

RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001301-WC

PIXIE CALDWELL

APPELLANT

v. ON PETITION FOR REVIEW OF A
DECISION OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-98-95304

MARY BRECKINRIDGE HOSPITAL;
HON. JOHN B. COLEMAN, ADMINISTRATIVE
LAW JUDGE; AND WORKERS' COMPENSATION BOARD

APPELLEE

OPINION
AFFIRMING

* * * * *

BEFORE: BARBER, BUCKINGHAM, AND HENRY, JUDGES.

HENRY, JUDGE: Pixie Caldwell filed this Petition for Review after the Workers Compensation Board affirmed the Administrative Law Judge's opinion and order dismissing her motion to reopen a workers compensation award based on the finding that she failed to establish an increase in occupational disability attributable to a work-related injury.

Pixie, a registered nurse, sustained a work-related injury to her cervical spine on March 16, 1997 and has not

worked since January 16, 1998, when she left her employment with Mary Breckinridge Hospital. In April, 1998, she underwent a cervical discectomy and fusion. In March, 1999, Pixie was awarded permanent partial disability benefits based on a 15% permanent impairment rating enhanced by the 1.5 multiplier pursuant to KRS 342.730(1)(c). The Board affirmed the ALJ's opinion and order and neither party sought further review.

In July 2002, Pixie filed a motion to reopen the award alleging a worsening of her physical condition and an increase in her permanent impairment and occupational disability. After the motion was granted, proof was taken and following a hearing, the ALJ dismissed the claim. The Board affirmed and this appeal followed.

The ALJ is the fact-finder and has the authority to determine the weight, credibility, character and substance of the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418, 419 (Ky. 1985). Where the evidence is conflicting, the court cannot substitute its judgment for the ALJ's. Pruitt v. Bugg Bros., 547 S.W.2d 123, 124 (Ky. 1977). To succeed on appeal, the petitioner must demonstrate that the evidence compels a finding in her favor and if there is substantial evidence to support the opinion and order, this court must affirm. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Simply because there is evidence upon which the ALJ could have

found in the petitioner's favor is insufficient as a basis for reversal. McCloud v. Beth-Elkhorn, 514 S.W.2d 46 (Ky. 1974).

This is a case where the medical evidence is conflicting. Two physicians expressed the opinion that Pixie has an increased impairment and a new disc herniation at C4-5 but three physicians, including Dr. Martyn Goldman, the university evaluator, concluded that she had not sustained an increase in her impairment since March, 1999 and that a proposed discectomy and fusion at C4-5 was neither reasonable nor necessary for the cure and relief of her injury. There was no error in the ALJ's reliance on Dr. Goldman's opinion and that of the two physicians who found no increased impairment.¹

The opinion of the Workers Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Monica Rice Smith
Hyden, Kentucky

BRIEF FOR APPELLEE:

W. Barry Lewis
Hazard, Kentucky

¹ KRS 342.315(2); Magic Coal v. Fox, 19 S.W.3d 88 (Ky. 2000) holding that KRS 342.315 requires the fact-finder to rely on the clinical findings and opinions of the university evaluator unless properly rebutted by the opponent of the evidence.