

RENDERED: MAY 3, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001320-WC

BARBARA SMITH

APPELLANT

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-00125

BLEDSON COAL CO.;
HON. CHRISTINA D. HAJJAR, ALJ;
AND THE WORKERS' COMPENSATION
BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: GOODWINE, JONES, AND NICKELL, JUDGES.

JONES, JUDGE: The Appellant, Barbara Smith, appeals from an opinion rendered by the Kentucky Workers' Compensation Board ("Board"). Following its review, the Board affirmed dismissal of Smith's acute and cumulative trauma injury claims. On appeal Smith asserts that Board should have reversed and

remanded her claim to the Administrative Law Judge (“ALJ”) because the ALJ’s decision was (1) based on an inaccurate analysis of the evidence; (2) not in conformity with the Workers’ Compensation Act (“Act”) and binding case law; and (3) based on deliberate misstatements by Dr. Timothy Kriss, a physician retained by the Appellee, Bledsoe Coal Company (“Bledsoe”). Having reviewed the record in conjunction with all applicable legal authority, we affirm.

I. BACKGROUND

From 1984 until December 31, 2014, Smith worked in and around the underground coal mines of Eastern Kentucky. During her lengthy coal mining career, Smith obtained numerous industry-specific certifications and performed several different mining-related jobs. Smith last worked for Bledsoe as a mine safety director but was laid off after the company was sold. Her last day of employment was December 31, 2014.

Smith filed a Form 101 Application for Resolution of Injury Claim (“Form 101”) with the Department of Workers’ Claims on January 17, 2017, alleging she injured her back in a fall at work. She listed the date of injury as September 11, 2014, through December 31, 2014. Smith later amended her Form 101 to include a claim for low back injuries due to cumulative trauma from working in the coal mines from 1984 through December 31, 2014.

Smith testified by deposition on April 3, 2017, and at a hearing held before the ALJ on January 31, 2018. She explained that on September 11, 2014, while checking oxygen tanks she fell and injured her back when a step broke. According to Smith, when the step broke she twisted around so that her back landed on her self-contained self-rescue device (“SCSR”). Smith said the fall was so hard that it knocked the wind out of her. After the accident, Smith was taken out of mine, reported the accident, and was seen by Dr. Abdul Kader Dahhan.

According to Smith, she was having difficulty breathing when she initially saw Dr. Dahhan. She stated that Dr. Dahhan x-rayed her ribs but did not examine her back or buttocks. Smith did not miss any work due to the accident. While Smith testified that she developed a bruise on her right hip in the days following the accident, she did not seek any additional medical treatment at that time and continued to work at Bledsoe without restrictions until she was laid off.

After Smith was laid off, she went to a farm she owns in Ohio County, Kentucky. Smith testified that it was there that she began having some trouble with her right thigh and knee in late 2015. These problems caused Smith to seek medical treatment with Denise Bunner, APRN (“Nurse Bunner”). Smith eventually had an MRI and was referred to Dr. David Eggers, a neurosurgeon, for additional treatment. Dr. Eggers diagnosed Smith with significant back injuries, which she testified he attributed to her years of work in the coal mines. Dr.

Eggers testified that Smith's 2014 fall was sufficient to cause the back injuries he diagnosed. Eggers performed lumbar surgeries on July 26, 2016, and January 24, 2017. Bledsoe's workers' compensation insurer paid for the MRI and the first surgery but declined to pay for any additional treatment. Medicaid paid for Smith's second surgery.

Smith filed her Form 101 shortly before her second surgery. She later supplemented her claim with a report from Dr. David Muffly, an orthopedic surgeon. After evaluating Smith on May 31, 2017, Dr. Muffly diagnosed her with chronic low back pain referred into the right leg after the September 11, 2014, low back injury, with minimal improvement after two surgeries. He also stated she has a (1) grade 1 anterolisthesis at L3-4 and L4-5 with mild instability based on flexion/extension x-rays; (2) multi-level lumbar degenerative disc disease; (3) spinal stenosis; and (4) neuroforaminal narrowing. He assessed a 26% impairment rating pursuant to the 5th Edition of the American Medical Association's, GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT utilizing the range of motion method since she had undergone two surgeries. Dr. Muffly attributed half of the impairment rating to Smith's September 11, 2014 fall, and the other half to cumulative trauma caused by her occupation. He advised she avoid lifting or carrying greater than fifteen pounds and avoid bending or stooping.

