

Commonwealth of Kentucky
Court of Appeals

NO. 2007-CA-002317-WC

WINTECH, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-70569

CAROLYN KING; HON.
CHRIS DAVIS, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** *

BEFORE: KELLER, TAYLOR, AND VANMETER, JUDGES.

KELLER, JUDGE: Carolyn King (King) suffered an injury to her right upper extremity on October 30, 2004. The Administrative Law Judge (ALJ) awarded King temporary total disability, permanent partial disability, and medical expense benefits related to that injury. Although King is no longer working, the ALJ found

that she retained the physical capacity to return to the type of work she performed at the time of her injury. Therefore, he did not award King enhanced benefits under Kentucky Revised Statutes (KRS) 342.730(1)(c)1 (the three times multiplier). King appealed to the Workers' Compensation Board (Board) arguing that she is entitled to the three times multiplier. The Board, after reviewing the evidence, vacated that part of the ALJ's opinion and award denying King the three times multiplier and remanded King's claim to the ALJ for additional findings. Wintech, Inc. (Wintech) petitions for a review of the Board's opinion arguing that the Board "erroneously substituted its judgment for that of the" ALJ. For the reasons set forth below, we affirm.

FACTS

Because the issue raised by Wintech on appeal is fact intensive, we will summarize, in detail, the evidence which is pertinent to the issue raised by Wintech.

As noted above, King suffered an injury to her right upper extremity on October 30, 2004. King testified that she operated a machine that printed information on turn signal devices and other similar automobile parts. To perform her job, King carried twenty-five pound "totes" of unfinished parts from where they were stored to her machine, a distance of approximately ten feet. She then removed a part from the tote; placed it on the machine, which was at or above chest level; held the part in place while the machine stamped it; removed the part; and then placed the finished part into a tote. When that tote was full of finished

parts, King carried it to an inspection station. King noted that, when the machine was set on manual, she did not have to do anything to operate it. However, when the machine was not set on manual, she had to push a button to do so. King testified that she could not perform the job one-handed and that she processed approximately 4,000 parts per day.

Following her injury, King underwent two right shoulder surgeries. She returned to work at Wintech as an inspector for nine months between the surgeries. However, King has not worked at Wintech since the second surgery. We note that King was offered the opportunity to return to work at Wintech; however, because of the repetitive nature of the work, King did not believe that there were any jobs at Wintech that she could perform without risk of additional injury to her shoulder.

Wintech and King filed medical records from Dr. Adam Smith, who first treated King on September 7, 2005. When King did not improve following conservative care, Dr. Smith performed arthroscopic surgery, repairing a partially torn rotator cuff. Following surgery, King's condition improved somewhat, and Dr. Smith released her to return to work with no use of the right arm on June 1, 2006. On July 13, 2006, Dr. Smith stated that King had reached maximum medical improvement. He recommended a functional capacity evaluation and an independent medical evaluation to determine King's impairment rating.

King filed the October 26, 2006, Form 107 of T. Scott Prince, M.D. Dr. Prince noted that King's job required her to push and pull a jig to load various

parts. Dr. Prince also noted that, after her injury, King underwent conservative care and, when she noted no significant improvement, she underwent arthroscopic surgeries in April 2005 and January 2006. Following the last surgery, King continued to experience constant upper arm pain with radiation into her shoulder, the base of her neck, and her elbow. She also complained of occasional tingling in her right hand, upper extremity swelling, weakness throughout her right upper extremity, and “significantly sharper pain with any sort of pushing or pulling motion.”

Dr. Prince’s examination revealed loss of right shoulder range of motion, tenderness in the shoulder, decreased right shoulder strength, slight swelling in the right upper extremity, decreased elbow and grip strength, reduced sensation in the right fourth and fifth fingers, and decreased reflexes at the biceps, triceps, and brachioradialis. Following his examination and review of the medical records, Dr. Prince made diagnoses of status post right shoulder surgeries with intermittent paresthesias of the right hand. He assigned King an 8% impairment rating and stated that she should avoid “forceful, repetitive or constant use of the right upper extremity” with “use of her right hand for brief periods of holding light objects only.” Additionally, Dr. Prince advised King to avoid use of vibratory tools, work at or above shoulder level with the right arm, and lifting with the right arm of more than six pounds maximum, two pounds infrequently.

