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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000923-WC

EVA BETH ROBY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-11-66743

TRIM MASTERS, INC.; HON. WILLIAM J.
RUDLOFF, ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
REVERSING

** ** * ** * ** *

BEFORE: COMBS, D. LAMBERT AND VANMETER, JUDGES.

D. LAMBERT, JUDGE: This matter is before this Court on petition for review of a decision by the Kentucky Workers' Compensation Board by the employer, Trim Masters, Inc., of injured employee, Eva Beth Roby. The question before this Court is whether the Workers' Compensation Board erred in reversing and remanding the

matter to the Administrative Law Judge with instructions to issue particular factual findings regarding permanent partial disability. Having reviewed the record, we reverse the ruling of the Workers' Compensation Board.

I. FACTUAL AND PROCEDURAL HISTORY

Trim Masters, Inc. (hereinafter "Trim Masters") operates a factory and employed Roby until the time of her injury. Roby's primary job duties included the manufacture of interior door trim components, which required fine manipulation and repetitive movements. On April 22, 2011, she began experiencing a gradual onset of pain in her right arm, elbow, and wrist, as well as declining grip function, which worsened over the course of the day. She sought treatment from Dr. Thomas Gabriel, an orthopedic and hand surgeon, who first attempted to treat Roby non-surgically. This course of treatment included significant restrictions: no lifting over ten pounds and no repetitive use of the right hand or arm. Roby attempted to continue her employment with Trim Masters, who was unable to accommodate her with those restrictions, given her role in the production process. Roby's employment ended due to her injury in September of 2011.

The non-surgical course of treatment having failed, Roby underwent surgery on her arm to repair the injury on October 2, 2011. The surgery left Roby with significantly diminished grip strength in her right hand and weakness in her right arm. She also testified that she experiences loss of sensation in her fingertips and persistent daily pain which she rated as a 5 on a 10-point scale. Gabriel placed

her on the restrictions permanently, as she continues to have extremely limited use of her dominant hand. She sought a second opinion from Dr. Warren Bilkey in 2012. Bilkey agreed with Gabriel's diagnosis and imposition of the restrictions.

Roby receives unemployment benefits. As a condition of receiving them, she must actively seek employment. She stated that she had no success in obtaining work, as employers are unable or unwilling to accommodate her medical restrictions. Her employment history consists primarily of production line factory work and work as a cashier. She enrolled in the nursing program at St. Catherine's College, hoping to obtain skills and certifications which would improve her employability.

Roby also filed for workers' compensation benefits. After a benefit review conference, the parties submitted the contested issues, including whether Roby was entitled to benefits for permanent total disability ("PTD"), to an Administrative Law Judge ("ALJ") for adjudication. From there, the procedural history of this matter begins a long and circuitous path to this Court.

The ALJ issued his opinion on May 13, 2013. In that opinion, the ALJ offered a recitation of the procedural history of the matter up to that point, summarized the evidence presented before him, and made findings of fact. Noting his reliance on Roby's work history, the nature of her injury, her age, her education, her testimony, and the medical evidence, the ALJ issued a factual finding that Roby was 100% occupationally disabled. Specifically relying on the test for PTD crafted by the Kentucky Supreme Court in *Ira A. Watson Dept. Store*

v. Hamilton, 34 S.W.3d 48 (Ky. 2000), the ALJ found Roby to be unable to find work consistently or to work dependably in her post-injury state. Consequently, he awarded Roby PTD benefits. Upon motion for reconsideration by Trim Masters, the ALJ amended his opinion and award to offset the income benefits he awarded against the unemployment benefits Roby was receiving.

Trim Masters then appealed the award to the Workers' Compensation Board (hereinafter "the Board"). The Board remanded the matter to the ALJ for further factual findings, noting that the ALJ had not fully explained in his opinion how Roby's age and education related to her injury en route to finding her entitled to PTD benefits. The Board noted that a mere recitation of the factors is inadequate to support a finding that a claimant is entitled to benefits, and discussion of the factors must be linked to specific facts presented in the record.

On remand, the ALJ's opinion contained largely identical substance, though it did provide some greater specificity in certain areas. In his analysis, the ALJ restated key points from the testimony of Bilkey, noting that it was the most compelling evidence presented. With regard to Roby's age, the ALJ only noted that she was in "early middle age." In regard to Roby's education, the ALJ noted that she received her high school diploma "many years ago" and it was reasonably probable that if Roby received vocational rehabilitation and completed her degree, she could find gainful employment, which would operate as grounds for Trim Masters to move to reopen the matter under KRS 342.125. The ALJ reached the same conclusions regarding the award of PTD benefits.

