

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NOT TO BE PUBLISHED OPINION

THIS OPINION IS DESIGNATED "NOT TO BE PUBLISHED." PURSUANT TO THE RULES OF CIVIL PROCEDURE PROMULGATED BY THE SUPREME COURT, CR 76.28 (4) (c), THIS OPINION IS NOT TO BE PUBLISHED AND SHALL NOT BE CITED OR USED AS AUTHORITY IN ANY OTHER CASE IN ANY COURT OF THIS STATE.

Supreme Court of Kentucky **FINAL**

2005-SC-0992-WC

DATE 10/12/06 EVA Grant H.D.C.

TINA TEETER

APPELLANT

V.

APPEAL FROM COURT OF APPEALS
2005-CA-0900-WC
WORKERS' COMPENSATION NO. 00-67095

UNITED PARCEL SERVICE;
HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Finding the employer's evidence in this workers' compensation claim to be the more persuasive and to be "supported by the university evaluator, who is afforded presumptive weight," an ALJ determined that the claimant had no permanent impairment from either of the incidents she alleged and that ongoing medical treatment with Dr. Cassaro was neither reasonable nor necessary. Moreover, the ALJ overruled the claimant's petition for reconsideration requesting future income benefits. The Workers' Compensation Board and the Court of Appeals affirmed.

Appealing, the claimant asserts that the university evaluator assigned an impairment rating, that the ALJ erred by failing to rely on it, and that she was not required to raise the issue in a petition for reconsideration. She also asserts that having

found an injury, the ALJ erred by failing to award future medical benefits. Because the ALJ determined reasonably that the university evaluator thought the claimant's impairment was unrelated to the alleged injuries and that the injuries lacked "any permanency," we affirm.

The claimant worked as a package handler in her employer's air freight division. She alleged that she sustained work-related injuries to her neck and right shoulder on September 8, 2000, and to her left shoulder on October 15, 2002. The employer paid medical expenses and temporary total disability benefits following the incidents. At the hearing, the claimant testified that she was still working for the employer but would like to perform lighter duty work. She stated that she continued to experience pain and stiffness in her shoulders, difficulty lifting, and difficulty sleeping. She continued to see Dr. Cassaro every two weeks for medication refills and trigger point injections and asserted that she would not be able to continue in her present job without them.

When the claim was submitted for a decision, the contested issues included the extent and duration of disability, the claimant's entitlement to benefits under KRS 342.730, whether the claimant sustained an injury as defined by the Act, and the reasonableness and necessity of ongoing medical treatment and future medical treatment.

After summarizing the extensive medical evidence, the ALJ was not persuaded that the claimant "ha[d] any permanency from the injuries herein." The ALJ noted that the claimant received many diagnostic tests and that MRI of her shoulders initially showed rotator/biceps tendonitis but later indicated that it had resolved. The claimant submitted reports from Dr. Cassaro, who assigned a 22% impairment that included a 5% non-work-related impairment. The ALJ found his testimony to be "rather

confusing," however, and noted that he appeared to be confused about how to calculate an impairment rating. He continued to treat the claimant with multiple, bi-weekly injections and thought they would be needed for another 3-5 years.

The ALJ noted that Dr. Baker's deposition revealed a very different view of the claimant's current treatment. In his opinion, she did not warrant a cervical impairment rating. He saw nothing that should have led the right shoulder injury to affect the entire right side of her body, noted that her complaints did not follow any known clinical pattern, and questioned their validity. In his opinion, the left shoulder injury should have resolved in six to eight weeks. The claimant should have reached maximum medical improvement (MMI) from the injury within three months after the onset of symptoms, which would have been before his evaluation. In his opinion, she had no impairment from the injury and did not require aggressive treatment. Dr. Baker also noted that the claimant's efforts during a functional capacity evaluation were inconsistent.

Other medical evidence indicated that Dr. Cassaro's diagnosis of neck and shoulder pain was not supported by objective medical findings; that the claimant's diagnosis and complaints were not related to the September, 2000, incident; that Dr. Cassaro's treatment was unreasonable and unnecessary; and that the claimant was at MMI and had no impairment from her injuries.

The ALJ ordered a university evaluation, which was performed by Dr. Martyn Goldman. His Form 107 report indicates that he diagnosed bilateral neck, shoulder, and arm pain in the absence of any demonstrable structural changes. In his opinion, continued symptomatology almost 4 years after the right shoulder injury and 21 months after the left shoulder injury without any significant structural abnormalities indicated that "her present complaints are not related to either of the aforementioned injuries."

