

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-001965-WC

FAMILY HOME HEALTH AGENCY

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
CLAIM NO. WC-03-82016

GENNIE D. LOY; HON. W. BRUCE COWDEN, JR.,
ADMINISTRATIVE LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: ACREE AND HOWARD, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

HOWARD, JUDGE: On petition for reconsideration, the Administrative Law Judge

(ALJ) enhanced the claimant's income benefit by the three-multiplier under KRS

342.730(1)(c)1 after finding that she could not return to the type of work she performed

at the time of her injury. Family Home Health Agency petitions for review of the

¹ Senior Judge David C. Buckingham sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

decision of the Workers' Compensation Board affirming the ALJ's award. Having concluded that the Board has not "overlooked or misconstrued controlling statutes or precedent, or committed an error in assessing the evidence so flagrant as to cause gross injustice," we affirm. *See Western Baptist Hosp. v. Kelly*, 827 S.W.2d 685, 687-88 (Ky. 1992).

On June 10, 2003, Ms. Gennie D. Loy was injured in a car accident during her employment with Family Home Health as a licensed practical nurse. Loy underwent two surgeries for her back injuries. Her claim was bifurcated, and in an order rendered on March 16, 2005, the ALJ determined the issues of work-relatedness, temporary total disability, and reasonableness of her medical treatment in Loy's favor. The claim was abated pending Loy's attaining maximum medical improvement. After the abatement was terminated and proof was reopened, the ALJ entered a supplemental opinion, order, and award. The ALJ awarded Loy permanent partial disability benefits based on a 13% occupational disability rating and declined to apply the three-multiplier after finding that she could return to her previous work. Loy petitioned for reconsideration, asserting that the ALJ misinterpreted the testimony relating to her job requirements and her ability to perform heavy lifting. The ALJ granted Loy's petition and enhanced her income benefits by the three-multiplier. Family Home Health then petitioned for reconsideration, contending that the ALJ exceeded his authority on Loy's petition for reconsideration as no patent error existed and a different adjudication on the merits was not permissible. The ALJ denied Family Home Health's petition, stating as follows:

KRS 342.281 does provide an opportunity for the Administrative Law Judge to revisit this issue especially in light of the fact that the Administrative Law Judge failed to notice specific job duties delineated in the job description sheet attached to Scott Mahler's (sic) deposition which included the requirements to transfer patients as instructed by a registered nurse and registered physical therapist. The Administrative Law Judge finds that this oversight was indeed a patent error appearing on the face of the record and that KRS 342.281 provides an opportunity to correct this oversight. See also Wells vs. Beth Alcorn Coal Corporation (sic), Ky. App., 708 S.W.2d 104 (1985) in which the Court of Appeals noted that KRS 342.281 is to be liberally construed and is not intended merely to address clerical errors but all patent errors.

Family Home Health appealed to the Workers' Compensation Board. It contended that the ALJ was without authority to award the three-multiplier enhancement to Loy's award on petition for reconsideration, and that the ALJ's enhancement of the award was not supported by substantial evidence. In its opinion, the Board stated that Loy was required to file a petition for reconsideration to preserve for appellate review the ALJ's initial finding that she could return to her job. The Board continued, as follows:

Wells v. Beth-Elkhorn Coal Corporation, 708 S.W.2d 104 (Ky.App. 1985), instructs that an ALJ, on petition for reconsideration, may not revisit the merits of a claim and alter his factual findings. This legal impediment to the ultimate authority of the ALJ however does not abrogate a party's responsibility to request adequate findings sufficient to apprise the parties of the basis of the decision and to permit meaningful appellate review. This is especially true in those instances where the aggrieved party believes the ALJ has made insufficient findings to support his conclusion or he has overlooked critical evidence in making his conclusion. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky.App. 1982).

Here, the ALJ candidly admitted he had overlooked Loy's job description when he determined Loy was physically capable of returning to her pre-injury employment. The issue of an injured worker's retained physical capacity to labor post-injury requires a weighing of the totality of the lay and medical evidence contained in the record. Carte v. Lorretto Motherhouse Infirmary, 19 S.W.3d 122 (Ky.App. 2000).

After Loy's petition for reconsideration, the ALJ concluded he had overlooked Loy's job description. No evidentiary weight was assigned to that piece of evidence in the opinion and award. The Board believes, as did the ALJ, this is precisely the type of patent error the fact finder could properly address on petition for reconsideration. Once the evidence which was previously overlooked becomes part of the evidentiary mix and that evidence is assigned weight and credibility, the ALJ is vested with the authority to correct his decision.

