STATE OF MICHIGAN

COURT OF APPEALS

NORMA ROBINSON

Plaintiff-Appellant,

v

BLUE CROSS AND BLUE SHIELD OF MICHIGAN and VIGILANT INSURANCE CO,

Defendant-Appellees.

UNPUBLISHED
December 3, 1996

No. 180960
WCAC No. 91-000902
ON REMAND

Before: Smolenski, P.J., and Markey and P.J. Sullivan,* JJ.

PER CURIAM.

Plaintiff Norma Robinson applied for leave to appeal a November 22, 1993 opinion and order of the Worker's Compensation Appellate Commission (WCAC) that reversed a magistrate's decision awarding plaintiff benefits. Although this Court denied plaintiff's application, our Supreme Court has remanded for our consideration as on leave granted. *Robinson v Blue Cross and Blue Shield of Michigan*, 447 Mich 1020 (1994). We affirm.

Plaintiff began working for defendant Blue Cross in July 1985 performing clerical and secretarial duties. On September 11, 1990, plaintiff slipped at work and fell with her legs in a "splits" position. Plaintiff experienced pain in her back, left hip and legs, as well as vaginal bleeding. Plaintiff was sent to a hospital where x-rays of her left hip and pelvis were taken. The hospital records indicate a primary complaint of pain in plaintiff's left hip.

Plaintiff never returned to work. At a hearing before the magistrate, plaintiff testified that her back continued to be sore and painful and on occasion became so painful that she doubled over. Plaintiff testified that she could not sit or stand for long periods of time. Plaintiff further testified that she could not do many of the tasks that her job required, such as moving boxes, and that she was primarily confined to her home.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Plaintiff's claim of a disabling back injury[1] was supported by the deposition testimony of Dr. Michael Goldman, a physician board certified in general practice, physical medicine and rehabilitation. Dr. Goldman examined plaintiff on March 6, 1991, at her attorney's request. This examination revealed clinical evidence of muscle tightness, spasm and tenderness. He performed an EMG that revealed some LR-5 radiculopathy on plaintiff's left side, which was consistent with a disc protrusion or bulging. Dr. Goldman agreed that his EMG findings were "mild," that he never reached a diagnosis of a herniated disc or disc protrusion, and that most of his remaining diagnoses were soft tissue inflammatory conditions. Dr. Goldman found that plaintiff was totally disabled.

Two board certified orthopedic surgeons who testified by deposition for defendant found no objective evidence of anything wrong with plaintiff and believed that she could return to work. Dr. William Higginbotham examined plaintiff on November 26, 1990. His written evaluation noted that although plaintiff was using crutches, she did not clinically present any problem that would require the use of crutches. Dr. Higginbotham's deposition testimony indicated that he did not take x-rays or perform an EMG, but he did review the radiologist's report from the x-rays taken when plaintiff was hospitalized following her slip and fall. Dr. Higginbotham testified that this report was consistent with his conclusion that plaintiff could return to work. Dr. Higginbotham performed a test for malingering in which he lightly pushed plaintiff's head and elicited a response from plaintiff of extreme pain in her lower back. Dr. Higginbotham testified that this response was completely inconsistent with what he did because his actions would not have increased any pressure on plaintiff's lower spine. Dr. Higginbotham performed this "malingering" test because he was concerned about the vagueness of plaintiff's complaints.

On April 8, 1991, Dr. Zachary Endress performed clinical tests on plaintiff and took x-rays of her left hip. His written evaluation and deposition testimony indicated that plaintiff's left hip joint was completely within normal limits. Dr. Endress testified that plaintiff's lumbar spine had a normal appearance and that he detected no paraspinus muscle spasms. Dr. Endress' report and deposition testimony further indicated that from an orthopedic standpoint, plaintiff could return to work without restrictions.

The magistrate's decision, which was mailed on October 28, 1991 and awarded plaintiff compensation, provides in relevant part as follows:

> Dr. Goldman is of the opinion that plaintiff suffered a soft tissue injury to the lumbosacral paraspinous muscles as evidenced by a flattened lumbar lordosis, and thought she was a candidate for continued physiotherapy.
>
> On the other hand, Zachary J. Endress, Jr. M.D., did not detect any lumbar lordosis at the time of his physical examination of the plaintiff carried out approximately one month later. Indeed, he was at a lost [sic] to explain the plaintiff's continued complaints of pain and disability. This in effect buttressed the testimony of Dr. William Higginbotham, III, M.D., Board Certified Orthopedic Surgeon who examined the plaintiff November 29, 1990, and whose findings served as a basis for stopping

compensation that had been initially undertaken voluntarily. Although the plaintiff appeared at that examination on crutches, Dr. Higginbotham was unable to substantiate her complaints with objective evidence and thus dismissed them and found her fit to resume employment at that time.

