

**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**NOT TO BE PUBLISHED OPINION**

***THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.***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: August 25, 2005  
NOT TO BE PUBLISHED

Supreme Court of Kentucky **FINAL**

2004-SC-0841-WC

DATE 9-15-05 ELLAGrou.H.P.C.

JANICE BOYER

APPELLANT

V.  
APPEAL FROM COURT OF APPEALS  
2004-CA-0625-WC  
WORKERS' COMPENSATION BOARD NO. 02-089531

BARNES & NOBLE; HON. J. LANDON OVERFIELD,  
ADMINISTRATIVE LAW JUDGE; AND WORKERS'  
COMPENSATION BOARD

APPELLEES

**MEMORANDUM OPINION OF THE COURT**

AFFIRMING

The claimant had a history of numerous back injuries since 1963. She sought total disability benefits for the effects of additional back injuries that occurred while working for the defendant-employer in 2001 and 2002, but an Administrative Law Judge (ALJ) determined that she failed to prove that her present back and psychological conditions were causally related to those injuries. The Workers' Compensation Board (Board) and the Court of Appeals affirmed. Likewise, we affirm.

The claimant was born in 1939 and was a college graduate. She testified to a history of previous lower back injuries and symptoms that dated from 1963. Her present complaints involve the same area of her back.

The claimant testified that she suffered a slipped disc in her back in 1963, while working as a physical education teacher. She experienced a pinching sensation in her low back and numbness in her left leg. In 1966, while pregnant, she suffered another

slipped disc in the same area of her back. It resolved following the birth of her child. At that time, her only permanent restrictions were to "be aware of any problems with lifting." She attempted to protect her back thereafter by lifting smaller amounts and using proper posture.

In 1985, the claimant suffered pain in her lower lumbar area and had muscle spasms after lifting a stack of books in the store where she worked. There was no associated leg pain, and the treatment was bed rest and heat. She missed five weeks of work and returned to full duty without restrictions.

In 1991, the claimant suffered an injury to the same area of her back while working. Although she experienced intermittent numbness in her left leg, her symptoms resolved following physical therapy. She stated that she was given permanent weight limits of 10 to 20 pounds, which the employer accommodated. The injury affected the same level of her spine as in the 1960's although she did not recall what level that was.

The claimant began working for Barnes and Noble in 1992. She testified that she informed the company of her restrictions when she was hired. After incidents that occurred at work in February and March, 2001, she experienced low back pain that occasionally extended down her leg but had no associated hip pain. She returned to work and had no difficulties until March 25, 2002, when she experienced low back pain while kneeling down to retrieve a book from the floor. She stated that it was in the same area that had been affected in 1985 and 1991. There was pain in the left leg, down to the knee, and pain that she referred to as "the iron bar across." She described the latter pain as extending from hip joint to hip joint and as becoming so severe that it included the buttocks and caused difficulty walking. She stated that she had not experienced this

type of pain before. She went to the emergency room, where she was given injections and referred to Dr. Lockstadt and to Nesbitt, her family physician.

Testifying to her present difficulties, the claimant stated that her lower back hurt and that there was pain in her buttocks that occasionally extended down her left leg to her knee. There was not much numbness or weakness. She had difficulty on stairs as well as difficulty lifting things and doing housework. She used a cane to walk and could not drive for more than 30 minutes at a time. She stated that she received Social Security Disability benefits based on her back.

Medical records indicated that In February, 1992, the claimant complained to Dr. Fitz of lower back pain that was exacerbated by walking, prolonged standing, and prolonged sitting. On April 6, 2000, she saw Dr. Nesbitt regarding back spasms, at which time he characterized her back pain as being chronic. In November, 2000, she saw Dr. Nesbitt for back pain after incidents in which she fell while walking her dog and in which she was struck in the back by a doorknob. On January 24, 2001, she complained of lower back pain secondary to coughing and sneezing. When cross-examined at the hearing, the claimant testified that any back pain had resolved before the 2001 injury.

