

**Commonwealth Of Kentucky
Court of Appeals**

NO. 2002-CA-001845-WC

MOUNTAIN MANOR NURSING

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-00-87992

EDITH JOHNSON;
HON. LLOYD R. EDENS,
ADMINISTRATIVE LAW JUDGE; AND
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: GUIDUGLI, JOHNSON AND KNOPF, JUDGES.

GUIDUGLI, JUDGE. Mountain Manor Nursing (hereinafter ~~A~~Mountain Manor~~@~~) has petitioned this Court for review of the August 7, 2002, opinion of the Workers=Compensation Board (hereinafter ~~A~~the Board~~@~~) affirming the Administrative Law Judge~~s~~ (hereinafter ~~A~~ALJ~~@~~) Opinion, Order and Award on the issue of the duration of temporary total disability (hereinafter ~~A~~TTD~~@~~) benefits. Having determined that there was substantial evidence to support the ALJ~~s~~ award and that the Board did not misconstrue controlling

statutes or commit any flagrant error in assessing the evidence, we affirm.

Edith Johnson (hereinafter AJohnson@ is currently a forty-six (46) year old resident of Virgie, Kentucky. She is married and is raising three adopted grandchildren with her husband. She completed the ninth grade, but never obtained her GED or any vocational training. Prior to working for Mountain Manor, she worked as a salesperson, as a department manager in a retail establishment, and as a cook. In 1996, Johnson began working as a cook for Mountain Manor, a nursing home, and later became a supervisor for the other kitchen employees. She did not relate any previous work injuries.

On February 16, 2000, Johnson slipped and fell on a wet floor in the kitchen area while hurrying to close a door. She sought treatment for a bruised left knee and returned to work in one week. A few months later, she experienced leg pain while serving on the tray line. She again sought treatment, and her treating physician, Dr. Ahmed, took her back off work on August 14, 2000. She has not returned to work since that date. At the time of her deposition, she was experiencing low back pain below the belt-line as well as pain in her left leg.

Johnson filed an Application for Resolution of Injury Claim on June 21, 2001. The claim was assigned to ALJ Edens, who later allowed her to amend her Form 101 to state a

psychiatric overlay claim. The parties filed proof from both medical and lay witnesses. We shall summarize the medical testimony as it pertains to this appeal.

Johnson introduced the medical records of Dr. Leon Briggs, who began treating her on October 18, 2000, in a pain clinic following her treatment with Dr. Naveed Ahmed. Dr. Briggs attempted a course of three epidural steroid injections, but Johnson failed to obtain any relief. By February 8, 2001, Dr. Briggs indicated that Johnson was medically maximized from a pain management standpoint, but needed her to undergo another MRI and a functional capacity evaluation before he could address her return to work. The insurance company denied the functional capacity evaluation, and the new MRI showed bulging discs and degenerative changes. On April 11, 2001, Dr. Briggs noted that her pain complaints were unchanged, stating that we feel that she is at maximum medical improvement. Johnson underwent an independent medical evaluation by Dr. Richard Sheridan at the request of Mountain Manor on April 24, 2001. He diagnosed resolved contusion to the left knee and resolved low back strain due to her February 16, 2000, work injury. At that time, Dr. Sheridan stated that she had reached maximum medical improvement, did not need any further treatment, and could return to full duty work without restriction. He assigned a 0% permanent partial impairment rating.

Johnson also introduced the medical of records of treating physician, Dr. Larry Coleman. He saw her on May 22, 2001, noting that Dr. Sheridan had recently evaluated her. In his note of that date, Dr. Coleman stated that Johnson was still having a lot of problems and had not been able to return to work. He noted further that she had been experiencing some depression due to her back pain, and agreed with Dr. Briggs that a functional capacity evaluation was necessary before returning her to work. Dr. Joseph Rapier evaluated Johnson at her request on October 4, 2001. He diagnosed a contusion to the left knee and a strained back, which aggravated her pre-existing dormant degenerative disc disease. He assigned a 10% permanent partial impairment rating according to DRE Category 3. He also assigned restrictions and stated that she could no longer perform the same type of work.

