

RENDERED: AUGUST 7, 2020; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2020-CA-000020-WC

CLIFFVIEW RESORT

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-17-53467

PEGGY FOX;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND LAMBERT, JUDGES.

CLAYTON, CHIEF JUDGE: This is a petition for review from an opinion of the Workers' Compensation Board (the "Board") affirming the decision of the Administrative Law Judge ("ALJ") to award permanent partial disability ("PPD") benefits, temporary total disability ("TTD") benefits, and medical benefits to

Peggy Fox (“Fox”) due to a work-related injury to Fox’s neck, left side, ribs, arm, elbow, hip, and stomach.

Relying on *Cepero v. Fabricated Metals Corp.*, 132 S.W.3d 839 (Ky. 2004), Fox’s employer, Cliffview Resort (“Cliffview”), argues that the ALJ’s findings were not supported by substantial evidence because the underlying medical opinion of the physician opining on causation was based on inaccurate and incomplete medical history. Cliffview further argues that the ALJ’s award of TTD benefits through the date upon which the physician opined Fox had achieved maximum medical improvement (“MMI”) for her injuries was erroneous.

From our review of the record and applicable law, the findings of the ALJ on causation and impairment were supported by substantial medical evidence and the ALJ’s award of TTD benefits was appropriate. Hence, we affirm.

BACKGROUND

The underlying facts of Fox’s case were set forth by the Board in its December 6, 2019 opinion:

Fox’s Form 101 alleges she sustained work-related injuries to multiple body parts on December 10, 2017, in the following manner: “Slipped on ice and fell in the basement entrance at work injuring her neck, left side, ribs, arm, elbow, hip and stomach.”

On May 31, 2018, Fox filed a Motion to Amend her Form 101 in order to include injuries to her left shoulder and lower back. Fox’s motion was sustained by order dated June 15, 2018.

Fox was deposed on June 15, 2018. She began working for Cliffview in April 2017 as a housekeeper. As to whether she experienced any non-work-related injuries to her neck, she testified as follows:

A: My neck hurts me, or it did hurt me, but it's not an injury. I didn't hurt myself.

Q: You had some pain, in other words, before December 10th of 2017?

A: Yes.

Q: What do you mean by it wasn't an injury. You just –

A: I didn't injure myself.

Q: Okay. You just had some pain and you're not really sure why?

A: Yeah. I just had pain in my neck.

She described the injurious event occurring on December 10, 2017:

A: Well, upon arriving at work, I started walking down the ramp to the basement. And as I approached two cars – well, a car and a truck – as I started between them to reach the porch to the door, I slipped on ice and fell on my left side.

Q: When you say left side, you mean you turned like completely to the left and fell onto your left arm, or were you kind of at an angle, or what do you remember?

A: One of my feet, I can't remember which one, as I was stepping on – I guess it was the foot that stepped on the ice first.

Q: Uh-huh (affirmative response).

A: And we were on a ramp, like at a grade, on blacktop. The foot slid and it – I don't remember which one, but the other foot went behind me. I guess it stayed on the blacktop.

Q: Uh-huh (affirmative response).

A: It was stable and it yanked me down. And as I went, it was kind of like the splits and a twist and I fell down.

Q: Okay.

A: I cracked my elbow on the blacktop and I kept sliding, my shoulder extended above my head.

Q: Okay.

A: And the rib cage just smacked the ground and my hip.

Fox acknowledged she was taking Gabapentin and Naproxen before her fall. She has not returned to work for Cliffview since her fall.

...

Fox eventually underwent neck surgery. She described the neck symptoms she experienced before the surgery as compared to after: "The neck symptoms before was a lot of pain and the right arm numbness and, after the surgery, the pain is getting a lot better. I still a [sic] have a numbness. It's – it's partially down the right arm now. The pain is, like, from the elbow down now."

Fox recounted her neck problems prior to her work-related fall:

A: Well, I had popping and cracking in my neck and they did an MRI and they said it was just mild degenerative changes, arthritis.

Q: Okay. So, in other words, as far as you know, you didn't – you had never injured your neck before you fell?

A: Well, the MRI showed negative.

Q: Sure. In other words, you never – you never in the past had something fall on you – you . . .

A: No.

Q: Just as an example, a motor vehicle accident or something where you were like, wow, I think I might've hurt my neck.

A: No.

. . .

