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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000107-WC

FORD MOTOR COMPANY (KTP)

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-13-01127

REGINA TENO; HONORABLE
MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE;
and KENTUCKY WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GOODWINE, LAMBERT, AND MAZE, JUDGES.

LAMBERT, JUDGE: Ford Motor Company (KTP) (hereinafter "Ford") has petitioned this Court for review of the opinion of the Workers' Compensation Board (hereinafter "the Board") affirming the decision of the Administrative Law

Judge (hereinafter “the ALJ”), on remand, awarding Regina Teno benefits for a work-related cumulative trauma injury. On appeal, Ford contends that the ALJ exceeded the directions on remand and addressed issues that had not been preserved in the earlier appeal. We affirm.

Teno was born in 1970, and she began working for Ford in 1993. She worked in several capacities there, including installing steering wheels, in the Trim Shop, in the Paint Department, in the C-Crew, and performing the Hang Job, in which she would remove chains from trucks and truck beds after they were rinsed in the painting process. While working in the Hang Job position, Teno claimed to have incurred the injury that became the subject of this claim. She filed a Form 101 Application for Resolution of Injury Claim on July 29, 2013, seeking compensation for cumulative trauma/repetitive motion injuries to her right arm, right wrist, and neck. She claimed she slowly developed “symptoms in [her] right arm that became disabling while performing repetitive job duties in” February 2013. Extensive proof was submitted, which has been summarized in this Court’s and the Supreme Court of Kentucky’s opinions in the first appeal of this matter.

ALJ Miller entered the first opinion in this case on June 11, 2015. In that opinion, the ALJ first addressed the disputed issue of causation, or work-relatedness. The ALJ determined that Teno had failed in her burden of proving causation:

Here, the causal relationship testimony comes from only one medical source, Dr. Bilkey. While Dr. Bilkey is a skilled and well-respected physician, it is not clear to the undersigned that he understood the Plaintiff's specific physical activities at her job nor the fact that she had been actively treated for these conditions in the past – with an MRI in 2011 for neck pain. It is apparent that Dr. Bilkey was not informed of Plaintiff's previous treatment for neck pain and right upper extremity pain. Dr. Bilkey states: "It does not appear that Ms. Teno has an active impairment affecting the neck or right upper limb prior to 2/8/2013." Without the history of previous similar symptoms and . . . any connection of those symptoms to work activities, Dr. Bilkey's opinion becomes less than persuasive. It is essential that each impairment be temporally related to the specific trauma (cumulative or otherwise) to that . . . body part.

The ALJ went on to note other treatment Teno had been receiving for conditions that were not related to her work and that she had been taking a narcotic pain medication for other conditions. She concluded that the medical evidence was "not persuasive that her claimed conditions [were] the result of her work activities." Therefore, the ALJ dismissed Teno's claim for benefits.

The Board affirmed Teno's appeal, but this Court reversed and remanded the Board's opinion, holding as follows:

Here, Teno claims the evidence compels a finding in her favor because four doctors diagnosed her with work-related thoracic outlet syndrome. Teno's argument, at first blush, appears convincing. Dr. Waters and Dr. Clair both diagnosed Teno with thoracic outlet syndrome, but neither linked that diagnosis to Teno's work activities. We note that Dr. Waters examined Teno as a part of her Ford Disability plan. Dr. Dave provided a

similar diagnosis with language establishing a causal linkage; he checked the work-related box on a disability form and described the injury as “repetitive moments.”

Dr. Bilkey provided the most detailed explanation connecting Teno’s diagnoses to her work activities. But the ALJ discounted Dr. Bilkey’s testimony, citing the physician’s misunderstanding of Teno’s prior medical history that led him to conclude that she had no prior pain or issues related to her right arm, right elbow, or neck. The ALJ found Teno had been actively treated for right arm, elbow, and neck pain since 2003 and stated that Dr. Bilkey failed to explain how or why Teno’s work activities caused her pain.