On March 29, 2001, the claimant saw Dr. Nesbitt for back pain that she related to lifting books at work on February 15, 2001, and March 6, 2001. She complained of sharp lower back pain; pain across the hipline, buttocks, and both legs; and numbness and tingling down to her ankles. An MRI of May 4, 2001, revealed mild, diffused disc bulging at L4-5 with mild bilateral neuroforaminal stenosis.

A May 9, 2001, report by Dr. Ravvin noted that the claimant had a prior history of back trouble and intermittent leg pain that were promoted by heavy lifting and also

noted that she used a TENS unit. He reviewed the recent MRI and attributed her current symptoms to a bulged, partly herniated left L4-5 disc. He did not think the condition warranted surgery but did recommend four to six weeks of physical therapy. He thought that she could work but should avoid lifting more than 20 pounds and should also avoid constant bending and stooping.

Dr. Lockstadt first saw the claimant on April 17, 2002, for lower back pain at L4-5 and L5-S1 that radiated into both of her buttocks, legs, and feet. She gave a history of two work-related back injuries, one in March, 2001, and another in March, 2002. X-rays revealed a loss of disc space at the affected levels. Dr. Lockstadt noted that an April 4, 2002, MRI revealed a degenerative disc at L4-5 and L5-S1 but no severe herniation. It also revealed a fair amount of ligamentous swelling, which probably accounted for her symptoms. He performed an epidural injection and recommended physical therapy, nonsteroidal medication, and various restrictions. Included were minimal repetitive bending and twisting of the spine; alternating sitting, standing, and walking; frequent changes in posture; and intermittent lifting up to ten pounds.

Dr. Lockstadt saw the claimant six additional times from April 23, 2002, through June 9, 2003. On July 3, 2002, he assigned a 5% AMA impairment under DRE Category II based on "Low back pain with radiculopathy and intermittent basis with instability pattern." On February 24, 2003, he revised it to an 8% impairment, characterizing a 3% impairment as being "preexisting inactive" and noting that no pre-existing active impairment was identified. He saw "absolutely no evidence of any nerve root compression." His treatment notes from that date indicate that a recent MRI revealed degenerative discs at L4-5 and L5-S1, with minor stenosis at those levels. He

noted that based on the severe numbness and weakness in her legs and her issues with falling, "I am not sure how this correlates."

Dr. Lockstadt's June 9, 2003, report states as follows:

Ms. Boyer has a real bizarre set of symptoms. I really don't know now to interpret them. She has low back pain, lumbosacral junction, stiffness and achiness. Nonspecific pain down the right lower extremity to the foot. [sic] I think she gives me a whole bunch of other symptoms where she states the pain radiates all the way up her back right down to her neck and all through her whole body. I just can't interpret those symptoms. It just doesn't make any sense. Perhaps this is just the way she talks about her pain in which case I would expect some of this to be somewhat of an exaggeration.

I can relate her back pain and leg pain and when I examined her today she has marked irritability at L4/5 and L5/S1 radiating to the right lower extremity into the foot.

Her MRI scan shows degenerative disk at that level with some degenerative herniation.

**RECOMMENDATIONS:** Usually I can treat these patients with lumbar disk decompression but with the bizarre set of symptoms that she has I am not convinced I will be able to do that for her. I can certainly explain her back and leg pains but in my hands I think treatment is too risky. Impairment rating is based on two level disk herniation. I agree that this lady is severely disabled by her pain. She is somewhat labile. Even though she had an epidural headache before, I would like her to have another epidural injection. If the epidural injection does help her then I think there is a reasonable chance that a disk decompression will help. If the epidural injections do not help her then I won't be able to help her. If the epidurals do help her she will need an updated MRI scan done at out [sic] office as the MRI scan I am presently reviewed which was done earlier is really uninterpretable.

When deposed, Dr. Lockstadt stated that it was not unusual for a woman of the claimant's age to have a disc bulge or for her MRI to show disc degeneration. He stated that disc degeneration, even a disc collapse, generally is not symptomatic and that the claimant's MRIs from 2001-2003 were consistent with those of an asymptomatic woman of her age. Therefore, he based his assessment of the date for the onset of her

impairment and the amount of pre-existing active impairment on the history he received from the claimant. She reported intermittent symptoms from March, 2001; therefore, he concluded that she had an active condition between that date and March, 2002.

