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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2018-CA-001136-WC

BULLITT COUNTY BOARD OF EDUCATION

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-01437

BRENDA HUTCHISON;
HON. GRANT S. ROARK, ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD

APPELLEES

AND

NO. 2018-CA-001167-WC

BRENDA HUTCHISON

CROSS-APPELLANT

v. CROSS-PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-14-01437

BULLITT COUNTY BOARD OF EDUCATION;
HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION BOARD

CROSS-APPELLEES

OPINION
AFFIRMING IN PART,
REVERSING IN PART,
AND REMANDING

** ** * * * * *

BEFORE: JONES, KRAMER, AND MAZE, JUDGES.

MAZE, JUDGE: Brenda Hutchison and Bullitt County Board of Education (“Bullitt County”) both petition for review of an opinion by the Workers’ Compensation Board affirming in part, vacating in part, and remanding a December 27, 2017 opinion and award by the administrative law judge (ALJ). After careful review, we affirm in part, reverse in part, and remand.

Brenda Hutchison is a former teacher whose Form 101 alleged she sustained three separate work-related injuries: a November 2012 injury after being hit in the stomach by a student, a December 2012 injury sustained after she fell at school and hurt her right hip and right shoulder, and a January 2014 injury sustained after slipping on ice in the school parking lot. It is undisputed that Hutchison received medical treatment to her right hip and shoulder prior to these alleged injuries.

At the evidentiary hearing, evidence was presented from Hutchison’s medical providers that the cause of her right hip pain was trochanter bursitis and acetabular fraying. On June 29, 2015, the ALJ rendered an opinion and order concluding that Hutchison did not suffer any permanent injury from either the

November 2012 or January 2014 incidents. However, the ALJ rejected Bullitt County's argument that the ailments to Hutchison's right hip and right shoulder were preexisting. The ALJ was persuaded by evidence from Hutchison's medical providers showing new pathology associated with the December 2012 incident. For those reasons, the ALJ found that Hutchison's injuries to her right shoulder and right hip were work-related and compensable and assigned her a 7% whole-person impairment rating.

Hutchison eventually underwent arthroscopic right rotator cuff repair as well as surgery to repair a labrum tear in her right hip. On June 7, 2016, Hutchison filed a motion to reopen alleging her shoulder and hip conditions had worsened to the point that she was permanently disabled. Contested issues included whether Hutchison's condition had worsened, whether her hip surgery was causally related to her December 2012 work injury, and whether the hip surgery was reasonable and necessary. Hutchison testified that her shoulder and hip injuries had worsened to the point that she unable to continue her employment as a teacher. Dr. Warren Bilkey evaluated Hutchison on her request. Dr. Bilkey concluded Hutchison suffered a right hip strain and labrum tear and developed residual painful gait following her surgery. Dr. Bilkey opined that Hutchison's diagnosis was due to her December 2012 injury and that the medical treatment she received for her hip was reasonable, medically necessary, and causally related to

her work injury. Dr. Bilkey assigned Hutchison a 17% whole-person impairment rating, acquired solely as a result of her December 2012 work injury.

Dr. Thomas Loeb evaluated Hutchison on Bullitt County's request. After reviewing Hutchison's medical records and completing a physical examination, Dr. Loeb's report opined that Hutchison reached maximum medical improvement on her right hip and shoulder within four to six months of each surgical procedure. Dr. Loeb was not specifically asked if Hutchison's hip surgery was causally related to her prior work injury. However, in a section of his report entitled "Discussion of Medical Records" he noted the following:

Beginning with the High Field & Open MRI from 7/19/2013, the only finding in the right shoulder was a "small focal intrasubstance anterior supraspinatus insertional tear and longhead biceps tendinosis and rotator cuff tendinosis." This is very minimal pathology to warrant the intense subjective complaints regarding the right shoulder. This is a disconnect between subjective complaints and objective findings. This is also borne out from the MRI study of 11/10/2015 of the right hip, though there appears to be bit more pathology in the right hip with "undermining and partial detachment tearing of the anterior-superior labrum. This was on 11/10/2015, which was a subsequent exam from the first which showed perhaps some progression according to the reading radiologist, Eric Fitzgerald, M.D. **There still is no bona fide evidence that the labral tear occurred exactly at the time of the alleged injury on 12/7/2012.** Nonetheless, Ms. Hutchison underwent successful operations on both the right shoulder on 11/19/2015 . . . and she also had what appears to be a successful right hip arthroscopy on 8/8/2016 with labral repair/base fixation and femoroplasty.

