

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002093-WC

AMERICAN NURSING CARE, INC.

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-06-88542

MARY ANN JENKINS;
HONORABLE DOUGLAS W. GOTT,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON AND NICKELL, JUDGES; KNOPF,¹ SENIOR JUDGE.

DIXON, JUDGE: American Nursing Care, Inc. (ANC) seeks review of a decision of the Workers' Compensation Board. The Board affirmed an administrative law

¹ Senior Judge William L. Knopf sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

judge's order sustaining a medical fee dispute in favor of ANC's former employee, Mary Ann Jenkins. Finding no error, we affirm.

Jenkins was employed by ANC as a home health nurse.² In the course of her employment, Jenkins injured her left shoulder, back, and neck on February 5, 2005.³ Thereafter, Jenkins was referred to Dr. Richard Hoblitzell, an orthopedic surgeon. Dr. Hoblitzell diagnosed chronic cervicothoracic strain, bilateral shoulder strain and left elbow strain. Jenkins sought workers' compensation benefits, and a partial settlement agreement resolving her left shoulder claim was approved on June 21, 2007.

During the pendency of her workers' compensation claims, Jenkins continued to follow-up with Dr. Hoblitzell for conservative treatment of her shoulder pain. In August 2008, Dr. Hoblitzell reviewed MRI scans of Jenkins's shoulder showing rotator cuff tendinitis and acromioclavicular arthritis. Dr. Hoblitzell noted that, based on Jenkins's history, "this all stems back to her original work injury in February 2005." Dr. Hoblitzell referred Jenkins to his medical partner, Dr. Forest Heis, for a second opinion regarding surgical intervention. Dr. Heis examined Jenkins on August 14, 2008, and he concluded that she would benefit from left shoulder arthroscopic evaluation with subacromial decompression. Based on Dr. Heis's recommendation, Jenkins requested that

² ANC terminated Jenkins's employment in July 2006.

³ Jenkins also suffered a prior knee injury on January 13, 2005; however, that injury is unrelated to the case before us.

ANC pre-authorize the procedure. ANC denied pre-authorization and filed a motion to reopen/medical fee dispute. ANC's motion to reopen was granted, and the dispute was referred to an ALJ for adjudication.

ANC submitted the utilization review report of Dr. Daniel Wolens, who reviewed Jenkins's medical records from Drs. Heis and Hoblitzell. Dr. Wolens found that Jenkins had developed new symptoms inconsistent with the 2005 work injury, and he concluded the recommended arthroscopy was not causally related to the work injury.

Jenkins, who represented herself at the hearing, testified regarding her on-going complaints of shoulder pain and her hope that surgery would resolve her symptoms. Jenkins submitted the medical records of Drs. Heis and Hoblitzell to support her position.

In an opinion and order of May 6, 2009, the ALJ resolved the dispute in favor of Jenkins. The ALJ found the medical opinions of Drs. Heis and Hoblitzell to be the most credible. The ALJ concluded:

The ALJ finds that opinion of Dr. Wolens to overlook Jenkins continued treatment with Dr. Hoblitzell for her complaints over the years. On June 15, 2007, Dr. Hoblitzell said that Jenkins' work injury had produced a chronic strain 'exacerbating some underlying degenerative changes.' This was just a few months before the November 12, 2007 MRI that revealed the condition that Dr. Heis eventually said required surgery. Based on the records of Drs. Hoblitzell and Heis, the ALJ finds that Jenkins' work injury caused a chronic stain and aroused degenerative changes to the point that she now requires the arthroscopic procedure recommended by Dr. Heis.

After an unsuccessful petition for reconsideration, ANC appealed the ALJ's order to the Board. ANC argued that Jenkins had failed to prove the surgery was related to her work injury and that the ALJ ignored the uncontroverted expert opinion of Dr. Wolens regarding causation. On October 8, 2009, the Board rendered an opinion affirming the ALJ's decision. This petition for review followed.

Upon reopening, ANC had the burden of proving the recommended treatment was unreasonable, *Mitee Enterprises v. Yates*, 865 S.W.2d 654, 655 (Ky. 1993), while Jenkins bore the burden of proving a causal connection between her work injury and the subsequent need for surgery. *Jones v. Newberg*, 890 S.W.2d 284, 285 (Ky. 1994). Because Jenkins was successful before the ALJ, the question before the Board on appeal was whether substantial evidence supported the ALJ's decision. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). When this Court reviews the Board's decision, our function is to correct the Board only where we believe it "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).

ANC argues here, as it did before the Board, that Jenkins failed to present an expert medical opinion establishing a causal connection between her work injury and the subsequent need for shoulder surgery. ANC opines that Dr.

Wolens's opinion as to causation was not refuted by Drs. Heis and Hoblitzell, and the ALJ erred by disregarding Dr. Wolens's opinion.

It is well settled that the ALJ "has the authority to determine the quality, character and substance of the evidence[.]" *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418, 419 (Ky. 1985), and he is free "to believe part of the evidence and disbelieve other parts of the evidence . . . [.]" *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). In the case at bar, the office notes of Drs. Heis and Hoblitzell indicated that Jenkins's shoulder pain and need for surgery related back to the work injury in 2005. Despite ANC's argument to the contrary, the ALJ did not improperly disregard Dr. Wolens's expert opinion; rather, the ALJ weighed the conflicting medical evidence and found Drs. Heis and Hoblitzell to be the most credible. After careful review, we find no error.

For the reasons stated herein, we affirm the decision of the Workers' Compensation Board.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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