

Commonwealth Of Kentucky

Court of Appeals

NO. 2005-CA-001015-WC

GENERAL ELECTRIC

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-96-01210

BARBARA LEWIS;
HON. MARCEL SMITH,
ADMINISTRATIVE LAW JUDGE; and
WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** **

BEFORE: GUIDUGLI AND MINTON, JUDGES; ROSENBLUM, SENIOR JUDGE. ¹
ROSENBLUM, SENIOR JUDGE: General Electric (GE) has petitioned
for review of an opinion of the Workers' Compensation Board
(Board) entered on April 15, 2005, which affirmed an opinion and
award of the administrative law judge (ALJ) rendered November 9,
2004, determining that surgery performed on Barbara Lewis'

¹ Senior Judge Paul W. Rosenblum sitting as Special Judge by assignment of the
Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and
Kentucky Revised Statutes 21.580.

(Lewis) left ankle was compensable under Kentucky Revised Statutes (KRS) 342.020.

Before us, GE contends that the Board erred in not remanding the case to the ALJ to enter a revised opinion indicating that the disputed medical condition is not compensable, arguing that 1) the medical report relied on by the ALJ, which provided the sole evidence of causation, was not properly filed as evidence pursuant to 803 Kentucky Administrative Regulations (KAR) 25:012, and alternatively, 2) the ALJ's decision as to causation is not based on substantial evidence.

Our standard of review of a decision of the Board "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." Western Baptist Hospital v. Kelly, 827 S.W.2d 685, 687-88 (Ky. 1992). Having reviewed the Board's application of the law and the evidence, we conclude that the Board committed no error.

Lewis was born March 15, 1950. She worked for GE for twenty years, beginning in March, 1977. While in GE's employ she sustained several injuries which were compensated by GE as work-related -- right knee (1994); left ankle (1995); right shoulder (1996), and carpal tunnel.

At issue herein is the 1995 injury to the left ankle. Lewis tripped over a wire basket containing parts and the injury to her left ankle caused her to be off work for several weeks. She was eventually diagnosed with a stress fracture and put in a cast. Over the next few years, she had flare-ups of pain which were treated unsuccessfully with orthotics, stockings, casting, nonsteroidal anti-inflammatories, and cortisone injections.

When she became unable to walk or sustain balance she sought help from Dr. John Sanders (Dr. Sanders) who performed surgery to insert a screw in her left ankle. According to an independent medical examination (IME) and medical records review conducted by Dr. Martyn Goldman (Dr. Goldman) for GE and filed in the record herein, Dr. Sanders' records indicate that he recommended ankle surgery *as a direct result of Lewis' 1995 work injury*, where the "(p)atient experienced injury directly to the posterior tibial tendon navicular area." In Dr. Sanders' post-operative report (filed by Lewis in this record as an attachment to her initiating motion to reopen and motion for fee dispute), Lewis had reported to Dr. Sanders a history of "chronically painful left foot and ankle, *secondary to a previous injury*, which had caused continued irritation." (emphasis added). GE did not challenge the compensability of the surgery or the medication to treat a rash following the surgery.

Although she did not have any additional injuries to the ankle, Lewis' pain continued and Dr. Sanders recommended a second surgery to remove the left ankle screw. Lewis sought a second opinion from her knee physician. He referred her to Dr. Mark Petrik (Dr. Petrik), and both of these doctors concluded that Lewis needed surgery on her left ankle. Dr. Petrik, in a report filed in the record by Lewis, indicated that the original surgery by Dr. Sanders was "to try to correct an acquired progressive flatfoot problem which *she reported evolved while she was still working, and which apparently has been accepted as a work-related issue.*" (emphasis added). Dr. Petrik performed the second surgery, removing the original screw, reconstructing the ankle, and putting in additional screws.

As the issue became whether GE was going to provide coverage for this second ankle surgery as related to the 1995 injury, Lewis was seen by Dr. Goldman. Dr. Goldman's medical records review appeared to corroborate Lewis' later deposition testimony that she had not had any additional injury to the left ankle since the initial work injury. But, based on the medical records review and the IME, Dr. Goldman concluded that her current medical condition was unrelated to her 1995 left ankle work injury:

(Lewis' current medical) condition . . . is not uncommon in overweight women who have a genetic predisposition to flatfoot as well.

Based on Dr. Goldman's conclusion, GE denied coverage for the second surgery.