(Emphasis added). Dr. Loeb also reviewed a report by Dr. Andrew DeGruccio, who evaluated Hutchison for her original workers' compensation claim. Dr. DeGruccio opined that Hutchison exhibited inappropriate pain behavior for both her right shoulder and right hip, essentially claiming she was exaggerating the pain caused by her work injury. Dr. DeGruccio also opined that Hutchison had prior back problems unrelated to the December 2012 injury that were contributing to her hip pain and that her work injuries did not require surgical treatment. Dr. Loeb ultimately found no evidence of any worsening of Hutchison's condition, noting that a comparison of medical records appeared to show "marked improvement" over time. Dr. Loeb assigned Hutchison with a 0% impairment rating to her hip at the time of his physical examination.

The ALJ found Dr. Loeb's opinions to be the most persuasive based on the recurring opinions by medical examiners in the reopening and the original litigation that Hutchison's subjective complaints were not consistent with their medical findings. The ALJ accepted Dr. Loeb's findings that Hutchison's shoulder and hip issues had improved since her original award. The ALJ also found that there was no evidence either surgery was necessitated by the December 2012 injury, noting that:

[T]he ALJ is not persuaded the surgery Dr. Carter performed on plaintiff's right hip in August, 2016 was work related. In reaching this conclusion, the ALJ again

relies on Dr. Loeb's opinion wherein he explained that to the extent any right hip surgery was required, it was not to correct any effects from the December 7, 2012 incident, but instead, would be to address plaintiff's prior, long-standing hip problems.

Based on these findings, ALJ concluded Hutchison had failed to carry her burden of proving her condition had worsened or that her surgeries were causally related to her work injury. Accordingly, she received no increase in her income benefits beyond the 2x multiplier provided by KRS¹ 342.730(1)(c)(2).

Hutchison appealed the ALJ's findings that she failed to prove the worsening of her condition and that her hip surgery was not compensable. Bullitt County cross-appealed, arguing the ALJ erred by failing to explicitly state Hutchison's income benefits were subject to the tier-down provisions set forth in the 1994 version of KRS 342.730. The Board affirmed the ALJ's finding that Hutchison failed to prove the worsening of her condition. However, the Board held that the ALJ erred by finding Hutchison's hip injury was not compensable. The Board noted that Dr. Loeb did not explicitly state that Hutchison's hip surgery was to correct hip problems that predated the December 2012 injury. Hence, the Board vacated this finding and remanded for further findings on whether Hutchison's hip surgery was reasonable and necessary. The Board instructed the

¹ Kentucky Revised Statutes.

ALJ to apply the version of KRS 342.730(4) in effect at the time of his amended decision. Both parties petitioned this Court for review.

The function of this Court's review of the Board is to correct the Board only where the Court perceives 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." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Because Hutchison bore the burden of proof and was unsuccessful before the ALJ, the issue on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [her] favor." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). As fact-finder, the ALJ has the sole authority to determine the quality, character and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). Similarly, it is within the ALJ's discretion alone to judge the weight to be afforded to and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). The ALJ may choose to accept or reject any testimony, or to believe or disbelieve any part of the evidence, regardless of whether it harkens from the same witness or the same adversary party's total proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000).

1. Worsening of Condition

Hutchison argues that even if Dr. Loeb was found to be a more credible witness, his own impairment measurements, depending on how they are analyzed, compel a finding of either a 9% or 11% whole-person impairment rating. Based on this data, Hutchison contends that the ALJ could not rely on Dr. Loeb's opinion without also finding a worsening of her conditions. We disagree. The ALJ had the discretion to believe or disbelieve any part of the evidence, regardless of whether it came from the same witness. In addition to his impairment ratings, which differed from the other physicians who evaluated Hutchison, Dr. Loeb opined, after performing a physical examination and reviewing Hutchison's medical records, that Hutchison's condition had actually improved since her original evaluation. Thus, the evidence in the record was not so overwhelming as to compel the conclusion that Hutchison's hip and shoulder injuries had worsened.

2. Compensability of Hip Surgery

On cross-appeal, Bullitt County argues the Board usurped the ALJ's role as factfinder by vacating his conclusion that Hutchison failed to carry her burden of proving her hip surgery was causally related to her work injury. Under the circumstances presented in this case, we disagree.

“The party responsible for paying post-award medical expenses has the burden of contesting a particular expense by filing a timely motion to reopen

and proving it to be non-compensable.” *Crawford & Co. v. Wright*, 284 S.W.3d 136, 140 (Ky. 2009) (footnote omitted). This burden includes the burden to prove the treatment is for a condition that is not work-related. If the employer fails in this burden, the question becomes whether the treatment is reasonable and necessary to treat the condition. The employer bears the burden as to work-relatedness and reasonableness/necessity. *See C & T of Hazard v. Stollings*, No. 2012-SC-000834-WC, 2013 WL 5777066, at *2 (Ky. Oct. 24, 2013).