However, our review of Dr. Bilkey’s report establishes that he indeed explained how Teno’s work activities caused her to experience pain. He stated, “Ms. Teno had the onset of neck pain, pain extending into both upper limbs much worse on the right in relation to a new job duty that had her doing repetitive lifting of heavier items than usual, unhooking and beating loose this chain.” And based upon his review of her past medical records, including 2008 records from Kleinert and Kutz, Dr. Bilkey determined that Teno had not been experiencing an active impairment at the time of her February 2013 work injury. That Teno had in the past sought treatment for her upper extremities does not mean that she was experiencing any active impairment at the time she claimed to have sustained her injury at Ford.

Teno has also argued that the ALJ failed to determine whether she had thoracic outlet syndrome, pointing out that Dr. Loeb admitted Teno might possibly have this condition. Teno attempts to challenge Dr. Loeb’s clinical impression by declaring, without citation to any authority, that “[t]horacic outlet syndrome is universally recognized to be caused by highly strenuous and repetitive work and athletic activities.” However, nothing in our jurisprudence requires an ALJ to find a

work-related causal connection based solely on a diagnosis of thoracic outlet syndrome. There must be proof in the record causally connecting the diagnosis to the work injury in order for the ALJ to make a finding of work-relatedness.

While the ALJ was certainly at liberty to pick and choose what evidence she found persuasive, we hold that she flagrantly erred in her discounted assessment of Dr. Bilkey's evaluation in reaching the decision to dismiss Teno's claim and that this caused a gross injustice to Teno. Because the ALJ is the fact-finder, we cannot hold that the evidence compels a finding that Teno's injury was related to her work for Ford. Rather, we must remand this matter to permit the ALJ to properly re-examine Dr. Bilkey's report along with the rest of the medical proof and make an appropriate decision as to whether Teno met her burden to establish that her condition was related to her work.

Teno v. Ford Motor Company, No. 2015-CA-001903-WC, 2017 WL 1533793 at *3 (Ky. App. Apr. 28, 2017).

Ford appealed this Court's opinion, and the Supreme Court affirmed in a detailed analysis that we shall set forth below:

A. The ALJ failed to demonstrate an accurate analysis of the evidence.

It is true that conflicting evidence was presented in this case. Teno presented evidence from Drs. Bilkey and Dave indicating Teno's injuries were caused by her occupation. Ford, on the other hand, presented evidence from Kleinert & Kutz and Dr. Loeb to the contrary. Causation requires a factual determination, *see Markwell & Hartz, Inc. v. Pigman*, 473 S.W.2d 842, 846 (Ky. 1971), and "an ALJ is vested with broad authority to decide questions involving causation." *Miller v. Go Hire*

Employment Dev., Inc., 473 S.W.3d 621, 629 (Ky. App. 2015). Generally, an ALJ may pick and choose the evidence on which to rely, rejecting any testimony and believing or disbelieving various parts of the evidence. *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Had the ALJ decided to rely on Ford's evidence over Teno's, we would not disturb that decision.

However, that is not what the ALJ did here. Instead of finding some experts more reliable than others, the ALJ's decision was based on erroneous conclusions and on the discounting of Dr. Bilkey's report. As stated above, Teno presented evidence from Dr. Bilkey and Dr. Dave supporting her contention that her injury was due to her current occupation. Further, ample circumstantial evidence was entered supporting Teno's contention and an ALJ has the authority "to infer causation from properly admitted evidence." *Dravo Lime Co., Inc. v. Eakins*, 156 S.W.3d 283, 289 (Ky. 2005). The ALJ's opinion states that "the causal relationship testimony comes from only one medical witness, Dr. Bilkey." This is not correct.

The ALJ continued by saying Dr. Bilkey does not explain how or why the work activity caused the pain. Again, this is not correct. Dr. Bilkey's July 21, 2014 IME states that Teno's pain is in relation to a new job duty that had her doing repetitive lifting of heavier items than usual, unhooking and beating loose this chain. This is consistent with the Court of Appeals' holding. Although an ALJ has broad authority to find an expert lacking credibility or unbelievable, the ALJ's statements here lead to the inevitable conclusion that she misconstrued and misunderstood the evidence before her. With such an erred conclusion, we have no choice but to reverse her decision, as the Court of Appeals has done.

B. The ALJ misconstrued Dr. Bilkey's report, or in the alternative, failed to demonstrate an

understanding of the legal consequences of Dr. Bilkey's report.