In order to resolve the fee dispute with GE for the second surgery, Lewis, *pro se*, filed the appropriate pleadings (motion for fee dispute and motion to reopen) with the Department of Workers' Claims and the case proceeded. Lewis filed as an attachment to her motion Dr. Sanders' operative report on her first surgery which linked the causation to a previous injury, and later filed the operative report from Dr. Petrik on the second surgery detailing removal of the screws from the first surgery and reconstruction on the same area. GE responded with Dr. Goldman's IME report. Lewis' deposition was also filed in the record.

On November 9, 2004, the ALJ rendered the following findings of fact and conclusions of law:

Having reviewed the record in its entirety, I am more persuaded by the medical opinions expressed by Dr. Sanders and find that the disputed surgery is compensable under KRS 342.020. Dr. Sanders gave an opinion on causation which is supported by his objective medical findings and the findings in surgery made by Dr. Petrik.

GE filed a petition for reconsideration, arguing that the ALJ erred in considering Dr. Sanders' report, specifically contending for the first time that as the report was only filed as an attachment to Lewis' initial pleadings it was never

entered into evidence. Alternatively, GE argued that Dr. Sanders' report did not establish causation. On December 7, 2004, the ALJ denied the petition, stating:

The report of Dr. Sanders is properly made part of the evidence by plaintiff. This report sets out Dr. Sander's [sic] opinions regarding causation sufficiently to support the findings.

GE appealed these issues to the Board. On April 15, 2005, the Board affirmed the decision of the ALJ, concluding that Dr. Sanders' report was properly included in the record as an expert opinion supporting the filing of Lewis' initial motion pursuant to 803 KAR 25:012; and did not violate 803 KAR 25:010 § 14(2) (or its reference to KRS 342.033), which states as follows:

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 KRS 342.033.

The Board also found that the ALJ had the sole authority to weigh the conflicting evidence between GE's Dr. Goldman and Lewis' Dr. Sanders as to causation, and the ALJ's reliance on Dr. Sanders' report provided substantial evidence of record. This petition for review followed.

We agree with the Board's conclusion that 803 KAR 25:010 § 14(2) is dispositive of GE's first issue. In accordance with 803 KAR 25:012 § 1(3)(a), Lewis filed her motion for fee dispute and reopening accompanied by "(n)ecessary supporting expert testimony," which was Dr. Sanders' report. While 803 KAR 25:010 § 14(1) provides that the Kentucky Rules of Evidence (KRE) apply in proceedings before an administrative law judge, the regulation also allows statutory and regulatory exceptions, such as 803 KAR 25:010 § 14(2), which provides that any party can file as evidence before the ALJ pertinent materials and relevant portions of hospital records. The ALJ controls the taking and presentation of proof. See *generally Big Sandy Community Action Program v. Chaffins*, 502 S.W.2d 526, 530 (Ky. 1973). The ALJ's acceptance of Dr. Sanders' report as evidence was properly based on the above regulation.

It is worth noting that although GE claims that it had no opportunity to rebut Dr. Sanders' report because the report was not introduced into evidence, GE was aware of Dr. Sanders' report because GE's proof in this case, Dr. Goldman's IME and medical report, contained the causation language from Dr. Sanders' report. Additionally, in GE's response to Lewis' motion to reopen, GE concedes:

In July of 2002, Dr. John Sanders recommended surgery on the claimant's left foot. He related the need for surgery to

the work injury. [GE] did not challenge the compensability of that procedure and, in fact, paid for the foot surgery. Subsequently, [GE] also authorized and paid for orthotics for the left foot.

On our review, we fail to see that the Board has erred by overlooking or misconstruing controlling authority.

In the alternative, GE argues that even if the ALJ properly considered Dr. Sanders' report, the report does not establish causation of the disputed injury and resulting expenses. We agree with the Board's conclusion that the report provided substantial evidence to support the ALJ's decision:

Dr. Sanders' report states "[t]he patient presented to the office with chronically painful left foot and ankle, secondary to previous injury, which had caused continued irritation to the posterior tibial pyramid." The need for surgery was the pre-operative diagnosis of "[p]osterior tibial dysfunction with collapse of medial column-left foot ankle, secondary to injury."

Lewis' deposition indicates that her only ankle injury was the 1995 one sustained at GE, and that she never further injured it. Dr. Sanders' report refers to a previous ankle injury. Although GE's medical evidence differed, because the ALJ had the sole authority to weigh the conflicting medical evidence as to causation, and since the ALJ's decision was based on substantial evidence, upon our review we fail to see how the Board "committed an error in assessing the evidence so flagrant as to cause gross injustice." Western Baptist Hospital, supra; see

generally Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985); and Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

For the foregoing reasons, the opinion of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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