Dr. Zerga evaluated the claimant in February, 2003, on behalf of the employer. He examined her and reviewed her medical records, including those from Drs. Ravvin, Lockstadt, and Weitzel. He also reviewed her deposition. After noting her testimony regarding her longstanding history of back symptoms, he concluded that the 2001 and 2002 incidents were not severe enough to cause a harmful change in the human organism or impairment. He also suspected that pre-injury medical records would have revealed an active condition had they been made available. Noting the claimant's admission that she was under a 10-20-pound lifting restriction before March, 2001, he stated that he would place her under no restrictions due to the 2001 and 2002 incidents.

Dr. Weitzel testified that the claimant sustained a permanent impairment from the psychiatric effects of her physical injury. In contrast, Dr. Cooley stated that the claimant's depression was in remission and caused no impairment. KRS 342.0011(1) provides that a psychiatric harm must directly result from a physical injury in order to be compensable. Therefore, the compensability of the alleged psychiatric injury is moot unless the evidence compelled a finding that there was a compensable physical injury.

The parties stipulated that the employer paid more than \$12,600.00 in medical benefits and also paid temporary total disability (TTD) benefits voluntarily from April 9 through July 11, 2002. As listed in the opinion and order, the contested issues included: "extent and duration of occupational disability, overpayment of [TTD] benefits, pre-existing active occupational disability, and the causation and work-relatedness of

Plaintiff's condition." After reciting the lay and medical evidence, the ALJ found the claimant's testimony not to be credible, stating as follows:

I was not impressed with Ms. Boyer's testimony. I came away from the hearing with the distinct impression, which has been confirmed by the totality of the evidence, that Plaintiff is greatly exaggerating her complaints of pain and dysfunction. There is also no doubt in my mind that Plaintiff is being less than candid in relating the history of her low back pain from 1963 through 2001. It is significant that her treating physician, Dr. Lockstadt, referred to the symptoms as she related them to him to be "bizarre", indicating that he really did not know [how] to interpret the symptoms. Simply stated, I am not convinced that Plaintiff is telling the truth concerning either her symptoms as they relate to her work for Defendant Employer or to her condition which pre-existed her work for Defendant Employer.

The ALJ concluded subsequently that the claimant failed to sustain her burden of proving that her present low back condition was causally related to the claimed injuries. In reaching the decision, the ALJ relied upon Dr. Zerga's opinion that no functional impairment resulted from them and the previous conclusion that the claimant was not being truthful regarding her current or past symptoms.

Workers' compensation law is fundamentally for the benefit of the injured worker. See Messer v. Drees, 382 S.W.2d 209 (Ky. 1964). Nonetheless, an injured worker has the burden to prove every element of a claim for benefits. Roark v. Alva Coal Corporation, 371 S.W.2d 856 (Ky. 1963); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). KRS 342.285 designates the ALJ as the finder of fact but permits an ALJ's decision to be reversed on a number of grounds, among which are that it is contrary to Chapter 342, that it is clearly erroneous under the evidence, or that it is arbitrary or capricious. The courts have construed KRS 342.285 to mean that the ALJ, rather than the Board or a reviewing court, has the sole discretion to determine the quality, character, and



substance of evidence. See Transportation Cabinet, Department of Highways v. Poe, 69 S.W.3d 60, 62 (Ky. 2001); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). In doing so, an ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977). An ALJ may choose among the reasonable inferences to be drawn from testimony. Jackson v. General Refractories, Co., 581 S.W.2d 10 (Ky. 1979); Blair Fork Coal Co. v. Blankenship, 416 S.W.2d 716 (Ky. 1967). Furthermore, when considering the medical evidence, an ALJ is not required to give greater weight to the testimony of a treating physician. Wells v. Morris, 698 S.W.2d 321 (Ky. App. 1985).