Q: Okay. Who – so, which doctor was it that read the MRI and then told you that you – that he thought you had some arthritis? Do you remember?

A: The radiologist? Is that what you mean?

Q: In other words, did you – did you take your MRI results to an orthopedist or Dr. Gay or somebody and they looked at it?

A: Dr. Gay. He read the results.

Q: Okay. And, – and, it was his opinion that you had some arthritis?

A: Yeah.

Fox introduced Dr. Gilbert's January 2, 2019, Form 107. Significantly, in the "History" section under "Prior Spinal Injuries," he noted the following:

None other than she had a little bit of neck problem in August 2017. She had an MRI, she says ordered by Dr. Gays [sic] that was negative. It resolved and she said she was essentially asymptomatic at the time of this injury. She had follow up imaging after her injury and failed conservative treatment [sic] had a standard surgery for a problem. She says she is still considering surgery on her shoulder. She has not had expensive treatment to her back. Her other medical problems include asthma and COPD.

After performing a physical examination and medical records review, Dr. Gilbert set forth the following diagnosis:

Cervical postsurgical syndrome, status post anterior cervical decompression fusion at C5-C6 with persistent neck pain, cervical radiculopathy with pain, numbness and weakness, muscle spasms, left shoulder pain and aggravation of degenerative joint disease and strain/sprain with tenderness, decreased range of motion and weakness in her left shoulder that interferes with function. Lumbar pain and lumbar radiculopathy. Lumbar strain/sprain and aggravation of degenerative disc disease, spondylosis, muscle spasms, decreased range of motion and burning pain radiating into the hips.

Regarding causation, Dr. Gilbert opined the work-related event on December 10, 2017, caused Fox's injuries. He assessed a 42% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. He opined Fox achieved MMI on January 2, 2019. Dr. Gilbert also opined Fox is unable to return to the type of work she was performing at the time of her injury and recommended sedentary duty.

As to the ALJ's discussion of the physician – Dr. Gay – who treated Fox for complaints of pain in the cervical spine and upper extremities prior to the work event, the ALJ noted that:

[Cliffview] mainly contests this case on the issue of whether the cervical spine condition, surgery and impairment are causally related to the work event or instead, prior active conditions for which [Fox] simply continued treatment. [Cliffview] relies heavily on the notes of Dr. Gay[.] However, [Fox] admits to having prior problems in her neck, but denies any prior accident. When asked at her deposition what hurt at the time of the accident she replied, "My neck, my shoulder, my ribs." The deposition continued on Page 19 and she indicated after being asked, "of all the body parts you just mentioned or just – – –"and she replied, "Yes. Except for the lower back, they missed that one." Later, on page 26 she was asked how her symptoms had changed. She indicated that her ribs had gotten better and her hip was about the same but that her neck, back and shoulder had gotten worse. The medical evidence on the issue of the neck is very confusing. As pointed out above, the notes of Dr. Gay are difficult to decipher, but it does appear to the undersigned that the plaintiff had pre-existing cervical pain, which did get worse after the work event. To the undersigned, the inclusion of the notes from Dr. Gay following the work incident confirm the plaintiff's credible testimony that the event caused a worsening of her cervical pain as well as pain in her left upper extremity, ribs, hip and lower back. The statement is confirmed by the physical therapy record and the treating physician's records of May 23, 2018 wherein the physician reported she had worsening neck pain with right arm pain with rotation of the neck down the bicep, which was becoming an issue as well. At that time, the focus turned from the left shoulder to the cervical spine as the culprit for the plaintiff's condition. Initially, Dr. Hughes assessed the plaintiff with a 5% impairment due

to a prior active condition. However, he explained that the plaintiff's condition had gotten worse after the event. Unlike Dr. Gilbert, Dr. Stephens and Dr. Primm felt that the fusion surgery was the result of the natural progression of the plaintiffs [sic] pre-existing degenerative disc disease rather than the arousal of the pre-existing degenerative disc disease. However, the diagnostic studies performed prior to the work event revealed only mild degenerative disc disease. In fact, Dr. Primm noted the degenerative disc disease were not out of the ordinary for someone of the plaintiff's age. To the undersigned, this gives credibility to the plaintiff's assertion that her prior neck pain was made worse by the work event and that that work event resulted in the cervical fusion being performed as opined by Dr. Gilbert. Therefore, I am persuaded that the work event led to the fusion surgery of the cervical spine. I am convinced that the event arouse [sic] pre-existing degenerative conditions in the lumbar and cervical spine as well as the left shoulder, which are compensable under McNutt Construction/First General Services v. Scott, 40 [S.W.3d 854 (Ky.) 2001).

