

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-001262-WC

SHERRY BROWN

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-99-85719

CENTRAL STATE HOSPITAL;
WORKERS' COMPENSATION BOARD;
and LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE

APPELLEES

OPINION
AFFIRMING IN PART AND
REMANDING IN PART WITH DIRECTIONS

** ** * * *

BEFORE: COMBS, GUIDUGLI, and SCHRODER, Judges.

COMBS, JUDGE. Sherry Brown petitions for review of an Opinion of the Workers' Compensation Board which affirmed the ruling of the Administrative Law Judge awarding partial permanent disability benefits. Several issues are before us on appeal: the duration of temporary total disability (TTD), the extent of Brown's permanent disability, the proper calculation of the award, and the admission of evidence. After a review of the

record, we affirm and remand in part solely to determine that the award has been calculated correctly.

Brown was an aide at Central State Hospital (Central State) in Louisville. At the time of her disabling injury on March 3, 1999, she was transporting a patient from Central State to a dental appointment. An automobile collision occurred, and she sustained an injury to her neck and back. Brown was unable to return to work and was paid TTD benefits from March 31, 1999, until September 26, 1999. In the fall of 1999, she attempted to return to work. However, her condition worsened. Central State voluntarily paid Brown TTD benefits for more than a year -- from December 12, 1999, through March 24, 2001.

After the TTD ended, Brown filed a claim seeking permanent total disability benefits. A hearing on her claim was conducted in September 2001. Considerable medical evidence was presented to the Administrative Law Judge (ALJ) on the issue of the extent of her disability. This evidence was set out in detail in the ALJ's award and was reiterated in the Opinion rendered by the Board.

The ALJ relied primarily on the medical opinion of Dr. Bart Goldman, who determined that Brown had sustained a 10% functional disability. The ALJ also relied upon restrictions assessed by her family physician, Dr. Christopher Pitcock, in deciding that Brown could not return to the work that she had

previously performed. Nonetheless, the ALJ concluded that Brown was not totally occupationally disabled and that she retained the capacity to perform sedentary and/or light work. Finally, again based on the report of Dr. Goldman, the ALJ found that Brown had reached maximum medical improvement on June 21, 2000 - with the result that an overpayment of TTD had occurred and that Central State was entitled to credit for that overpayment against the award.

On petition for reconsideration, the ALJ made some minor changes in the calculation of the award of permanent partial disability benefits and specifically provided that the credit for TTD could not be applied to future payments of disability. He directed that the credit be recouped as provided in Triangle Insulation & Sheet Metal Co, v. Stratemeyer, Ky., 782 S.W.2d 628 (1990).

Brown appealed to the Board. In its review, the Board concluded: (1) that the evidence did not compel an award of permanent occupational disability benefits; (2) that there was sufficient evidence to support the ALJ's decision with respect to the date on which Brown reached maximum medical improvement (thereby limiting the period of TTD); and (3) that the ALJ did not err in refusing to admit a document prepared by Brown's treating physician -- a document which was presented for the first time at the hearing before the ALJ. We cannot conclude

that the Board committed any error in its rulings. See, Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687 (1992).

Brown argues that the Board erred in affirming the ALJ's determination that she is not totally disabled. She contends that it was inconsistent for the ALJ to accept the opinion of her treating physician (Dr. Pitcock) that she suffered radiculopathy while rejecting that same doctor's testimony pertaining to her limitations and restrictions.

However, as the fact-finder, the ALJ has:

the right to believe part of the evidence
and disbelieve other parts of the evidence
whether it came from the same witness or the
same adversary party's total proof.

Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977). From our review of the record, we believe that the Board did not err in concluding that the evidence did not compel a finding of total occupational disability. Special Fund v. Francis, Ky., 708 S.W.2d 641 (1986); Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 419 (1985). Thus, we must affirm the decision of the Board upholding the award of permanent partial disability benefits.

Brown also contends that the Board erred in affirming the ALJ's finding that she reached a maximum medical improvement in June 2000, resulting in his termination of her TTD benefits as of that date. Her argument with respect to the TTD issue is

dual in nature: (1) she argues that Central State waived any right to credit for overpayment of TTD because it did not raise the issue before the ALJ; and (2) she contends that it was erroneous to terminate her TTD benefits when the evidence revealed that she was not able to return to the work she had been performing at the time of the injury in June 2000. In support of the second portion of these arguments, she relies on she relies on Central Kentucky Steel v. Wise, Ky., 19 S.W.3d 657 (2000), and Halls Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000).

The Board rejected the wavier argument as follows:

[I]t has long been acknowledged that the length of temporary total disability payments is subsumed within the issue of extent and duration. Although Brown argues otherwise, she provides no reference to any case law that would support her position. All elements of "disability" are properly preserved when a question is raised concerning extent and duration of occupational disability. Since the award of permanent partial disability and permanent total disability is interrelated with the period of temporary total disability, by necessity an ALJ must always make a determination as to the appropriateness of temporary total disability unless the parties stipulate specifically that the period of temporary total paid equates to the actual temporary total disability.

The Board correctly observed that the ALJ must necessarily decide when TTD benefits should end and when permanent benefits begin. It was also correct in concluding that the issue of

credit for overpayment is contained within the general category of "extent and duration" of disability.