I observed the plaintiff on the stand and note that she testified in a reasonably straight forward manner over the approximate one hour it took to elicit her testimony. No independent evidence of activity inconsistent with her claim of disability was presented. Her complaints have been consistent following the conceded trauma. The explanation of Dr. Michael Goldman as to the source of her complaints is accepted (in part) to the extent that plaintiff is found to be suffering disabling symptoms as a result of a soft tissue injury to her lumbosacral spine.

Defendant appealed to the WCAC, arguing that the magistrate's finding of disability was not supported by competent, material and substantial evidence and resulted in erroneous conclusions of law. The WCAC agreed with defendant and reversed the magistrate's decision. Its November 22, 1993 opinion and order provided in relevant part as follows:

The defendant is correct when it states our review is limited by MCL 418.861a(3)[; MSA 17.237(861a)(3)] to a determination of whether the magistrate's findings are supported by competent, material and substantial evidence on the whole record. *Holden v Ford Motor Co*, [439 Mich 257; 484 NW2d 227 (1992)]. Such scrutiny of the magistrate's opinion, while not as extensive as under the former "de novo" standard, entails a degree of qualitative and quantitative evaluation of the evidence so as to provide a full, thorough, and fair review. *Holden, supra*.

In order to fulfill that standard we are compelled to review the evidence as follows. Plaintiff was injured when she fell on September 11, 1990, while working as a secretary for defendant. She immediately complained of severe pain in her back, hips and legs, along with vaginal bleeding, for which she sought emergency treatment. The magistrate reviewed the depositions of four doctors, reviewed the extensive notes of the emergency room physician and other treating physicians at Metro Medical group, and plaintiff's own testimony concerning her physical condition.

Of the four medical experts testifying by deposition, only Dr. Michael Goldman found the plaintiff to be disabled due to "chronic dorsal and lumbar myofascial ligamentous strain with a traumatic left hip strain," as well as some possible nerve irritation. As pointed out in defendant's brief, plaintiff failed to call her treating physicians, instead utilizing Dr. Goldman, who only saw her once on March 6, 1991. We also acknowledge that the magistrate correctly found no merit in plaintiff's contention of continuing severe vaginal bleeding, at least in a causal relation to this work injury.

Against Dr. Goldman's lone finding, the magistrate had to weigh the testimony of other medical experts, such as that of Dr. Zachary J. Endress, a board certified orthopedic surgeon, who examined plaintiff on April 8, 1991. On the basis of his physical exam and x-rays he took, he found no objective evidence of any orthopedic problems, and would return her to work without restriction.

Dr. William Higginbotham, also a board certified orthopedic surgeon, examined plaintiff on November 26, 1990, and also found plaintiff not to be disabled. Additionally his findings cast some doubt on plaintiff's credibility in giving symptomatic responses to physical orthopedic testing:

"I am concerned, however, because she shows non-physiologic pain responses, such as pain increase with light push on her head. She also has vague symptomatic complaints of pain that are not well localized and poorly defined, both by the patient's own history as well as on clinical examination today. These findings would tend to indicate that Ms. Robinson does not have evidence of a disabling orthopedic condition and symptomatic complaints may be in excess of the actual findings. When I have had an opportunity to review her past medical x-rays, I will send an addendum regarding those findings. In the presence of a history of minimal injuries, I would think at this point in time that she would be capable of returning back to work."

Dr. Higginbotham later reviewed the x-ray report, taken when plaintiff went to the emergency room immediately after her fall, and opined that it supported his conclusion.

* * *

While plaintiff's treating physicians, Dr. James and other Metro Medical Group staff doctors, were not deposed, their office records from 1990 were received in evidence. A careful review of the records reveals plaintiff's treating physicians agree with the findings of the two orthopedic surgeons, to wit, no objective evidence of any serious orthopedic injury[.]

