

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002390-WC

FRONTIER NURSING SERVICES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-67068

GERALDINE SIZEMORE; HON. JAMES
KERR, ADMINISTRATIVE LAW JUDGE;
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * ** * ** *

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

WINE, JUDGE: Frontier Nursing Services (Frontier) petitions for review of an October 23, 2006 opinion by the Workers' Compensation Board (Board), which affirmed an administrative law judge's (ALJ) opinion and award to Geraldine Sizemore. Frontier argues that the ALJ's findings regarding the extent and causation of Sizemore's

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judges by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

impairment were clearly erroneous. But while the evidence would support a contrary conclusion, we agree with the Board that the ALJ's decision was supported by substantial evidence. Hence, we affirm.

Sizemore began working for Frontier as a licensed practical nurse in 1991. She reported a prior history of generalized low back and neck complaints beginning around 1986. She received periodic chiropractic adjustments over the years to address back and neck pain, as well as headaches. She denied any radicular symptoms associated with the back pain prior to 2001.

Sizemore was involved in a non-work-related automobile accident on July 23, 2001, when her car rolled over an embankment and landed in water. She struck her head in the accident and reported neck and low back pain with tingling in her right arm afterward. She received treatment for her injuries immediately after the accident. However, Sizemore missed no time at work because of this accident, nor were any work restrictions placed on her. Sizemore testified that she was taking Darvocet as needed to alleviate the generalized aches and pains in her neck and back, but she states that she experienced no residual neck or back pain as a result of the accident. Furthermore, there is no indication in the medical record of further complaints or treatment for the effects of the 2001 accident.

On November 9, 2003, Sizemore was working with a nurse's assistant to reposition a patient in his bed, utilizing a draw sheet. As she lifted the patient and began to shift him in the bed, Sizemore felt a pop in her back and pain radiating down her left

hip and leg, to the level of her calf. Sizemore described this pain as different from any kind of back pain she had suffered in the past. Specifically, she described the pain as burning and increasing in intensity as she attempted to work through the remainder of her shift.

Sizemore visited the emergency room of Mary Breckenridge Hospital, the facility where she was working on behalf of Frontier. An x-ray of her lumbar spine showed only the levoscoliosis and spondylosis previously known to her. Sizemore was diagnosed with a lumbar strain and prescribed Robaxin and Percocet. She was discharged, to follow up with her family physician.

Sizemore followed up a few days later with Dr. Anita Cornett. At that time, Sizemore reported that her symptoms were worse, and described weakness in addition to radiating pain in the left leg. The MRI, which was performed December 11, 2003, showed a “small left lateral disc protrusion at L3-L4 which minimally narrows the neural foramen on the left side.” The radiologist remarked that there was no right-sided component to this finding.

Sizemore continued treatment with Dr. Cornett, who diagnosed Sizemore with “L3-4 disc protrusion with radiculopathy.” Sizemore also continued chiropractic treatment, and began undergoing physical therapy. Dr. Cornett released Sizemore back to work on February 2, 2004, with restrictions to work only an eight-hour shift. Sizemore acknowledged that her condition had significantly improved at that time and she was no

longer feeling any pain in her extremities. But she also stated that she was not fully recovered from the lifting incident.

Nevertheless, Sizemore returned to work on February 2, 2004, and she worked eight hours without any problem. But on the way home from work that day, she was involved in another non-work-related motor vehicle accident. It was a substantial collision, resulting in injuries to her neck, back, arms and shoulders, ribs, and head. While surgery has provided some relief, Sizemore has not returned to work and does not expect to be able to do so. She is currently receiving social security disability benefits.

After the lifting incident, Sizemore filed a claim seeking workers' compensation benefits. In addition to her medical records, the parties filed medical reports from their respective independent medical examiners, Dr. James Templin and Dr. Bart Goldman. After examining Sizemore and reviewing her medical records, Dr. Templin assessed Sizemore at the upper end of DRE Category II range, for an 8% permanent impairment to the body as a whole. He also attributed all of this impairment to Sizemore's work-related injury of November 9, 2003. Dr. Goldman agreed with Dr. Templin that Sizemore qualifies for a DRE Category II impairment rating. But he offered a 5% rating, the lower end of the Category II range. Dr. Goldman also disagreed with Dr. Templin as to the cause of Sizemore's lumbar impairment. He specifically noted that Sizemore's pain and radicular symptoms had resolved by the time she returned to work on February 2, 2004. Thus, Dr. Goldman concluded that all of Sizemore's impairment is attributable to the February 2, 2004 accident, and he assessed a 0%

permanent impairment rating relative to the work-related lifting incident at issue in this claim.

