

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000293-WC

ANITA RUDOLPH

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-08-91524

JEFFERSON COUNTY PUBLIC SCHOOLS;
HONORABLE GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: VANMETER, ACTING CHIEF JUDGE; DIXON, JUDGE;
LAMBERT,¹ SENIOR JUDGE.

DIXON, JUDGE: Anita Rudolph seeks review of a decision of the Workers'
Compensation Board, which affirmed an ALJ's opinion awarding Rudolph

¹ Senior Judge Joseph E. Lambert 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.

permanent partial disability benefits. Rudolph contends the Board erred because the evidence compelled a finding that she is totally disabled. After careful review, we affirm.

On January 17, 2008, Rudolph injured her right shoulder when she slipped in the snow during the course of her duties as a bus driver for Jefferson County Public Schools (JCPS). An MRI of her shoulder showed moderate AC joint changes and tendonitis, with an intact rotator cuff. Dr. Navin Kilambi, an orthopedic surgeon, provided conservative treatment, including injective therapy and physical therapy. When Rudolph's pain did not resolve, she underwent shoulder surgery on June 16, 2008.² Rudolph resumed physical therapy and received diagnostic injections for four months following surgery; however, her shoulder pain persisted.

On November 20, 2008, Dr. Kilambi noted that Rudolph was unable to pass her DOT physical, and he determined that permanent lifting restrictions were appropriate. Dr. Kilambi placed Rudolph at maximum medical improvement, noting that "radiographically and clinically we could not get a specific reason why she continued to have the pain . . . [.]". During a February 4, 2009, follow-up visit, Rudolph still complained of shoulder pain. Dr. Kilambi's examination showed AC joint tenderness and near-full range of motion. Thereafter, Dr. Kilambi assessed a 6% impairment rating, and he assigned permanent medical restrictions of: limited

² Rudolph underwent a right shoulder arthroscopic acromioplasty and bursectomy and right shoulder arthroscopic distal clavicle resection.

overhead work, less than one to two pounds non-repetitive lifting, no repetitive twisting or bending of the right shoulder, no repetitive pushing or pulling of the right shoulder in an attempt to keep most of her work below shoulder level.

Rudolph did not return to work following the accident, and she filed for workers' compensation benefits in September 2008.³ A formal hearing was held June 3, 2009, to address the contested issue of extent and duration of disability. JCPS submitted Dr. Kilambi's medical report/impairment assessment, and the ALJ heard testimony from Rudolph.

At the time of the hearing, Rudolph was 48 years old. She testified that she began working as a bus monitor for JCPS in 1997, and began driving a bus in 2001. Prior to 1997, Rudolph, a high school graduate, worked in food service at Norton Hospital and Kentucky Kingdom theme park. Regarding her injury, Rudolph asserted that the surgery failed to improve her radiating shoulder pain. Rudolph stated that she could not return to her job as a bus driver because she could not turn the steering wheel or operate the air brake. Rudolph testified that she went to the emergency room at University Hospital in May 2009, due to shoulder pain, and she received medication and a sling. Rudolph explained that, because she could not use her right arm, she began wearing the sling on a daily basis so her arm stays tucked close to her body. Rudolph stated that she could not return to any type of employment because of her limitations.

³ Rudolph's shoulder claim was consolidated with a pending claim for a 2004 wrist injury, which is not germane to this petition for review.

On cross-examination, Rudolph stated she had contacted a restaurant and a bakery about employment opportunities, but there were no job openings. Rudolph expressed uncertainty when asked if she could perform her former jobs of bus monitor and food service cashier. Rudolph testified that she was still able to drive her personal automobile.

In a July 27, 2009, opinion, the ALJ concluded:

Having reviewed the evidence record, the Administrative Law Judge is not persuaded plaintiff is totally disabled. Considering plaintiff's injury and accompanying restrictions in the context of her age, experience, and education, the Administrative Law Judge finds plaintiff is not precluded from returning to all gainful employment on a regular and sustained basis. For these reasons, it is determined plaintiff is not totally disabled.

