injury,” the statutorily defined prerequisite for any award of workers’ compensation benefits. The offending portion of the ALJ’s order of dismissal stated in relevant part as follows:

**FINDINGS OF FACT AND CONCLUSIONS OF
LAW**

1. The facts as stipulated by the parties.
2. Injury as defined by the Act – Work-relatedness/Causation

“Injury” is statutorily defined in KRS 342.0011(1) as a work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment, which proximally causes a

¹ Eagle also asserted a psychological injury claim based upon the work-related incident of June 11, 2015, which the ALJ failed to specifically address. Upon review, the Board vacated in part the ALJ’s blanket dismissal of this matter to the extent that it had disposed of Eagle’s psychological injury claim and remanded for further consideration of that issue. There is no contention that the Board erred in this respect. Thus, we need not discuss it.

harmful change in the human organism evidenced by objective medical findings. “Objective medical findings” is defined by KRS 342.0011(33) as information gained through direct observation and testing of the patient, applying objective or standardized methods. In *Gibbs v. Premier Scale Co./Indiana Scale Co.*, 50 S.W.3d 754 (Ky. 2001), the Kentucky Supreme Court held that a diagnosis of a harmful change may comply with the requirements of KRS 342.0011(1) and (33) if it is based upon symptoms which are documented by means of direct observation and/or testing applying objective or standardized methods. See also *Staples, Inc. v. Konvelski*, 56 S.W.3d 412 (Ky. 2001), in which the Court held that while objective medical evidence must support a harmful change diagnosis, it is unnecessary to prove causation of any injury through objective medical findings.

Based on Eagle’s treatment records, the ALJ finds that *Eagle has failed to prove she sustained a harmful change in the human organism as a result of the work-related injury on June 11, 2015.* The treatment records of Ruth Combs, APRN establish Eagle had the same complaints and received treatment for the same complaints *prior to the work injury.* Further, Eagle’s testimony regarding this prior treatment is inconsistent with the medical treatment records.

Eagle treated with Ruth Combs, APRN, at Dr. Lester’s office from April 8, 2013 through April 27, 2015. When Eagle began treatment on April 8, 2013, she complained of right leg, lower back and neck pain. She described the pain as constant. She reported numbness and tingling in her hands, legs and feet. Throughout her treatment with Ms. Combs, she continued to have these complaints. On August 28, 2014, she complained of increased hip and right leg pain, as well as neck pain and tingling in her left upper extremity to her fingers. On that date, Ms. Combs noted positive Tinel’s and Phalen’s tests. She also noted tenderness from the L4-S1 and the lumbar paraspinal

muscles and right SI and Gluteal paraformis muscles. Eagle was diagnosed with fibromyalgia and diffuse muscle pain. On multiple occasions, Ms. Combs noted sacroiliac pain. Ms. Combs treated Eagle for these complaints and diagnoses through April 27, 2015.

When Eagle presented to Dr. Rowe on June 26, 2015 *following the work injury*, she report[ed] constant low back pain radiating down both legs. She also complained of neck pain with some numbness and paresthesia in the hands. When she initiated treatment with Dr. El-Kalliny, she described the same symptoms. She reported low back pain radiating to the lower extremities and neck pain that radiates into the upper extremity worse on the left with paresthesias in all fingers.

Further, Eagle's testimony regarding her treatment *prior to the work injury* is inconsistent with what she reported in the treatment records from Dr. Lester's office. At her deposition and hearing, she testified she had minor pain in her neck and low back *before the work injury*. However, her intake form from Dr. Lester's office describes her low back and neck pain very differently. She described the pain as constant. She reported the pain was affecting her ability to sit. She could only stand for minutes. She could walk very little. She indicated her activities were affected by her current problems. She advised she could only safely lift 20 pounds. Eagle's testimony downplays the pain she described at the time of her treatment with Ms. Combs at Dr. Lester's office. She testified she did not remember having any pain in her arms *prior to the work injury*. Yet the notes from Dr. Lester's office document pain and paresthesias in her arms and fingers. Her intake form completed in 2013 describes the same problems she reported having *after the work injury*.