Bledsoe filed a Form 111 Notice of Claim Denial. Bledsoe asserted Smith's alleged injury did not arise from her employment. Bledsoe also asserted affirmative defenses based on lack of notice (although later stipulated to), statute of limitations, and failure to support her claim with objective medical evidence. Bledsoe also filed a special answer asserting Smith failed to file her claim within two years of the date of injury.

In support of its position that the September 11, 2014, fall did not cause Smith's alleged back injuries, Bledsoe submitted Dr. Dahhan's office note from the day of Smith's fall. In the note, Dr. Dahhan stated that he saw Smith following a fall at work. She was complaining of low back pain. His examination showed she had full range of motion in all major joints. He diagnosed Smith with sprains and strains of the ribs.

Bledsoe also submitted a report from Dr. Kriss, who evaluated Smith on June 7, 2017, at Bledsoe's request. He noted Smith worked as a coal miner for over thirty years. She reported that on September 11, 2014, a step broke causing her to fall on her back, onto the SCSR, a small metal oxygen tank on her back. She had an onset of back pain but was able to get up. She saw Dr. Dahhan later that day, and later had two lumbar laminectomies. On the date of her examination with Dr. Kriss, Smith complained of right low back pain, right anterior thigh pain, and as the day progressed she was unable to walk due to right hip/thigh pain.

Dr. Kriss diagnosed Smith as status post L3-4 and L4-5 bilateral laminectomy, medial facetectomies and foraminotomies. He stated she had a positive right orthopedic hip examination and degenerative pathology in the right hip joint, which is responsible for the bulk of her complaints. He recommended she have a right hip MRI with contrast. He stated there was no documentation supporting low back pain on September 11, 2014. Dr. Dahhan noted the pain was localized in the right anterior chest, and he diagnosed sprains/strains of the ribs. He noted Smith required no treatment for over a year and a half, and she continued to work after the accident. Dr. Kriss incorrectly noted she worked for one and a half years after the accident rather than three and a half months. He noted the first medical treatment she received after the accident was in 2016 for right knee pain radiating down her leg.

Dr. Kriss found Smith's complaints of low back pain, radiculopathy, lumbar stenosis, neurogenic claudication, right hip joint pathology and referred pain from the right hip joint are not attributable to the September 11, 2014 fall. He also determined there is no evidence of cumulative, repetitive, incremental work injury to Smith's lumbar spine, hip, or lower extremities. He stated Smith would have reached MMI by January 11, 2015, for any musculoskeletal strain or contusion.

Dr. Kriss testified by deposition on October 18, 2017. He explained

that spondylosis means degenerative changes to the spine. He stated that a review of Smith's x-rays revealed "a fair amount of degenerative change" which was normal for her age. He stated the x-rays revealed findings of only degenerative changes, without acute traumatic findings. He testified the type of surgery Dr. Eggers performed was to relieve pain. He did not disagree with the surgeries Dr. Eggers performed. However, he opined the need for the surgeries was not due to the September 11, 2014 chest/rib/thoracic injury, which did not result in a lumbar injury. He stated the need for her surgery was not due to any of her past work. He also noted there was no report of low back, hip, pelvis or leg pain for over one and a half years after the accident. He again stated Smith needs an orthopedic evaluation based upon her right hip examination and weakness of the right psoas muscle. He stated Smith's problems with her hip preclude a determination regarding lumbar restrictions

The ALJ conducted a Benefit Review Conference ("BRC") on November 16, 2017. At the BRC the parties stipulated to: (1) jurisdiction under the Act; (2) an employment relationship existed between Smith and Bledsoe Coal; (3) no temporary total disability benefits ("TTD") were paid to Smith; (4) some medical expenses were paid on Smith's behalf; (5) Smith's date of birth, August 1, 1954; (6) Smith's education level as being two years of college/associate degree/CNA/LPN/AA; and (7) Smith's specialized/vocational training as

consisting of two years of college/multiple coal mining certifications. The parties identified the contested issues as: (1) work-relatedness/causation; (2) date of injury and manifestation date; (3) due and timely notice; (4) medical expenses, unpaid or contested; (5) average weekly wage; (6) physical capacity to return to the type of work performed at the time of injury; (7) permanent disability benefits pursuant to KRS¹ 342.730; and (8) statute of limitations.