While acknowledging the conflicting opinions of Drs. Goldman and Templin with respect to the extent and cause of Sizemore's permanent impairment of the lumbar spine, the ALJ found Dr. Templin's assessment to be more credible on these issues. The ALJ noted from Sizemore's testimony that her symptoms had nearly resolved when she returned to work on February 2, 2004, but pointed out that she was still not entirely symptomless at that time. The ALJ also noted that there was an extensive objective medical record showing the progress of Sizemore's recovery from the date of the lifting incident up to the second automobile accident. Based upon Dr. Templin's assessment and Sizemore's medical history, the ALJ determined that Sizemore retains an 8% impairment as a result of the work-related injury. On appeal, the Board affirmed, and Frontier now petitions for review of the Board's decision.

As it argued before the Board, Frontier again contends that the ALJ clearly erred in finding that any of Sizemore's impairment was attributable to her work-related injury. In the alternative, Frontier asserts that only the 5% impairment rating assigned by Dr. Goldman can be attributed to Sizemore's work-related injury. But while the evidence would support either determination, we cannot say that the ALJ clearly erred by accepting Dr. Templin's contrary conclusion.

The Board correctly set out the standard of review as follows:

It is well-established that a claimant in a workers' compensation claim bears the burden of proving each of the

essential elements of his cause of action. *Burton v. Foster Wheeler Corp.*, 72 S.W.3d 925 (Ky. 2002). Since Sizemore was successful in persuading the ALJ that she sustained an 8% permanent impairment as a result of her work-related injury, the question on appeal is whether there was substantial evidence of probative value to support the ALJ's conclusion. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky.App. 1984). Substantial evidence is defined as evidence of relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B. F. Goodrich Chemical Co.*, 474 S.W.2d 367 (Ky. 1971). As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, [695 S.W.2d 418 (Ky. 1985)].

Similarly, the ALJ has the sole authority to judge the weight to be accorded to and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997); *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky.App. 1995).

Of particular significance to the instant appeal, it will be noted that the fact-finder may reject any testimony and believe or disbelieve various parts of the evidence, even if it comes from the same witness or the same adversary party's total proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000); *Whittaker v. Rowland*, 998 S.W.2d 479 (Ky. 1999); *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky.App. 2000). Thus, evidence contrary to the ALJ's decision is not sufficient, in and of itself, to require reversal on appeal. *Transportation Cabinet v. Poe*, 69 S.W.3d 60, 62 (Ky. 2002). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986).

In this case, the ALJ's conclusion was clearly supported by the assessment offered by Dr. Templin. Frontier maintains that the ALJ erred by relying on Dr. Templin's assessment because Sizemore's back pain and radicular symptoms were

resolved by the time she returned to work on February 2, 2004. Frontier also notes that the DRE Category II ratings assessed by both Dr. Templin and Dr. Goldman are based on Sizemore's non-verifiable radicular complaints and asymmetrical range of motion loss. Frontier contends that these objective findings are inconsistent with the ALJ's conclusion that Sizemore retained any permanent impairment as of February 2, 2004. Consequently, Frontier argues the evidence compels a finding that Sizemore's current impairment is related only to her second automobile accident.

But as the Board correctly observed, Sizemore testified that her symptoms had not entirely resolved by the time she returned to work on February 2, 2004. This is consistent with the discharge notes completed by her physical therapist, and with the history she provided to Drs. Templin and Goldman. Furthermore, the radicular symptoms in Sizemore's lower extremities did not return until some time after the automobile accident on February 2, 2004. Thus, as the Board concluded, "there is no more reason to relate those symptoms to the non work-related [automobile accident] than to the work-related lifting incident. Indeed, it seems more logical to relate those symptoms to the lifting incident after which they immediately arose, than to a subsequent [automobile accident] after which they were not mentioned whatsoever."

The function of our review is to correct the Board only when "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." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). It was clearly within the ALJ's

discretion to assess Sizemore's credibility and the relative probative value of the opinions of Drs. Goldman and Templin. While Frontier has pointed to conflicting evidence and reasonable alternative theories of the case, we agree with the Board that the evidence does not compel reversal.

Accordingly, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

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