Although Dr. El-Kalliny and Dr. Bilkey opined Eagle's low back, neck and carpal tunnel conditions and her treatments including the surgeries were *related to her*

work injury, neither had the prior treatment records from Dr. Lester's office. Further, despite having performed the cervical surgery, Dr. El-Kalliny on multiple occasions advised Eagle's was not a surgical case. He noted on March 24, 2016 that the MRI did not reveal anything surgical. Following the updated MRI of July 11, 2016, he noted the MRI revealed no cord compression and no change. Again, on August 4, 2016, Dr. El-Kalliny advised he would not recommend Eagle for surgical procedure on the cervical or lumbar spines. It is then strange and concerning to this ALJ that Dr. El-Kalliny three months later with no additional imaging studies or objective changes does a "complete 180" and performs a cervical fusion on Eagle.

Based on the forgoing, the ALJ is persuaded by the opinion of Dr. Vaughn[sic]. *Dr. Vaughn [sic] opined there is no objective evidence of a harmful change to the human organism caused by the work injury on June 11, 2015.* He opined there was no need for permanent restrictions *due to the work injury*. He further opined any ongoing treatment is due to the pre-existing and active conditions. He felt a large part of Eagle's symptoms are related to her pre-existing fibromyalgia.

Similarly, *Dr. Ballard opined Eagle's complaints were not related to the specific work injury.* She performed nerve conduction testing which revealed no evidence of nerve entrapment or cervical or lumbar radiculopathy. She found Eagle MMI as of October 20, 2015. She imposed no restrictions on Eagle. *She opined there is no need for further diagnostics or treatment with regard to the work injury.*

Based on the foregoing, Eagle has failed to prove she sustained any work related injury as defined by the Act on June 11, 2015.

(Emphasis added.)

Appealing to the Board, Eagle interpreted the ALJ's order as having made two dispositive findings. First, citing the repeated references to "her work injury" and "the work injury on June 11, 2015," Eagle surmised the ALJ had found that she had indeed sustained a work-related injury on June 11, 2015. Second, citing the repeated references to "pre-existing and active conditions," Eagle further surmised the ALJ had found that because she suffered from pre-existing conditions in the regions of her body affected by her injury, her June 11, 2015 work-related injury was not compensable. Accordingly, the focus of her appeal was upon the second of those perceived findings. She pointed out that the existence of pre-existing conditions did not necessarily preclude workers' compensation benefits. She argued the ALJ had erred, for purposes of determining the compensability of her claim, in failing to apply the precepts of *Finley v. DBM Techs.*, 217 S.W.3d 261 (Ky. App. 2007), to apportion her current impairment between her work-related injury and any pre-existing, active conditions. Further, she argued the evidence of record overwhelmingly supported that she suffered from no pre-existing, active conditions at the time of her work-injury and was thus entitled to benefits.

However, the Board disagreed with Eagle's interpretation of the ALJ's order, interpreting it as having made only one dispositive finding – namely, that Eagle had failed to demonstrate she had sustained *any* injury within the

meaning of the Act. Thus, the Board explained that much of Eagle's administrative appeal was superfluous:

[T]he ALJ was not required to set forth *any* analysis regarding pre-existing, active disability. This is not a case where the ALJ was apportioning impairment between the work-related injury and a pre-existing active condition. Finley v. DBM Technologies, *supra*. Based upon the opinions of Drs. Vaughan and Ballard, the ALJ dismissed Eagle's claim for benefits due to a failure to prove she sustained any work-related injury as defined by the Act on June 11, 2015. Therefore, any analysis of pre-existing, active disability pursuant to Finley, is unnecessary.

The Board further explained that if Eagle was arguing the ALJ's fact-finding or analysis was substandard, her argument was unpreserved due to her failure to file a petition for reconsideration to that effect. *See Eaton Axle Corp. v. Nally*, 688 S.W.2d 334 (Ky. 1985); *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000). Rather, the sole task on appeal was to determine whether the ALJ's ultimate conclusion was contrary to the overwhelming weight of the evidence. *See Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). And, the Board affirmed after determining that what was referenced in the ALJ's order demonstrated the ALJ's ultimate conclusion was *not* contrary to the overwhelming weight of the evidence.

