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NOT TO BE PUBLISHED OPINION

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RENDERED: NOVEMBER 26, 2008
NOT TO BE PUBLISHED

Supreme Court of Kentucky

FINAL
DATE 12-17-08 E.A.Grant D.C.

2007-SC-000748-WC

FRANKLIN INSURANCE AGENCY, INC. — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2007-CA-000578-WC
WORKERS' COMPENSATION BOARD NO. 01-95574

EDIE M. SIMPSON;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

AND

2007-SC-000914-WC

EDIE M. SIMPSON — CROSS-APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2007-CA-000578-WC
WORKERS' COMPENSATION BOARD NO. 01-95574

FRANKLIN INSURANCE AGENCY, INC.;
HONORABLE JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — CROSS-APPELLEES

MEMORANDUM OPINION OF THE COURT

AFFIRMING

An Administrative Law Judge (ALJ) found that the claimant was partially disabled by a work-related back injury and resulting psychiatric condition but dismissed her claims that bladder, sexual, and bowel dysfunction resulted from nerve damage due to the injury. A majority of the Workers' Compensation Board (Board) affirmed. The Court of Appeals reversed and remanded for further proceedings insofar as the ALJ failed to state reasons for failing to rely on uncontradicted medical evidence that the bladder and sexual dysfunction were work-related.

Appealing, the employer asserts that the evidence of causation was not unrebutted, that the ALJ explained his reasons for dismissing the claims, and that substantial evidence supported the decision. The claimant asserts that the ALJ erred by failing to state a proper basis for failing to rely on unrebutted medical evidence of causation.[1] In a cross-appeal, she asserts that unrebutted medical evidence supports a finding that her bowel condition is work-related and also that the evidence as a whole compels a finding of total disability. We affirm for the reasons stated herein.

The claimant was born in 1961, completed high school, obtained an

[1] Collins v. Castleton Farms, Inc., 560 S.W.2d 830, 831 (Ky. App. 1977) (quoting 3 A. Larson, Workmen's Compensation Law, § 80.20 (9th ed. 1976).

insurance agent's license, and purchased the Franklin Insurance Agency. It is undisputed that she injured her back on January 2, 2000, while lifting a five-gallon water jug onto a water cooler. She responded well to conservative treatment, and Dr. Mackey released her to return to work on February 8, 2000. Her severe back pain returned about a month later during a trip to the store to purchase a treadmill. She underwent a laminectomy at L5-S1 on March 10, 2000, and a repeat procedure on March 27, 2001. Within hours of the 2001 surgery, she developed severe pain, a lack of sensation in her legs, and an inability to use her lower body, which resulted in surgery on the following day to remove a blood clot from the spinal canal. Shortly thereafter, she underwent another surgery to remove more of the clot and decompress the L5 nerve root. When discharged from the hospital on April 4, 2001, her diagnoses included: recurrent nucleus pulposus at L5-S1, cauda equina syndrome, and L5 nerve root compromise. After the surgery, she experienced left foot drop, continued back pain, and depression as well as bowel, bladder, and sexual dysfunction. She sold the insurance agency after an unsuccessful attempt to return to work and has not worked since May 2002.

The claimant alleged that the back injury resulted in lumbar and psychiatric impairments, which are no longer at issue. She also alleged impairment from nerve damage that caused bowel, bladder, and sexual dysfunction. The employer asserted that the latter three conditions did not result from the work-related injury and, thus, were not compensable.

Dr. Nichols, an orthopedist, evaluated the claimant in June 2002, about 15 months after the final surgery. He stated that she reported episodes of bladder leakage, which should result in a permanent impairment rating if supported by treatment records. He noted that she reported no bowel dysfunction.

Dr. Concepcion, a urologist, began to treat the claimant on August 6, 2002, for complaints of bladder leakage. He noted that she reported mild stress incontinence before the March 2001 surgeries but developed neurologic deficits and a worsening of the condition secondary to the surgeries. Physical examination clearly revealed diminished sensation, primarily on the left side, which he attributed to the second 2001 surgery. He thought that the surgery probably caused some inflammation and potential scarring affecting the nerve root that controls the bladder, explaining that she had a fairly normal pattern until after the back surgery and had no history of any of the other known causes. Although testing did not reveal uninhibited bladder contractions, which he would have expected, it did reveal a diminished bladder capacity. He concluded that she had a neurogenic bladder. On August 20, 2002, she complained of bladder spasms and blood in the urine that resulted from chronic inflammation and cystitis, but Dr. Concepcion explained subsequently that he did not attribute "[t]his particular event" to the back injury and surgeries. On September 4, 2002, he prescribed medication to address the incontinence and discharged her from his care.