The ALJ's opinion does not prove to this Court that the ALJ fully understood Dr. Bilkey's report. The ALJ stated: "It is apparent Plaintiff has been actively treated for neck and upper extremity pain as early as 2004 Dr. Bilkey states: 'It does not appear that Ms. Teno has an active impairment affecting the neck or right upper limb prior to 2/8/2013.' Without the history of previous similar symptoms and the [sic] any connection of those symptoms to work activities, Dr. Bilkey's opinion becomes less than persuasive."

It appears that because Teno had previously treated for similar injuries, Dr. Bilkey's statement regarding no active impairment seemed less credible to the ALJ. A reviewing court is in no position to second guess the ALJ's credibility determination. However, this Court has held that "impairment" and "disability" are not synonymous. *Roberts Bros. Coal Co. v. Robinson*, 113 S.W.3d 181, 183 (Ky. 2003). This reasoning is supported by the fact that Kentucky Revised Statute (KRS) 342.730(1)(a) "requires the ALJ to determine the worker's disability, while KRS 342.730 (1)(b) requires the ALJ to determine the worker's impairment." *Id.* "For that reason, if an individual is working without restrictions at the time a work-related injury is sustained, a finding of pre-existing impairment does not compel a finding of pre-existing disability with regard to an award that is made under KRS 342.730(1)(a)." *Id.*

The work-related arousal of a pre-existing condition into disabling reality is compensable. *Finley v. DBM Technologies*, 217 S.W.3d 261, 265 (Ky. App. 2007), (citing *McNutt Construction/First Generation Servs. v. Scott*, 40 S.W.3d 854 (Ky. 2001)). "To be characterized as active, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the

occurrence of the work-related injury.” *Id.* (emphasis in original).

Alternatively, where the underlying pre-existing disease or condition is shown to have been asymptomatic immediately prior to the work-related traumatic event and all of the employee’s permanent impairment is medically determined to have arisen after that event – due either to the effects of the trauma directly or secondary to the medical treatment necessary to address previously nonexistent symptoms attributable to an underlying condition exacerbated by the event – then as a matter of law the underlying condition must be viewed as previously dormant and aroused into disabling reality by the injury. *Id.* (emphasis in original).

Teno was working without restrictions at the time of her February 2013 work injury. As the Court of Appeals pointed out, Dr. Bilkey reviewed Teno’s past medical records and determined she had no active impairment. “That Teno had in the past sought treatment for her upper extremities does not mean that she was experiencing any active impairment at the time she claimed to have sustained her injury at Ford.” *Teno v. Ford Motor Company*, No. 2015-CA-001903-WC, 2017 WL 1533793, at *1, *6 (Ky. App. April 28, 2017). While the ALJ recited a thorough history of Teno’s symptoms and prior medical treatment, it is not clear to this Court that the ALJ understood the significance of Dr. Bilkey’s statement. The ALJ made no findings as to whether or not Teno was suffering from a pre-existing condition that became aroused by her performance of the chain-hang job.

Because the ALJ’s opinion did not rely on any evidence other than Dr. Bilkey, and because the ALJ did

not demonstrate an understanding of the legal conditions of “disability” and “impairment,” this Court agrees with the Court of Appeals and reverses. Again, it is not for this Court to weigh the evidence, but instead we remand for the ALJ, as fact-finder, to reconsider in light of this opinion.

Even though this Court is affirming the Court of Appeals and remanding this matter for further consideration by the ALJ, we now address additional issues that are likely to recur on remand. *Springer v. Commonwealth*, 998 S.W.2d 439, 445 (Ky. 1999).

C. The ALJ shall make findings that relate to Teno’s theory of the case.

Teno argues that the ALJ and Board misinterpreted the medical and lay evidence, particularly in the fact that the ALJ did not make a finding as to whether Teno suffered from thoracic outlet syndrome. It is logical in a workers’ compensation case that the ALJ will first determine if the claimant is suffering from an injury before the ALJ will determine if that injury was caused by the claimant’s job. Here, the ALJ made general findings of pre-existing back and upper extremity injuries. But the ALJ did not make any findings on the diagnoses of CTS or thoracic outlet syndrome. Teno was entitled to findings that appropriately address her theory of the case. *Sidney Coal Co., Inc./Clean Energy Mining Co. v. Huffman*, 233 S.W.3d 710, 714 (Ky. 2007). Therefore, on remand, sufficient findings must be made to demonstrate the ALJ considered all of the evidence. *See id.*

As stated above, no deference is owed to an ALJ’s decision when the ALJ commits an “error in assessing the evidence so flagrant as to cause gross injustice.” [*Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)]. After reviewing the record and the ALJ’s opinion, it is apparent to this Court that the ALJ erred in

assessing the evidence. The only remedy this Court can bestow is to allow Teno to receive a comprehensive and proper review of the evidence upon remand.

