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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000327-WC

MICKEY BOONE — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-07-86319

DAWAHARES; HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; AND
THE WORKERS' COMPENSATION
BOARD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER AND THOMPSON, JUDGES; SHAKE,[1] SENIOR JUDGE.

[1] Senior Judge Ann O'Malley Shake 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.

KELLER, JUDGE: Mickey Boone (Boone) appeals from the opinion of the Workers' Compensation Board (the Board) affirming the Administrative Law Judge's (ALJ) finding that Boone's left knee replacement surgery and her claim to benefits associated with that surgery are not related to her work injury. Before us, Boone argues that the medical evidence irrefutably establishes that her knee injury aroused a pre-existing dormant condition and that all medical treatment flowing from that injury is compensable. Dawahares argues that the ALJ determined that the knee replacement surgery was not related to the work injury; therefore, the ALJ did not need to address whether the injury aroused a pre-existing dormant condition. Furthermore, Dawahares argues that sufficient evidence of substance supports the ALJ's findings and those findings cannot be disturbed on appeal. For the following reasons, we affirm.

FACTS

Boone is 62 years of age, has an eleventh grade education, and has worked in retail and as a self-employed cleaner. She last worked in September 2008. On March 14, 2007, Boone suffered a work-related injury to her left knee.[2]

[2] We note that Dawahare's initially disputed whether Boone suffered an injury to her left knee. In its brief, Dawahare's summarizes the evidence it submitted questioning whether Boone suffered that injury. However, Dawahare's has not appealed the ALJ's finding that Boone suffered a left knee injury. Therefore, we do not address whether a left-knee injury occurred and have not summarized the evidence regarding that issue.

On June 11, 2007, Boone underwent arthroscopic surgery. Following that surgery she returned to work and was "doing fine" until she underwent an independent medical evaluation with Dr. Bilkey in April 2008. After that evaluation, Boone experienced pain and swelling in her knee that she described as being the same as what she experienced prior to the arthroscopic surgery. In June 2008, Boone underwent total knee replacement surgery.

Because the issues on appeal relate to the medical proof, we summarize that proof in detail below.

1. Bardstown Ambulatory Care

The records from Bardstown Ambulatory Care indicate that Boone first sought treatment on March 26, 2007, for complaints of left knee pain. She continued to treat at that facility through May 7, 2007.

2. Dr. Sanjiv Mehta

It appears that Dr. Mehta began treating Boone in early June 2007 and that he performed arthroscopic surgery to repair a torn meniscus on June 11, 2007. Four weeks after that surgery, Boone reported minimal aches and pains and Dr. Mehta noted near normal range of motion. Dr. Mehta recommended use of a brace as needed, cautioned Boone about the possibility of re-injuring her knee, and released her to return to work on July 16, 2007.

On June 9, 2008, Dr. Mehta performed left total knee replacement surgery because of Boone's "severe degenerative osteoarthritis." Following surgery, Boone improved and, by July 18, 2008, she was walking without the

assistance of a walker or cane. On August 12, 2008, Dr. Mehta released Boone to return to work; however, by August 28, 2008, he noted that Boone was experiencing pain and swelling because of her work activity. Therefore, Dr. Mehta advised Boone to seek more sedentary work. On October 9, 2008, Dr. Mehta noted that Boone's implants were stable and that she only had occasional aches and pains. He recommended "weight bearing as tolerated."

3. Dr. Warren Bilkey

Dr. Bilkey performed an independent medical examination of Boone on April 1, 2008. Dr. Bilkey noted Boone's non-work-related back surgeries, her work-related knee injury, her arthroscopic knee surgery, and that she had "completed a course of treatment and [had] been released from care."

Boone stated that she had returned to her pre-injury job despite having some pain with stair climbing, squatting, and kneeling. Dr. Bilkey's examination revealed loss of range of motion, decreased strength, no loss of stability, no effusion, tenderness in the medial compartment of the knee and hamstring tendons, no muscle spasm, and appropriate pain behaviors. Following his examination, Dr. Bilkey made diagnoses of "status post arthroscopic repair of" a lateral meniscus tear and left knee sprain, which he related to the work injury. Dr. Bilkey noted that Boone had reached maximum medical improvement, and he recommended no additional diagnostic testing or treatment. Additionally, Dr. Bilkey noted that Boone was "doing very well" orthopedically and, although she had some ongoing knee symptoms, she was not bothered by them because she was taking "very

strong pain medication" for her lumbar spine condition. Finally, Dr. Bilkey assigned Boone a 5% impairment rating and advised her to avoid squatting, kneeling, and stair climbing.