* * *

It is true the Appellate Commission will not normally reverse a magistrate for choosing between two reasonable but differing views. *Fisher v Clark Equipment Co*, 1990 ACO #352; 1990 Mich ACO 1204; *Couzzins v Motor Wheel Corp*, 1989 ACO #341; 1989 Mich ACO 1602. Also, it is within the magistrate's discretion to accept the medical testimony he finds most persuasive, and as long as there is a reasonable basis for his findings, we will not displace them. *Miklik v Michigan Special Machine Co*, 415 Mich 364[; 329 NW2d 713 (1982)]; *Clark v Lakeview Community Nursing Home*, 1992 ACO #189; 1992 Mich ACO 565.

However, there must be a rational choice between reasonable alternatives, and it must be based on the requisite evidence. It is not enough that the magistrate's observations of the plaintiff agree with that of a given medical expert. *Firu v GMC, CPC-Pontiac*, 1992 ACO # 760; 1992 Mich ACO 2348. Likewise, the magistrate cannot chose the opinion of one expert over others, where that expert's findings are based on subjective symptomatology without any objective findings, and here the plaintiff's credibility is at issue. *Couch v Whitehall Industries*, 1992 ACO #105; 1992 Mich ACO 321.

As pointed out in defendant's brief, there are marked similarities between the case at bar and *Couch, supra*. There as here, the record disclosed a serious question as to plaintiff's credibility. Dr. Higginbotham found no objective reason plaintiff appeared at his office using crutches. A careful review of the entire record fails to disclose any mention of the crutches by any other doctor, including Dr. Goldman. Further, suspecting exaggeration of symptomatology on plaintiff's part, he performed a so-called malingerer's test, which came up positive[.]

* * *

We also find it notable, that in a qualified explanation as to his physical examination of plaintiff, Dr. Goldman admitted a reliance on the patient's symptomatic responses in reaching many of his conclusions.

We find no reasonable basis in Magistrate Egan's acceptance of the opinion of Dr. Goldman, based on one visit, over several other medical experts, especially in light of plaintiff's questionable credibility.

Although we are always reluctant to overturn a magistrate's decision, as he or she has the advantage of seeing the witnesses first hand, we are compelled to do so here. In so doing we have weighed the whole record, reviewing the various testimony and exhibits, both from a qualitative and quantitative viewpoint. Since such a review does not reveal the requisite competent, material and substantial evidence to support the magistrate's findings, we are compelled to reverse him. *Holden, supra*. [11/22/93 Opinion & Order, pp 1-5.]

On appeal to this Court, plaintiff essentially argues that the WCAC's decision is based on errors of law and that the WCAC exceeded its review authority. We disagree.

The appropriate standard of review was recently summarized in *Illes v Jones Transfer Co (On Remand)*, 213 Mich App 44, 50-51; 539 NW2d 382 (1995):

In reviewing a magistrate's decision, the WCAC must perform both a qualitative and quantitative review of the record. MCL 418.861a(13); MSA 17.237(861a)(13). The WCAC's review is not de novo, however, and the WCAC may not merely substitute its opinion for that of the magistrate. *Kovach v Henry Ford Hosp*, 207 Mich App 107, 111; 523 NW2d 800 (1994). A magistrate's findings of fact are to be regarded as conclusive if supported by "competent, material, and substantial evidence on the whole record." MCL 418.861a(3); MSA 17.237(861a)(3).

On review by this Court, findings of fact by the WCAC are conclusive if there is any competent evidence to support them. MCL 418.861a(14); MSA 17.237(861a)(14); *Holden v Ford Motor Co*, 439 Mich 257, 263; 484 NW2d 227 (1992). However, a decision of the WCAC is subject to reversal if the WCAC operated within the wrong legal framework or its decision was based on erroneous legal reasoning. *O'Connor v Binney Auto Parts*, 203 Mich App 522, 527; 513 NW2d 818 (1994). In *Holden*, *supra* at 269, our Supreme Court stated:

"If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, did not 'misapprehend or grossly misapply' the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal, or if it is granted, to affirm. . . . ." [T.G. Kavanagh, J., with Jansen, P.J., and Corrigan, J., concurring in separate opinions.]

In addition, *Holden*, *supra* at 267-268, teaches that

[t]he question on judicial appellate review is, in each case, whether the WCAC acted in a manner consistent with the concept of administrative appellate review that is less than de novo review in finding that the magistrate's decision was or was not supported by competent, material, and substantial evidence on the whole record. In judging, on judicial appellate review, whether the WCAC acted properly, this Court and the Court of Appeals begin with the words of the Legislature. This Court and the Court of Appeals consider whether there are issues of credibility of live witnesses to be determined by the magistrate, the evidence considered and ignored by the magistrate and the WCAC, the care taken by the magistrate and the WCAC, and the reasoning and analysis of the magistrate
and the WCAC.