Following a final evidentiary hearing, the ALJ rendered an opinion and order dismissing Smith's claim. The ALJ determined Smith did not timely file her claim because it was filed more than two years after the September 11, 2014 injury date, and that Bledsoe had no obligation to notify the Department because Smith returned to work after the date of the accident and no TTD benefits were paid, nor should they have been paid.

The ALJ next determined that the evidence was insufficient to establish that Smith sustained any permanent injuries from the fall or that her need for back surgery was occasioned by her work in the coal mines. The ALJ noted that while she found Smith's testimony that she fell at work convincing, she was persuaded by Dr. Kriss's report in combination with Dr. Dahhan's treatment note from the date of the fall that the complaints Smith had of back pain were not related to the fall. The ALJ specifically noted that she had reviewed the

¹ Kentucky Revised Statutes.

contradicting reports and medical evidence submitted by Smith but found Dr. Kriss's report more convincing.

Following an unsuccessful petition for reconsideration, Smith appealed to the Board. While the Board took issue with the ALJ's analysis of the notice and statute of limitations issue, it ultimately determined that any error the ALJ made with respect to the tolling of the statute of limitations was harmless because the ALJ "additionally dismissed Smith's claims for both acute and cumulative trauma injuries based upon the merits of the claim." The Board concluded that the ALJ's opinion was supported by sufficient evidence of record, and that Smith had failed to produce evidence that compelled a different result. To this end, the Board explained:

The parties stipulated Smith fell at work on September 11, 2014. However, the evidence does not compel a finding she sustained a permanent injury either from that fall, or due to the thirty years she worked as an underground coalminer. As noted by the ALJ, Smith sought treatment with Dr. Dahhan after the accident, and although his office note indicates she complained of back pain, he treated her for complaints of pain in her rib and difficulty breathing. There is no evidence that any additional treatment was sought or required during the remaining three and a half months of her employment with Bledsoe. In fact, there is no evidence she sought any treatment until she saw Nurse Bunner in April 2016. While Smith points to the misstatement by Dr. Kriss who indicated she continued to work for a year and a half after the accident, the ALJ explained that she did not rely upon that statement. The ALJ also explained why she relied upon Dr. Kriss' opinions in dismissing the claim.

We note Smith's allegations of fraud by Bledsoe and Dr. Kriss, but there is no evidence supporting those assertions. Dr. Kriss' report was submitted as evidence without objection, and he testified by deposition. There was no allegation of fraud by either Bledsoe or Dr. Kriss during his cross-examination, nor was any other evidence, medical or lay, submitted supporting this assertion. Dr. Kriss' opinion constitutes substantial evidence supporting the ALJ's dismissal of the claim, and no contrary result is compelled. Although Smith is able to point to evidence contrary to this determination, a different decision is not compelled.

(8/3/2018 Board Op. at 20).

This appeal followed.

II. STANDARD OF REVIEW

Pursuant to KRS 342.285, the ALJ is the sole finder of fact in workers' compensation claims. Our courts have construed this authority to mean that the ALJ has the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from that evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985); *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). Moreover, an ALJ has sole discretion to decide whom and what to believe, and 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 adversary party's total proof. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977).

On review, neither the Board nor the appellate court can substitute its judgment for that of the ALJ as to the weight of evidence on questions of fact. *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 441 (Ky. App. 1982). A reviewing body cannot second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion. *Medley v. Bd. of Educ., Shelby County*, 168 S.W.3d 398, 406 (Ky. App. 2004). Discretion is abused only when an ALJ's decision is arbitrary, unreasonable, unfair, or unsupported by sound legal principles. *Downing v. Downing*, 45 S.W.3d 449, 454 (Ky. App. 2001).

III. ANALYSIS

While the Board found the ALJ's reliance on the statute of limitations questionable, it based its decision to affirm on the ALJ's analysis of the merits of Smith's claim *vis-à-vis* the ALJ's conclusion that Smith's specific and cumulative injuries were not causally related to any work-related injuries. Having reviewed the record, we agree with the Board's conclusions on the merits. Accordingly, we decline to review the statute of limitations issues. The ALJ's alternative grounds for dismissal were supported by substantial evidence rendering any legal errors on the statute of limitations issues harmless.

