RENDERED: APRIL 28, 2017; 10:00 A.M.
TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2015-CA-001903-WC

REGINA TENO — APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. 2013-01127

FORD MOTOR COMPANY;
JEANIE OWEN MILLER, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: ACREE, J. LAMBERT, AND THOMPSON, JUDGES.

LAMBERT, J., JUDGE: Regina Teno has petitioned this Court for review of the decision of the Workers' Compensation Board (the Board) affirming the Administrative Law Judge's (ALJ) dismissal of her workers' compensation claim.

The ALJ found that Teno failed to prove a work-related injury. On appeal to this Court, Teno claims the ALJ and the Board overlooked the opinions of numerous medical professionals who diagnosed Teno with work-related thoracic outlet syndrome and, instead, erroneously relied solely on the opinion of one defense independent medical exam doctor. Because we hold that the ALJ misconstrued the evidence of one of the physicians, we reverse the Board's opinion.

Teno began working for Appellee Ford Motor Company in 1993. She held numerous positions while at Ford. Around February of 2011, Teno transferred to Ford's paint department and was assigned to work the "left hang" job on the paint line. Teno described the job as strenuous and repetitious, and she said she had to do a lot of bending and reaching.

While in the paint department, truck cabs and boxes are placed on skids and secured with chains. A conveyor lowers each skid into a paint bath (which is recessed in the floor), where the component is coated with a tacky pre-coat (referred to as the "E" coat of paint) before being rinsed in other vats down the line. As each skid was conveyed out of the E-coating/rinse vats, Teno had to quickly bend at waist level and use a six-inch hand tool, similar to a crow bar and weighing about one pound, to remove the front and back chains on her side of the carrier. Teno held the tool and worked it with her right hand to unhook the chain from the front-left corner of the skid. She then used her tool to transfer the free-end of the chain to an overhead conveyor. Teno quickly shifted her tool to her left hand, unhooked the back-left corner's chain from the carrier, lifted the chain

overhead, and hooked it to the conveyor. The sticky pre-coat often made the chains difficult to remove. Once free, the conveyor transported the skids to the next workstation while the overhead trolley conveyed the chains back to the point of entry.

Teno testified in deposition that the job was taxing on her body from the start, but over time her discomfort lessened and she was doing well in the position. In November 2012, however, Teno's right arm and elbow began to hurt. She purchased elbow and wrist braces, which provided some relief. Teno also experienced pain around her right collarbone and down into her right bicep when lifting the chains overhead. The pain, while intermittent at first, became constant and severe by February 8, 2013. Teno sought medical treatment.

Teno's medical history is complex and lengthy. Suffice it to say numerous physicians prescribed conservative medical treatment, including steroid injections, physical therapy, pain medication, a cervical MRI, and chiropractic care. None of these treatments offered Teno lasting relief.

Initially, Teno did not report her right upper extremity pain as work-related. She informed medical personnel it was a "private insurance" matter. At some point, Teno changed her mind and sought workers' compensation benefits.

Teno filed a Form 101 on July 29, 2013, seeking compensation for cumulative trauma/repetitive motion injuries to her right arm, right wrist, and neck.[1] She claimed she slowly developed "symptoms in [her] right arm that

[1] Teno's Form 101 also requested compensation for cumulative trauma to her left wrist. It appears from the record she later abandoned that particular claim.

became disabling while performing repetitive job duties in" February 2013. A formal hearing was held on April 27, 2015. A summary of the evidence follows.

Teno treated regularly with Dr. Kamlesh Dave, her primary physician. In fact, in an addendum to her medical history, Teno indicated that she had treated with Dr. Dave for approximately five or six years due to problems she was having with her right arm/wrist and neck. Teno also treated previously with Dr. Carlton Paige at First Stop Urgent Care Center in 2003 and 2004 for issues related to her right arm, wrist, and neck. On March 10, 2003, Teno hit her elbow and sought treatment. Dr. Paige diagnosed medial epicondylitis on the right, and advised Teno to avoid overuse of the elbow.

