

Commonwealth Of Kentucky
Court of Appeals

NO. 2005-CA-001214-WC

LADONNA LUSE

APPELLANT

PETITION FOR REVIEW OF A DECISION
v. OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-00354

ROBERT W. GAREY, D.M.D.;
KINNEY E. SLAUGHTER, D.M.D.;
KATHY R. SLAUGHTER, D.M.D.;
HON. MARCEL SMITH, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

AND

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CROSS-APPELLANT

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CROSS-APPELLEES

OPINION
AFFIRMING

** ** * * * * *

BEFORE: GUIDUGLI, McANULTY, AND SCHRODER, JUDGES.

SCHRODER, JUDGE: LaDonna Luse petitions for a review of a decision of the Worker's Compensation Board which affirmed in part, and vacated and remanded in part, an opinion and order of the ALJ which dismissed her claim in its entirety on statute of limitations grounds. Cross-appellant Robert W. Garey, D.M.D., contends that the Board erred in vacating and remanding in part to the ALJ. We affirm the Board.

LaDonna Luse worked as a dental hygienist, rotating between the office of Robert W. Garey, D.M.D., and the offices of Kinney E. Slaughter, D.M.D., and Kathy R. Slaughter, D.M.D. Her duties included taking x-rays, a history, doing perio charting and hard tissue charting, flossing, scaling, and the polishing of teeth. She mostly sat as she worked, and her job duties required her to work in awkward positions. Luse first began to experience pain in her neck in 1996. Her symptoms were not caused by any specific event. Rather, she began noticing pain on the way home from work. Around 1999, she also began experiencing low back pain, which she attributed to having to scoot around in a faulty chair with stuck casters at Dr. Garey's office.

In 1999, she began treatment with a chiropractor, Dr. Kelly Estes, for complaints of neck, shoulder, and upper middle back pain. She advised that her injury was work-related on a

patient information form, and in discussing causation with Dr. Estes she told him she thought her problem was related to her employment and he agreed.

Luse began seeing Dr. Monte Rommelman, a board certified physiatrist, in October, 2001, having been referred to him by her family physician. Luse's complaints at this time were neck and shoulder pain. Dr. Rommelman saw Luse for treatment several times in October, November, and December, 2001, for neck and shoulder pain. Dr. Rommelman did not see Luse again until October 22, 2003, at which time she again complained of neck and shoulder pain. Luse first mentioned lower back and right lower extremity problems to Dr. Rommelman in March of 2004. On April 14, 2004, Dr. Rommelman diagnosed this additional problem as a right piriformis syndrome.

Luse's last day of work was August 14, 2003. She testified that she stopped working because her problems were getting severe and she was unable to hold her instruments. On February 20, 2004, Luse filed an application for benefits with the Department of Workers' Claims. In a July, 2004, deposition, Dr. Rommelman opined: "Her upper extremity pain and sensory deficit was noted to be a combination of myofascial pain causing a thoracic outlet syndrome, and her hip and leg pain was diagnosed as a piriformis syndrome with result in sciatic compression." Dr. Rommelman opined that Luse's work as a dental

hygienist was a contributing factor in the upper body conditions, and that having to scoot in a chair with stuck rollers very well could lead to piriformis syndrome.

Dr. Rommelman first assessed an impairment rating in July, 2004, at which time he assessed Luse as having a 9% whole person impairment. He attributed 6% to the upper body complaints, and 3% to the right piriformis syndrome. As to the 6% impairment he assessed for Luse's upper body complaints, Dr. Rommelman testified that this impairment rating would have been the same when he first saw her in October, 2001. As to the 3% attributed to the right piriformis syndrome, Dr. Rommelman testified that Luse first brought these symptoms to his attention in March, 2004.

Luse testified that the symptoms she experienced in her neck, right arm, shoulder, and low back worsened over time from 1997 until she left work in August, 2003. Luse testified that her symptoms severely worsened in the two years before she left work, estimating that three-fourths of these problems developed within those last two years.

In an opinion and order entered November 17, 2004, the ALJ found that Luse had suffered an injury as defined by KRS 342.0011(1), but that her claim was barred on statute of limitations grounds. The ALJ found that the two year statute of limitations, per KRS 342.185 and KRS 342.270, began to run in

1999, when Luse was informed by Dr. Estes that her problems were work-related. Hence, the ALJ concluded that her February 20, 2004, filing was untimely, and, therefore, her entire claim was barred. Upon Luse's motion for reconsideration, in an order entered December 30, 2004, the ALJ found, in pertinent part:

Plaintiff asks for part of her claim to be found compensable as having arisen within two years of the date she filed her claim. However, Dr. Rommelman wasn't able to attribute any of the 9% impairment he assessed within that two years that would have enabled me to find it compensable. I could not find any impairment to have arisen within the two years prior to February 20, 2004. Therefore, I had to dismiss the claim in its entirety.

In an opinion entered May 16, 2005, the Board agreed that, of the 9% overall impairment assessed by Dr. Rommelman, the 6% attributable to the neck, shoulder, and upper extremity complaints was barred by the statute of limitations. However, as to the 3% attributable to the right piriformis syndrome, the Board concluded that the ALJ's findings of fact were insufficient. As to the 6%, the Board opined:

While there is nothing contained in Dr. Estes' records addressing work-related causation, Luse testified at her deposition that Dr. Estes in 1999 agreed her overall condition was the result of work-related cumulative trauma. We believe her testimony alone in this instance is sufficient to satisfy the standard established in Alcan Foil Products v. Huff, [2 S.W.3d 96 (Ky. 1999)], and progeny for the clocking of her two-year statute of limitations. We believe

this to be true with respect to Luse's low back condition, as well as her neck, shoulder, and right upper extremity complaints. . . . Dr. Estes qualifies as a "physician" for purposes of the Act. See KRS 342.0011(32). . . . Here, the ALJ was persuaded by Luse's testimony she was informed by Dr. Estes in 1999 that her collective physical complaints were work-related. For purposes of the clocking of the statute of limitations, that is sufficient. Luse did not file her claim until 2004. The ALJ, therefore, properly ruled her cause of action is barred pursuant to KRS 342.185.