Trim Masters again appealed the ALJ's ruling to the Board, and the Board again reversed and remanded for further factual findings. The Board reasoned that the ALJ's analysis did not comply with the directive provided in its prior opinion. The ALJ did not discuss specifically the Board's concerns about how Roby's age and education related to the decision that she was permanently and totally disabled.

The ALJ apparently took offense to the second remand. In his third opinion, issued on August 11, 2014, he noted that his finding as to Roby's credibility was based on the fact that "I was the only one who actually saw and heard this lady testify." Further, he offered a quotation from the unreported case of *Jeffries v. Clark & Ward*, 2007 WL 2343805 (Ky.App. 2007): "It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors relating to the judgment of credibility by a trier of fact are subconscious and many are related to life experiences." *Id.* at * 5 (emphasis added by ALJ). These comments are questionable in light of the fact that the Board had not negatively discussed the findings of the ALJ as they related to the credibility of the witnesses in any way. The ALJ also noted in his discussion of PTD: "I now make the factual determination that her age places her in early middle age for the purposes of re-employment in the highly competitive job market." He made a similar finding regarding Roby's education, noting that the passage of significant time since her completion of high school and her lack of vocational education or training

negatively affected her re-employability. The ALJ noted the evidence that he was relying on: the testimony of Bilkey, who placed her on such stringent restriction that she was forced to essentially work with only one hand; the testimony of Roby, who noted her pain levels and her difficulties in finding employment before trying to go back to school; and William Ellis, a vocational rehabilitation specialist, who testified that Roby's permanent restrictions prevented her from being able to return to work. Based on that testimony, the ALJ made the factual finding that because Roby "cannot find work consistently or work dependably in the highly competitive job market" she fell within *Ira A. Watson Dept. Store's* definition of a permanently and totally disabled individual.

Trim Masters appealed the ruling for the third time to the Board. The Board again noted that the ALJ's findings did not address the concerns it raised in its first order remanding the matter. The Board further noted that the ALJ did not address Roby's testimony that other nurses had told her that she could perform the duties of a pediatric nurse within the restrictions. The Board also questioned how repeating the statement that Roby was in "early middle age" added to the analysis in light of the fact that no evidence linked it to her disability. Finally, the Board noted that repeated remands of the claim worked a disservice to both Roby and Trim Masters before directing the ALJ to comply with the directives of the Board on remand by performing the analysis to support the award.

The ALJ issued his fourth opinion in this matter on January 15, 2015. This opinion was largely identical to the opinion he issued on August 11, 2014,

with several exceptions. The ALJ underlined pertinent facts throughout his recitation of the evidence which tend to support his findings. Regarding Roby's age, the ALJ offered the following finding: "Ms. Roby is now 37 years of age and I make the determination that her age places her in the early middle age for purposes of re-employment in the highly competitive job market under Bureau of Labor Statistics studies" (emphasis in original). He further opined that the fact that Roby is 37 years old and has not worked in three years supports a finding of PTD, with no further elaboration. The ALJ also repeated Ellis' conclusions just as he had done in the previous order, but with underlining for emphasis. The ALJ also addressed the new concern raised by the Board in its previous order, by noting that no vocational evidence was produced which tended to show Roby would be physically capable of performing the job duties of a pediatric nurse, and the only evidence to the contrary is anecdotal. The ALJ ultimately reached the same conclusion as in the previous three orders.

Trim Masters appealed to the Board for the fourth time. The patience of the members had clearly grown thin by this point in the process. The Board issued its last opinion on May 15, 2015. Therein the Board first noted the ALJ's failure to abide by the directives regarding the factual findings related to age and education. It also pointed out that the ALJ's January 15, 2015, order was essentially identical to the August 11, 2014, order, with only minor changes. The Board characterized the ALJ's failure to comply with its direction as an abuse of discretion in that the ALJ had failed to point to substantial evidence to support his

conclusion. Such lack of support, the Board argued, “implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” *Ky. Nat’l Park Comm’n, ex rel. Commonwealth v. Russell*, 301 Ky. 187, 191 S.W.2d 214, 217 (1945). The Board noted the evidence produced by Roby established that she suffered a work-related injury and has been unable to return to her former employment. Reasoning that the ALJ had abused his discretion in failing to adequately support the conclusion that Roby was entitled PTD benefits, the Board then remanded the matter to the ALJ with instructions to issue findings that Roby was only entitled to permanent partial disability benefits.