“It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of

a workers' compensation claim." *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). This includes medical causation, which must be proved to a reasonable medical probability with expert medical testimony. *Brown-Forman Corp. v. Upchurch*, 127 S.W.3d 615, 621 (Ky. 2004).

As is typical, this case involved conflicting medical opinions and reports. KRS 342.285 designates the ALJ as the finder of fact in workers' compensation cases and gives the ALJ the sole discretion to determine the quality, character, and substance of evidence. As fact-finder, an 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. *Ford Motor Company (LAP) v. Curtsinger*, 511 S.W.3d 922, 930 (Ky. App. 2017). If the party with the burden of proof fails to convince the ALJ, that finding stands unless on appellate review that party can establish that the evidence was so overwhelming that it compels a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

First, Smith argues that she submitted evidence from several physicians that the ALJ "completely discounted and clearly misconstrued." The ALJ's opinion demonstrates otherwise. The ALJ reviewed the evidence submitted and relied on by Smith. It is clear to us that the ALJ understood the nature of the evidence and considered it before she rendered her opinion. On the determinative

issue of causation, however, the ALJ was more persuaded by the evidence submitted by Bledsoe, specifically Dr. Kriss's report and Dr. Dahhan's treatment note. The ALJ explained that she found Bledsoe's proof most convincing because Smith did not seek medical treatment for her back injury for a lengthy period following the initial fall and Smith's last day of work. The ALJ was convinced that had either the fall or the cumulative traumas associated with her work caused Smith's injury, she would have likely sought treatment earlier. The ALJ appropriately weighed the evidence, made a legal conclusion, and supported that conclusion with sufficient detail. The evidence supports the ALJ's conclusion.

Smith, however, argues that the ALJ should not have relied on Dr. Dahhan's treatment note and Dr. Kriss's report. She explains that Dr. Dahhan incorrectly diagnosed Smith with a "chest/rib injury" despite the history he was given that she fell and injured her back. Smith goes on to explain that Dr. Kriss relied on the incorrect history in Dr. Dahhan's notes rendering his opinion likewise invalid.

When a physician's opinion is based on a history that is "substantially inaccurate or largely incomplete," that opinion "cannot constitute substantial evidence." *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839, 842 (Ky. 2004). In *Cepero*, the ALJ awarded Cepero benefits based upon evidence from two physicians that indicated that his knee condition was related to a work injury.

However, neither doctor was aware that Cepero had suffered a severe injury to his knee several years earlier. The Kentucky Supreme Court held that the ALJ erred in relying on the physicians' conclusions because they were made without knowledge of the prior injuries. The Court explained that a "[m]edical 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.

We are not persuaded that this case is analogous to *Cepero*. The record indicates that Dr. Dahhan was made aware that Smith fell on her back and was having pain. Apparently, however, after conducting a physical examination, Dr. Dahhan chose only to x-ray Smith's chest area. Smith is free to argue that Dr. Dahhan's examination was incomplete or faulty; however, such arguments go to the weight of the report and any subsequent reliance on it, not to its admissibility.

In sum, Dr. Kriss's opinion supports the ALJ's legal conclusion regarding causation. The report was properly considered by the ALJ. Considering the report, Smith cannot demonstrate that the evidence compelled a determination in her favor as to causation.

Finally, Smith argues that Dr. Kriss and Bledsoe made misstatements so egregious as to constitute fraud on the court. The argument with respect to Dr. Kriss centers on the history of injury set forth in his report. Smith has not

identified anything that points to any misstatements being deliberate or made in bad faith. “Clearly fraud means something more than mere mistakes or errors of judgment[.]” *Calloway v. Octavia J. Coal Min. Co.*, 271 Ky. 8, 111 S.W.2d 395, 398 (1937). As to Smith’s assertions regarding the notice of injury form, Smith has not proved that Bledsoe retained a copy of the form after the company was sold. Even so, this issue deals primarily with the statute of limitations argument that we have already determined is not dispositive in this case.

IV. CONCLUSION

For the reasons set forth above, the August 3, 2018, opinion of the Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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