A finding that favors the party with the burden of proof is not arbitrary or unreasonable if it is supported by substantial evidence. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). When an ALJ determines that the party with the burden of proof has failed to meet that burden, the party must show on appeal that the favorable evidence was overwhelming and compelled a favorable finding, in other words that the ALJ's decision was arbitrary or unreasonable under the evidence. Id. Contrary to the claimant's assertion, nothing in Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992), changed that standard or denied a party a meaningful avenue for appealing an arbitrary decision. In fact, Kelly was a case in which the Board reversed a finding that the worker failed to meet her burden of proving causation. The Board explained that the favorable medical evidence was uncontradicted and that there was no substantial evidence to the contrary; therefore, the evidence compelled a decision in the worker's favor and the ALJ's finding to the contrary was arbitrary. The Court of Appeals affirmed, after which the employer appealed to the Supreme Court. Also affirming, the Supreme

Court reminded the employer of the longstanding principles that arbitrary or clearly erroneous findings of fact are properly reversed on appeal and that it is not an appellate court's function to reweigh the evidence on a question of fact.

In the present case, the claimant had the burden of proving every element of her claim, including that the March 2001 and 2002 injuries caused a permanent impairment and, therefore, a disability. She did not prevail before the ALJ and maintained on appeal that the ALJ erred by failing to determine that she suffers from an occupational disability due to her work-related injuries. Therefore, her burden was to show that the favorable evidence was so overwhelming that it was unreasonable for the ALJ to conclude that the alleged injuries were not the cause of at least part of her present impairment or disability. The Board and the Court of Appeals were convinced that she failed to meet that burden, and so are we.

The claimant asserts that Dr. Lockstadt's June 9, 2003, report clearly related her back and leg pain to the degenerative discs and that he thought she was severely disabled by her pain. She argues that the ALJ relied upon a misinterpretation of the report as a basis for concluding that she was being untruthful about her symptoms and their relationship to her work for the defendant-employer. She also asserts that "a treating physician should always be given greater credibility than a physician compensated for their report and testimony" but does not address Wells v. Morris, supra. Finally, she maintains that she did not have a pre-existing active disability that would require any exclusion under the 1996 Act.

Since December 12, 1996, an exclusion from a partial disability award is based upon pre-existing impairment; whereas, an exclusion from a total disability award is based upon pre-existing disability. Roberts Brothers Coal Co. v. Robinson, 113 S.W.3d

181 (Ky. 2003). Although the assessment of impairment is a matter for the medical experts, an ALJ is not compelled to rely on a medical opinion that is the product of a defective or incomplete history. See Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004); Osborne v. Pepsi Cola, 816 S.W.2d 643 (Ky. 1991). Although physicians commonly express opinions regarding a worker's disability, determining the extent of disability under the 1996 Act is a matter for an ALJ. See Ira A. Watson Dept. Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000)

In view of the claimant's history of back problems, including a slipped disc and intermittent numbness in the left leg since 1963, causation and pre-existing active disability were at issue. The claimant's credibility regarding her symptoms and their occupational effect at the relevant points in time was a matter for the ALJ to decide. Nothing in Dr. Lockstadt's records, deposition testimony, or June 9, 2003, report indicates that she gave him a history of the back problems she experienced before March, 2001. When deposed, he testified that he based his assessment of the date for the onset of the claimant's impairment and the lack of any pre-existing active impairment on the history that she reported. After reviewing Dr. Lockstadt's June 9, 2003, report in its entirety, we are convinced that it was reasonable for the ALJ to infer that he thought the claimant was exaggerating at least some of her symptoms. Likewise, it was reasonable to rely on that inference as a partial basis for concluding that the claimant was being "less than candid" in relating her history of low back pain from 1963 to 2001, in relating the extent to which her symptoms were present before the 2001 and 2002 injuries, and in relating her present symptoms to her work for the defendant-employer.

Dr. Lockstadt received a history that failed to include the claimant's previous back injuries and symptoms. His favorable opinions regarding the cause of her impairment and the extent to which it was pre-existing and active were based on that history. Dr. Zerga received a history that included some of the previous back problems and concluded that the work-related incidents caused no permanent impairment. Under the circumstances, the evidence that the incidents caused a permanent impairment or disability was not so overwhelming that it compelled a favorable finding. The conclusion that the claimant failed to meet her burden of proof was neither arbitrary nor unreasonable.

The decision of the Court of Appeals is affirmed.

All concur.

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