I am equally convinced that the plaintiff did have a prior active impairment to the cervical spine as noted by Dr. Hughes. I am convinced that prior active impairment was 5% under the AMA Guidelines, as he opined in March 2018, prior to the fusion surgery. The plaintiff clearly had symptoms for which treatment was being rendered prior to the work event. Therefore, her condition was symptomatic and impairment ratable as required in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007).

While the plaintiff may have had an active impairment to her cervical spine at the time of her work event, she is nevertheless entitled to benefits based upon the impairment resulting from the work injury and the need for surgery based upon the medical opinion of Dr. Gilbert. As a general rule, all of the injurious

consequences that flow from a work related physical injury and that are not attributable to an unrelated cause are compensable. Beech Creek Coal Company v. Cox, 237 [S.W.2d 56 (Ky.) 1951). Further, under Derr Construction Company v. Bennett, 873 S.W.2d 824 (Ky. 1994), an employer can be held responsible for a worsening or progression of a pre-existing active condition as the result of a work injury. Had the work related fall not led to the surgery and increased impairment, the plaintiff would have only been entitled to temporary benefits for the cervical condition under Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001).

As to TTD benefits, the ALJ stated as follows:

Temporary total disability is defined in KRS 342.0011(11)(a) as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement, which would permit a return to employment. It is a two-part test. Magellan Health v. Helms, 140 [S.W.3d] 579 (Ky. App. 2004). In this instance, the plaintiff was placed at maximum medical improvement by Dr. Gilbert on January 2, 2019. Prior to that time, she had not reach [sic] maximum medical improvement or a level of improvement that would allow her return to her customary occupation. Therefore, she is entitled to temporary total disability benefits from December 11, 2017 through January 2, 2019. Based upon her average weekly wage of \$269.62, the temporary total disability rate is \$179.75.

Cliffview filed a petition for reconsideration, which the ALJ denied.

An appeal to the Board followed, which subsequently issued an opinion in December of 2019 affirming the ALJ's opinion. This appeal followed.

ISSUES

Cliffview argues that: 1) the Board erroneously concluded that the ALJ's finding regarding medical causation as it pertained to Fox's cervical spine injury was based on substantial evidence because Dr. Gilbert's opinion was "objectively corrupt" and 2) the Board erroneously affirmed the ALJ's award of TTD benefits.

ANALYSIS

a. Standard of Review

The Board's review is limited to determining whether the evidence was "sufficient to support" the ALJ's findings, or if the evidence "compell[ed] a different result." *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687 (Ky. 1992). Additionally, "[t]he ALJ, as the finder of fact, and not the reviewing court, 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) (citing *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985)).

Where the party that bears the burden of proof is successful before the ALJ and the Board, the question on appeal is "whether the decision . . . is supported by substantial evidence." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). Substantial evidence is defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the

minds of reasonable men.” *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971) (citing *O’Nan v. Ecklar Moore Exp., Inc.*, 339 S.W.2d 466 (Ky. 1960)).

Further, the function of this Court is to review the Board’s decision solely to determine whether 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.” *Kelly*, 827 S.W.2d at 687-88.

b. Discussion

Cliffview first argues that the Board erred in affirming the ALJ’s determination regarding causation of the injury to Fox’s cervical spine. Specifically, Cliffview argues that the ALJ erroneously relied on Dr. Gilbert’s opinion because Dr. Gilbert had an inaccurate understanding of Fox’s pre-existing neck problems, and that the facts and holding in *Cepero* are applicable in this case.

Cepero involved a claimant who neglected to divulge a substantial non-work-related injury to his knee prior to the work-related incident in question in which he claimed an injury to the same knee. *Cepero*, 132 S.W.3d at 841-42.

While the doctor providing the causation opinion was unaware of the history of prior injury to the claimant’s same knee in *Cepero*, every other physician who was made aware of the previous injury was of the opinion that the claimant’s injury was not work-related and derived from the non-work-related injury. *Id.* In holding

that the evidence was not substantial and did not support the ALJ's conclusion, the

Cepero Court stated:

where 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 (citations omitted).

