

Commonwealth of Kentucky
Court of Appeals

NO. 2006-CA-001975-WC

PATRICIA MILLS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-03-67443

FRESENIUS MEDICAL CARE HOLDING;
HON. LAWRENCE F. SMITH, ADMINISTRATIVE LAW
JUDGE; WORKERS' COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART
REVERSING IN PART AND REMANDING

** ** *

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

ABRAMSON, JUDGE: Patricia Mills seeks review of a decision of the Workers' Compensation Board affirming the decision of the Administrative Law Judge (ALJ), refusing to award temporary total disability (TTD) benefits to Mills for a work-related injury suffered by her on October 23, 2003, and denying certain medical expenses on the basis that her injury had resolved no later than November 30, 2003. Because the ALJ's

decision on TTD benefits is supported by substantial evidence, we affirm the Board's decision on that issue. However, we reverse and remand as to Mills's medical expenses claim finding no evidence to support the November 30, 2003, resolution date adopted by the ALJ and affirmed by the Board.

On August 5, 2005, Mills filed an Application for Resolution of Injury Claim. She contended that on October 23, 2003, while acting within the scope and course of her employment with Fresenius Medical Care Holding, she injured her back while moving a desk. According to Mills's testimony before the ALJ, she did not immediately realize that she had injured herself and did not seek prompt medical treatment. She contends, however, that the pain began to worsen over the next several days, and when she reported to work on October 27, 2003, her supervisor suggested she seek treatment if she believed it was needed. Mills left work after that and never returned to her job with Fresenius.

On October 29, 2003, Mills sought treatment from Claude C. Hazlett, M.D. Mills introduced Dr. Hazlett's medical records at the hearing. Although the ALJ understandably found Dr. Hazlett's records to be conflicting and, at times, “indecipherable,” it is clear that Mills was under his care during much of November and possibly a portion of December 2003. Though the various documents are inconsistent, at least some of them indicate that Mills may have been restricted from returning to work for various periods of time. The records further indicate that Mills underwent an MRI

examination on December 15, 2003, the results of which showed that her lumbar spine was normal.

Mills also submitted to the ALJ the medical records of Dr. K. T. Reichard, an orthopedic surgeon. These records indicated that Mills presented at Dr. Reichard's office on January 29, 2004, complaining of back pain following an October, 2003, injury at work. Though his notes reveal that Mills had some muscular soreness and some restriction in her range of motion, Dr. Reichard did not find any neurological or other abnormalities. As a result, he simply diagnosed Mills as having "chronic low back pain." However, Dr. Reichard prescribed medication and advised her to remain off from work while undergoing physical therapy until March 2004, at which time she would be reevaluated. Subsequently, on March 25, 2004, Dr. Reichard noted that Mills was markedly improved.

At the hearing, Elaine Woods, Mills's supervisor at Fresenius, testified that Mills had been the subject of numerous disciplinary actions because of chronic tardiness. Woods further testified that in beginning in early October, 2003, Mills told several other employees that she was seeking a transfer to Knoxville because she had a boyfriend who lived there as well as other family members. In fact, according to Mills's own testimony, on October 7, 2003, she formally requested a transfer to Knoxville. Mills stated that she wanted to attend the University of Tennessee to complete work toward her bachelor's degree and time was of the essence. However, according to Woods, the request was denied on October 10, 2003, due to Mills's record of disciplinary actions. Mills

eventually moved to Knoxville in January 2004 and began working with a temporary employment agency in March of that year.

In his Opinion and Order, the ALJ found that Mills suffered a work-related injury on October 23, 2003, and provided timely notice to Fresenius four days later. However, he found no proof that the injury Mills sustained resulted in total disability for any length of time. Based on this, and further based on his own conclusion that Mills moved to Knoxville in “late November,” the ALJ concluded that her injury had resolved no later than November 30, 2003. As a result, the ALJ determined that Fresenius was responsible for Mills's medical expenses incurred between October 23, 2003, and November 30, 2003, but that Mills was not entitled to TTD benefits. On review, the Board affirmed and this appeal followed.

As the finder of fact, the ALJ has the sole discretion to determine the character, quality and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308 (Ky. 1993); *Paramount Foods, Inc. v. Burkhardt*, 695 S.W.2d 418 (Ky. 1985). In carrying out his duties, the ALJ is free to reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness or the same party's proof. *Magic Coal Co. v. Fox*, 19 S.W.3d 88 (Ky. 2000); *Caudill v. Maloney's Discount Stores*, 560 S.W.2d 15 (Ky. 1977); *Halls Hardwood Floor Co. v. Stapleton*, 16 S.W.3d 327 (Ky. App. 2000). The ALJ has the sole authority to judge the weight and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997); *Luttrel v. Cardinal Aluminum Co.*,

909 S.W.2d 334 (Ky. App. 1995). When there is conflicting evidence, he is to choose which witnesses and evidence to believe. *Pruitt v. Bugg Brothers*, 547 S.W.2d 123 (Ky. 1977).