IV. CONCLUSION.

This opinion does not order the ALJ to enter a finding for Teno. However, the ALJ is required to prove a thorough consideration of all of the evidence, including causation, and delineate a sufficient basis for the ALJ's opinion. For the above stated reasons, we affirm the Court of Appeals and remand this case to the ALJ for further proceedings consistent with this opinion.

Ford Motor Company v. Teno, No. 2017-SC-000229-WC, 2018 WL 1417684 at *3-6 (Ky. Mar. 22, 2018). On remand, the Board, in turn, remanded the claim to the ALJ “for further determination in accordance with the provisions of the decision of the Supreme Court of Kentucky.” The claim was reassigned to ALJ Rice-Smith.

On July 16, 2018, the new ALJ entered an opinion on remand, summarizing the lay and medical evidence and entering new findings of fact and conclusions of law. The ALJ first found that Teno had sustained a work-related injury on February 8, 2013. She found Teno's testimony about her work activities and physical symptoms to be credible, and in turn found Dr. Bilkey's opinion to be persuasive. Regarding Dr. Bilkey's opinion, the ALJ stated:

Dr. Bilkey diagnosed a cervical sprain, bilateral upper extremity strain, and myofascial pain caused by the February 8, 2013 injury. He also noted Teno had right carpal tunnel syndrome and cubital tunnel syndrome for

which she had undergone surgical release for nerve compression. He also reported a diagnosis of thoracic outlet syndrome. Dr. Bilkey advised all the diagnoses are causally related to Teno's February 8, 2013 work injury. Dr. Bilkey explained Teno has an onset of neck pain extending to both upper limbs much worse on the right in relation to a new job that had her doing repetitive lifting of heavy items. He advised the onset of the symptoms was gradual over several weeks perhaps three months.

The ALJ then discounted Dr. Loeb's competing opinion:

Dr. Loeb opined that Teno's condition was not related to her work injury; however, in arriving at his opinion Dr. Loeb did not have an accurate understanding of Teno's work activities. Dr. Loeb's discussion of Teno's work activities discusses her repetitive lifting and removing of chains from truck parts prior to the parts being painted. This is not a complete description of Teno's job activities, particularly how much use and stress was on her right hand. Teno had to use a tool to jerk up and down on the chains because the paint caused them to bond to the skids. Due to the speed of the skids coming at her, she had to hold the tool and work it with her right hand to unhook the chains then use the same hand and tool to transfer the free end of the chain to the overhead-conveyor. Teno also had to remove door hooks and another fastener referred to as a "starship." She had to reach with her right arm to release the hold from the latch cavity and remove the device. She had to manipulate the parts with her fingers. She had to jerk the door to undo the latch and then shut the door. The starships were big and heavy. The starship often got jammed into the door's framework[.] Teno would have to beat on it with her right fist to force it up and out. She removed 2 starships from 200 trucks per work shift. Dr. Loeb admitted the mechanism of injury or the mechanism of aggravation was not well understood. This is certainly true since based on his report he did not have

a precise understanding of everything Teno's job required.

Based on these findings, the ALJ found that Teno had sustained her burden of proof that her condition was related to her work for Ford.

The ALJ went on to address whether Teno was entitled to an award of permanent partial disability (PPD) benefits pursuant to KRS 342.730, an issue the original ALJ did not have to reach in the first opinion. The ALJ found that Teno had sustained an 11% whole body impairment, that she was not totally disabled, and that she did not retain the capacity to return to her work at Ford, thus entitling her to the three multiplier. Accordingly, the ALJ awarded Teno PPD benefits at a rate of \$186.29 per week beginning February 8, 2013, for 425 weeks as well as medical expenses. Ford was to receive an offset against these benefits for overlapping Ford Disability Retirement benefits.