Dr. Evins, a urologist, saw the claimant twice in October 2002. Testing revealed that she had "excellent flow rate . . . no uninhibited bladder constrictions and we were unable to demonstrate leakage on the patient with coughing . . . ." He reported that he found no sign of interstitial cystitis or neurologic disease in the bladder. He diagnosed an urgency/frequency syndrome of undetermined cause.

The claimant returned to Dr. Concepcion in August 2003, at which time he referred her to a gynecologist regarding the pressure created by a drop in her bladder and to a gastroenterologist regarding her bowel complaints. She did not complain of incontinence at that time.

When deposed by the employer in 2004, Dr. Concepcion explained that stress incontinence and urge incontinence are separate conditions that can occur concomitantly. He stated that the claimant had undergone a hysterectomy, which can aggravate stress incontinence, and that she had mild stress and urge incontinence before the back injury. The urge incontinence worsened after the injury. She was unable to tell when she needed to urinate or control her bladder. He noted that she had positive physical findings that suggested a neurologic deficit and that testing also revealed poor sphincter tone and diminished sensation in the genital areas. Considering the objective physical findings and clinical history, he thought that the bladder condition would warrant a 15% permanent impairment rating if she were not taking the medication that he prescribed in September 2002 to help control her

symptoms. He acknowledged that her bladder capacity was much greater when Dr. Evins tested her one month later and that she did not reach maximum medical improvement based on objective findings until she saw Dr. Evins. He also acknowledged that she did not complain of incontinence when he saw her in August 2004. Dr. Concepcion testified that the claimant's sexual dysfunction complaints were consistent with her history of injury and treatment, and the gynecologist who examined her reported a significant neurological deficit, primarily on the left side of her pelvis. In his opinion, the condition was potentially related to her injury. When asked if he thought that the bowel problems resulted from the injury, he responded, "Not really." He noted, however, that pain medication may "slow your bowels down."

Dr. Gaw evaluated the claimant in April 2004. He diagnosed a multi-operated lumbar spine; history of cauda equina syndrome with residual neurological involvement of the left sacral nerve roots, including loss of sensation around the left side of the rectum and vagina; and loss of normal bladder and sexual function. Dr. Gaw concluded that medical treatment for the work-related back injury resulted in neurological damage that warranted a 9% permanent impairment rating based on the urinary system and a 9% permanent impairment rating based on sexual dysfunction.

The ALJ found that the claimant sustained a 23% permanent impairment rating due to the back injury, itself, and a 10% rating due to a psychiatric condition that did not carry work limitations according to Dr.

Granacher. The ALJ analyzed the evidence regarding bladder, sexual, and bowel dysfunction as follows:

> Dr. Evins diagnosed the plaintiff with urgency/frequency syndrome, but could not determine the cause of that condition. Dr. Concepcion originally noted the plaintiff may have some inflammation around the nerve roots going to the bladder, but the diagnostic studies showed chronic inflammation and cystitis with small blood clots in the bladder. He noted the inflammation and clots were not caused by the work related injury and also that the plaintiff had a drop in the bladder. In addition, he noted the sexual dysfunction to potentially be related to the work injury. The plaintiff bears the burden of proof and risk of non-persuasion to convince the trier of fact as to each and every element of her claim. Snawder v. Stice, Ky. App., 576 S.W.2d 276 (1979). In this particular instance, the medical proof is not at all clear as to the cause of the plaintiff's bladder, bowel and sexual dysfunctions. The mere possibility of a causal relationship is insufficient to permit a finding that a medical condition is work related and therefore, compensable. (citations omitted).

Having found that the claimant failed to meet her burden of proof, the ALJ dismissed the claims for the conditions. The Board's majority determined that the claimant's medical evidence was unrebutted but refused to reverse, stating that the evidence did not compel a favorable finding. The Court of Appeals determined that the Board erred by failing to reverse in part and remand for an explanation of the reasons for rejecting unrebutted medical evidence in the bladder and sexual dysfunction claims. We agree.

The employer asserts that the issue on appeal was whether the evidence compelled a finding in the claimant's favor. Arguing that substantial evidence

rebutted the claimant's evidence, the employer maintains that Court of Appeals erred by attempting to reweigh the evidence. It asserts that Dr. Evins' testimony provided substantial evidence to support dismissing the bladder dysfunction claim and that the claimant failed to prove causation in the sexual dysfunction claim because Dr. Concepcion stated only that the condition was "potentially" related to the back injury.