Asked on Section I of the Form to state the claimant's AMA impairment, Dr. Goldman responded that it was 18% and indicated that he arrived at the percentage after assigning a 12% impairment to the right shoulder and a 7% impairment to the left shoulder based on shoulder range of motion (Figures 16-40, 43 and 46). He stated that the claimant did not have active impairment before the injury. He stated that she had restrictions but that he did not think her current symptoms were due to the injuries or their residuals. Absent any structural abnormalities to account for her complaints of pain, he thought that the continued use of oral narcotic medication was neither reasonable nor necessary. Absent any structural abnormalities to the cervical spine, he did not think that any expenses or treatment were related to the reported injury.

The ALJ characterized Dr. Goldman's testimony as indicating that the claimant "did indeed have a functional impairment to both shoulders, but that it was not related to the injuries herein" and as also indicating that the ongoing treatment from Dr. Cassaro was unnecessary. Finding the employer's evidence to be more persuasive and to be supported by Dr. Goldman's testimony, the ALJ concluded that the claimant had no permanent impairment from either of the alleged incidents. Moreover, despite the claimant's testimony to the contrary, the ALJ found her ongoing treatment with Dr. Cassaro to be medically unnecessary and unreasonable.

The claimant filed a petition for reconsideration in which she expressed disagreement with the finding of no permanent impairment but requested no additional findings of fact under KRS 342.315(2). She asserted that the ALJ erred by dismissing the claim in its entirety. Pointing to the finding that she sustained injuries, the claimant argued that the ALJ erred by failing to award future medical benefits and that the reasonableness and necessity of future treatment for the effects of an injury could only

be determined in the future, when such benefits were sought. The ALJ overruled the petition, after which the claimant appealed.

KRS 342.315(1) permits an ALJ to order a university evaluation when a medical question is at issue. KRS 342.315(2) provides:

The physicians and institutions performing evaluations pursuant to this section shall render reports encompassing their findings and opinions in the form prescribed by the executive director. Except as otherwise provided in KRS 342.316, the clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence. (emphasis added).

The claimant asserts that the Board and Court of Appeals majority erred in determining that Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985), required a petition for reconsideration on the present facts. She explains that she was not asserting on appeal that the ALJ rejected Dr. Goldman's clinical findings and opinions without stating the reasons for doing so as required by KRS 342.315(2). Nor was she asserting that the ALJ misunderstood the report, a matter that could have been rectified pursuant to a petition for reconsideration. Instead, she disagreed with the ALJ's interpretation of Dr. Goldman's report as indicating that her impairment was not caused by her injuries. Therefore, she was not required to petition for reconsideration in order to assert that the impairment stated in his report was entitled to presumptive weight.

Assuming for the purpose of discussion that the claimant adequately preserved an argument that she disagrees with the ALJ's interpretation of the report, the fact remains that a disagreement regarding the interpretation of evidence is not an

adequate basis for reversal on appeal. Under KRS 342.315(2), Dr. Goldman's opinion that the claimant had an 18% impairment was entitled to presumptive weight. However, the claimant had the burden to prove that the impairment was caused by her injuries in order to be entitled to income benefits. KRS 342.281 permits an ALJ to interpret the evidence, to decide what inferences to draw from it, to weigh conflicting evidence, and to draw reasonable conclusions. The recitation of Dr. Goldman's report indicates that the ALJ understood it but chose to interpret it differently from the claimant. The ALJ concluded that Dr. Goldman thought the claimant's injuries were not the cause of her complaints or her impairment. Having reviewed the report in its entirety, we are convinced that the ALJ's interpretation was reasonable. Therefore, although the claimant may disagree, the finding that her impairment was unrelated to her injuries may not be disturbed on appeal.

The ALJ determined that the ongoing medical treatment by Dr. Cassaro was unreasonable and unnecessary for the claimant's injuries and overruled the claimant's petition for reconsideration requesting an award of future medical expenses. This court acknowledged in Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), that some injuries are temporary and warrant no award of future medical expenses. In the present case, Dr. Goldman's report supported the finding that the claimant's injuries had resolved and warranted neither Dr. Cassaro's ongoing medical treatment nor any future medical treatment. The ALJ's refusal to award such benefits was reasonable under the circumstances and was properly sustained on appeal.

The decision of the Court of Appeals is affirmed.

All concur.

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