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NOT TO BE PUBLISHED OPINION

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RENDERED: FEBRUARY 14, 2019
NOT TO BE PUBLISHED

Supreme Court of Kentucky

2018-SC-000202-WC

BOLSTER AND JEFFRIES HEALTH CARE GROUP, LLC, d/b/a AUBURN NURSING — APPELLANT

V.

ON APPEAL FROM COURT OF APPEALS
CASE NO. 2017-CA-001460-WC
WORKERS' COMPENSATION BOARD NO. 14-WC-76150
AND 15-WC-92512

APRIL MAYHEW;
HON. DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD — APPELLEES

MEMORANDUM OPINION OF THE COURT

REVERSING

Appellee April Mayhew sought workers' compensation benefits for a lower back injury she attributed to two work-related incidents. The Administrative Law Judge (ALJ), having heard the evidence and legal arguments, concluded that Mayhew had failed to meet her burden of proof as to both incidents and dismissed her claims. The Workers' Compensation Board (Board) unanimously affirmed, finding substantial evidence supported the ALJ's determination that Mayhew did not sustain a work-related injury. In a 2-1 decision, the Court of Appeals reversed on the grounds that the evidence regarding the second incident was "overwhelming" and "compels" a finding that a work-related injury

occurred. The appellate panel remanded the case for an analysis pursuant to *Finley v. DBM Technologies*, 217 S.W.3d 261 (Ky. App. 2007), as to whether Mayhew had suffered an arousal of a pre-existing condition.

On appeal, Appellant Bolster and Jeffries Health Care Group, LLC, d/b/a Auburn Nursing (Auburn) insists that substantial evidence supported the ALJ and Board's conclusions that Mayhew had not established the work-relatedness of her injury, and consequently the Court of Appeals improperly substituted its own factual finding for that of the ALJ, leading to the emphasis on *Finley*. Auburn insists that *Finley*, a case involving pre-existing conditions, has no relevance unless and until the work-relatedness of an injury is established by the claimant. Agreeing that the Court of Appeals erred, we reverse.

RELEVANT FACTS

Mayhew worked as a certified nursing assistant (CNA) for Auburn beginning in 2012. Her duties involved assisting nursing home residents with daily activities including eating, walking, showering, and dressing, and included some lifting. She initially alleged a lower back injury on February 26, 2015, when moving a resident from bed to wheelchair but later amended to assert a second, earlier back injury on July 7, 2014, when moving a resident from a wheelchair. The ALJ found that the 2014 injury was a temporary groin injury for which she received medical benefits, not a back injury, a finding affirmed by the Board and not appealed to the Court of Appeals. Consequently, the only issue before us is the February 26, 2015 incident and because the

presence or absence of substantial evidence supporting the ALJ's dismissal of that claim is central, we quote at length from his Opinion and Order:

> February 26, 2015 injury. The evidence supporting dismissal of the two injury claims runs together. A bridge between the two would be Mayhew's testimony that "all my problems have been on my left leg," and began after the 2015 injury. (p. 36). If all her problems began in 2015, then they do not relate to the 2014 injury.
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> But the problem with relating her problems to a February 26, 2015 injury is that they began before that date. She gave Dr. Poe a history of two years of low back pain on January 14, 2015. She gave Dr. Reynolds a history of two years of low back pain on March 2, 2015. This coincides with the records from The Medical Center at Bowling Green, where she was given diagnoses of back pain and sciatica in 2012 and 2013.
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> Mayhew seemed impressed to have been given a diagnosis of sciatica to explain her complaints. She used the label at least seven times in her deposition alone. (p. 34-36, 45, 49, 51). She said, "And then I got told it was sciatic nerve," implying that diagnosis came following a work injury and finally explained her problem. (p. 49). But she had been given the sciatica diagnosis at The Medical Center at Bowling Green in 2013, before either work injury. The 2014 work injury clearly did not cause a herniated lumbar disc, for the reasons explained in the preceding paragraph. So that leaves Mayhew to prove the radiating leg symptoms emanating from a herniated disc stemmed from an injury on February 26, 2015. But she was diagnosed with sciatica by Dr. Reynolds on January 27, 2015; and complained to Dr. Poe about burning pain and numbness down the left leg on January 14, 2015, a month before the alleged work injury.
>
> Mayhew did not give a history of a work related injury in her first appointments with Dr. Reynolds and Dr. Poe after February 26, 2015. (3/2/15 for Dr. Reynolds and 1/14/15 for Dr. Poe). She gave Dr. Reynolds a history of a work injury "in Feb or March" on her fourth appointment with him after February 26, 2015. (5/21/15). She treated with Dr. Poe through April 10, 2015, and never gave him a history of a work injury.