As to her psychological claim, Johnson relied upon Dr. Eric Johnson's October 8, 2001, psychological evaluation. He diagnosed major depression, single episode, and noted that her depression had improved, but that there was room for improvement. She had not yet reached maximum medical improvement. Mountain Manor relied upon the deposition of psychiatrist Dr. David Shraberg, who evaluated Johnson on November 2, 2001. He found no clinical depression, diagnosing only an adjustment disorder. Dr. Shraberg did not assign any

functional impairment or restrictions from a psychiatric standpoint.

Following a benefit review conference, extent and duration remained one of the contested issues and the parties stipulated that Mountain Manor paid TTD benefits from October 17, 2000, through May 1, 2001. On January 18, 2002, the ALJ held a final hearing and the parties filed briefs. Interestingly, neither party addressed the appropriate duration of TTD. The ALJ issued an Opinion, Order and Award on February 18, 2002, finding that Johnson's injury was related to the work incident, that based upon Dr. Rapier's evaluation she was temporarily totally disabled from August 14, 2000, through October 4, 2001, and that she had sustained a 10% permanent partial impairment. Benefits were awarded accordingly. The ALJ did not find that Johnson suffered from any permanent functional impairment due to the anxiety and depression she experienced, although he did relate both to the work injury. Both parties filed petitions for reconsideration. Specifically, Mountain Manor argued that the TTD award was too long in duration based upon Dr. Sheridan's April 24, 2001, evaluation, in which he stated that Johnson had reached maximum medical improvement. The ALJ denied Mountain Manor's petition, noting that it was merely attempting to reargue the merits of the case.

Mountain Manor appealed the ALJ's decision to the Board solely on the issue of the duration of TTD benefits, arguing that the benefits should have been awarded only through April 11, 2001, pursuant to the records of Dr. Briggs. In an August 7, 2002, opinion, the Board affirmed the ALJ's decision, holding that there was sufficient evidence of substantial probative value based upon the combination of her physical and psychological conditions to support the ALJ's determination to award TTD benefits until October 4, 2001. This appeal followed.

In its Petition for Review, Mountain Manor continues to argue that the award of TTD benefits should have ended on April 11, 2001, the date Johnson reached maximum medical improvement pursuant to the testimony of Dr. Briggs and confirmed by that of Dr. Sheridan. Although Dr. Rapier determined that Johnson had reached maximum medical improvement by the time of his October 4, 2001, evaluation, he did not address specifically when she had reached that point or contradict the opinions of either Dr. Briggs or Dr. Sheridan. Additionally, Mountain Manor argues that the Board impermissibly made its own finding of fact by including consideration of her psychological condition in determining when TTD benefits should terminate. The ALJ had only relied upon Johnson's physical condition in determining the duration of TTD benefits, finding no occupational implications to the psychological overlay

portion of her claim. In her response, Johnson argues that the ALJ's findings regarding the duration of TTD were supported by substantial evidence, noting that the ALJ as the fact-finder has the sole authority to judge the evidence and may believe or reject any testimony.

In Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685 (1992), the Supreme Court addressed its role and that of the Court of Appeals in reviewing decisions in workers=compensation actions. The function of further review of the WCB in the Court of Appeals 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. @ Id., at 687-88.

In workers=compensation actions, the claimant has the burden of proof and the risk of persuading the fact-finding ALJ. Snawder v. Stice, Ky.App., 576 S.W.2d 276, 279 (1979). When the decision of the fact-finder favors the person with the burden of proof, his only burden on appeal is to show that there was some evidence of substance to support the finding, meaning evidence which would permit a fact-finder to reasonably find as it did. @ Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

Although a court cannot substitute its evaluation of the weight and credibility of the evidence for that of the Workmen's Compensation Board, nevertheless, the

findings of fact of the board when it decides in favor of the claimant must be supported by substantial evidence. Substantial evidence means evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.

