

RENDERED: January 23, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2003-CA-000355-WC

RETA FAYE YOUNG

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-94-17090

PIKE COUNTY BOARD OF EDUCATION;
WORKERS' COMPENSATION BOARD;
HON. BONNIE KITTINGER, ADMINISTRATIVE LAW JUDGE;
and WORKERS' COMPENSATION FUNDS

APPELLEES

OPINION

AFFIRMING

** ** * * *

BEFORE: McANULTY, MINTON, and SCHRODER, Judges.

MINTON, Judge: Reta Faye Young seeks review of a Workers' Compensation Board (Board) opinion affirming the decision of an administrative law judge (ALJ) dismissing her claim for reopening her workers' compensation claim against the Pike

County Board of Education (Board of Education) and the Workers' Compensation Funds. The ALJ held that Young had failed to sustain her burden of proving by objective medical evidence an increase in occupational disability as the result of a worsening of impairment since the date of the award due to her work-related injury.¹

Young, born May 17, 1954, began working as a school teacher for the Board of Education in September 1990. In a 1990 automobile accident, she sustained a non-work-related injury which resulted in an active impairment. On March 1, 1994, while traveling to a curriculum meeting, she was involved in another automobile accident and sustained a work-related injury. Subsequently, Young developed pain in her head, neck, shoulder, arms, hip, and jaw for which she filed a workers' compensation claim. In a final opinion and award rendered June 5, 1998, Young was awarded temporary total disability benefits until September 29, 1997, and was found to be 40% permanently occupationally disabled. One half of Young's permanent occupational disability was determined to be due to a prior, active, non-work-related condition related to her 1990 automobile accident. The remaining compensable impairment was apportioned equally between the Board of Education and the

¹ Ky. Rev. Stat. (KRS) 342.125(1)(d).

Special Fund.² Since her condition developed after her 1994 automobile accident, Young returned to work only for a brief period in 1997. She has not worked since the 1998 workers' compensation award.

In December 2001, Young filed a motion to reopen her workers' compensation claim on the grounds that her impairment has worsened since the June 5, 1998, opinion and award due to the condition caused by her 1994 work-related injury. The Hon. Bonnie C. Kettinger, ALJ, entered an opinion, award, and order on July 26, 2002, denying Young's motion to reopen her workers' compensation claim because she failed to sustain her burden of proving an increase in her occupational disability and impairment. Young's petition for reconsideration was overruled on September 5, 2002. She then appealed to the Board on the grounds that the ALJ did not rule in conformity with the law or adequately consider what she believed to be the overwhelming evidence demonstrating Young's worsened physical and psychological impairment. On January 22, 2003, the Workers' Compensation Board entered an opinion affirming the opinion, award, and order entered by the ALJ. Young appeals from the Board's decision on the grounds that the Board committed

² The Special Fund, a division of the Departments of Workplace Standards, was succeeded by the Workers' Compensation Funds on July 15, 2002. Compare KRS 336.020 (1998) with KRS 336.020 (2002).

flagrant error in assessing the evidence because the evidence before the ALJ was so overwhelming as to compel a contrary result.

Young testified at the hearing in her reopening before the ALJ, describing how her pain had increased and how she had become more disabled since the 1998 award. She described an average day and her inability to perform more than the most basic housekeeping tasks. The ALJ also considered Young's hearing and deposition testimony offered in her original worker's compensation claim in 1998 in which she claimed that she was unable to perform more than basic housekeeping at that time.

Upon her motion to reopen before the ALJ, Young submitted medical reports from Drs. Samuel King, David Forester, and James Templin, each of whom had treated her after her 1994 injury and had testified or had submitted a report in her 1998 workers' compensation claim. Young also hired Dr. Templin to perform a medical examination. She submitted a report of his findings for her reopening.³ The Board of Education relied upon evidence from the depositions of Drs. King and Templin and the report of Dr. David Shraberg, a psychiatrist who performed an examination of Young on its behalf.

³ At the time Dr. Templin performed the examination, February 20, 2002, he had not treated Young for approximately 5 months.