In accordance with the teaching of *Holden*, we note that in this case the magistrate considered the conflicting evidence concerning whether plaintiff was disabled. Although the magistrate did not

specifically comment on plaintiff's credibility, his opinion describing her demeanor during her live testimony, the consistency of her complaints, and the absence of other evidence of activity inconsistent with her complaints seems to indicate his belief that she was credible. The magistrate also accepted Dr. Goldman's deposition testimony concerning the source of plaintiff's complaints, i.e., a soft-tissue injury to plaintiff's lumbosacral spine. Thus, the magistrate detailed his factual findings to disclose his analytical process, and he apparently found plaintiff credible. See *Woody v Cello-Foil Products*, 450 Mich 588, 594-595; 546 NW2d 226 (1996). The issue, however, is whether the testimony of plaintiff and Dr. Goldman constituted substantial evidence, as that term is defined in MCL 418.861a(3); MSA 17.237(861a)(3), on which the magistrate could base a finding that plaintiff suffered from a disabling soft tissue work-related injury to her lumbosacral spine. See *Kovach, supra* at 111.

In turning to the WCAC's opinion in this case, we note that the WCAC cited the appropriate standard for its review. Our Supreme Court in *Holden*, *supra* at 284, recognized that a magistrate's determination of credibility is not absolutely binding on the WCAC in every case. Additionally, the WCAC here recognized that it is not supposed to conduct a de novo review but must provide a qualitative and quantitative evaluation of the evidence in a full, thorough and fair review.

In performing its evaluation of the evidence, the WCAC noted the opinion of Dr. Goldman, which was adopted by the magistrate, but the WCAC felt that the magistrate had failed to weigh the testimony of the other medical experts, Drs. Endress and Higginbotham. In contrast to Dr. Goldman, these physicians found no objective evidence of any alleged orthopedic problems. In fact, Dr. Higginbotham testified that the plaintiff was malingering. The WCAC pointed out the problems with plaintiff's credibility and relied in part on the evidence contained in plaintiff's medical records maintained by her treating physicians. Remarkably, plaintiff failed to call as witnesses her own treating physicians, who arguably would be most familiar with her condition. The records of those doctors indicated that plaintiff had normal range of motion along her left hip, that plaintiff walked normally, that there was no evidence of spasms in plaintiff's back, that plaintiff had normal motion in her back, knee and ankles, and that there was no sign of straight leg weakness.

In light of plaintiff's questionable credibility and the very substantial medical testimony relating to the viability of her medical complaints, the WCAC opined that the magistrate unreasonably relied upon the testimony of Dr. Goldman. Thus, the WCAC concluded that there was no "reasonable basis" for accepting Dr. Goldman's opinion, based on one visit, over the testimony of several other medical experts, including one who indicated plaintiff was malingering. The WCAC concluded that based upon its examination of the whole record, it could not find the "requisite competent, material and substantial evidence" to support plaintiff's claim.

The Supreme Court in *Holden* also indicated that reviewing courts should give the WCAC "some latitude" and "due deference" to the WCAC's administrative expertise. *Id*. Specifically, *Holden, supra* at 269, stated:

> If it appears on judicial appellate review that the WCAC carefully examined the record, was duly cognizant of the deference to be given to the decision of the magistrate, and

> did not "misapprehend or grossly misapply" the substantial evidence standard, and gave an adequate reason grounded in the record for reversing the magistrate, the judicial tendency should be to deny leave to appeal. [Footnote omitted; emphasis added.]

Clearly, the WCAC in this case satisfied the principles which governed its review. The WCAC was deferential, understood the standard to apply, reviewed the entire record, and devoted the majority of its opinion to explaining why it completely disagreed with the conclusion reached by the magistrate. The WCAC's reasons for reversal were clearly well-grounded in the record.

Consequently, we affirm.

/s/ Jane E. Markey
/s/ Paul J. Sullivan

[1] Plaintiff also sought benefits below for a claim of internal injuries related to vaginal bleeding. This claim was rejected by the magistrate and is not a part of this appeal. Nonetheless, this specious claim reflects also on plaintiff's credibility and was so noted by the WCAC.