Wintech filed the November 1, 2004, accident investigation form. For a “[d]escription of what took place to cause the incident/accident” the person

completing the form noted that King was “running machine and placing part onto jig. After placing part on jig associate would press part downward very hard.”

The form indicates that King was advised that she did not need to push downward on the part; however, it also indicates that the jig had recently been replaced.

Wintech filed the report of Rick Pounds, M.S., RCEP, FABDA (Pounds), who performed a functional capacity evaluation on January 10, 2007. Following his evaluation, Pounds stated that King met all lifting requirements to perform light duty work. As to work with her right upper extremity, Pounds noted that King could only perform repetitive tasks with her right hand at 72% of MTM,¹ could perform repetitive tasks with her right fingers at 57% of MTM, and had right grip strength of 17 pounds, compared to 74 pounds on the left.

Wintech filed the report of Luca Conte, Ph.D. King complained to Dr. Conte of right shoulder pain, aggravated by physical activities. She reported that she could lift a half-gallon of milk with her right arm but that she performed all other lifting with her left arm. After reviewing the restrictions imposed by Dr. Prince and the functional capacity evaluation results, Dr. Conte concluded that King could return “to her prior jobs of Assistant Manager of a retail establishment, and Crossing/Security Guard.” He also stated that she could perform a wide range of jobs within the cashier, personal service, office clerical/administrative support, and motor vehicle operator categories. Dr. Conte did not list any jobs within the factory or production categories as being within King’s capabilities. Furthermore,

¹ Methods-Time Measurement – a system of time and motion study that analyzes the basic motions necessary to accomplish a particular task and then assigns each motion a time standard.

when addressing King's ability to return to her past jobs, Dr. Conte did not mention King's job at Wintech.

Wintech filed the January 19, 2007, report of Dr. Thomas Cervoni. King complained to Dr. Cervoni of right shoulder pain, stiffness, and weakness, with occasional right arm and hand numbness, and occasional neck and trapezial pain. She stated that her ability to lift and reach was limited by her condition. Dr. Cervoni's examination revealed decreased right shoulder range of motion, decreased right upper extremity strength, decreased right grip strength, and decreased sensation in the right long, ring, and small fingers. Following his examination and review of King's medical records, Dr. Cervoni made diagnoses of right shoulder impingement syndrome, status post two surgeries, possible cervical disc disease/radiculopathy, and possible right cubital tunnel syndrome. Dr. Cervoni assigned King a 6% impairment rating and stated that "[i]t would be reasonable for her work restrictions to follow her capabilities as demonstrated at her functional capacity evaluation of 1/10/07." However, she "would not have the ability to perform sustained or repetitive overhead right arm/shoulder activities on any consistent basis." Because he did not have a detailed job description, Dr. Cervoni could not

assess if she retains the physical capacity to return to her former employment at Wintech. It would depend on whether the job tasks and responsibilities would comply with the restrictions from her FCE and as outlined above. It would depend also on which station she was assigned, and whether the process was automatic with pushing

buttons, or if it would have to be manually operated, or the overhead requirements

1. The ALJ Opinion

Based on the above, the ALJ concluded that King could return to the job she performed at Wintech. In doing so, he found Dr. Prince's limitation of lifting two pounds infrequently lacked credibility, especially in light of the FCE results. The ALJ found Dr. Cervoni's restrictions, "as derived from the FCE," to be more credible. We note that, when summarizing the FCE report, the ALJ simply noted that King "performed at maximum sustained levels for pushing and pulling at the waist and shoulder levels. She could lift 20 pounds overhead." The ALJ did not note King's limitations with regard to performing repetitive tasks or her decreased grip strength. Therefore, it appears that the ALJ focused solely on the strength requirements of King's job, not the repetitive nature of the work performed.

