

RENDERED: April 18, 1997; 2:00 p.m.
NOT TO BE PUBLISHED

NO. 96-CA-001043-WC

KRISTI LEE HOUGHTON

APPELLANT

V. PETITION FOR REVIEW OF A DECISION OF
THE WORKERS' COMPENSATION BOARD
NO. WC-94-033443

AMERICAN NURSING CARE; SPECIAL FUND;¹
ZARING P. ROBERTSON, Administrative
Law Judge; and WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * * * *

BEFORE: EMBERTON, HUDDLESTON and SCHRODER, Judges.

HUDDLESTON, JUDGE. Kristi Lee Houghton appeals from an opinion of the Workers' Compensation Board that affirmed an Administrative Law Judge's dismissal of her claim for permanent disability benefits.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court of Kentucky thoroughly explained our standard of review in matters such as this:

¹ While the Special Fund is named as a party to this appeal, we have been informed that Houghton has sought no relief from the Special Fund and that the Special Fund was dismissed as a party to the underlying action.

The function of further review of the [Workers' Compensation Board] in the Court of Appeals is to correct the Board only where the . . . Court perceives the Board has overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice.

Perceiving no error, we adopt the opinion of the Board:

J. PATRICK ABELL, CHAIRMAN. Petitioner, Kristi Lee Houghton ("Houghton"), appeals from an opinion and order of the Hon. Zaring P. Robertson, Administrative Law Judge ("ALJ"), entered on November 6, 1995 awarding her temporary total disability benefits in the amount of \$3,385.66 and reimbursement for medical expenses incurred for chiropractic treatment rendered in June and July of 1995 but otherwise dismissing her claim for permanent disability benefits after determining that she had failed to prove that she suffered any permanent occupational disability as a result of her work-related motor vehicle accident of July 1994 while in the employment of respondent, American Nursing Care ("American Nursing").

Houghton began working as a home health aide for American Nursing in October of 1989 and worked there until her work-related motor vehicle accident of July 25, 1994. At the time of the proceedings below, she was 26 years of age and had a high school diploma. She described the accident as having occurred as she was approaching Harrodsburg Road in Lexington, Kentucky. She testified that a kid ran a stop sign and that she hit him

head on, going about 20 to 30 miles an hour. Her first symptoms from the injury started about five hours after the accident and consisted of pain in the side of the neck and shoulders. She sought medical treatment at an Urgent Treatment Center which provided her with muscle relaxants and anti-inflammatory medicine.

The medical evidence submitted in this claim consists of a medical report and deposition from Dr. James Templin. Dr. Templin began treating Houghton in early 1995 and continued treating her through August 14, 1995. His clinical findings reveal normal range of motion and no evidence of neurological deficiency. He testified that from a clinical standpoint he could find no nerve root involvement in either the cervical spine or the lumbar spine. He reviewed cervical MRIs obtained in November 1994 and concluded that the MRIs were normal. He assigned an impairment rating of 3 percent to the body as a whole but stated that impairment rating was based solely upon Houghton's subjective complaints of pain. He conceded that based upon objective findings on clinical examination and diagnostic study, he would not place any restrictions on Houghton if she had told him she wanted to carry out normal activities. Based upon her subjective complaints of pain, however, he would restrict her as follows: avoiding lifting more than 20 pounds; avoiding repetitive lifting of more than five pounds; no

pushing, pulling, lifting, or twisting, or any activities above the shoulder level; and avoiding the use of vibratory tools.

Testimony was also presented by Laura K. Stewart, a vocational specialist and work-hardening case manager at Cardinal Hill Hospital. Stewart's evaluation took place in late January and early February 1995. Her evaluation consisted of reviewing medical records, taking a history from Houghton, and administering various vocational tests. Stewart concluded that Houghton could not return to her previous employment at American Nursing but had the intelligence and education to pursue other vocational opportunities.

The ALJ, taking into consideration the medical evidence from Dr. Templin and Houghton's age, education, and work experience, concluded that she had failed to prove she was suffering any permanent occupational disability.

On appeal, Houghton contends the ALJ erred in disregarding uncontradicted evidence that she was disabled. She refers us to Bullock v. Gay, Ky., 177 S.W.2d 883 (1944), as standing for that proposition. Houghton had the burden of proof in establishing that her injury was disabling. Jude v. Cubbage, Ky.App., 251 S.W.2d 584 (1952), and Snawder v. Stice, Ky.App., 576 S.W.2d 276 (1979). Since she had the burden of proof on

this issue, the question on appeal is whether the evidence was so overwhelming as to compel a finding in her favor. Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418 (1985). Compelling evidence is evidence so persuasive that it is clearly unreasonable for the ALJ not to be convinced by it. Hudson v. Owens, Ky., 439 S.W.2d 565 (1969), and REO Mechanical v. Barnes, Ky.App., 691 S.W.2d 224 (1985). Houghton must show the record contains evidence which compels a finding in her favor, not just some evidence which would support a reversal of the ALJ's opinion. McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46 (1974). If there is no evidence to compel a finding in her favor, then the ALJ's determination may not be reversed. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986). This Board may not substitute its judgment for that of the ALJ. [Ky. Rev. Stat. (KRS)] 342.285(1).

Although Houghton characterizes the medical evidence as uncontradicted, a review of the record indicates otherwise. As the trier of fact, the ALJ may reject or accept any testimony before him and believe or disbelieve various parts of the evidence, including evidence from the same witness. Pruitt v. Bugg Borthers, Ky., 547 S.W.2d 123 (1977), and Codell Constr. Co. v. Dixon, Ky., 478 S.W.2d 703 (1972).

Dr. Templin, although at one point assigning an impairment rating to Houghton's condition and imposing restrictions on her activities, acknowledged he did that solely based upon her subjective complaints. Clinically, he could find nothing abnormal. Furthermore, the determination of occupational disability is a function of the ALJ, and the assignment of impairment ratings do not automatically mandate a finding of occupational disability. Cook v. Paducah Recapping Service, Ky., 694 S.W.2d 684 (1985).

Accordingly, the decision of the ALJ is hereby **AFFIRMED** and this appeal **DISMISSED**.

ALL CONCUR.

The opinion of the Workers' Compensation Board is accordingly affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

David R. Marshall
Lexington, Kentucky

BRIEF FOR APPELLEE,
AMERICAN NURSING CARE:

Ronald J. Pohl
FERRERI & FOGLE
Lexington, Kentucky

BRIEF FOR APPELLEE,
SPECIAL FUND:

Angeline B. Golden
Louisville, Kentucky