A year later, on May 3, 2004, Teno again went to Dr. Paige complaining of upper back and neck pain that radiated into both arms causing them to "go to sleep." Dr. Paige observed Teno also had hand weakness and hand paresthesia. Six months later, Teno called Dr. Paige's office and reported that she was experiencing neck pain and thought it was a "nerve problem." Dr. Paige evaluated Teno a few days later. Teno complained of neck pain that radiated into her shoulders. She also stated that sometimes her fingers go numb. A December 26, 2004 x-ray of Teno's right hand was normal.

Several years later, on October 6, 2011, Teno underwent an MRI of the brain and neck. The MRI showed mild degenerative changes of the cervical spine. Dr. Damon Gatewood's clinical indication was headaches and neck pain.

Dr. Ghias Arar, a neurologist, evaluated Teno on February 12, 2013. Teno complained of severe right arm pain, bilateral upper extremity numbness and tingling, and neck pain. The doctor recommended an EMG-nerve conduction study. The study revealed moderately severe right carpal tunnel syndrome.

Dr. Yorell Manon-Matos, an orthopedist at Kleinert and Kutz, examined Teno on February 20, 2013, and administered conservative treatment. The doctor re-evaluated Teno on March 20, 2013. His clinical impression was right carpal tunnel syndrome, RSF triggering, and right bicep tendonitis. Medical records from Dr. Manon-Matos do not include any causal language connecting Teno's diagnoses to her occupation. Indeed, Dr. Manon-Matos specifically opined Teno's condition was not related to her occupation. Dr. Manon-Matos last evaluated Teno on June 4, 2013. Her condition was essentially unchanged. Teno chose not to continue treatment with Dr. Manon-Matos.

In the interim, Teno presented to Dr. Rachel Chase at the Kentuckiana Center for Better Bone and Joint Health on April 22, 2013, for an initial evaluation for diffuse widespread joint pain. Teno's primary concern was an underlying diagnosis of rheumatoid arthritis. She complained of knee, hip, pelvis, and right arm pain. She stated her pain began in 2010. Dr. Chase diagnosed trochanteric bursitis – bilaterally; osteoarthritis of the knees and spine; and biceps tendonitis/carpal tunnel syndrome.

On June 16, 2013, Teno filed a "certification for disability benefits" form seeking benefits under Ford's disability plan. In the treating physician

section of that submittal, Dr. Dave certified that Teno had sustained work-related repetitive motion injuries resulting in wrist and neck pain, severe carpal tunnel, and severe bicep tendonitis. Dr. Dave restricted Teno from all work activities.

Dr. Amitava Gupta, an orthopedic hand surgeon, evaluated Teno on July 23, 2013. Teno reported the pain began in the medial aspect of her right arm and radiated through the elbow and occasionally to her fingertips. She also experienced sharp neck pain at times. The doctor diagnosed right carpal tunnel syndrome and right cubital tunnel syndrome. Dr. Gupta performed right carpal tunnel and cubital tunnel releases in August 2013. The surgery was not beneficial. Dr. Gupta referred Teno to the Cleveland Clinic.

Dr. Daniel Clair, a vascular surgeon, evaluated Teno at the Cleveland Clinic on January 16, 2014. The assessment included a vascular study. Dr. Clair opined Teno's symptoms were somewhat consistent with thoracic outlet syndrome and recommended surgery. Teno scheduled surgery for August 2014, but later elected not to proceed.

In fall 2014, Dr. Dave submitted a medical update form to extend Teno's Ford disability benefits. Dr. Dave diagnosed Teno with thoracic outlet syndrome and continued to restrict all work activities.