In reviewing the ALJ's decision, the Board must decide whether the evidence compelled a result contrary to that reached by the ALJ. *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence that is so overwhelming no reasonable person could reach the same conclusion as the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky. App. 1985). Evidence that is merely contrary to the ALJ's decision is not adequate to require reversal on appeal. *Whittaker v. Rowland*, 998 S.W.2d 479, 482 (Ky. 1999). In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. *Special Fund v. Francis*, 708 S.W.2d 641 (Ky. 1986). Our purpose in reviewing the decisions 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). In so reviewing the Board's decision in this matter, we agree that the ALJ did not err when he ordered that TTD benefits be denied. However, we believe that the ALJ did err when, after finding competent medical evidence that Mills did suffer a work-related injury he chose to disregard that same evidence showing that Mills remained under a physician's treatment for this injury until March 25, 2004.

The ALJ found Dr. Hazlett's medical records to be confusing, contradictory and, at times, “indecipherable” and our review of those documents leads us to the same conclusion. However, as the ALJ noted, the one point upon which the records are consistent is that Mills complained of back pain resulting from a work-related injury occurring on October 23, 2003. Because of this, and further because there is no contradictory medical evidence in the record, we agree with his conclusion that there was substantial evidence to support a finding that Mills suffered a work-related injury.

However, the question as to the degree to which the injury affected Mills's ability to work is not so readily answered in the records. Mills, contends that the injury prevented her from returning to any work until March 2004. In fact, Dr. Reichard's records indicate that he advised Mills to remain off from work while undergoing physical therapy. Dr. Hazlett's records, however, are closer in time to the date of injury and do not evidence such a restriction. Though Dr. Hazlett's records seem to indicate that there may have been short periods of time during which Mills was restricted from working, *all* five Disability Certificates in the record, each prepared during Mills's visits to Dr. Hazlett, indicate that Mills was released to return to work either on the day following the date of the Certificate or shortly thereafter.¹ Because of this, the medical evidence in the record is at least equally supportive of the conclusion that Mills was not temporarily totally disabled as it is supportive of her claim that she was. As a result, we find that the ALJ's

¹ The Disability Certificates are dated November 4, 2003; November 5, 2003; November 21, 2003; and December 23, 2003. The date of the fifth Certificate in the record is illegible, but the Certificate does indicate that Mills was released to return to work on November 20, 2003.

decision was supported by substantial evidence and we are foreclosed from setting aside the Board's decision affirming it.

Having found that Mills suffered a work-related injury, the ALJ was correct that her medical expenses related to the injury were to be paid by Fresenius. Because the medical records in this matter are unclear, it is difficult to determine when Mills's work-related injury was resolved. The ALJ, relying primarily on his finding that Mills moved to Tennessee in late November 2003, concluded that the injury resolved no later than November 30, 2003. We disagree. We are unable to determine from the record where the ALJ found support for his conclusion that Mills moved to Tennessee in November 2003. In fact, her uncontradicted testimony indicates that she did not move until January 2004. Similarly, we cannot find any evidence in the record supporting the ALJ's conclusion that the injury was resolved prior to March 2004. Conversely, Dr. Reichard's medical records confirm that Mills had some muscular tenderness and a restricted range of motion during her January 29, 2004, visit, and that these problems were not relieved until she completed approximately two months of physical therapy. Because these records are not contradicted by any other medical evidence, they can only support the conclusion that Mills's injury did not resolve until March 25, 2004. Accordingly, we reverse the Board's Order holding that medical expenses were not recoverable after Mills's injury resolved on November 30, 2003.

In summary, we find substantial evidence in the record to support the ALJ's conclusions that Mills did suffer a work-related injury on October 23, 2003. We likewise

agree that the record does not support Mills's claim that she was temporarily totally disabled and thus entitled to TTD benefits. However, we further find that the medical evidence indicates that the injury resolved on March 25, 2004, rather than on November 30, 2003, and thus Fresenius is responsible for Mills's medical expenses incurred between October 23, 2003 and March 25, 2004. Therefore, we reverse the Board's opinion with respect to the disallowance of medical expenses after November 30, 2003, and remand for entry of an order consistent with this opinion. The Board's August 18, 2006, Opinion is affirmed in all other respects.

ALL CONCUR.

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