Smyzer v. Goodrich Chemical Co., Ky., 474 S.W.2d 367, 369

(1971). Substantial evidence is ~~A~~evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men.@ Union Underwear Co. v. Scarce, Ky., 896 S.W.2d 7, 9 (1995). Because Johnson was successful before the ALJ, we must affirm the Board's decision if we determine that the ALJ's decision in this matter is supported by substantial evidence.

Where evidence is conflicting, the ALJ, as the finder of fact, ~~A~~has the authority to determine the quality, character and substance of the evidence presented. . . .@ Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985). See also Luttrell v. Cardinal Aluminum Co., Ky.App., 909 S.W.2d 334

(1995). The ALJ may also ~~A~~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). On the other hand, the ALJ may not reject uncontradicted medical evidence unless a sufficient explanation is provided.

Commonwealth v. Workers=Comp. Bd. of Ky., Ky.App., 697 S.W.2d

540 (1985), Mengel v. Hawaiian-Tropic Northwest & Central Distributors, Inc., Ky.App., 618 S.W.2d 194 (1981). See also Osborne v. Pepsi-Cola, Ky., 816 S.W.2d 643 (1991).

This case specifically concerns the duration of TTD. KRS 342.0011(11) (a) defines TTD as ~~A~~the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.~~@~~ In W.L. Harper Constr. Co., Inc. v. Baker, Ky.App., 858 S.W.2d 202, 205 (1993), this Court stated:

To summarize, TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is capable, which is available in the local labor market. Moreover, as the Board noted, the question presented is one of fact no matter how TTD is defined.

See also Halls Hardwood Floor Co. v. Stapleton, Ky.App., 16 S.W.3d 327 (2000).

Turning to the merits of the present appeal, we agree with the Board and Johnson that there is substantial evidence in the record to support the ALJ's award of TTD benefits through October 4, 2001. Although we do not believe it was appropriate for the Board to rely upon evidence of Johnson's psychological condition to justify the ALJ's decision, we nevertheless believe

that the medical evidence of her physical condition supports the determination.

The ALJ was clearly within his authority to rely upon the testimony of Dr. Rapier in determining the duration of TTD, and in particular when Johnson reached maximum medical improvement. It is well-settled that the ALJ has the authority to pick and choose which evidence to rely upon as long as there is substantial evidence to support his conclusions. Dr. Rapier's October 4, 2001, report inferred that Johnson had reached maximum medical improvement on that date as seen by his imposition of a permanent impairment rating and restrictions. These findings constitute substantial evidence as to the duration of TTD. In his report, Dr. Rapier did not specifically discuss when Johnson reached maximum medical improvement and Mountain Manor did not depose him in order to elicit his opinion as to when she reached that point. Although both Dr. Briggs and Dr. Sheridan noted that she had reached maximum medical improvement the previous April, Dr. Sheridan also stated that she did not need further treatment and could return to full duty. Following Dr. Sheridan's April 24, 2001, evaluation, her treating physician noted that Johnson was still having a lot of problems and was unable to return to work. Additionally, Dr. Briggs stated that Johnson was at maximum medical improvement from a pain standpoint only. Therefore, it appears that the

medical evidence regarding when Johnson reached maximum medical improvement from a physical standpoint was contradictory, giving the ALJ the ability to choose which evidence to rely upon in making his decision.

Although we have determined that the ALJ's decision is supported by substantial evidence, this is not to say that another ALJ in reviewing the same evidence could not have determined that the period of TTD terminated any earlier. Indeed, the Board recognized this in its opinion, stating that the statement by Dr. Briggs that Johnson reached maximum medical improvement on April 11, 2001 would be substantial evidence supporting a finding she reached maximum medical improvement on that date. @

Because the Board in affirming the ALJ's opinion, order, and award did not overlook or misconstrue controlling statutes or precedent, or commit an error in assessing the evidence so flagrant as to cause gross injustice, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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