Roby then filed the instant petition for review.

II. ANALYSIS

1. STANDARD OF REVIEW

“On appeal, our standard of review of a decision of the Workers’ Compensation Board ‘is to correct the Board only where the . . . Court perceives 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.’” *Pike County Bd. of Educ. v. Mills*, 260 S.W.3d 366, 368 (Ky.App. 2008) (quoting *Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992)); *Butler’s Fleet Serv. v. Martin*, 173 S.W.3d 628, 631 (Ky.App. 2005); *Wal-Mart v. Southers*, 152 S.W.3d 242, 245 (Ky.App. 2004).

A claimant bears the burden of proof—and the risk of non-persuasion—on every element of a workers’ compensation claim. *Pike County* at 368 (citing

Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky.App. 1984)). See also *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986) (if the fact-finder finds in favor of the person having the burden of proof, the burden on appeal is only to show that there was some substantial evidence to support the decision); cf. *Gray v. Trimmer*, 173 S.W.3d 236, 241 (Ky. 2005) (if the ALJ finds against the party having the burden of proof, the appellant must “show that the ALJ misapplied the law or that the evidence in her favor was so overwhelming that it compelled a favorable finding”).

When reviewing a workers’ compensation claim, KRS 342.285 designates the ALJ as the fact-finder. KRS 342.285(1). This provision has been construed to grant the ALJ “the sole discretion to determine the quality, character, weight, credibility, and substance of the evidence, and to draw reasonable inferences from the evidence.” *Bowerman v. Black Equipment Co.*, 297 S.W.3d 858, 866 (Ky.App. 2009). Though KRS 342.285(2)(d) establishes a clear error standard of review for findings of fact, the Board should not “substitute its judgment for that of the [ALJ] as to the weight of evidence on questions of fact[.]” *Id.* (quoting *Shields v. Pittsburgh & Midway Coal Mining Co.*, 634 S.W.2d 440, 441 (Ky.App. 1982)). An ALJ is entitled to believe or disbelieve all or parts of the evidence presented for review. *Caudill v. Maloney’s Discount Stores*, 560 S.W.2d 15 (Ky. 1977). “In short, appellate courts may not second-guess or disturb discretionary decisions of an ALJ unless those decisions amount to an abuse of discretion.” *Bowerman*, at 866 (citing *Medley v. Bd. of Educ., Shelby County*, 168

S.W.3d 398, 406 (Ky.App. 2004)). “If the reviewing court concludes the rule of law was correctly applied to facts supported by substantial evidence, the final order of the agency must be affirmed.” *Kentucky Unemployment Ins. Comm'n v. Cecil*, 381 S.W.3d 238, 246 (Ky. 2012) (citing *Brown Hotel Co. v. Edwards*, 365 S.W.2d 299 (Ky. 1962)). A reviewing court is, however, entitled to substitute its judgment for that of the agency where the agency's ruling is based on an “incorrect view of the law[.]” *Kentucky Bd. of Nursing v. Ward*, 890 S.W.2d 641, 642 (Ky.App. 1994).

2. THE ALJ’S DECISION WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

In her petition for review, Roby argues that the Board lacked the authority to reverse and remand with instructions for the ALJ to issue specific findings of fact. Indeed, the Board lacks authority to reverse an ALJ’s factual findings unless the record is without substantial evidence to support them. *Special Fund v. Francis, supra*. At the same time, an ALJ is required by statute to clearly set out the basic facts to support the ultimate conclusions (*Mosely v. Ford Motor Co.*, 968 S.W.2d 675, 677 (Ky.App. 1998)), but need not discuss the minutiae of every element of proof. *Id.* at 678 (“Although the additional findings of the ALJ were not greatly detailed, he did set forth basic facts supporting his ultimate conclusions such that each side was dealt with fairly and properly apprised of the basis for the decision.”) (internal quotations omitted).

Roby contends that the ALJ's findings were supported by substantial evidence, and notes that the ALJ recited the evidence consistently with each time the matter was remanded. Beginning with the order issued on May 13, 2013, the ALJ offered a summary of the evidence: the testimony of Roby, the testimony and reports of Bilkey, the reports of Gabriel, the report of Ellis, and the report of Trim Masters' vocational expert, Paula Shifflett. Further, the ALJ cited much of this evidence again in his discussion before announcing his findings.