We also find no error with regard to the ALJ's determination that none of Luse's disability was attributable to Luse's neck, shoulder and right upper extremity complaints incurred within two years of the filing of her claim. Pertaining to Luse's neck, shoulder, and right upper extremity complaints, Dr. Rommelman stated that the 6% impairment rating would have probably been the same in 2001. In light of that testimony, we disagree with the petitioner's argument that apportionment of disability relative to a worsening of Luse's upper body complaints for the two years immediately preceding the filing of her claim was compelled. . . .

As to the 3% impairment attributed to the piriformis syndrome, the Board found the ALJ's findings of fact insufficient, stating:

Pertaining to Dr. Rommelman's diagnosis of piriformis syndrome of the right hip and leg resulting in sciatic compression, we must agree with the petitioner that the ALJ's findings of fact are insufficient regarding apportionment in accordance with Special Fund v. Clark, [998 S.W.2d 487 (Ky. 1999)]. While the record supports a finding

that in 1999, Luse was informed that her "low back" complaints were generally work-related and in 2000 she received physical therapy to address "low back" symptoms, the first mention of right hip and leg radiculopathy occurs, according to Dr. Rommelman, in early 2004. Dr. Rommelman attributed 3% of Luse's overall 9% functional impairment rating to those complaints and further testified that his conclusions regarding piriformis syndrome were based upon objective medical evidence. We believe such evidence could represent a worsening of Luse's repetitive low back injury - a condition already determined by the ALJ to be work-related - within two years of the filing of the claim. Unfortunately, the ALJ's opinion below, as well as her order on petition for reconsideration, are silent as to this question. While the ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of her reasoning in reaching a particular result, the decision must adequately lay out the basic facts from the evidence upon which her ultimate conclusions were drawn so that the parties are reasonably apprised of the basis of that decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973); Shields v. Pittsburg and Midway Coal Mining Co., 634 S.W.2d 440 (Ky.App. 1982). We are, therefore, left with no alternative but to vacate with regard to this issue. . . . On remand, the ALJ is instructed to engage in a discussion and conduct the appropriate legal analysis pertaining to the development of Luse's right hip and leg complaints. If the ALJ determines a portion of Luse's 3% impairment to be compensable pursuant to Special Fund v. Clark, supra, she is further instructed to make specific findings as to what activities performed for which respondent produced the harmful change and whether apportionment between the parties is appropriate, citing to the particular

testimony/evidence of record relied upon in so ruling. Conversely, if such evidence is ultimately rejected by the ALJ, she shall specifically state in any new order on remand her reasons for rejecting the evidence.

From the Board's opinion, Luse appeals and Garey cross-appeals to this Court. Luse appeals that portion of the Board's decision which affirmed the ALJ's denial of her claim for any part of the 6% whole person impairment attributable to the neck and right upper extremity problem. Garey appeals that portion of the Board's order which vacated and remanded to the ALJ for further findings of fact concerning the 3% attributable to the piriformis syndrome, and requests this Court reinstate the opinion of the ALJ which dismissed the claim in its entirety.

As to Luse's 6% whole impairment rating due to the upper body problems, we agree with the Board and the ALJ. The ALJ, as fact finder, has the sole authority to determine the weight, credibility, substance, and inferences to be drawn from the evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). Where evidence is conflicting, the ALJ may choose whom and what to believe. Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977). The ALJ may choose to believe parts of the evidence and disbelieve other parts, even when it comes from the same witness or the same party's total proof. Caudill v.

Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). The function of the Court of Appeals in reviewing a decision of the Worker's Compensation Board is to correct the Board only where the Court perceives the Board has overlooked or misconstrued statutes, precedent or has flagrantly erred in assessing the evidence so as to cause a gross injustice. Western Baptist Hospital v. Kelly, 827 S.W.2d 685 (Ky. 1992). We see no error in the Board and the ALJ choosing to rely on Dr. Rommelman's analysis, over Luse's testimony, that Luse had a 6% impairment attributable to the upper body condition, and that this is the same rating he would have given her in October, 2001. We further see no error in the Board and the ALJ's determination that as to the upper body condition, the statute of limitations began to run in 1999 when Dr. Estes agreed that her condition was work-related.

Luse was diagnosed with the piriformis syndrome in April, 2004, which is after the claim was filed, for which Dr. Rommelman assessed an additional 3% impairment to the body as a whole. The question becomes when did the statute of limitations start running for this claim. Garey, the cross-appellant, argues that other medical records document the lower extremity symptoms several years prior to 2004. That may or may not be true. The Board felt the ALJ's findings were insufficient as to the 3% impairment due to the piriformis syndrome, and remanded

for a full evaluation of this claim. While we believe it could be argued that the remand is not a final and appealable decision, we agree with the Board that the matter should be remanded to the ALJ for further findings on this matter. Once the findings are made and reviewed by the Board, then we can review those findings. Under Western Baptist Hospital, this is the extent of our review at this time and we must affirm.

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

ALL CONCUR.

BRIEF FOR APPELLANT/CROSS-
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