

Commonwealth Of Kentucky
Court of Appeals

NO. 2004-CA-001447-WC

UNITED PARCEL SERVICE

APPELLANT

V. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-02-73489

DONNA BOND;
HONORABLE MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE;
AND WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: DYCHE, KNOPF, AND MINTON, JUDGES.

MINTON, JUDGE: Donna Bond injured her back while working for United Parcel Service. The Administrative Law Judge awarded her permanent partial occupational disability benefits as a result, which UPS has not contested on appeal. UPS does contest the award of additional temporary total disability benefits based on a supplemental medical report introduced at the initial hearing for "statistical purposes." The specific question we are asked to review is whether the ALJ abused his discretion by relying

upon these records as an evidentiary basis for the award of the additional TTD benefits. We do not believe the ALJ's decision amounts to an abuse of discretion; so we affirm.

Bond began working for UPS in May 1997. Although initially employed as a package handler, she was eventually transferred to a position in the "small sort" department. On June 24, 2002, Bond felt a "snap" in her back when she bent over to pick up a tote filled with packages. She was sent to the company doctors at BaptistWorx and was kept off work for three days. Bond returned to work, restricted to light duty, until July 29, 2002, when she was again taken off work until August 27, 2002. She received TTD benefits during her absence.

In September 2002, BaptistWorx referred Bond to Dr. John Gormley, who returned Bond to work with light duty restrictions until March 21, 2003. Dr. Gormley further restricted Bond from all work activities from March 21, 2003, through May 19, 2003. Bond was not paid TTD benefits for this period.

Upon her return to UPS, Bond was reassigned to a less physically demanding job in the "induct" department. But on September 3, 2003, Bond was informed that although her employment relationship with UPS would continue, she could not return to work until all restrictions were lifted.

At the benefits hearing, Bond introduced the testimony of Dr. S. Pearson Auerbach. Dr. Auerbach assessed Bond with a permanent functional impairment rating of 5 percent to the body as a whole and interpreted her diagnostic studies as showing significant degenerative disc disease and some midline disc bulging. In contrast, UPS introduced the testimony of Dr. Thomas Loeb. Dr. Loeb diagnosed Bond with "lumbosacral strain with preexisting facet arthritis at L4-5 and L5-S1 bilaterally." He assessed Bond with a 0 percent permanent functional impairment but stated she should not lift more than 70 pounds.

Bond testified at the hearing that Dr. Gormley had kept her off work from March 21, 2003, through May 19, 2003, and that she had provided "off-duty work slips" to UPS for that period. She further testified that neither UPS nor its workers' compensation provider had paid her TTD benefits during that period. Evidence of the work slips provided by Dr. Gormley was introduced at the hearing "for statistical purposes." Counsel for UPS did not object to the introduction of the work slips, stating that he "would stipulate that they're [sic] records of who they say they are and what they say." Although UPS did not stipulate that Bond "actually provided them to her employer at the time she said she did," counsel stated he "didn't have a problem with them being admitted as an exhibit."

In his Opinion and Award, the ALJ awarded Bond benefits based upon a 5 percent functional impairment rating. With regard to the issue of Bond's TTD benefits, the ALJ also found:

Although not specifically raised as an issue, the Plaintiff seeks additional temporary total disability benefits in her brief. The Plaintiff relies on the medical records of Dr. Gormley attached to the hearing transcript. The Defendant asserts in its brief that the Plaintiff cannot rely on the records of Dr. Gormley, although they did not object to the submission of these records as an exhibit at the hearing for statistical content. The Plaintiff's credible testimony was that she did provide the Defendant with a copy of these off work slips during her treatment. The Administrative Law Judge does find the fact that Dr. Gormley took the Plaintiff off work as statistical in nature and supported by the Plaintiff's testimony. The Defendant was also aware of this upon receipt of the notices. Therefore the Administrative Law Judge does believe that the Plaintiff would be entitled to additional temporary total disability benefits from March 21, 2003 through May 19, 2003.

UPS petitioned for reconsideration, solely on the question of whether Bond was owed additional TTD benefits. The petition was denied. On appeal, UPS argued that the ALJ abused his discretion in awarding Bond additional TTD benefits because reliance on Dr. Gormley's records was prohibited by 803 KAR¹ 25:010, Section 14(2). The Workers' Compensation Board

¹ Kentucky Administrative Regulations.

disagreed, stating that "the decision upon which evidence to rely rests solely with the ALJ. Nothing in the regulation limits the ALJ's consideration to historical and statistical content only." The Board further held:

UPS's argument that it did not object to the introduction of the evidence because Bond's attorney stated the records were for "statistical content only" is without merit. As previously stated, there is nothing in the statute or the regulations which precludes the ALJ from considering the physician's opinion contained in records filed by a party pursuant to 808 [sic] KAR 25:010, Section 14(2).