4. Dr. Philip Corbett

Dr. Corbett performed an independent medical examination of Boone on April 29, 2008. Boone told Dr. Corbett that she did well following her post-surgery physical therapy until she underwent an independent medical examination in mid-April. As noted by Dr. Corbett, Boone stated that, following that examination, she experienced "severe swelling, pain and burning" and that her left knee hurt "as bad as it did before her" surgery. Dr. Corbett noted that Boone had recently undergone an MRI and had an appointment scheduled with Dr. Mehta that afternoon.

Dr. Corbett's examination revealed decreased range of motion, swelling, intact ligaments, an antalgic gait, and left thigh atrophy. Boone's x-rays revealed significant joint space narrowing and a small spur. Following his examination and review of Boone's medical records, Dr. Corbett stated that Boone had undergone a partial medial meniscectomy, a thermal chondroplasty, and a thermal abrasion of the lateral meniscus. Because the onset of Boone's symptoms was not more temporally related to her injury, Dr. Corbett could not state whether her condition represented "a displacement of an old injury or something inline [sic] with the aging process;" however, he stated that Boone did have a "significant mechanical disorder" with her left knee. Finally, Dr. Corbett stated that Boone had

not reached maximum medical improvement and needed further evaluation. We note that Dr. Corbett stated

> that there is evidence here of a longstanding problem, i.e. degenerative joint disease, as well as the degeneration of the medial and lateral meniscus, which on the basis of my experience and the description in the operative progress notes, is unlikely to have been caused in the manner described.

In his October 2 and November 14, 2008, reports, Dr. Corbett noted that he had not been able to examine Boone after her knee replacement surgery; however, he had reviewed additional medical records. Based on his review of those records, in particular the operative note and Boone's MRI report, Dr. Corbett concluded that Boone had required knee replacement surgery because of her pre-existing degenerative joint disease not because of her work injury or arthroscopic surgery. According to Dr. Corbett, Boone's degenerative joint disease pre-existed the work injury by five to ten years or more and "probably would have qualified for a permanent impairment for osteoarthritis on the day prior to" her work injury.

On December 5, 2008, Dr. Corbett performed a second independent medical evaluation. Boone complained to Dr. Corbett of continued pain and swelling and stated that she did not think she could work in a job that required her to stand all day on concrete.

Dr. Corbett's examination revealed increased left calf size, no evidence of antalgia, normal patellar tracking, and a sense of warmth but no evidence of edema. Following his examination, Dr. Corbett made a diagnosis of

"[s]tatus post left total knee arthroplasty with satisfactory position of the implants, persistent edema of the left lower extremity" and "acceptable" alignment and stability.

5. Dr. Mark Henderson

Dr. Henderson performed an evaluation of Boone on January 5, 2009. Boone complained to Dr. Henderson of "significant difficulty" walking up and down stairs, a "lot of pain at night," and "intermittent swelling."

Dr. Henderson's examination revealed decreased range of motion, normal strength and alignment, and no instability. Following his examination, Dr. Henderson assigned Boone a 20% impairment rating and stated that "it is more likely than not that the work related injury of record brought a pre-existing, nonsymptomatic condition into disabling reality."

6. The ALJ's Opinion

Based on the preceding, the ALJ found that Boone suffered a "mild twisting injury to her left knee, supermiposed on pre-existing degenerative changes . . . which resulted in her having to have the knee arthroscopy . . . ." However, the ALJ stated that Boone's total knee replacement surgery was not the result of the injury, "but was due to longstanding degenerative changes." The ALJ then awarded Boone a period of temporary total disability (TTD) benefits and a period of permanent partial disability benefits beginning on the date her TTD award stopped and ending on the date she underwent the total knee replacement surgery. In doing so, the ALJ found that Boone's impairment rating related to the

injury and subsequent arthroscopic surgery "was absorbed into the total knee replacement impairment."