Here, the record reflects a different factual situation than the one found in *Cepero*. Fox testified that her neck hurt prior to her fall at work but that she did not know the cause of the discomfort. Nor did Fox specify any facts or point to one incident which would be indicative of an acute injury prior to the work injury. Alternatively, *Cepero* involved a specific, acute non-work-related injury after which the claimant was confined to a wheelchair for a period of time and surgery was recommended.

Additionally, unlike in *Cepero*, the record indicates that Dr. Gilbert had some awareness of Fox's neck problems prior to the work injury. Particularly, Dr. Gilbert's January 2, 2019 report noted the neck problems that Fox described experiencing in August of 2017, and which corresponds with Dr. Gay's records from August of 2017. Unlike the two physicians in *Cepero* – one of whom

testified that, had she known of the past injury, her opinion would have been different – the record in this case reflects that Dr. Gilbert was aware that Fox had previously received treatment for her neck pain. Accordingly, it is not “irrefutable” that Dr. Gilbert was unaware of Fox’s personal medical history or that Dr. Gilbert’s records were “substantially inaccurate or largely incomplete.” *Id.*

Finally, we agree with the Board that the amount of knowledge that Dr. Gilbert had regarding the cause of Fox’s spine condition goes to the overall weight that the ALJ chose to afford Dr. Gilbert’s opinion. As we previously discussed, the ALJ is the finder of fact and is the only body that “has the . . . authority to determine the quality, character, and substance of the evidence.” *Tipton*, 862 S.W.2d at 309 (citation omitted). Although a different outcome may have been reached by the ALJ, we are not empowered on appeal to disregard an ALJ’s determination if substantial evidence underpins such decision. *See McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46, 47 (Ky. 1974). Dr. Gilbert’s opinion constituted substantial evidence upon which the ALJ could rely, and we therefore affirm the ALJ’s decision.

We further note that the ALJ accounted for Fox’s pre-existing cervical spine condition by utilizing Dr. Arthur Hughes’s opinion to allocate a 5% whole-person impairment rating to such condition. The ALJ clearly referred to the cervical condition, stating that “[t]he plaintiff clearly had symptoms for which

treatment was being rendered prior to the work event. Therefore, the condition was symptomatic and impairment ratable[.]” As a result, the ALJ clearly took into account Fox’s pre-existing condition in its award of benefits.

Cliffview next argues that the ALJ erred when it awarded Fox TTD benefits continuously from the date of Fox’s accident through January 2, 2019, which was the date that Dr. Gilbert’s opinion stated that Fox had reached MMI. Kentucky Revised Statutes (KRS) 342.0011(11)(a) defines temporary total disability as “the condition of an employee who has not reached [MMI] from an injury and has not reached a level of improvement that would permit a return to employment[.]” Further, as stated in *W.L. Harper Const. Co., Inc. v. Baker*, a panel of this Court stated:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant’s condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. *Moreover . . . the question presented is one of fact no matter how TTD is defined.*

858 S.W.2d 202, 205 (Ky. App. 1993) (emphasis added). In other words, where a claimant has not reached MMI, TTD benefits are payable until such time as the claimant’s level of improvement permits a return to the type of work he or she was customarily performing at the time of the injury. *Magellan Behavioral Health v.*

Helms, 140 S.W.3d 579, 580-81 (Ky. App. 2004). MMI is a medical question and, for that reason, Fox was required to produce competent evidence, based on a reasonable medical opinion, to establish the period or periods of her TTD. *Kroger v. Ligon*, 338 S.W.3d 269, 274 (Ky. 2011) (citation omitted).

Here, while there were various dates submitted by the different physicians regarding MMI, the ALJ utilized the date of MMI assessed by Dr. Gilbert, whose report we have already determined provided substantial evidence concerning the causation of Fox’s cervical injury. As stated in *Kroger*, “[w]hen confronted with conflicting medical opinions, such as were present in this case, the ALJ may decide whom and what to believe.” *Id.* at 275 (citation omitted). Because the extent and duration of TTD benefits that should be paid in a particular case is a question of fact to be determined by the ALJ, and the evidence in this case “was not so overwhelming as to render the decision that was made unreasonable[,]” we cannot find that the ALJ erred. *Id.*

CONCLUSION

For the foregoing reasons, we affirm the Board’s opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Lexington, Kentucky

BRIEF FOR APPELLEE PEGGY
FOX:

McKinnley Morgan
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