Independent medical evaluations were conducted by Dr. Valerie Waters, Dr. Warren Bilkey, and Dr. Thomas Loeb. Dr. Waters diagnosed thoracic outlet syndrome and status-post right carpal/cubital tunnel. However, she provided no opinion as to the causation of these conditions. Dr. Bilkey provided similar

diagnoses as Dr. Waters, but found the conditions to be work-related, noting "[it] does not appear that Ms. Teno had an active impairment affecting the neck or right upper limb prior to 2/8/13." Dr. Bilkey found Teno to be at maximum medical improvement, issued numerous work restrictions, and assigned an 11% whole-person permanent impairment rating, 3% of which he related to thoracic outlet syndrome.

Dr. Loeb, however, disagreed with the diagnosis of thoracic outlet syndrome. He suspected pre-existing, non-work related brachial or cervical plexitis. Dr. Loeb was also not convinced that Teno's carpal and cubital tunnel issues were related to her work activities. He further opined Teno sustained no permanent impairment in regard to any work-related injury, and issued a 0% impairment rating. Dr. Loeb concluded his report as follows:

> In summary, this is a very pleasant, 43-year-old patient who has developed onset of what appears to be a cervical plexopathy or brachial plexopathy or neuritis with the outside, very distant possibility of thoracic outlet syndrome or Parsonage-Turner syndrome. None of these diagnoses would be related to a work-related causation in my opinion. I think her symptoms arose spontaneously and without relationship to her work.

The ALJ determined Teno failed to prove her diagnoses were causally related to her work. Persuaded by Dr. Loeb's medical opinion, the ALJ dismissed Teno's claim for benefits. She reasoned:

> It is apparent [Teno] has been actively treated for neck and upper extremity pain as early as 2004. Initially, she did not report her right upper extremity pain as a work related condition. She testified that was because she

didn't want to be switched from her job and cause other workers to lose their jobs. . . . After being seen and treated at First Stop Urgent Care she reported it as a work injury, with an injury date of February 8, 2013. It is unclear when a physician told [Teno] her condition was work-related. The record indicates that initially she reported these conditions as "private insurance" matters. The initial neurologist, who performed the first diagnostic test, opined she suffered from carpal tunnel syndrome and cervical radicular pain. However, there is no causation opinion or statement in Dr. Arar's records. [Teno] filed her claim on July 2013 without a medical report indicating the causal relationship between a work injury (or activity) and her condition. To the contrary, there is an early statement (March 4, 2013) by Dr. Yorell Manon-Matos in the Kleinert and Kutz chart that her condition was not related to her occupation. There is a report completed for Unicare by Dr. Dave dated June 16, 2013 that her disability is due to current occupation, he states that there was no "injury" but relates the disability to "repetitive movements." On July 7, 2014, Dr. Bilkey, [Teno's] IME physician, opines [Teno's] condition is work-related and describes the activity she was engaged in at work simultaneous to her onset of right upper extremity pain. However, Dr. Bilkey does not explain how or why the work activity caused the pain.

. . . .

Here, the causal relationship testimony comes from only one medical witness, Dr. Bilkey. While Dr. Bilkey is a skilled and well-respected physician, it is not clear to the undersigned that he understood [Teno's] specific physical activities at her job nor the fact that she had been actively treated for these conditions in the past – with an MRI in 2011 for neck pain. It is apparent that Dr. Bilkey was not informed of [Teno's] previous treatment for neck pain and right upper extremity pain. Dr. Bilkey states: "It does not appear that Ms. Teno has an active impairment affecting the neck or right upper limb prior to 2/8/2013." Without the history of previous similar symptoms and the connection of those symptoms to work activities, Dr. Bilkey's opinion becomes less