Now on appeal before this Court, Eagle insists at the outset that her interpretation of the ALJ's order was the correct one.² We disagree. When interpreting a judgment, "effect must be given to that which is unavoidably and necessarily implied in a judgment, as well as that which is expressed in the most appropriate language." *Furlow v. Sturgeon*, 436 S.W.2d 485, 486 (Ky. 1969) (citation omitted). Here, while the ALJ's order makes repeated references to "her work injury" and "the work injury on June 11, 2015," the ALJ's ultimate conclusion was that Eagle did *not* sustain an "injury" within the meaning of KRS 342.0011(1). That much is clear from the ALJ's statement that "Eagle has *failed to prove she sustained a harmful change in the human organism* as a result of the work-related injury on June 11, 2015." (Emphasis added.) And, it is abundantly clear from the ALJ's concluding sentence: "Based on the foregoing, *Eagle has failed to prove she sustained any work related injury as defined by the Act on June 11, 2015.*" (Emphasis added.)

² Eagle also appears to argue the "fact" of her work-related injury was "conceded." She insinuates this fact was memorialized in two places: (1) the Benefit Review Conference (BRC) order; and (2) Sourcehov's brief before the ALJ. But, Eagle misrepresents the record. In its own review, the Board pointed out that the BRC order specifically notes Sourcehov contested Eagle's claim because there was a "question of whether [sic] is an injury as defined by the Act," and that the BRC order listed "work-related injury" and "injury" as contested issues. Likewise, Sourcehov's brief before the ALJ contains no such concession. To the extent that it even approached the subject, it merely stated, "*At most, Ms. Eagle suffered a temporary exacerbation of a pre-existing, active condition that was resolved by October 20, 2015.*" (Emphasis added).

Furthermore, we agree with the Board's determination that what was referenced in the ALJ's order (particularly the reports of Drs. John Vaughan and Ellen Ballard) demonstrated the ALJ's ultimate conclusion was *not* contrary to the overwhelming weight of the evidence. After performing a physical examination and a medical records review, Dr. Vaughan provided the following opinions in an Independent Medical Examination (IME) report:

My diagnoses for cervical condition are cervical spondylosis (degenerative changes), and status post cervical fusion C6-7 by history.

My diagnosis for lumbar condition is lumbar spondylosis (degenerative changes).

I do not believe her painful complaints or the diagnosis of cervical spondylosis or lumbar spondylosis are caused by the work incident of 6/11/15. I believe these were active pre-existing conditions as documented in her medical records. I base this on the fact that she had multiple visits immediately before her work incident with Ms. Ruth Ann Combs in which she was having chronic lower back and neck problems. As noted in Review of Medical Records, she had multiple different medications for these chronic problems.

I do not believe there is any objective evidence of a harmful change to the human organism caused by the work incident of 6/11/15. At best, the work incident may have caused a temporary exacerbation of a pre-existing active condition in her neck and lower back. Also, the reports of her lumbar and cervical MRIs only showed normal age-related degenerative changes.

Dr. Vaughan assessed an impairment rating for Eagle's pre-existing, active condition explaining:

Regardless of causation, I would assign a 25% impairment rating to the cervical spine. This is due to the fact that she has had a cervical fusion. This is a Cervical DRE Category IV according to the Fifth Edition, AMA Guidelines. I would not attribute this to the work incident of 6/11/15. I believe this was a pre-existing active condition. This is demonstrated by her medical records.

On my examination today, she had a full range of motion of her lower back. She has a 0% impairment to her lumbar. This is a Lumbar DRE Category I. I base this on no neurologic deficit and a full range of motion. Also, her objective studies of just a bulging disc at L5-S1 is a normal age-related degenerative finding. I do not believe there was any objective change to her lumbar as a result of the work incident of 6/11/15.

I do not believe she needs active ongoing medical treatment to her cervical or lumbar as a result of the work incident of 6/11/15. I believe any need for ongoing treatment was pre-existing and active before this work accident. This is demonstrated by medical records of Ms. Ruth Ann Combs which show extensive pre-existing medical treatment. I believe a large part of her remaining symptoms are also associated with her fibromyalgia, which was a pre-existing active condition.