2. The Board Opinion

The Board reviewed the evidence and vacated that portion of the ALJ's opinion denying King the three times multiplier and remanded the claim to the ALJ for additional findings. In its summary of the evidence, the Board noted Dr. Cervoni's statement that King "would not have the ability to perform sustained or repetitive overhead right arm/shoulder activities on any consistent basis." The Board also noted Dr. Cervoni's statement that, whether King could return to her past work, "would depend . . . on which station she was assigned, and whether the

process was automatic with pushing buttons, or if it would have to be manually operated, or the overhead requirements” Finally, the Board noted that, although Dr. Conte listed a number of jobs King could perform within her restrictions, he did not list her job for Wintech.

The Board stated that whether King had the “functional ability to process 450 component parts per hour, eight hours per day [was] central to any final determination concerning her capacity to return to the type of work she was performing at the time of her injury.” Based on its review, the Board found that:

it appears doubtful there is any evidence sufficient to support a finding that King presently retains the physical capacity to perform her past job activities with Wintech as parts printer on such an unrelenting repetitive basis. The FCE relied on so heavily by the ALJ documents that King has maximum sustained grip strength in her right hand of only seventeen pounds. In addition, the FCE measured King’s ability to perform repetitive work tasks using her right hand and upper extremity at 72% of normal MTM. Moreover, King scored only 57% of normal MTM in relation to her ability to perform repetitive work tasks using the fingers of her right hand. Both Dr. Prince and Dr. Cervoni would restrict King from performing sustained or repetitive activities using her right hand and arm. Even Dr. Conte does not entertain the possibility of King returning to her pre-injury repetitive work duties at Wintech. [Footnote from original omitted.]

Based on the above, the Board found that the ALJ did not fully address the issue, *i.e.*, whether King retained the capacity to perform the repetitive tasks that were the vital part of her pre-injury job. The Board remanded the matter to the ALJ with directions to specifically address this issue. Wintech took

exception to the Board's statement that "it appears doubtful" that there is any evidence that would support the ALJ's opinion.

STANDARD OF REVIEW

When reviewing one of the Board's decisions, this Court will only reverse the Board when it has overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice.

Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). In order to review the Board's decision, we must review the ALJ's decision because the ALJ as fact finder has the sole authority to judge the weight, credibility, substance and inferences to be drawn from the evidence. *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985). In reaching his decision, the ALJ is free to choose to believe or disbelieve parts of the evidence from the total proof, no matter which party offered it. *Brockway v. Rockwell International*, 907 S.W.2d 166, 169 (Ky. App. 1995).

ANALYSIS

Taking the above standard into consideration, we agree with the following portion of the Board's analysis and adopt it as our own.

In the case *sub judice*, King's testimony regarding the intensive repetitive nature of her work as a printing jig machine operator for Wintech is unrefuted. Whether after two surgeries there is medical evidence of record to support a finding that King retains the functional ability to process 4,000 parts per shift using her right hand and upper extremity is paramount to any ruling concerning the 3-multiplier.

KRS 342.730(1)(c)1 provides:

If, due to an injury, an employee does not retain the physical capacity to return *to the type of work that the employee performed at the time of injury*, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection, but this provision shall not be construed so as to extend the duration of payments. [Emphasis in Board opinion.]

With reference to the meaning of the phrase [sic] “type of work” as used in KRS 342.730(1)(c)1, the Kentucky Supreme Court in Ford Motor Co. v. Foreman, 142 S.W.3d 141 (Ky. 2004) has instructed:

When used in the context of an award that is based upon an objectively determined functional impairment, ‘*the type of work that the employee performed at the time of injury*’ was most likely intended by the legislature to refer to the actual jobs that the individual performed. [Emphasis in Board opinion.]

Id. at 144.