> than persuasive. It is essential that each impairment be temporally related to the specific trauma (cumulative or otherwise) to that body part.
>
> Of additional significance is the ongoing and current medical treatment [Teno] was receiving for other orthopedic and neurological conditions which were apparently not connected to her work. Importantly, in April of 2013 (after she had reported the upper extremity as a work injury) she was seen by Dr. Chase for an initial evaluation for diffuse widespread joint pain. Dr. Chase does not address the causation of [Teno's] symptoms but among the various pains reported to Dr. Chase, [Teno] includes her bicep pain, her right arm and wrist pain (and it is noted she is seeing orthopedists for these conditions). It is noted that [Teno] was taking tramadol, a narcotic pain medicine, for other conditions of an orthopedic nature before this medicine was prescribed for the neck and right upper extremity pain.
>
> After reviewing the volumes of medical records in this case, the undersigned is satisfied that [Teno] does not have the capacity to work at Ford -- however, the undersigned finds the medical evidence is not persuasive that her claimed conditions are a result of her work activities.
>
> Simply put, [Teno's] evidence is not sufficient to carry her burden of proof as it relates to work related/causation of her cumulative trauma.

Teno filed a petition for reconsideration, arguing the ALJ misinterpreted the medical and lay evidence in finding Teno did not suffer a work-related injury. She declared that the diagnosis of thoracic outlet syndrome alone, which she claims is known to be caused by highly strenuous and repetitive work and athletic activities, is clear evidence she sustained a work-related injury. The ALJ denied Teno's reconsideration petition.

Teno appealed to the Board, arguing the ALJ dismissed her claim against the overwhelming weight of the evidence. The Board was not persuaded. It reasoned:

> In this instance, there were differing medical opinions in the record addressing the cause of Teno's conditions. Although Teno contends Dr. Dave's opinion, as the treating physician, is persuasive, nothing in Chapter 342 mandates greater weight be given to a treating physician's testimony. Wells v. Morris, 698 S.W.2d 321 (Ky. App. 1985); Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829 (Ky. 2008).
>
> Dr. Loeb's opinions constitute substantial evidence supporting the ALJ's determination [that] Teno's conditions are not casually related to her work activities at Ford, and no contrary result is compelled. Dr. Loeb reviewed all pertinent medical records, and disagreed with the diagnosis of thoracic outlet syndrome. Rather, he suspected she had chronic pain from a pre-existing non-work-related brachial plexitis. He also opined her activities with Ford were not consistent with carpal tunnel syndrome or cubital tunnel syndrome. According to Dr. Loeb, any alleged cervical strain or carpal tunnel syndrome is not related to her work.
>
> The ALJ accurately summarized Dr. Dave's June 16, 2013 report. The report provides no explanation of any connection between work and the various conditions diagnosed. We conclude the ALJ correctly understood the evidence before her regarding causation, weighed that evidence, and, as was her prerogative, determined Teno's evidence was not persuasive. The ALJ cited Dr. Bilkey's apparent lack of knowledge of Teno's past medical treatment and her work activities in concluding his opinion was not persuasive. While Dr. Waters diagnosed thoracic outlet syndrome, Dr. Loeb stated Teno did not have that condition. Dr. Waters' opinion is merely conflicting evidence. The evidence falls far short of compelling a finding Teno's conditions are causally related to her employment with Ford. Because Teno

> failed to meet her burden of proof on this threshold issue, the ALJ properly dismissed the claim.

This petition for review follows.

This Court's role in reviewing a decision of the 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." *W. Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992). Assessment of the credibility of the witnesses and the persuasive weight of the evidence is entirely within the ALJ's authority. Kentucky Revised Statute (KRS) 342.285. The ALJ, not the Board, is empowered "to determine the quality, character, and substance of the evidence." *American Greetings Corp. v. Bunch*, 331 S.W.3d 600, 602 (Ky. 2010) (footnote omitted). The ALJ is also free to reject testimony, *id.*, and "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). For this reason, the Board "shall not substitute its judgment for that of the administrative law judge as to the weight of evidence on questions of fact . . . ." KRS 342.285(2); *see also FEI Installation, Inc. v. Williams*, 214 S.W.3d 313, 316 (Ky. 2007).