The Board affirmed the ALJ's findings supporting the three-multiplier.

This petition for review followed.

Family Home Health contends that the ALJ improperly reconsidered the merits when he granted Loy's petition for reconsideration and applied the three-multiplier to her permanent partial disability benefits. It maintains that the ALJ's initial finding of Loy's ability to return to work is not a patent error, and therefore not subject to revision on petition for reconsideration pursuant to KRS 342.281.

A petition for reconsideration is required to preserve for appellate review a question of fact so that "all justiciable issues are disposed of before the appellate process begins." *Brasch-Barry General Contractors v. Jones*, 175 S.W.3d 81, 83 (Ky. 2005), quoting *Eaton Axle Corp. v. Nally*, 688 S.W.2d 334, 338 (Ky. 1985). The ALJ may correct patent errors on petition for reconsideration, including clerical, factual, or legal

errors. *Commonwealth, Dept. of Mental Health v. Robertson*, 447 S.W.2d 857, 859 (Ky. 1986) *overruled on other grounds*, *Whittaker v. Wright*, 969 S.W.2d 209 (Ky. 1998); *Wells v. Beth-Elkhorn Coal Corp .*, 708 S.W.2d 104, 106 (Ky.App. 1986).

In the December 21, 2005, initial award, the ALJ declined to enhance Loy's award, in part, on his reliance on "Mr. Marler's testimony elicited on page 11 of his deposition in which he acknowledged that the Plaintiff's job duties did not involve any lifting and did not require the Plaintiff to pick up patients or help them in and out of the bath." Loy was required to file a petition for reconsideration to preserve for appellate review the ALJ's initial finding that she could return to the type of work she performed prior to her injury. *See Brash-Barry General Contractors*, 175 S.W.3d at 83. The ALJ found on petition for reconsideration that "although [he] recognized [in the initial order and award] the job description sheet on the Plaintiff's position attached to Marler's deposition . . . [he] erred in failing to recognize the specific job duties delineated in the job description sheet, "including 'transfers as instructed by a Registered Nurse or Registered Physical Therapist.'" The ALJ did not simply "change his mind," as asserted by Family Home Health. Overlooking the evidence of Loy's specific job duties is a patent error subject to correction on petition for reconsideration.

Family Home Health contends that the evidence does not support the enhancement of Loy's permanent partial disability benefit by the three-multiplier.

The ALJ "has the sole authority to determine the quality, character, and substance of the evidence." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993).

The ALJ may reject any evidence and believe or disbelieve evidence, regardless of whether it comes from the same witness or same party's proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88, 96 (Ky. 2000). Where the ALJ finds in favor of the employee, such as the case before us, those findings will be affirmed if they are supported by substantial evidence, which is "evidence which would permit a fact-finder to reasonably find as it did." *Special Fund v. Francis*, 708 S.W.2d 641, 643 (Ky. 1986).

Family Home Health correctly points out that Loy's testimony was inconsistent relating to whether her job required lifting in contravention of her medical restrictions. Nevertheless, it was within the ALJ's prerogative to assess and determine the credibility of the witnesses. Loy testified that she had to occasionally lift patients exceeding her 25-pound restriction or turn patients in their beds. We agree with the Board that the ALJ's findings on Loy's ability to return to the type of work she performed before her injury "are not so unreasonable that they must be reversed as a matter of law."

Family Home Health asserts the ALJ erred in basing his enhancement of Loy's income benefit on the job description in light of the testimony that Loy had not performed heavy lifting and that she was not expected to perform heavy lifting. It cites *Ford Motor Co. v. Forman*, 142 S.W.3d 141 (Ky. 2004), in support of its argument. The testimony relied on by Family Home Health contradicted Loy's testimony that on rare occasion she was required to lift patients who exceeded her 25-pound limit. As the ALJ's application of the the three-multiplier was supported by substantial evidence, we will not reverse the Board on this issue.

Finally, we decline Loy's request to dismiss this appeal based on her assertion that Family Home Health's petition to the Board was untimely. When the ALJ granted Loy's petition for reconsideration and applied the three-multiplier, Family Home Health was entitled to file its petition for reconsideration and to preserve for appeal any alleged errors of fact in the ALJ's enhancement of Loy's award by the three-multiplier. Such was not untimely.

The decision of the Workers' Compensation Board is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

M. Christopher Davis
Louisville, Kentucky

BRIEF FOR APPELLEE GENNIE D. LOY:

Larry Ashlock
Elizabethtown, Kentucky