Mayhew's presentation to The Medical Center at Bowling Green on February 26, 2015 is not consistent with an operable herniated disc causing radicular symptoms. An x-ray reported "no acute abnormalities, chronic findings," and Mayhew was released to unrestricted work immediately.

The ALJ believed Susan Taylor that Mayhew complained of back and leg pain at work prior to either of the injury dates in this case.

A lack of polish as a witness does not disqualify a meritorious claim. But sometimes vague, confusing testimony signals a greater concern. It is one thing not to be a good historian, but another to fail to remember the names of businesses where applications for employment have been made since the injury (p. 20), or significant details about treatment that occurred in the not too distant past. Asked in her October 24, 2016 deposition about treatment during the time she saw Dr. Reynolds, she said, "I don't remember. It's been a long time ago. To me, it's been a long time ago." (p. 50). And then we have the added, significant concern about the reliability of testimony. Mayhew denied any prior injuries or treatment before her claimed work injuries (p. 51); that plainly is not true. She attempted to rehabilitate herself at the Hearing by acknowledging sciatic nerve symptoms before either injury injury [sic] but unpersuasively attempted to minimize the misrepresentation by several times saying "it was nothing that changed by life." (HT p. 26)

And again on this second claim, Dr. Fishbein does not provide convincing evidence on causation or impairment. His initial report was issued without knowledge of the prior complaints and treatment. After he reviewed the prior records he said the preexisting condition deserved some apportionment, so his recognition of prior active impairment goes against Mayhew's testimony that her complaints were insignificant, and also against the argument in her brief that there is no active impairment under Finley. (p. 12). As to the rating, the ALJ does not find Dr. Fishbein's opinion of 2% active impairment to be in accordance with the AMA Guides because, as noted above in resolution of the 2014 injury claim, there is no provision under Table 15-3 for an impairment rating between 0% and 5%. Further, there is no explanation for that 2% rating –

> no identification of a condition for which impairment is assigned under Table 15-3. And then for the reduced 11% rating, Dr. Fishbein arbitrarily assigns 2% to the 2014 injury and 9% to the 2015 injury, in essence compounding his error because Table 15-3 does not provide for impairment between 8% and 10% either; DRE Lumbar Category II impairment caps at 8% and Category III begins at 10%. So even if Mayhew had proven causation, her claim for permanent income or medical benefits still fails because she has not met her burden of establishing a reliable impairment rating on which to base such an award. *Jones v. Brasch-Barry Gen. Contractors*, 189 S.W.3d 149 (Ky. App. 2006).
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> Plaintiff's supplemental brief attempts to take this case down a path different from what was pled or practiced. She argues that her condition is the result of an accumulation of lifting incidents with patients that "became disabling" on February 26, 2015. This was not a "cumulative trauma" case, but a claim of two acute injuries, neither of which the ALJ finds to have been proven.

The Board examined the record, particularly Mayhew's testimony, and the ALJ's opinion before concluding that dismissal was appropriate. The Board highlighted the Independent Medical Examination report of Dr. Dennis O'Keefe, a physician who examined Mayhew and reviewed her medical records before concluding that she had suffered a disc herniation but that it was not work-related.

As noted, a divided Court of Appeals panel reversed, with the majority concluding that the findings on an MRI conducted eight days after the February 26, 2015 incident ("left paraspinal disc herniation and S1 nerve root compression") and Mayhew's testimony that she was unable to continue working as a CNA (after returning for a day and a half) compelled a finding that she had suffered a "harmful change" as a result of the February 2015 lifting

incident. With that finding contrary to the ALJ's conclusion, the court insisted that on remand the ALJ should consider whether Mayhew suffered an arousal of a pre-existing condition: "[T]he sudden onset of pain attendant to the February 26 injury falls within the clear parameters of *Finley* . . . ."