Teno filed a petition for reconsideration regarding her claim for temporary total disability (TTD) benefits, arguing that her entitlement to these benefits had not been addressed in the opinion, and regarding the credit for disability retirement benefits, noting that the ruling was premature. Ford also petitioned the ALJ for reconsideration, disputing the ALJ's review of the entire case because there was no direction to do so on remand and pointing out her failure to refer to the procedural history of the case. Ford also argued that Teno failed to appeal whether she was entitled to TTD benefits or the dismissal of her claim for

PPD benefits. Ford asserted that the ALJ's review on remand should be limited to the examination of disability v. impairment and whether Teno had thoracic outlet syndrome, as set forth by the Supreme Court in its opinion, and that the ALJ should ultimately reinstate the original opinion.

The ALJ entered an order ruling on the petitions, granting a portion of Ford's petition to state that the parties stipulated Teno had sustained an alleged injury and to correct the time that her income benefits would terminate. The rest of Ford's petition was denied, with the ALJ noting that the Supreme Court found that the ALJ had erred in assessing the evidence in the first opinion and that the only remedy was to allow for a comprehensive review on remand. As to Teno's petition, the ALJ granted the portion regarding TTD benefits and awarded her such benefits for two periods of time based on the medical evidence. The ALJ denied the rest of Teno's petition.

Ford appealed the ALJ's rulings to the Board, making essentially the same arguments it raised in the petition for reconsideration. It specifically argued that the second ALJ effectively vacated the original opinion and in doing so exceeded the scope of the remand. Ford also argued that the ALJ improperly addressed issues not raised by Teno in the prior appeal. Teno disputed Ford's arguments in her responsive brief. The Board entered an opinion affirming on

December 21, 2018. This petition for review by Ford now follows, in which it raises the same arguments it did before the Board.

In *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992), the Supreme Court of Kentucky set forth our role in the review of a workers' compensation appeal. This Court's function is to correct a decision of 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." *Id.* at 687-88.

Ford first argues that the ALJ exceeded the scope of the Supreme Court's direction on remand by treating the original opinion as if it had been vacated. Ford contends that this Court – as affirmed by the Supreme Court – reversed and remanded the ALJ's original opinion and that the Board improperly considered this holding to have vacated that opinion. We disagree.

In our 2017 opinion, we reversed the opinion of the Board, which had affirmed the ALJ's original opinion. We did not reverse the ALJ's opinion, notwithstanding dicta in the Supreme Court's opinion in the first appeal. We then included the direction that the matter be remanded to the ALJ for further proceedings. And similarly, the Supreme Court did not reverse the ALJ's opinion; it affirmed our decision reversing and remanding the Board's decision and included the following direction:

This opinion does not order the ALJ to enter a finding for Teno. However, the ALJ is required to prove a thorough consideration of all of the evidence, including causation, and delineate a sufficient basis for the ALJ's opinion. For the above stated reasons, we affirm the Court of Appeals and remand this case to the ALJ for further proceedings consistent with this opinion.

Our action in reversing the Board's opinion essentially vacated the ALJ's original opinion, meaning that the ALJ had to properly consider the evidence and enter a new ruling; none of the rulings required the ALJ to reach the same conclusion, but the ALJ was required to base the conclusion on a proper review of the evidence. The Board appropriately remanded the case to the ALJ for further determination once the Supreme Court's opinion was final. And the Board appropriately affirmed the ALJ's opinion on remand, as it did not commit any error in the scope of its review on remand.

Second, Ford argues that the ALJ committed reversible error in considering issues not preserved by Teno in the prior appeal. These include the dismissal in the original opinion of her claims for TTD benefits and regarding injuries to other parts of her body. The ALJ never reached these issues in the original opinion because Teno's entire claim was dismissed for lack of causation, which in turn meant that these issues would not have been subject to appeal because they were never addressed. Because both this Court and the Supreme Court held that the ALJ's original ruling on causation was in error, the ALJ on

remand would necessarily have to address all issues if the decision on causation changed based upon the later examination of the evidence. That is what happened in this case, and the ALJ did not commit any error in deciding these issues.

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

ALL CONCUR.

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