According to Dr. King's January 28, 1998, deposition, Young then experienced pain on a daily basis and had difficulty with any prolonged physical activity. He imposed stringent physical restrictions on her activities. He also stated that Young was totally occupationally disabled⁴ from any and all occupations and was not a candidate for rehabilitation. He attributed 50% of Young's condition to the arousal of degenerative disc disease. In his April 19, 2002, deposition, he stated that Young's condition had been exacerbated since 1998, citing as an example new findings in Young's March 1, 2002, MRI scan: a small herniation at L4-5 with slight nerve entrapment.⁵ He felt that the herniation at L4-5 could have worsened either due to Young's 1990 non-work-related injury or her 1994 work-related injury or both.

In January 1997, Young entered a four-week comprehensive pain management program overseen by Dr. Templin at Cardinal Hill Hospital in Lexington, Kentucky. In 1998, he described Young's prognosis for returning to work as a school teacher as guarded, stating that, at a minimum, she would need to continue to take medication and seek psychological

⁴ Dr. King does not give impairment ratings according to the American Medical Association Guides to the Evaluation of Permanent Impairment.

⁵ Although Young had a herniated disc at this level as early as 1990, a 1991 MRI did not appear to show nerve entrapment.

counseling. In the report based on his February 20, 2002, examination of Young, Dr. Templin diagnosed her as having numerous medical conditions.⁶ All of these diagnoses were also listed in his 1997 report except for those concerning chronic mid back pain, thoracic pain/disease/herniation, and fibromyalgia. Dr. Templin imposed stringent physical activity restrictions on Young. In his 2002 report, Dr. Templin assigned Young an 18% impairment rating, which he subsequently revised to 22% based on Young's March 1, 2002, MRI scan showing a herniated disc at L4 with possible nerve root entrapment. The MRI also showed bulges in Young's cervical and thoracic spine, but Dr. Templin stated that these were not causing any symptoms or problems and could be due to the natural aging process. Although he stated that the nerve root entrapment at L4 occurred after Young's 1994 work-related injury, he could not determine whether it was due to that injury. He did state that the 1994 injury contributed to the increase in her impairment rating.

⁶ Specifically, chronic low back pain syndrome, history of degenerative lumbar disc disease, history of degenerative cervical disc disease, chronic mid back pain syndrome, history of thoracic pain syndrome, history of degenerative thoracic disc disease, history of thoracic disc herniation, history of bilateral temporomandibular joint syndrome, history of gallbladder disease, history of fibromyalgia syndrome, status post C-section x 2, status post D&C x 3, status post cholecystectomy, and status post bilateral tubal ligation.

Dr. Forester, a psychiatrist, began treating Young for major depressive episodes with anxious features in February 1996. In his February 26, 2002, report, Dr. Forester noted that Young's diagnosis remained major depression with anxious features, though her psychiatric condition had worsened, progressing from a Class II impairment, according to the Guides, in 1996 to a Class III impairment in 2003. Based on her complaints, he attributed Young's worsened psychiatric condition to her work-related injury as exacerbated by chronic, progressive pain. He stated that she should avoid stress and activities that would exacerbate her pain. He also did not believe that Young was physically capable of teaching school again.

Dr. David Shraberg, also a psychiatrist, performed examinations of Young for the Board of Education in both 1996 and 2002. In his April 26, 2002, report, he stated that Young's condition was the same as in 1996 with no worsening or aggravation. He discounted the idea that Young's diagnosis of fibromyalgia could be related to her 1994 injury on the basis of certain medical authorities who reject a link between fibromyalgia and mild physical injury. Likewise, he did not believe that Young had any chronic pain complaints or psychiatric syndrome specifically related to her automobile accident of 1994. Instead, he opined that Young had developed a

transient delusional hypochondriasis associated with a somatoform pain disorder⁷ which predates her 1994 work-related automobile accident. He believed that, but for this somatoform disorder and its associated hypochondriasis, Young could return to work. Dr. Shraberg also expressed concern over the level and intensity of medication Young was receiving, including prescriptions for powerful drugs such as OxyContin and Methadone.⁸ He thought that her current condition was more a consequence of her treatment and polypharmacy than of a chronic pain syndrome or psychiatric disorder related to the March 1, 1994, injury. He suggested that Young undergo a pharmacological evaluation/intervention with the goal of weaning her off of narcotic pain medication and getting her back to work.