Trim Masters contends that each time the Board remanded the matter, the ALJ merely "tweaked" his ruling, and ignored the Board's directives. The Board, in its first two opinions reversing, held that the findings of fact issued by the ALJ were insufficient to permit meaningful appellate review. Further, Trim Masters, just as the Board had previously done, points out that the ALJ only offered conclusory statements regarding how Roby's age and education played into the determination that she was permanently totally disabled.

The operative question before this Court is whether the ALJ's findings here are supported by substantial evidence. "Substantial evidence is defined as 'evidence of substance and relative consequence having the fitness to induce conviction in the minds of reasonable [persons].'" *Borkowski v. Commonwealth*, 139 S.W.3d 531, 533 (Ky.App. 2004) (quoting *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998)).

The Kentucky workers' compensation statute defines "permanent total disability" as "the condition of an employee who, due to an injury, has a permanent

disability rating and has a complete and permanent inability to perform any type of work as a result of an injury” KRS 342.0011(11)(c). Analysis of whether a claimant is permanently totally disabled . . .

necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities.

Ira A. Watson Dept. Store at 51.

The Court will now examine the specific evidence relied on by the ALJ. Both Roby and Bilkey testified that her symptoms persist, even after surgery. He assigned a permanent 6% whole person impairment. Gabriel imposed stringent restriction on Roby’s use of her arm, with which Bilkey agreed. Ellis concluded that Roby’s persistent pain and the permanent restrictions combined to render her 100% vocationally disabled. However, Ellis’ testimony noted that Roby’s disability would continue “until her retraining is complete,” but she was not a good candidate for vocational rehabilitation until she can get her pain under control. Also telling is the ALJ’s conclusion that “[i]f she receives vocational rehabilitation to assist her in obtaining her nursing degree, it is reasonably probable that she will obtain employment for which she is physically capable and that she will obtain

regular gainful employment as a nurse, thereby entitling the defendant to move to reopen the case based on a change of condition under KRS 342.125.”

Some of this evidence tends to contradict the ALJ’s factual findings. However, “[a]lthough a party may note evidence which would have supported a conclusion contrary to the ALJ’s decision, such evidence is not an adequate basis for reversal on appeal.” *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999) (citing *McCloud v. Beth-Elkhorn Corp.*, 514 S.W.2d 46 (Ky. 1974)).

Rather than remanding again for factual findings on the issue of PTD benefits, the Board instead chose to shoehorn the situation into KRS 342.285(c) and (d), so that it could find the ALJ’s ruling an abuse of discretion. The Board’s ruling essentially ignored the ALJ’s factual findings regarding the nature, severity, and duration of Roby’s injury, and the effect thereof on her employment prospects, in favor of an overly strict reading of the authority regarding two of the other factors. The Board also focused on the perceived disregard the ALJ afforded its commands to make particular factual findings.

This Court finds that substantial evidence does support the ALJ’s factual finding, and the Board’s order directing the ALJ to make findings that contradict his own impermissibly encroaches on the role of the ALJ as fact-finder.

III. CONCLUSION

This Court, having found the Board improperly substituted its own judgment for that of the ALJ on an issue of fact, hereby REVERSES the ruling of the Board.

VANMETER, JUDGE, CONCURS.

COMBS, JUDGE, CONCURS WITH SEPARATE OPINION.

COMBS, JUDGE, CONCURRING. It is both unfortunate and unnecessary that this case has taken so long to achieve resolution. The ALJ acted within the proper parameters of his considerable discretion in assessing the evidence. In his *third* opinion in attempting to comply with the Board's directives in its repeated remands, he aptly observed the inescapable reality that one's judgment is affected by factors that are often "subconscious and related to *life* experiences." (Emphasis original.)

Nonetheless, the Board again remanded and again disregarded the ALJ's evaluation of the substantial evidence before him. In so doing, the Board improperly invaded the legitimate province of the ALJ and impermissibly substituted its judgment for his.

What should have been a professional directive as to legal standards deteriorated into an impasse between the Board and the ALJ. The result has been an unconscionable delay to the injured petitioner.

BRIEF FOR APPELLANT:

Ben T. Haydon, Jr.
Audrey Leeann Haydon
Bardstown, Kentucky

BRIEF FOR APPELLEE:

Denis S. Kline
Louisville, Kentucky