Instead, the evidence persuades the Administrative Law Judge plaintiff is entitled to an award of permanent, partial disability based on Dr. Kilambi's 6% impairment rating with application of the three multiplier set forth in KRS 342.730(1)(c)1 because her restrictions prevent her from returning to the kind of work she performed at the time of her injury.

Following an unsuccessful petition for reconsideration, Rudolph appealed the ALJ's decision to the Board. Rudolph argued that the ALJ misinterpreted Dr. Kilambi's medical restrictions because the uncontradicted evidence compelled a finding of total disability. In its opinion affirming, the Board stated:

We begin by noting the ALJ correctly summarized Dr. Kilambi's restrictions in his summary of evidence. In his findings regarding extent and duration, the ALJ referred

to the restrictions noting Rudolph's argument that Dr. Kilambi's restrictions entitled her to permanent total disability benefits. The ALJ indicated that, having reviewed the evidence, he was not persuaded Rudolph was permanently totally disabled. Dr. Kilambi's opinion was the only medical opinion of record. We must presume the ALJ correctly understood that evidence since his summary of the evidence is accurate. The ALJ simply was not persuaded Dr. Kilambi's restrictions, when considered in combination with the effects of her injury, age, education and work experience, rendered Rudolph permanently totally disabled.

In her petition for review, Rudolph raises the same arguments as she did before the Board; she alternatively argues, for the first time, that the ALJ failed to render sufficient findings of fact regarding total disability.

“It has long been the rule that the claimant bears the burden of proof and the risk of nonpersuasion before the fact-finder with regard to every element of a workers' compensation claim.” *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). If the claimant is unsuccessful before the ALJ and appeals to the Board, the question before the Board is “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). When this Court reviews a decision of the Board, our role is to correct the Board only if 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).

Rudolph points out that the ALJ misstated the medical restrictions in his findings of fact. She argues this error indicates the ALJ failed to consider all of the relevant evidence, which resulted in an erroneous finding of partial disability. Accordingly, Rudolph asserts that the evidence, viewed in its entirety, compelled a finding of total disability.

“It is among the functions of the ALJ to translate the lay and medical evidence into a finding of occupational disability.” *McNutt Const./First Gen. Servs. v. Scott*, 40 S.W.3d 854, 860 (Ky. 2001). Determining the extent of occupational disability “requires a weighing of the evidence concerning whether the worker will be able to earn an income by providing services on a regular and sustained basis in a competitive economy.” *Ira A. Watson Dept. Store v. Hamilton*, 34 S.W.3d 48, 51 (Ky. 2000).

Specifically, Rudolph opines that her testimony regarding her physical limitations, in light of her uncontradicted medical restrictions, compelled a finding of total disability. We disagree.

The ALJ was free “to believe part of the evidence and disbelieve other parts of the evidence, regardless of whether it comes from the same witness or the same adversary party's total proof.” *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15, 16 (Ky. 1977). Here, the record reflects that Rudolph’s age, high school education, and work experience as a bus monitor and food service cashier would allow her to perform work that is mostly below shoulder level and within her medical restrictions. As a result, the ALJ concluded that Rudolph was “not

precluded from returning to all gainful employment on a regular and sustained basis.” Despite Rudolph’s argument to the contrary, she simply has not shown that the evidence in her favor was “so overwhelming that no reasonable person would fail to be persuaded by it.” *Magic Coal Co.*, 19 S.W.3d at 96. Accordingly, we find no error in the Board’s determination that the evidence did not compel a finding of total disability.

Although Rudolph did not raise the sufficiency of the ALJ’s findings on appeal to the Board, we will briefly address her contention that the ALJ failed to explain why he rejected her claim of total disability.

An ALJ is obligated “to support [his] conclusions with facts drawn from the evidence in each case so that both sides may be dealt with fairly and be properly apprised of the basis for the decision.” *Shields v. Pittsburgh & Midway Coal Min. Co.*, 634 S.W.2d 440, 444 (Ky. App. 1982). Our review indicates that the ALJ summarized the evidence and succinctly set forth the facts he relied upon to reach his decision regarding the extent of Rudolph’s disability; consequently, we find no error.

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

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward A. Mayer
Louisville, Kentucky

BRIEF FOR APPELLEES:

Timothy P. O'Mara
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