In a workers' compensation claim, the claimant bears the burden of proving each and every essential element of her

⁷ Somatoform pain disorder is diagnosed as a disorder marked by "persistent and chronic pain at one or more sites in which psychological factors are thought to play a role." Health Illustrated Encyclopedia, A.D.A.M., <http://www.nlm.nih.gov/medlineplus/ency/article/000922.htm> (last updated 2/1/2003). Persons with this disorder may have other medical problems, but these fail to fully account for their pain, hence it is believed to be related to psychological factors, such as stress or unconscious conflict. Id. The pain of somatoform pain disorder, while believed to be at least partly psychological in origin, may be so severe as to impair a person's ability to function. Id.

⁸ Young also takes or has taken the following prescription drugs: Flexiril, BuSpar, Zoloft, Elavil, and Klonopin.

claim.⁹ Consequently, the burden of proof was on Young to prove not only a deterioration of her medical condition but also a change in her occupational disability.¹⁰ In ascertaining whether such a change has occurred, the ALJ may analyze the evidence presented at the time of reopening, as well as that which was considered in the original claim.¹¹

Where the party bearing the burden of proof is unsuccessful before the ALJ, the question on appeal is whether the evidence compels a different result.¹² Compelling evidence is defined as evidence that is so overwhelming that no reasonable person could reach the same conclusion as the ALJ.¹³ It is not enough for Young to show that there is merely some evidence that would support a contrary conclusion.¹⁴ So long as the ALJ's opinion is supported by any evidence of substance,

⁹ Snawder v. Stice, Ky. App., 576 S.W.2d 276, 279 (1979).

¹⁰ See KRS 342.125(1)(d).

¹¹ W.E. Caldwell Co. v. Borders, 301 Ky. 843, 193 S.W.2d 453, 455 (1946).

¹² Wolf Creek Collieries v. Crum, Ky. App., 673 S.W.2d 735, 736 (1984).

¹³ REO Mechanical v. Barnes, Ky. App., 691 S.W.2d 224, 226 (1985).

¹⁴ McCloud v. Beth-Elkhorn Corp., Ky., 514 S.W.2d 46, 47 (1974).

then it cannot be said that the evidence compels a different result.¹⁵

The authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence belongs solely to the ALJ as fact finder.¹⁶ The ALJ may choose to believe parts of the evidence and disbelieve other parts, even if it comes from the same witness or the same party's total proof.¹⁷ The Board may not substitute its judgment for that of the ALJ in matters involving the weight to be afforded the evidence on questions of fact.¹⁸ Similarly, the function of the Court of Appeals when reviewing the Board's decision is to correct it only when the Court perceives that 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."¹⁹ In this instance, the Board correctly applied the governing law, and the Court perceives no

¹⁵ Special Fund v. Francis, Ky., 708 S.W.2d 641, 643 (1986).

¹⁶ Paramount Foods, Inc. v. Burkhardt, Ky., 695 S.W.2d 418, 419 (1985).

¹⁷ Caudill v. Maloney's Discount Stores, Ky., 560 S.W.2d 15, 16 (1977).

¹⁸ KRS 342.285(2).

¹⁹ Western Baptist Hospital v. Kelly, Ky., 827 S.W.2d 685, 687-88 (1992).

error in its assessment of the evidence. There was substantial evidence to support the ALJ's ultimate determination.

The ALJ characterized Young's testimony as sincere and credible, in that Young obviously believed she was totally disabled. However, the ALJ concluded that the objective medical evidence did not establish that Young's disability had worsened as a result of her 1994 work-related injury since her workers' compensation award on June 5, 1998. Although Dr. Forester stated that Young's psychiatric symptoms had progressed, the ALJ noted that his assessment was based solely on Young's complaints and that there was no medical evidence of an increase or worsening. As for the evidence from Drs. Templin and King that Young has developed a nerve entrapment at L4, the ALJ noted that this problem could not be specifically attributed to the 1994 injury. Likewise, the other bulging discs in Young's spine could be attributed to the natural aging process. The ALJ also took note of Dr. Shraberg's evidence that Young's treatment, specifically overmedication, was to blame for her condition rather than any worsening of her impairment due to her 1994 work-related injury. Based on the lay and medical testimony in the record, the ALJ concluded that Young had not met her burden of proof to establish a change in her disability as shown by objective medical evidence of a worsening of impairment due to the 1994 motor vehicle accident. Therefore, Young's motion to

reopen was overruled, and her claim for increased disability benefits dismissed.