KRS 342.020(1) provides that the employer shall pay “for the cure and relief from the effects of an injury . . . as may reasonable be required at the time of the injury and thereafter for the length of time set forth in this section.” “The basic rule is that a subsequent injury, whether an aggravation of the original injury or a new and distinct injury, is compensable if it is the direct and natural result of a compensable primary injury.” *Addington Resources, Inc. v. Perkins*, 947 S.W.2d 421, 423 (Ky. App. 1997) (quoting Larson, *Workmen’s Compensation Law* § 13.11 (1996)). Thus, the with respect to the compensability of the right-hip surgery, the first relevant question is whether the work injury caused or contributed to the subsequent need for the surgery – to repair the labrum tear. If the employer does not present evidence that calls work-relatedness into question, the next inquiry is whether the surgery was reasonable and necessary to treat the condition at issue.

The ALJ on reopening noted Dr. Loeb's opinion that Hutchison's hip condition had actually improved since the June 29, 2015, opinion. By implication, the ALJ interpreted this to mean that Dr. Loeb believed that the 2016 hip surgery was not necessitated by Hutchison's December 7, 2012, injury. But as the Board pointed out, Dr. Loeb was never asked to address this particular issue. In his July 11, 2017, report, Dr. Loeb stated only that the tear did not occur at the same time as the hip injury, which Hutchison never claimed.

Furthermore, Dr. Loeb also opined that the original work injury did not result in any ratable impairment. However, the ALJ in the original award specifically found that Hutchison suffered "a new injury to the right hip," as a result of the December 7, 2012, incident. Consequently, the prior ALJ assessed a 7% impairment, including 3% for the right hip. Since this finding is *res judicata*, the ALJ on reopening was not free to accept Dr. Loeb's contrary conclusion. *See Garrett Mining Co. v. Nye*, 122 S.W.3d 513, 522 (Ky. 2003).

While the ALJ has the discretion to draw proper inferences from the record, all parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision and allow for meaningful appellate review. *Kentland Elkhorn Coal Corp. v. Yates*, 743 S.W.2d 47, 49-50 (Ky. App. 1988); *Shields v. Pittsburgh & Midway Coal Min. Co.*, 634 S.W.2d 440, 444 (Ky. App. 1982). The ALJ's findings on reopening suggest both a misallocation of the burden of proof and a

failure to afford proper deference to the conclusive findings made in the original award. While it is possible to reconcile these issues to the evidence of record, that is the role of the ALJ, not the Board or this Court.

Under the circumstances, the most appropriate remedy is to remand this matter to the ALJ to clearly specify how Dr. Loeb's opinions support a conclusion that the hip surgery was neither reasonable nor necessary to treat the work-related hip injury suffered on December 7, 2012. Moreover, since Bullitt County bears the burden of proof on this issue, the lack of such evidence in the record would require a finding in favor of Hutchison on the medical fee dispute. Therefore, we affirm the Board's order of remand on this single issue.

3. KRS 342.730(4)

After Hutchison filed her motion to reopen, but before the motion could be ruled upon, the Kentucky Supreme Court rendered an opinion holding that KRS 342.730(4), which limited workers' compensation benefits for injured workers who qualify for normal old-age Social Security, violated the Equal Protection Clause. *See Parker v. Webster County Coal, LLC (Dotiki Mine)*, 529 S.W.3d 759 (Ky. 2017). In the 2018 Regular Session of the General Assembly, KRS 342.730(4) was amended to read as follows:

All income benefits payable pursuant to this chapter shall terminate as of the date upon which the employee reaches the age of seventy (70), or four (4) years after the employee's injury or last exposure, whichever last

occurs.

Based upon the recent holding by the Kentucky Supreme Court in *Holcim v. Swinford*, 581 S.W.3d 37 (Ky. 2019), we must conclude that the 2018 amendment to KRS 342.730(4) is applicable to the current claim. In Section 20(3) of HB 2, the General Assembly expressly declared the newly amended version of KRS 342.730(4) “shall apply prospectively and retroactively to all claims” where the injury occurred after December 12, 1996, and the claims “have not been fully and finally adjudicated, or are in the appellate process, or for which time to file an appeal has not lapsed, as of the effective date of this Act.” 2018 Ky. Acts ch. 40 (HB 2), § 20(3) (eff. July 14, 2018). In *Holcim*, the Supreme Court held that this language clearly evidenced the General Assembly’s intention that the statute apply retroactively, even though it was included in a non-codified portion of the statute. *Id.* at 43-44. Therefore, we conclude the claim at bar satisfies the conditions for retroactive application of the newly-amended version of KRS 342.730(4). Consequently, we must remand this matter to the ALJ for entry of an award applying the 2018 version of KRS 342.730(4).

Accordingly, we affirm the Board’s holding affirming the ALJ’s finding that Hutchison failed to carry her burden of proving the worsening of her condition. In the cross-petition for review, we also affirm the portion of the Board’s opinion vacating the ALJ’s finding that Hutchison’s hip surgery was not

compensable. Lastly, this matter is also remanded to the ALJ with instruction to apply the 2018 amendment to KRS 342.730(4) to Hutchison's claim.

ALL CONCUR.

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