IMPORTANT NOTICE

NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

RENDERED: APRIL 24, 2003
NOT TO BE PUBLISHED

FINAL
DATE 5-15-03

Supreme Court of Kentucky

2002-SC-0520-WC

JEANETTA FUGATE APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2001-CA-1683-WC
WORKERS' COMPENSATION BOARD NO. 00-01010

M. FINE & SONS MANUFACTURING;
HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Not persuaded by evidence that a work-related injury to the claimant's eye awakened a dormant histoplasmosis infection, causing it to migrate to the eye and damage her vision, the Administrative Law Judge (ALJ) dismissed the claim without deciding the remaining issues. Although the claimant maintained on appeal that the evidence compelled a favorable finding, the Workers' Compensation Board (Board) rejected the argument in a decision that was later affirmed by a majority of the Court of Appeals. We affirm.

On April 26, 1999, the claimant began working for the defendant-employer as a sewing machine operator. She alleged that on May 13, 1999, she felt something hit her left eye while she was sewing. Looking down, she saw that the needle of her machine was broken and informed her supervisor. She first noticed problems with her eye approximately two weeks later, when her vision began to be blurred and foggy. Nonetheless, she did not seek medical treatment until 90 days after her employment began, at which point she expected to have health insurance. She eventually quit working due to her deteriorating vision and a resulting inability to sew. The claimant also indicated that she presently used reading glasses and was unable to see at night. She denied any problems with her vision in the past or any problems with her right eye. Despite two laser surgeries, she continued to have vision problems in her left eye.

Medical evidence indicated that the claimant's eye problems were due to histoplasmosis. Dr. Isernhagan performed the laser surgeries and noted that the claimant had four active histo spots on her left eye. The macula of the right eye appeared to be normal with an inactive histo spot, and the peripheral retina showed some typical histo scars.

Dr. Holbrook evaluated the claimant on January 8, 2001, and indicated that she had histoplasmosis in both eyes but that the left eye was affected more than the right. When completing the Form 107 report, he responded "maybe" to a question concerning whether, within a reasonable medical probability, the work-related injury was the cause of the claimant's complaints. He explained that the histoplasmosis larvae generally comes from the soil via the hands and feet and lays dormant in the lungs. Then, something happens (the patient becomes run down, has the flu) and causes the organism to awaken, move to the eye, and form lesions. Turning to whether the claimant's injury caused the condition to awaken and move to the eye, he indicated that it "could have: I suppose[.]" In response to a subsequent question concerning apportionment, he indicated that the claimant's condition was due, in part, to the arousal of a dormant condition and referred back to his answer with regard to causation.

Among other things, the contested issues included whether a work-related accident occurred and causation. After reviewing the lay and medical evidence, the ALJ noted that it was the claimant's burden to establish that her left eye condition was work-related. Pointing out that Dr. Holbrook had stated "maybe" when questioned about causation and had indicated only that the injury "could have" awakened the histoplasmosis, the ALJ determined that Dr. Holbrook's testimony was not sufficient to meet that burden. Markwell & Hartz v. Pigman, Ky., 473 S.W.2d 842 (1971). In doing so, the ALJ noted that the presence of a histoplasmosis lesion in the claimant's right eye belied her theory of causation. Having concluded that the evidence did not sufficiently establish that the eye condition was due to the alleged injury, the ALJ determined that the remaining issues were moot.

Appealing the decision, the claimant maintains that the decision to dismiss the claim was not supported by substantial evidence. We note, however, that there is no such requirement for a finding that the party with the burden of proof failed to meet that burden. Butcher v. Island Creek Coal Co., Ky., 465 S.W.2d 49 (1971). As the ALJ noted, it was the claimant's burden to prove that she sustained a work-related injury that awakened the histoplasmosis and caused it to migrate from her lungs to her left eye. Thus, her burden on appeal is to establish that the ALJ's decision was unreasonable because the evidence in her favor was so overwhelming that it compelled a favorable finding as a matter of law. Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Taking issue with the ALJ's rationale for rejecting the proposed theory of causation, the claimant points out that she had no problem with her left eye before the incident at work and that she has never had a problem with her right eye. She maintains that the histoplasmosis lesion in her right eye was inactive because, unlike the left eye, the right eye did not sustain an injury to arouse the condition into disability. Although logical on its face, the claimant's assertion is not consistent with Dr. Holbrook's testimony. He reported that the organism remained dormant in the lungs until something awakened it, leading it to migrate to the eye and cause a lesion. Thus, a histoplasmosis lesion would not have been present in the right eye until after the underlying condition was awakened.

The claimant then points to her testimony that she had no symptoms of histoplasmosis, including any breathing problems, before the incident at work. Furthermore, she points to testimony that both her breathing and left eye problems began a few weeks after the injury. Emphasizing that the medical evidence was uncontradicted, she maintains that it compelled a finding that the condition was awakened by the alleged injury to her left eye.

As the finder of fact, the ALJ has the authority to judge the weight and credibility of evidence and to draw reasonable inferences from it. Therefore, an ALJ may reject even uncontradicted evidence if a reasonable basis for doing so is stated. See Bullock v. Gay, 296 Ky. 489, 177 S.W.2d 883 (1944). Questions concerning the effect of the phrasing of expert medical testimony actually concern the quality or degree of proof that is necessary to support a finding. Rogers v. Sullivan, Ky., 410 S.W.2d 624, 627 (1966).

To prove causation, a medical expert's language must go beyond the realm of mere speculation or mere possibility and establish that the work-related accident was the probable cause of the harm that resulted. Stauffer Chemical Co. v. Greenwell, Ky. App., 713 S.W.2d 825 (1986). In Turner v. Commonwealth, Ky., 5 S.W.3d 119, 122-23

(1999), we pointed out that an expert medical witness is not required to use any particular "magic words," including the words "reasonable medical probability." We explained, "the requirement of 'reasonable probability' relate[s] to the proponent's burden of proof." Id. In other words, it is the quality and substance of the evidence, rather than the use of any particular "magic words," that determines whether the evidence rises to the level necessary to prove a particular fact.

After reviewing the evidence, the ALJ concluded that Dr. Holbrook's report did not prove causation with a reasonable degree of medical certainty. Although Dr. Holbrook's statements may be read to imply a belief that the incident at work aroused the dormant histoplasmosis, resulting in the eye condition, they may also be read to imply a lack of conviction on his part. Language such as "maybe," "could have," and "I suppose" simply does not compel a conclusion that Dr. Holbrook thought the incident was the likely cause of the claimant's eye problems.

The decision of the Court of Appeals is affirmed.

All concur.

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