The "substantial evidence" test concerns the weight of evidence necessary to support a finding for the party with the burden of proof on a factual issue; whereas, the "compelling evidence" test concerns the weight of evidence necessary to require a finding for the party with the burden of proof.[2] Substantial evidence of a fact is evidence sufficient to permit a reasonable finding for the proponent.[3] When the parties present conflicting evidence on a matter relevant to the outcome of their dispute, the ALJ must weigh their evidence and determine which is more persuasive. Collins v. Castleton Farms, Inc., supra at 831, explains that a fact-finder who rejects uncontradicted (i.e., unrebutted) evidence has not weighed the evidence but determined its legal effect. The decision quotes from Professor Larson's treatise concerning the proper legal effect of uncontradicted evidence as follows:

> The [fact-finder] may even refuse to follow the uncontradicted evidence in the record, but when it does so, its reasons for rejecting the only evidence in the record should appear – e.g., that the testimony was inherently improbable, or so inconsistent as to be

[2] See Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

[3] Id.

> incredible, that the witness was interested, or that his testimony on the point at issue was impeached by falsity in his statements on other matters. Unless some explanation is furnished for the disregard of all uncontradicted testimony in the record, the [fact-finder] may find [the] award reversed as arbitrary and unsupported.[4]

In other words, unrebutted evidence compels a finding for the party that it favors unless the fact-finder has a proper basis for rejecting it.

KRS 342.285 designates the ALJ as the finder of fact in workers' compensation cases with the sole discretion to determine the quality, character, and substance of evidence.[5] Despite the claimant's assertion, neither Professor Larson's treatise nor Collins v. Castleton Farms, Inc., supra at 831, indicates that the listed examples are the only bases on which an ALJ may properly reject unrebutted testimony. An ALJ's factual finding must be affirmed unless it is unreasonable under the evidence, unless it is based on a misunderstanding of the evidence, or unless it is based on a misapplication of the law.

The claimant had the burden to prove every element of her claim,

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[4] See also Bullock v. Gay, 296 Ky. 489, 177 S.W.2d 883, 855 (1944) (the testimony of a witness regarding matters within the witness's knowledge generally is conclusive as to a fact not improbable or in conflict with other evidence unless the witness is interested in the outcome or otherwise discredited); Commonwealth v. Workers' Compensation Board of Kentucky, 697 S.W.2d 540, 541 (Ky. App. 1985) (a fact-finder lacks authority to reject uncontradicted evidence absent a sufficient explanation the reasons for doing so); Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. App. 1981) (the fact-finder may not disregard uncontradicted medical evidence regarding a question properly within the province of medical experts).

[5] See also Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

including causation. In other words, KRS 342.0011(1) required her to prove that the lifting incident was the proximate cause producing bladder, sexual, and bowel dysfunction. The ALJ determined that that the claimant failed to meet her burden because the medical proof regarding the cause of the conditions was "not at all clear."

Drs. Nichols, Concepcion, and Gaw testified for the claimant in the bladder dysfunction claim. The ALJ appears to have misread Dr. Concepcion's testimony and failed to address Dr. Gaw's testimony regarding the condition. Although Dr. Concepcion stated that the chronic inflammation and cystitis that were present on August 20, 2002, did not result from the back injury, he confined the opinion to "[t]his particular event." Both he and Dr. Gaw diagnosed a bladder condition and attributed it to nerve damage that resulted from the back injury. Testifying for the employer, Dr. Evins also diagnosed a bladder condition but stated that he could not determine the cause, testimony that expressed no opinion regarding causation. Thus, the claim must be remanded for the ALJ to reconsider Dr. Concepcion's testimony and to address Dr. Gaw's testimony. The ALJ must either state a proper basis for rejecting the claimant's evidence regarding the condition or rely on it.

Drs. Gaw and Concepcion testified for the claimant regarding sexual dysfunction. Dr. Gaw clearly attributed the condition to the effects of the back injury. Although Dr. Concepcion thought that the condition potentially resulted from the injury, such equivocal testimony did not rebut Dr. Gaw's

opinion. The employer offered no affirmative evidence to the contrary. Thus, the claim must be remanded for the ALJ to address Dr. Gaw's testimony. The ALJ must state a proper basis for rejecting the evidence or rely on it.

We are not convinced that unrebutted medical testimony provided substantial evidence of a causal connection between the claimant's bowel condition and the back injury. No physician testified clearly to such a relationship. Although Dr. Concepcion acknowledged that pain medications could cause the bowels to slow down, he also stated that he did not think the back injury caused the claimant's bowel condition.

The decision of the Court of Appeals is affirmed. This matter is remanded to the ALJ for further consideration, including a decision regarding permanent disability if the ALJ relies on the claimant's evidence.

All sitting. All concur.

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