Teno argues the ALJ and the Board committed reversible error by dismissing her claim in its entirety on the issue of work-relatedness/causation against the overwhelming weight of the evidence. She claims the record compels a finding in her favor.

Teno had the burden to prove every element of her claim. *Greg's Const. v. Keeton*, 385 S.W.3d 420, 423 (Ky. 2012). Because Teno was unsuccessful in her burden before the ALJ, the question on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in his favor." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky. App. 1984). Compelling evidence is evidence so overwhelming that no reasonable person could fail to be persuaded by the evidence. *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456, 461 (Ky. 2012). "Evidence that would have supported but not compelled a different decision is an inadequate basis for reversal on appeal." *Id.*

Causation is a factual issue to be determined within the sound discretion of the fact-finder. *Markwell & Hartz, Inc. v. Pigman*, 473 S.W.2d 842, 846 (Ky. 1971). "[A]n ALJ is vested with broad authority to decide questions involving causation." *Miller v. Go Hire Employment Dev., Inc*., 473 S.W.3d 621, 629 (Ky. App. 2015); *see also Dravo Lime Co. v. Eakins*, 156 S.W.3d 283, 288-90 (Ky. 2005).

Here, Teno claims the evidence compels a finding in her favor because four doctors diagnosed her with work-related thoracic outlet syndrome. Teno's argument, at first blush, appears convincing. Dr. Waters and Dr. Clair both diagnosed Teno with thoracic outlet syndrome, but neither linked that diagnosis to Teno's work activities. We note that Dr. Waters examined Teno as a part of her Ford Disability plan. Dr. Dave provided a similar diagnosis with language

establishing a causal linkage; he checked the work-related box on a disability form and described the injury as "repetitive moments."

Dr. Bilkey provided the most detailed explanation connecting Teno's diagnoses to her work activities. But the ALJ discounted Dr. Bilkey's testimony, citing the physician's misunderstanding of Teno's prior medical history that led him to conclude that she had no prior pain or issues related to her right arm, right elbow, or neck. The ALJ found Teno had been actively treated for right arm, elbow, and neck pain since 2003 and stated that Dr. Bilkey failed to explain how or why Teno's work activities caused her pain.

However, our review of Dr. Bilkey's report establishes that he indeed explained how Teno's work activities caused her to experience pain. He stated, "Ms. Teno had the onset of neck pain, pain extending into both upper limbs much worse on the right in relation to a new job duty that had her doing repetitive lifting of heavier items than usual, unhooking and beating loose this chain." And based upon his review of her past medical records, including 2008 records from Kleinert and Kutz, Dr. Bilkey determined that Teno had not been experiencing an active impairment at the time of her February 2013 work injury. That Teno had in the past sought treatment for her upper extremities does not mean that she was experiencing any active impairment at the time she claimed to have sustained her injury at Ford.

Teno has also argued that the ALJ failed to determine whether she had thoracic outlet syndrome, pointing out that Dr. Loeb admitted Teno might possibly

have this condition. Teno attempts to challenge Dr. Loeb's clinical impression by declaring, without citation to any authority, that "[t]horacic outlet syndrome is universally recognized to be caused by highly strenuous and repetitive work and athletic activities." However, nothing in our jurisprudence requires an ALJ to find a work-related causal connection based solely on a diagnosis of thoracic outlet syndrome. There must be proof in the record causally connecting the diagnosis to the work injury in order for the ALJ to make a finding of work-relatedness.

While the ALJ was certainly at liberty to pick and choose what evidence she found persuasive, we hold that she flagrantly erred in her discounted assessment of Dr. Bilkey's evaluation in reaching the decision to dismiss Teno's claim and that this caused a gross injustice to Teno. Because the ALJ is the fact-finder, we cannot hold that the evidence compels a finding that Teno's injury was related to her work for Ford. Rather, we must remand this matter to permit the ALJ to properly re-examine Dr. Bilkey's report along with the rest of the medical proof and make an appropriate decision as to whether Teno met her burden to establish that her condition was related to her work.