ANALYSIS

A workers' compensation claimant has the burden of proving every element of her claim, *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984), including causation, *i.e.*, that the injury was work connected under Kentucky Revised Statute (KRS) 342.0111(1). *Jones v. Newburg*, 890 S.W.2d 284, 285 (Ky. 1994). The ALJ is the fact-finder and has sole authority to determine the quality, character and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). When evidence is conflicting, "which evidence to believe is the exclusive province of the ALJ." *Id.* (citing *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977)). On appellate review, the issue is whether substantial evidence of probative value supports the ALJ's findings. *Whittaker v. Rowland*, 998 S.W.2d 479, 481-82 (Ky. 1999). If the party with the burden of proof fails to convince the ALJ, that finding stands unless on appellate review that party can establish that the evidence was so overwhelming that it compels a favorable finding. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

Here, Mayhew did not, in the ALJ's and the Board's views, meet her burden of proving that her back injury was work-related. In concluding causation had not been established, the ALJ focused on Mayhew's complaints

of back pain dating to 2012 and 2013; her failure to give a history of work related injury in her first appointments with two different doctors following the alleged February 26, 2015 injury (with delayed reporting to one of them and never reporting a work-related injury to the other doctor); her presentation to a medical center the day of the alleged injury where an x-ray revealed "no acute abnormalities, chronic findings," resulting in her return to work with no restrictions; and "significant concerns about the reliability of [Mayhew's] testimony." The ALJ also noted that Dr. Fishbein, upon whom Mayhew relied for causation proof, had issued an initial report "without knowledge of [Mayhew's] prior complaints and treatment." After being informed of her medical history, he adjusted his opinion to suggest apportionment was appropriate for a pre-existing condition but Mayhew's presentation had never acknowledged any pre-existing issue, focusing instead on two acute injuries "neither of which the ALJ finds to have been proven."

The Board noted that in addition to substantial evidence supporting the ALJ's conclusion regarding causation, the record contained affirmative evidence from Dr. O'Keefe that Mayhew had experienced "a lumbar disc herniation at the L5-S1 level with S1 root compression," for which surgery was appropriate but that the condition was not due to a work-related injury on February 26, 2015, as alleged. Dr. O'Keefe also opined that she was physically capable of returning to work as a CNA, although she should not lift in excess of 50 pounds on more than an occasional basis, meaning she should have co-worker assistance when lifting a heavy patient.

Having reviewed the record, it is apparent that the Court of Appeals substituted its own fact finding, choosing to rely on an MRI finding (with no reference to accompanying testimony) and Mayhew's own personal testimony regarding her inability to return to work as "compelling evidence" that causation from the February 26, 2015 lifting incident had been proven. We must disagree with that assessment and find that the ALJ was well within his authority on this record (and the Board within their authority) in concluding that Mayhew had not established the February 2015 incident as the cause of her injury. The ALJ sifted through the evidence and chose what he found credible, as he is entitled, indeed required, to do. *Square D Co.*, 862 S.W.2d at 309. His finding that Mayhew had not established causation is supported by both the record and his careful analysis of the relevant proof and should not have been disturbed.

The Court of Appeals, after holding the evidence compelled a causation finding, required the ALJ to apply *Finley* on remand. However, *Finley* is not applicable unless and until causation of an injury is established. In that case, Bridget Finley, a machine operator, suffered a readily identifiable back injury that left her unable to stand upright and the uncontradicted medical evidence was that she suffered "from a congenital deformity of the spine known as scoliosis." 217 S.W.3d at 263. "It was also undisputed that the work injury aroused the scoliosis into a disabling reality." *Id.* The Court of Appeals summarized the thrust of their decision as follows:

> To summarize, a pre-existing condition that is both asymptomatic and produces no impairment prior to the work-

> related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable. A pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant state, the arousal is considered temporary. If the pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary.

Id. at 265. As this quote reflects, a *Finley* analysis comes into play when a "work-related injury" arouses a pre-existing dormant condition. A work-related injury must be established before *Finley* applies.

Here, the ALJ found no work-related injury on February 26, 2015 as alleged by Mayhew, and it cannot fairly be said that overwhelming evidence compelled a contrary conclusion. As the Board aptly noted, there was conflicting evidence in the record and "the fact Mayhew can cite to evidence that would have supported a different outcome than that reached by the ALJ is not an adequate basis to reverse on appeal." Without a work-related injury, the issue of a pre-existing dormant condition (which Mayhew did not assert) is never reached, and *Finley* is not pertinent. The Court of Appeals erred in concluding otherwise.

For the foregoing reasons we reverse the opinion of the Court of Appeals and reinstate the dismissal ordered by the ALJ and affirmed by the Workers' Compensation Board.

C.J. Minton; Hughes, Lambert, VanMeter, and Wright, JJ., sitting. Keller, J., concurs in result only.

COUNSEL FOR APPELLANT:

Mary Ellen Schaffner
Fogle, Keller Walker, PLLC

COUNSEL FOR APPELLEE

Donald D. Zuccarello
Law Office of Donald D. Zuccarello, PLLC