I reviewed the opinions of Dr. Warren Bilkey. I would agree that she has a DRE Category IV impairment regarding cervical. Our difference of opinion is causation. I believe this was a pre-existing active condition and not due to the alleged work injury of 6/11/15. Dr. Bilkey also assigned a sacral dysfunction of 8%. I disagree on this and the causation. I based this on the fact that Ms. Ruth Ann Combs noted multiple times,

prior to the alleged work injury, that she was having sacroiliac pain and required significant treatment for this. This is all documented in the medical records. She was also noted to have numbness in both hands, and positive Phalen's and Tinel test before the work injury. This shows her carpal tunnel was a pre-existing active condition.

Dr. El-Kalliny also assigned a DRE Category of impairment for cervical. I believe this is reasonable, but a pre-existing active condition not related to the work incident. I believe the carpal tunnel and lumbar spine impairments were also pre-existing and active as documented by the medical records.

Dr. Vaughan then concluded by stating Eagle could return to light and medium duty job activities.

Similarly, after performing an examination and medical records review, Dr. Ballard set forth the following diagnosis of Eagle's condition:

"History of diffuse spinal complaints with no objective findings." Dr. Ballard then answered the following questions:

1. What is the current diagnosis as relates to work injury?

See above.

2. Is this diagnosis a direct result of his/her employment and consistent with the described mechanism of injury? If so, please provide rationale.

No, in my opinion, her present complaints cannot be related to a specific work injury. She does have a history of fibromyalgia.

3. Are further diagnostics indicated? If yes, then please specify.

No, she does not require further diagnostics.

4. What is the recommended treatment plan? Please be specific in terms of duration and frequency.

She does not require any further treatment as regards a June 11, 2015, incident.

5. Are there any medical restrictions? If so, please specify, along with their anticipated duration.

She has no medical restrictions as regards a June 11, 2015, incident.

6. Has maximum medical improvement been obtained? If not, what is the anticipated time frame to achieve maximum medical improvement?

In my opinion, she is at maximum medical improvement.

7. Is there a PPI rating for the work injury of 6/11/15?

There is no evidence that she has an impairment rating for the work injury of June 11, 2015, other than 0% per the Fifth Edition of the AMA Guides.

Accurately summarizing this evidence, the Board explained in

relevant part as follows:

Dr. Vaughan's report constitutes substantial evidence supporting the dismissal of Eagle's claim for physical injuries. In his report, Dr. Vaughan stated there was no objective evidence of a harmful change to the human organism caused by the work incident of June 11, 2015. Dr. Vaughan concluded Eagle did not sustain an injury on that date. Although he stated "at best" a work

incident may have caused a temporary exacerbation of a pre-existing active condition in the neck and lower back, Dr. Vaughan also noted the reports of the lumbar and cervical MRI only showed normal age-related degenerative changes. Dr. Vaughan did not definitely opine the incident of June 11, 2015, caused a temporary exacerbation of a pre-existing active condition. More importantly, he did not attribute the 25% impairment rating he assessed due to the cervical fusion surgery to the work incident of June 11, 2015. In the same vein, since Eagle had a full range of motion in her lower back, Dr. Vaughan concluded she had a zero impairment rating to the lumbar spine. That fact combined with a finding of no neurological deficit led Dr. Vaughan to conclude there was no objective change to the lumbar region as a result of the work incident of June 11, 2015. Dr. Vaughan also concluded the bilateral carpal tunnel syndrome was not work-related, since Ruth Ann Combs' medical records reveal Eagle had numbness in both hands and positive Phalen's and Tinel tests before the work injury demonstrating the bilateral carpal tunnel syndrome was a pre-existing active condition.

Further, Dr. Ballard's October 20, 2015 report *alone* constitutes substantial evidence in support of the ALJ's decision to dismiss Eagle's claim for failure to prove an injury as defined by the Act. In her report, Dr. Ballard took a history and performed an examination on the cervical and lumbar spine. She specifically measured the right and left hand grip strength. As a result, she concluded Eagle's complaints could not be related to a specific work injury. Those opinions constitute substantial evidence supporting the ALJ's determination Eagle did not sustain work-related injuries to her cervical and lumbar regions as well as work-related bilateral carpal tunnel syndrome.

In short, we agree with the Board and find no error in its determination that the ALJ's dismissal of Eagle's claim was not overwhelmingly

against, but rather consistent with, the substantial evidence of record. We therefore
AFFIRM.

ALL CONCUR.

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