For the foregoing reasons, we reverse the November 13, 2015, Opinion of the Workers' Compensation Board and remand this matter for further proceedings in accordance with this opinion.

THOMPSON, JUDGE, CONCURS.

ACREE, JUDGE, DISSENTS AND FILES SEPARATE OPINION.

ACREE, JUDGE, DISSENTING: Respectfully, I dissent.

To justify reversal, we must find the evidence so overwhelmingly in her favor, upon consideration of the entire record, that no reasonable person could fail to be persuaded by the evidence. *Gaines Gentry Thoroughbreds/Fayette Farms v. Mandujano*, 366 S.W.3d 456, 461 (Ky. 2012). My review of the evidence simply indicates to me that Teno's evidence "would have supported but not compelled a different decision" and that "is an inadequate basis for reversal on appeal." *Id*.

In my opinion, the majority fails to defer, as we must and as the Board must to the broad authority vested in the ALJ to decide questions involving causation. *Dravo Lime Co. v. Eakins*, 156 S.W.3d 283, 288-90 (Ky. 2005); *Miller v. Go Hire Employment Dev., Inc.*, 473 S.W.3d 621, 629 (Ky. App. 2015). I acknowledge that four doctors diagnosed her with work-related thoracic outlet syndrome and, at first blush, that argument appears convincing. But it ultimately misses the mark. Dr. Waters and Dr. Clair both diagnosed Teno with thoracic outlet syndrome, but neither linked that diagnosis to Teno's work activities. Dr. Dave provided a similar diagnosis with language establishing a causal linkage, but he did so perfunctorily and without explanation. Dr. Dave simply checked the work-related box on a disability form and described the injury as "repetitive movements." The ALJ found Dr. Dave's opinion carried little persuasive value.

Dr. Bilkey provided the most detailed explanation connecting Teno's diagnoses to her work activities. But the ALJ, as she was entitled to do, deeply discounted Dr. Bilkey's testimony. Dr. Bilkey's misunderstanding of Teno's prior

medical history led him to conclude that she had no prior pain or issues related to her right arm, right elbow, or neck. The ALJ's survey of the medical evidence revealed otherwise. Specifically, the ALJ found Teno had been actively treated for right arm, elbow, and neck pain since 2003. The ALJ also pointed out that Dr. Bilkey failed to explain how or why Teno's work activities caused her pain. The ALJ found Dr. Bilkey's medical opinion to be less than persuasive.

As correctly point out by Teno, Dr. Loeb freely admitted Teno might possibly have thoracic outlet syndrome. But he also opined, unequivocally, that such diagnosis, even if accurate, was not causally related to her work at Ford. Teno attempts to challenge Dr. Loeb's clinical impression by declaring, with no supporting authority, that "[t]horacic outlet syndrome is universally recognized to be caused by highly strenuous and repetitive work and athletic activities." (Appellant's Brief, p. 13). Teno's self-serving medical conclusion regarding thoracic outlet syndrome is of no value to this Court. And nothing in our jurisprudence requires an ALJ to find a work-related causal connection based solely on a diagnosis of thoracic outlet syndrome.

Ultimately, the ALJ was at liberty to pick and choose what evidence she found persuasive, and her reliance upon Dr. Loeb's determination that Teno sustained no work-related cumulative trauma was wholly within her prerogative. The evidence favorable to Teno, while certainly ample, was not such that it compels a finding in her favor.

For the foregoing reasons, I dissent.

BRIEF FOR APPELLANT:

Nicholas Murphy
Louisville, Kentucky

BRIEF FOR APPELLEE, FORD MOTOR COMPANY:

Hon. George T. T. Kitchen, III
Louisville, Kentucky