7. The Board's Opinion

Following the ALJ's denial of Boone's petition for reconsideration, Boone appealed to the Board. The Board affirmed the ALJ's finding that Boone had a work-related knee injury and her finding that Boone's total knee replacement surgery was not related to the injury. However, the Board reversed the ALJ's finding that Boone is not entitled to PPD benefits beyond the date of her total knee replacement surgery. With regard to Boone's total knee replacement surgery, the Board found as follows:

> [W]e believe the sole issue is whether the opinions of Dr. Corbett constitute substantial evidence to support the ALJ's opinion. If Dr. Corbett's opinion constitutes substantial evidence then the record does not compel the result Boone now seeks. Further, the medical opinion expressed by Dr. Henderson would not be unrebutted.
>
> In that context we point out that Dr. Corbett, in the third paragraph of his October 2, 2008, letter, stated the total knee replacement surgery was required because of the pain from Boone's chronic longstanding preexisting degenerative disease, not the work injury. Certainly there was no question Boone had preexisting degenerative changes. The only issue in dispute is whether those degenerative changes were dormant and non-disabling prior to the March 14, 2007, injury. In that same letter, Dr. Corbett went on to state that his diagnosis of degenerative arthritis of the left knee did not relate to the alleged work injury. He noted it was conceivable a degenerative tear of the meniscus was completed or made symptomatic by the injury of March 14, 2007. If that were true, he would attribute some responsibility for Boone's first operative procedure to the

injury of March 14, 2007, and hypothetically speaking, he would assess a 1% impairment rating. However, in his letter, Dr. Corbett plainly stated that he believed no impairment should be assessed as a result of the March 14, 2007, injury. The above can only be interpreted to mean Dr. Corbett believed the need for the knee replacement surgery was caused by a chronic longstanding preexisting active osteoarthritic condition in the left knee and was not caused by the March 14, 2007, injury.

After receiving another series of medical records, including the operative notes and post-operative follow up notes regarding the knee replacement surgery, Dr. Corbett in a letter dated November 14, 2008, supplemented his letter of October 2, 2008. Again, Dr. Corbett stated he believed "significant degenerative arthritis" preexisted the alleged work injury and Boone would have qualified for a permanent impairment rating for osteoarthritis on the day before the March 14, 2007, work injury. The logical import of that statement is that immediately prior to her injury, Boone had degenerative disc disease which was both symptomatic and impairment ratable. The Court of Appeals articulated the following in Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007) regarding an "active" condition:

> To be characterized as active, an underlying pre-existing condition must be symptomatic *and* impairment ratable pursuant to the AMA *Guidelines* immediately prior to the occurrence of the work-related injury.

The burden of proving a pre-existing "active" condition falls squarely on the shoulders of the employer. Id. In this case Dawahares met its burden via the reports of Dr. Corbett. Clearly the opinions expressed by Dr. Corbett in his letters establish that the degenerative arthritis, which everyone has acknowledged, preexisted the alleged work injury and was symptomatic and impairment ratable immediately prior to the work injury. Thus, the opinions of Dr. Corbett constitute substantial

> evidence that supports the ALJ's determination that Boone's need for a total knee replacement was not caused by the March 14, 2007, work injury. That being the case, the opinions of Dr. Henderson are not uncontradicted and the ALJ was not required to give any more credence to Dr. Henderson's opinions than those expressed by Dr. Corbett. We point out that Dr. Henderson's opinions are not unequivocal and/or forceful. His opinions were based upon the medical records he was provided and the patient's history and do not in any way delve into the specific facts of the case *sub judice* nor specifically link the work injury to the need for knee replacement surgery. In contrast, we believe Dr. Corbett's letters, and opinions expressed therein, do recognize and deal with the possibility of a dormant non-disabling condition being aroused by the work injury of March 14, 2007, and plainly set forth why he believes no impairment should be assessed as a result of the March 14, 2007, injury. Dr. Corbett's letters clearly establish he believed Boone's degenerative osteoarthtiric knee problems were both symptomatic and impairment ratable immediately prior to the March 14, 2007, work injury. Accordingly, the ALJ acted within her authority and the discretion afforded her under the law in determining that the work injury of March 14, 2007, did not cause the need for left knee replacement surgery. That being the case, Boone's argument that the ALJ failed to consider whether Boone's total knee replacement was caused by the arousal of a dormant non-disabling condition and the opinion of Dr. Henderson constituted uncontradicted medical evidence are without merit.

Based on the above, the Board affirmed the ALJ's opinion regarding Boone's knee replacement surgery.

STANDARD OF REVIEW

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). Because Boone had the burden of proof before the ALJ, to win a reversal on appeal, she must establish that the evidence favorable to her was so overwhelming as to compel a finding in her favor or that the Board overlooked or misconstrued controlling law or so flagrantly erred in evaluating the evidence that it has caused gross injustice. *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986); *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). With these standards in mind, we address the issues raised on appeal.