Therefore, the ALJ's decision was affirmed.

UPS claims that the ALJ "committed reversible error by awarding additional TTD benefits from March 21, 2003 through May 19, 2003." We disagree.

When evaluating an appeal in a workers' compensation decision, it is well-settled that "the ALJ, as fact-finder, has the sole authority to judge the weight, credibility and inferences to be drawn from the record."² The decision of the ALJ may be appealed to the Board; but "no new evidence may be introduced before the Board, and the Board may not substitute its judgment for that of the ALJ concerning the weight of evidence on questions of fact."³ The role of this Court in

² Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329, 331 (Ky. 1997).

³ Smith v. Dixie Fuel Co., 900 S.W.2d 609, 612 (Ky. 1995).

reviewing decisions of the Board "is to correct the Board only when we perceive that the Board has overlooked or misconstrued controlling law or committed an error in assessing the evidence so flagrant as to cause gross injustice."⁴ If a decision is made in favor of the claimant, the question on appeal "is whether the decision . . . is supported by substantial evidence."⁵ The term "substantial evidence" has been defined as "evidence of substance and relevant consequence having the fitness to induce conviction in the minds of reasonable men."⁶

With this standard in mind, we turn to UPS's claim. The basis for UPS's argument is its interpretation of 803 KAR 25:010, Section 14(2). That section provides:

Any party may file as evidence before the administrative law judge pertinent material and relevant portions of hospital, educational, Office of Vital Statistics, Armed Forces, Social Security, and other public records. An opinion of a physician which is expressed in these records shall not be considered by an administrative law judge in violation of the limitation on the number of physician's opinions established in KRS⁷ 342.033.

⁴ Daniel v. Armco Steel Company, L.P., 913 S.W.2d 797, 798 (Ky.App. 1995), quoting Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-688 (Ky. 1992).

⁵ Wolf Creek Collieries v. Crum, 673 S.W.2d 735, 736 (Ky.App. 1984).

⁶ Smyzer v. B.F. Goodrich Chemical Company, 474 S.W.2d 367, 369 (Ky. 1971).

⁷ Kentucky Revised Statutes.

With regard to the number of physician's opinions that may be introduced, KRS 342.033 states, "[i]n a claim for benefits, no party may introduce direct testimony from more than two (2) physicians without prior consent from the administrative law judge."

In its argument, UPS focuses primarily on the words in 803 KAR 25:010, Section 14(2), that state, "[a]n opinion of a physician which is expressed in these records shall not be considered by an administrative law judge" If this phrase marked the end of the regulation, we would be inclined to agree with UPS that the ALJ had erroneously considered Dr. Gormley's report. But the regulation continues with the words "in violation of the limitation on the number of physician's opinions established in KRS 342.033." KRS 342.033 clearly limits a party to direct testimony from two physicians. In this case, Bond only offered the direct testimony of one physician, Dr. Auerbach. Therefore, the ALJ's consideration of Dr. Gormley's report did not violate KRS 342.033. And since the relevant provision of 803 KAR 25:010, Section 14(2), states that consideration of additional reports is only impermissible if it violates KRS 342.033, we do not agree with UPS that the ALJ's consideration of Dr. Gormley's report was in error.

UPS further argues that "[t]he last minute introduction of Dr. Gormley's records by ambush at the Hearing

did not afford [it] an opportunity to cross-examine Dr. Gormley.” We believe this argument would carry more weight if cross-examination of Dr. Gormley were necessitated by introduction of the medical evidence. But the only evidence actually ascertained by the records was corroboration of the fact that Bond was off work from March 21, 2003, through May 19, 2003. Dr. Gormley’s report did not provide an analysis of Bond’s medical condition, nor did the ALJ consider it as proof of Bond’s disability. Rather, Dr. Gormley’s report was used for statistical purposes to prove that Bond was off work for the stated period and that he provided Bond with off-duty work slips. We believe this evidence, along with Bond’s credible testimony that she provided the slips to UPS, was substantial enough to justify the ALJ’s decision to award Bond additional TTD benefits.

For these reasons, the decision of the Workers’ Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE DONNA BOND:

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