

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.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: OCTOBER 23, 2003
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL

2003-SC-0158-WC

DATE 11-13-03 ELLA GROWN D.C.

UNITED PARCEL SERVICE

APPELLANT

APPEAL FROM COURT OF APPEALS

2002-CA-2123-WC

V.

WORKERS' COMPENSATION BOARD NO. 2000-WC-78179

JEANETTE GOUGH; HON. RONALD E.
JOHNSON, ADMINISTRATIVE LAW
JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

This appeal is from a 3-0 opinion of the Court of Appeals affirming a decision of the Workers' Compensation Board that affirmed an opinion and award of the Administrative Law Judge finding Gough permanently totally disabled.

The question on appeal is whether the Board exceeded its scope of review and made an independent and impermissible finding of fact.

Gough was injured on May 30, 2000 while working for UPS when a box fell on her, striking her above the right ear and landing on her foot. The box weighed seventy pounds or more and Gough described it "like being hit with a bat". She received immediate medical care, but her pain and the conditions of numbness and tingling in her fingers and arms could not be subsided with subsequent progressive treatments. In

Gough's deposition submitted to the ALJ, she reported that UPS originally offered a light duty work assignment to which she reported, but after a few days UPS sent her home and told her not to return until she received a physician's release.

Approximately one year after the accident, UPS terminated her income benefits at which time she filed an Application for Resolution of Injury Claim. The parties stipulated many facts including that the injury was work related. The issues contested by the parties before the ALJ were the extent of the injury, causation, and the character and duration of the disability.

The ALJ found that Gough has an 8% impairment based upon a category DRE II cervical impairment as found in the 5th edition of the AMA guides. Her physical limitations include lifting no more than 20 pounds with no overhead reaching and limited upper right extremity activity. Her restrictions also include limited ability to gaze upward or downward. He found that Gough believes she is totally disabled, but noted a disparity between her subjective beliefs and the medical proof. Specifically, although she complains of severe pain and numbness and tingling in her fingers, there is no objective medical proof of radiculopathy.

Given these findings, the ALJ reasoned that because of the cervical injury, Gough could not perform anything but light work if she had education or experience that would allow her to do this type of work. Because she has little education and no GED, she would not qualify for consideration of vocational training. Therefore, he found that despite her ability to perform sedentary jobs, she would not be able to compete in a competitive economy given her age, education and experience. The ALJ then concluded that Gough was permanently totally disabled. A Petition for Reconsideration

filed by UPS was denied. The Board and the Court of Appeals affirmed. This appeal followed.

The main issue presented by UPS is whether the Board made an independent finding of fact. It contends that the Board's function on review was to determine whether there was sufficient evidence to support a finding of permanent total disability, but in doing so, the Board made an independent finding regarding the physical demands of Gough's past work. UPS also argues that affirming this case will result in enlarging the class of persons eligible for permanent total disability beyond that intended by its definition in KRS 342.0011.

The Worker's Compensation Board and the Court of Appeals correctly analyzed the facts and the law in this case. The claimant in a workers' compensation claim bears the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). When the ALJ finds for the claimant, the question on appeal is whether there was substantial evidence of probative value to support the ALJ's conclusion. Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735 (1984).

The factors in a permanent total disability case include the claimant's post-injury physical, emotional, intellectual, and vocational status and how those factors interact; they also include a consideration of the likelihood that the particular claimant would be able to find work consistently under normal employment conditions. Transportation Cabinet v Poe, Ky., 69 S.W.3d 60 (2001); Ira A. Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48 (2000). A worker's ability to find work consistently under normal employment conditions, for purposes of determining whether that worker has sustained a partial or total occupational disability, is affected by factors such as whether the

individual will be dependable and whether his physiological restrictions prohibit him from using the skills which are within his individual vocational capabilities. McNutt Construction/First General Services v Scott, Ky., 40 S.W.3d 854 (2000).

UPS has focused the argument on appeal towards using KRS 342.0011(11)(c)'s definition of permanent total disability with the lay person's sense of the word "work" and not the Legislature's own intended meaning of this word as delivered in KRS 342.0011(34). This misunderstanding of the statute precludes seeing that the ALJ's reasoning was necessarily broader than merely determining whether Gough could perform light duty in any setting. Rather, it was the ALJ's function to determine whether Gough could compete in a competitive economy and whether she had an AMA impairment. If there was sufficient evidence of probative value to support these two elements, then the ALJ's decision cannot be upset on appeal.