On appeal before the Board, Young argued that the evidence before the ALJ was so overwhelming as to compel a finding in her favor. In support of this claim, she asserted that the ALJ made erroneous findings concerning her physical and psychological conditions and improperly relied upon Young's testimony offered in her original workers' compensation claim concerning the extent of her disability.

Young claimed that the ALJ's finding that Young's physical condition and impairment had not worsened since the 1998 award was refuted by the 2002 MRI showing bulges in her thoracic and cervical spine and a nerve root entrapment in her lumbar spine. However, as noted above, neither the nerve root entrapment nor the bulges in her spine were specifically attributed to her 1994 injury, much less to a worsening of her condition due to that injury which has developed since the 1998 award. The evidence from Drs. King and Templin supported the theory that the bulges in Young's spine could be due to the natural aging process.

Similarly, Young objected that the ALJ did not take into consideration Dr. Forester's testimony in her original claim that her disability due to her work-related injury had a psychological component and his subsequent testimony that her

psychological condition had worsened and progressed since the 1998 award. The Board succinctly refuted this assertion, stating as follows:

Again, contrary to Young's arguments, the ALJ noted that Dr. Forester opined that Young's psychiatric condition had progressed. Instead, it is apparent that the ALJ relied on Dr. Shraberg's testimony that Young's problem was due to overmedication. While it may have been better for the ALJ to make a direct comparison between Dr. Forester's testimony in the original claim and on reopening, clearly the ALJ's conclusion that Young suffered no worsening or aggravation of her psychological condition is supported by Dr. Shraberg's testimony. Inasmuch as this constitutes substantial evidence, we are without authority to hold otherwise.^[20]

Young's claims concerning the evidence of a worsening of her physical and psychological condition are not enough to establish that the evidence compels a result contrary to that reached by the ALJ. Young merely points out that there is some evidence that would support a contrary conclusion, which is not enough. Clearly, the ALJ's opinion is supported by substantial

²⁰ Special Fund v. Francis, 708 S.W.2d 641.

evidence. Young would have had the Board second guess the ALJ's determinations concerning the weight, credibility, substance, and inferences to be drawn from the evidence--evaluations solely within the ALJ's authority as fact-finder. The Board properly refused to do this.

Also in her appeal before the Board, Young asserted that the ALJ abused her discretion in considering Young's testimony from the original claim concerning her belief that she was then totally occupationally disabled and unable to do anything more than rudimentary housekeeping chores. The Board properly rejected this argument, albeit with little discussion. The Court notes, however, that an ALJ must consider a worker's post-injury physical, emotional, intellectual, and vocational status in determining what the worker is capable of doing after recovering from the work injury.²¹ And, in a reopening, an ALJ may analyze the evidence considered at the original claim to determine whether there has been a change in the worker's occupational disability.²² Therefore, Young's assessment given in her original worker's compensation claim of what she was then capable of doing is as relevant as her assessment of the same matter given in 2002 upon reopening to the ALJ's determination

²¹ Ira Watson Dept. Store v. Hamilton, Ky., 34 S.W.3d 48, 51 (2000).

²² W.E. Caldwell Co., 193 S.W.2d at 453.

of whether her condition and impairment have worsened since the 1998 award.

In her appeal before this Court, Young seeks to undermine the ALJ's ultimate decision and, hence, the Board's affirmation of it by calling into question some of the ALJ's specific findings of fact. However, Young did not raise these objections before the ALJ. An appellant may not raise new matters for the first time on appeal.²³ Therefore, in deciding this appeal, the Court will not consider Young's specific objections to the ALJ's findings of fact which were raised for the first time on appeal.

Because the Board did not misconstrue controlling statutes or precedent or commit an error in assessing the evidence so flagrant as to cause gross injustice, its opinion is affirmed.

ALL CONCUR.

²³ Kennedy v. Commonwealth, Ky., 544 S.W.2d 219, 222 (1976).

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