ANALYSIS

At the outset, we note that Boone bore the burden of proving that her total knee replacement surgery and resultant impairment were related to the work injury. *See Roark v. Alva Coal Corp.*, 371 S.W.2d 856, 857 (Ky. 1963); *Snawder v. Stice*, 576 S.W.2d 276, 279 (Ky. App. 1979); *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). A workers' compensation claimant can meet that burden by establishing that her condition was caused by the work injury or by establishing that she had a pre-existing dormant condition that was aroused into disabling reality by the work injury. *See McNutt Constr./First Gen. Servs. v. Scott,* 40 S.W.3d 854, 859 (Ky. 2001). It is unrebutted that Boone required the total knee replacement surgery because of significant degenerative osteoarthritis and that her degenerative osteoarthritis was not caused by but pre-existed the work

injury. Therefore, Boone bore the burden of proving that the work injury aroused into disabling reality that pre-existing condition.

In *Finley v. DBM Technologies,* 217 S.W.3d 261, 265 (Ky. App. 2007), this Court held that a condition must be classified as dormant and aroused into disabling reality if it was

> asymptomatic immediately prior to the work-related traumatic event *and* all of the employee's permanent impairment is medically determined to have arisen after the event – due either to the effects of the trauma directly or secondary to medical treatment necessary to address previously nonexistent symptoms attributable to an underlying condition exacerbated by the event . . .

Id. at 265 (emphasis in original). On the other hand, a condition is pre-existing and active if it is symptomatic and impairment ratable immediately prior to the work injury. *Id.*

Having reviewed the record, we agree with Boone that the Board incorrectly determined that her pre-existing osteoarthritis was active at the time of the work injury. As noted by the Board, Dr. Corbett stated that Boone had degenerative arthritis that was impairment ratable in her left knee prior to the work injury. However, Dr. Corbett does not state that the condition was symptomatic immediately before the work injury. The Board's finding that Dr. Corbett's reports "can only be interpreted to mean [he] believed the need for the knee replacement surgery was caused by a chronic longstanding preexisting active osteoarthritic condition in the left knee and was not caused by the March 14, 2007, injury," (emphasis in original) is simply not supported by the evidence. Therefore, the

Board incorrectly concluded that Boone's degenerative left knee condition actively pre-existed the work injury.

Having determined that the Board incorrectly found that Boone's osteoarthritis was active at the time of the injury, we must determine if, as Boone argues, the evidence that her osteoarthritis was dormant, and aroused by the work injury is unrebutted. As noted above, there is no evidence that Boone's condition was symptomatic prior to the work injury. Therefore, Boone's claim that her condition was dormant prior to the work injury is unrebutted.

However, the evidence that all of her impairment arose either directly from the injury or from medical treatment necessary to treat the effects of the injury is not unrebutted. In fact, Dr. Corbett specifically stated that Boone's knee replacement surgery was not the result of either the work injury or of her post-injury arthroscopic surgery. Therefore, there was evidence in the record indicating that Boone's condition was not aroused into disabling reality by the work injury.

We next address Boone's argument that Dr. Corbett's reports did not constitute substantial evidence. Substantial evidence is that evidence which has the "fitness to induce conviction in the minds of reasonable men." *Smyzer v. B.F. Goodrich Chemical Co.*, 474 S.W.2d 367, 369 (Ky. 1971). Boone argues that Dr. Corbett's opinion is not evidence of substance because he did not address whether her osteoarthritis was symptomatic prior to the work injury. As noted above, whether a condition was dormant before a work injury is but one factor in establishing entitlement to benefits. Boone was also required to establish that her

dormant condition was aroused into disabling reality by the work injury. Dr. Corbett's failure to address the dormancy issue does not denigrate his opinion regarding the arousal issue. Dr. Corbett is a qualified physician and his opinion regarding the work-relatedness of Boone's total knee replacement surgery is supported by the MRI findings and Dr. Mehta's surgical findings. Therefore, it is evidence of substance on which the ALJ could reasonably rely.

While we might have decided differently, the ALJ's finding that Boone's total knee replacement surgery was not related to the work injury is supported by evidence of substance. Therefore, we cannot disturb it on appeal.

CONCLUSION

We disagree with the Board's opinion that Boone's osteoarthritis actively pre-existed the work injury. However, the ALJ's finding that Boone's total knee replacement surgery and resultant impairment was not related to that injury is supported by evidence of substance. Therefore, we affirm.

ALL CONCUR.

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