Hence, the issue that should have been addressed by the ALJ below included not only whether King retains the residual functional capacity to lift twenty-five pound tote bags [sic] filled with component parts, or for that matter the individual component parts themselves – the weight of which is obviously negligible, but also whether King retains the ability to use her right hand and arm to load 7.5 parts per minute onto a jig and then apply sufficient pressure to hold each part in place long enough to be double stamped – on [a] regular and sustained basis eight hours per day, five days per week, fifty-two weeks per year.

We do not necessarily agree with the Board that “it appears doubtful there is any evidence sufficient to support a finding that King presently retains the physical capacity to perform her past job activities with Wintech.” However, we do agree with the Board that the ALJ missed the mark when he failed to address King’s ability to perform the repetitive activities required of her.

Furthermore, we note that Dr. Prince stated that King could not return to her pre-injury job activities. Dr. Cervoni, the only other physician to address the issue, stated that he could not make any determination regarding King’s ability to return to her pre-injury job. Thus, Dr. Prince’s medical opinion is un rebutted. The ALJ is free to reject un rebutted medical evidence; however, he must provide a sufficient reason for doing so. *Collins v. Castleton Farms, Inc.*, 560 S.W.2d 830, 831 (Ky. App. 1977). This, the ALJ failed to do. Therefore, we affirm the Board and remand this matter to the ALJ for further proceedings consistent with this Opinion.

CONCLUSION

Because we agree with the Board that the ALJ did not sufficiently address King’s ability to perform the repetitive tasks required by her pre-injury job with Wintech, we affirm and remand this matter to the ALJ for additional proceedings consistent with this Opinion.

TAYLOR, JUDGE, CONCURS.

VANMETER, JUDGE, DISSENTS.

VANMETER, JUDGE, DISSENTING: I respectfully dissent. Since King bore the burden of proving that she lacked the physical capacity to return to the same type of work she performed pre-injury, the question to the Board on appeal from the ALJ's finding that she instead retained such capacity was "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [her] favor." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). The Court of Appeals is to correct the Board only when it "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 Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

An ALJ should consider both lay and medical evidence to determine whether a claimant retains the physical capacity to return to the type of work she performed on the date of her injury. *See Ford Motor Co. v. Forman*, 142 S.W.3d 141, 145 (Ky. 2004). Here, one doctor expressly opined that King did not retain the physical capacity to return to the type of work she was performing at the time of her injury. A second doctor did not express an opinion on whether King could return to her former job because he did not have a detailed job description. A third doctor listed several occupations King could physically perform, but did not specifically address whether she retained the physical capacity to return to her pre-injury work. Finally, Rick Pounds, a registered clinical exercise physiologist, opined that King could perform work at sedentary and light physical demand levels. In sum, only one doctor expressly opined that King could not return to her

work at Wintech. And, of course, the ALJ was not required to accept that doctor's testimony. *See Miller v. East Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997) (ALJ has the sole authority to judge the weight, credibility, and inferences to be drawn from the record).

With regard to the lay evidence, King testified in great detail before the ALJ regarding the manner in which she performed her job at Wintech. She explained the physical requirements of the position, including the number of parts she was required to complete in each shift, and testified that she did not believe she could return to the job.² Considering the lay and medical evidence together, the ALJ acted within his purview by concluding that King could perform the duties required by her old position within the limitations set by the medical professionals' restrictions. As such, the evidence does not compel a finding in King's favor on this issue, and the Board erred by vacating the ALJ's decision.³

This conclusion is further supported by the letter Wintech sent to King after her second surgery, offering her the opportunity to "return to [her] duties." The letter indicated that Wintech had reviewed the King's functional capacity evaluation and determined that her abilities fit "well within the normal production environment" of Wintech.

² This testimony is also found in King's deposition, which is part of the record.

³ That the Board remanded for the ALJ to consider whether King could perform the repetitive task at the required rate was erroneous as the ALJ's conclusion necessarily included a resolution of this issue.

I would reverse the Board's opinion and remand this matter for reinstatement of the ALJ's opinion.

BRIEF FOR APPELLANT:

Gregory L. Little
Lexington, Kentucky

BRIEF FOR APPELLEE:

Bradly Slutskin
Versailles, Kentucky