Additionally, we find no error in the Board's review and assessment of the evidence upon which the ALJ relied in establishing the date of Brown's maximum medical improvement (MMI) as June 21, 2000. This date is significant because TTD is payable until an injured employee either reaches MMI or is released to perform the type of work he was performing at the time of the injury. Halls, supra, at 329. A claimant is considered to have reached MMI when:

the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over.

W.L. Harper Construction Company, Inc. v. Baker, Ky.App., 858 S.W.2d 202, 205 (1993).

The finding of the ALJ as to the date Brown reached MMI was based on Dr. Goldman's report. The Board determined this report to be sufficient evidence to support the ALJ's finding of MMI. After reviewing Dr. Goldman's report, we have found no error in the Board's analysis. After an extensive evaluation of Brown on June 21, 2000, Dr. Goldman reported as follows:

Ms. Brown describes a strain-type injury to her low back after a motor vehicle accident. She has been treated for over a year for this problem. She returned to work for a

short time of approximately three months. However, she has now been off work since December 1999.

On examination at this time, she has mildly restricted range of motion of her lumbar spine and this appears to be voluntarily limited. She has a normal motor and sensory examination of her lower extremities. She does have subjective complaints of decreased sensation in the first web space on the right, but not over the anterior tibia, both of which are L5. She has no true atrophy on the right, as far as I can tell. In fact, she states that her right leg hurts, but her left leg "goes out." The right calf is 2 cm. Smaller than the left.

However, she does have a history of a previous blood clot on the left side, and in my opinion, this was residual swelling of the left calf, rather than atrophy of the right calf. However, because of these findings, which are equivocal at best, it may very well be reasonable to approve a myelogram and post-myelographic CT scan. Also, for the sake of completeness, EMG and Nerve Conduction Velocities of the lower extremities may be indicated.

If there is no surgical lesion felt to be present on the myelogram, then it is my opinion that Ms. Brown is at maximum medical improvement.

. . .

If there is a significant surgical lesion, then surgery may be indicated and her impairment rating would be 10%, based on radiculopathy.

. . .

I would recommend that she remain off work at this time, until the myelogram has been performed and interpreted. If no surgery is

planned, and since she has been off work for six months this most recent time, without any significant therapy, I would recommend a short course of physical therapy, three times a week for two weeks. This should be followed by a short course of daily work hardening for two weeks, prior to her return to work. (Emphasis added.)

Dr. Goldman's opinion established Brown's date of MMI as June 2000 in the event that further testing did not reveal a "significant surgical lesion." Although the record does not reveal whether Brown underwent a myelogram as Dr. Goldman suggested, there is no evidence suggesting that surgery was indicated to improve Brown's condition. In fact, the evidence was to the contrary. Thus, the ALJ was entitled to infer that Brown's medical condition had stabilized and that the "lingering disability [was] permanent." Epling v. Four B & C Coal Co., Inc., Ky.App., 858 S.W.2d 216, 219 (1993).

Next, Brown argues that the Board erred in affirming the ALJ's calculation of the credit that Central State is entitled to recoup. In his original award, the ALJ calculated the total award of permanent disability benefits to be \$11,431.23. From that amount, he deducted \$6,813.78, the amount of the overpayment of TTD, leaving Brown with an award of \$4,617.45. On reconsideration, Central State alleged an error in the calculation of Brown's weekly wage and figured the permanent award to be worth \$10,378.50. After deducting

\$7,978.00 for the overpayment, it argued that it owed Brown \$2,400.

Brown contends that Central State was not entitled to a credit. However, she argues that if it were so entitled, it could only recoup those sums owed at the time of the award.

The ALJ's order on reconsideration is ambiguous. He agreed with Brown that the employer was entitled to credit for overpayment only against past due amounts as provided in Triangle Insulation Co. v. Stratemeyer, Ky., 782 S.W.2d 628 (1990). Applied correctly, Stratemeyer would allow Central State to recoup credit for those sums owed up to November 26, 2001, the date of the award. However, in an apparent contradiction, the ALJ also stated that calculations set forth by Central State were correct. Central State's calculations deducted the overpayment from the entire award -- including future benefits. Without performing the calculations himself, the ALJ accepted Central State's calculations as correct. Thus, we cannot agree with the Board's position that the ALJ thereby "clarified his directives" respecting the amount of the credit which Central State is entitled to apply against the award.

We remand the matter to the ALJ and direct that he make specific mathematical calculations (as he had done in his original award) setting forth the exact amount of the award and

the amount to which Central State is entitled to recoup pursuant to Stratemeyer.

Finally, Brown argues that the ALJ erred in refusing to admit into evidence a report of Dr. Pitcock tendered for the first time at the hearing. The discussion of this issue contained in her appellate brief is identical to that raised before the Board. Brown has not made any reference to the Board's analysis of this issue, nor has she suggested in what manner the Board erred in concluding that the ALJ did not abuse his discretion in refusing to admit a medical report out of time. The Board relied on Searcy v. Three Point Coal Co., Ky., 124 S.W.2d 228 (1939), in upholding the ALJ's evidentiary ruling in light of the fact that the evidence of the medical report was available within the proof time. We find no error.

The Opinion of the Board is affirmed in all respects. The matter is remanded with directions that Central State's credit for overpayments be re-calculated by the ALJ as set forth in this Opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

Edward A. Mayer
Louisville, Kentucky

BRIEF FOR APPELLEE CENTRAL
STATE HOSPITAL:

K. Lance Lucas
Florence, Kentucky