The ALJ found that Gough had an AMA impairment and made findings relevant to each of the factors we identified in Ira A. Watson Dept. Store, supra and Poe, supra. The ALJ relied on the objective medical testimony of the several doctors who rendered expert opinions in this case. Because the finding of 8% was explicitly contained within the testimony, it is not clearly erroneous, and it is supported by substantial evidence. Therefore, the only other determination was whether she could compete in a competitive economy.

The ALJ found that "particularly her education and experience" prevented Gough from competing in a competitive economy. Following the reasoning of McNutt Construction/First General Services, supra, the ALJ found that Gough's experience included being "a housewife from 1976 to 1984 when she became a self-employed auto mechanic until 1994 when she went to work for Big Horn Lake, a pay lake where the

plaintiff stocked the lake and did management tasks”. This was the ALJ’s assessment of Gough’s individual vocational capabilities. The ALJ’s characterization of these jobs, while not explicit, could only be that these jobs were not sedentary. The ALJ analyzed that Gough’s vocational capabilities could not be broadened through vocational training until she obtained her GED. Because the ALJ describes the light duty jobs as sedentary, it only follows that the ALJ inferred that all of the prior jobs described by Gough were non-sedentary positions. This was a reasonable inference supported by the evidence in the record.

It is in this vocational assessment that UPS takes issue. It has urged this Court to consider that in order to meet her burden of proof, Gough needed to submit further evidence of the detailed specifics of each job. The necessary requirements of her past jobs were inferred from her descriptions. The ALJ determined that the severity of the physiological limitations left Gough with the ability to perform only sedentary work. In this case, these job descriptions were sufficient for the ALJ to determine whether Gough possessed skills able to be used in a sedentary position. When the Board summarized this determination of her past experience with the term “physical labor”, UPS claims this was a finding independent of the ALJ. However, the ALJ had already made this determination implicitly in order to find Gough permanently and totally disabled. The Board made no independent finding here.

The last consideration is whether the ALJ’s finding that Gough could not compete in a competitive economy was supported by substantial evidence of probative value. He compared her physiological restrictions against her vocational abilities. The ALJ found that Gough had limited lifting capabilities, limited use of her right upper extremity, and limited ability to gaze upward or downward. Other findings included

Gough's subjective belief of being unable to work and her inability to take care of herself or bathe. Together with the descriptions of pain severe enough to cause tearing on a regular basis, and her condition, the ALJ had sufficient evidence to find physiological limitations with regard to physical labor. The ALJ found that her limitations narrowed her available duties to sedentary positions. This was a finding supported by substantial evidence of probative value.

Although UPS argues that more description of the past jobs was necessary before this comparison could be made, the descriptions of the work given by the claimant in this case provided enough evidence for the ALJ to make reasonable inferences about her vocational abilities. The ALJ needed merely to determine if her vocational abilities included any skills capable of application in a sedentary job. Gough's descriptions of her past jobs, such as operating a tow truck, had sufficient facts to show that each was of a nature requiring something other than sedentary work. Therefore, the ALJ's finding that her past work was non-sedentary, which the Board summarized with the label "physical", was supported by sufficient evidence of probative value.

The parties agree that the ALJ was not required to provide a detailed summary of the evidence or include the minute details of his reasoning that led to the ultimate conclusion that Gough was permanently and totally disabled. KRS 342.275(3) provides that the record must contain "the award, order or decision, together with a statement of the findings of fact, rulings of law and any other matters pertinent to the question at issue." The ALJ is required to clearly set out the basic facts used to support his ultimate conclusion. Shields v. Pittsburgh & Midway Coal Mining Co., Ky.App., 634 S.W.2d 440 (1982).

We agree with the Court of Appeals that the Board in this case merely recited a finding of fact previously made by the ALJ and we do not believe that the Board improperly made a finding of fact independent of the ALJ. Clearly, the ALJ's conclusions must be supported with facts drawn from the evidence. KRS 342.275(3). If such evidence exists, then the ALJ's decision cannot be disturbed on appeal. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). The argument that the Board acted outside the scope of its review authority is without merit.

The decision of the Court of Appeals is affirmed.

All concur.

COUNSEL FOR APPELLANT:

Thomas L. Ferreri
FERRERI & FOGLE
203 Speed Building
333 Guthrie Green
Louisville, KY 40202

COUNSEL FOR APPELLEE:

Robert L. Catlett, Jr.,
1900 Waterfront Plaza
325 West Main Street
Louisville, KY 40202