

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-002554-WC

ANGELICA JEFFRIES

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-02099

CLARK & WARD; HONORABLE J. LANDON
OVERFIELD, ADMINISTRATIVE LAW JUDGE;
AND KENTUCKY WORKERS' COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** *

BEFORE: ABRAMSON, ACREE, AND WINE, JUDGES.

ABRAMSON, JUDGE: Angelica Jeffries seeks review of the November 7, 2006

Opinion of the Workers' Compensation Board affirming the decision of the

Administrative Law Judge (ALJ), dismissing Jeffries' claim for benefits on the ground

that Jeffries failed to sustain her burden of proving that her medical condition was caused

by or related to her work at Clark & Ward. Though there is contradictory evidence in the

record, we find that the ALJ's decision was supported by substantial evidence and thus affirm the Board's Opinion.

Jeffries was employed by Clark & Ward, a law firm, from September 2002 through April 2003. Prior to this, she was employed for two years as a paralegal in Wisconsin. Working as a legal secretary for Clark & Ward, Jeffries spent approximately 95% of her time doing transcription which consisted of nearly continuous typing. Upon leaving Clark & Ward in 2003, she went to work for another law firm as a paralegal.

In late November, 2002, Jeffries began experiencing numbness, tingling and cramping in the fourth and fifth fingers of both hands. She testified that each hand would occasionally tighten up into a claw, and her forearms would stiffen. She also stated that her upper arms, neck and shoulders were sore and painful. Though Jeffries admitted that she previously had developed a similar condition in her hands while working in Wisconsin and that the condition has never gone away, she argued to the ALJ that the present problem was a new one unrelated to the previous condition and involved different fingers.

Both parties submitted testimony and numerous medical reports to support their respective positions. Because the Board set forth a concise summary of the voluminous record in its November 7, 2006 Opinion, we include that portion of the order below.

Jeffries testified [by deposition that] her current symptoms were different from the problem she developed in her thumbs years ago. She stated her problem with regard to her work at Clark & Ward involved her small and ring

fingers. She stated the problem began with cramping, numbness, [and] tingling. Her hand would claw up, her forearms would stiffen, and her upper arms, neck and shoulders were sore and painful. Jeffries testified the numbness and tingling in her hands affected her ability to work. She acknowledged receiving treatment for her thumbs while living in Wisconsin, and that the thumb problem never went away. She indicated this was not part of her complaints related to her work at Clark & Ward. She first noticed the problem with her ring and small fingers in November 2002. The problem increased and on December 19, 2002, she saw Dr. [Mark] Einbecker. [Jeffries] stated she reported her complaints of numbness in the ring and small fingers to Dr. Einbecker. She next saw Dr. Einbecker in January 2003. Dr. Einbecker advised Jeffries to stretch and take breaks and indicated that if her problem became worse she could try physical therapy. Jeffries stated she did not seek medical attention again until she saw Dr. [J. Martin] Favetto in June 2004. After she last saw Dr. Einbecker in 2003 and prior to seeing Dr. Favetto in 2004, Jeffries changed jobs. She indicated the decreased amount of typing at her new job seemed to have helped her hands. She testified the problems with her thumbs had nothing to do with the problems with her hands.

At the hearing on March 28, 2006, Jeffries read a statement which reiterated much of her deposition testimony. She indicated she developed symptoms with her fourth and fifth fingers bilaterally at the end of November or early December 2002. Jeffries stated she suffered numbness, tingling, and hand cramping. She saw Dr. Einbecker on December 19, 2002 and was diagnosed with exercise induced carpal tunnel syndrome. Jeffries acknowledged previous complaints involving the “thenar prominences” of her hands and stated these symptoms were located exclusively in her thumbs. She indicated she considered the condition involving her fourth and fifth fingers to be a different condition, involving completely different anatomical features. Jeffries testified that after taking the paralegal position with another law office her symptoms became less severe and less frequent, but continued. She stated she still experienced numbness, tingling, and aching in the ring and small fingers

bilaterally, and in the lateral aspect of her arms. She stated Clark & Ward's workers' compensation insurance company had given approval for treatment by Dr. Favetto and Jeffries began a course of physical therapy which improved her symptoms. Late in the course of that physical therapy, she was advised the carrier no longer would pay for the sessions.¹ Jeffries stated she discontinued physical therapy in 2005 and since that time noticed a gradual increase in the frequency and intensity of her symptoms. She stated she continues to have bilateral fourth and fifth finger cramping and numbness, neck and shoulder pain, and bilateral pain in her elbows. Jeffries indicated she had received no treatment since March 2005. She stated she wanted to resume medical treatment and that Drs. Atasoy and Kasden advised treatment with a hand surgeon and possible hand surgery. Jeffries indicated she wanted to continue with physical therapy prior to any surgery.

Jeffries submitted the July 22, 2004 report of Dr. J. Martin Favetto, who evaluated Jeffries on July 2, 2004. Dr. Favetto diagnosed thoracic outlet compression, ordered an EMG/NCV study, physical therapy, and a work site evaluation. He stated thoracic outlet compression occurred due to an anatomic condition which was aggravated by posture, such as posture at work. Dr. Favetto noted that prolonged periods of typing and sitting could aggravate the problem. He did not feel Jeffries had reached maximum medical improvement when she was seen on January 13, 2005.

Jeffries introduced medical records from Dr. Erdogan Atasoy, who saw Jeffries on March 8, 2005. Dr. Atasoy received a history of bilateral fourth and fifth finger numbness and cramps for two years, as well as arm and upper back pain. Jeffries reported night time symptoms of lower posterior neck pain, elbow pain, and numbness and tingling when her arm was in certain positions. She reported bilateral arm tiredness with activities above her shoulder and her hands were cold. Dr. Atasoy diagnosed bilateral upper back

¹ In fact, when Clark & Ward's workers' compensation insurance carrier ceased coverage of her physical therapy sessions, Jeffries instituted the present action by filing unfair claims settlement proceedings with the Office of Workers' Claims. These allegations were transferred to the ALJ after she later filed a claim for benefits alleging a work-related injury.

myofascitis and associated moderate bilateral thoracic outlet compression, most likely work-related. He ordered physical therapy for the thoracic outlet compression, advised use of Tylenol, and discussed possible scalene injections and trigger point injections.

Jeffries introduced the November 14, 2002 medical record of Dr. Josephine Glazer. Jeffries complained of bilateral pain in the thenar eminence with hand pain for five years, worsening over the last year. Jeffries described the pain as a constant ache that was increased after a full day of repetitive motion. The doctor noted bilateral tenderness to palpation over the palmar portion of the thumb, and grip strength was intact. Dr. Glazer diagnosed non-specific bilateral thumb tendonitis.

Jeffries introduced the report of Dr. Gregory T. Snider, who performed an evaluation on June 2, 2005. Jeffries' chief complaints were neck stiffness radiating into the intrascapular area and into the upper arms and forearms. She continued to have bilateral fourth and fifth finger numbness, but fewer complaints of the thenar symptoms at the time of the evaluation. Dr. Snider diagnosed fibromyalgia and cervical strain. It was his opinion that Jeffries did not suffer from thoracic outlet compression. Dr. Snider stated that there was no testing to confirm that diagnosis. X-rays indicated no cervical ribs and the EMG/NCV studies were normal. He stated fibromyalgia is a condition of unknown etiology. Dr. Snider explained the symptoms can be aggravated by certain activities or by superimposed cervical strain. He indicated prolonged computer or office work could contribute to aggravation or exacerbation of these symptoms. Dr. Snider opined that Jeffries' fibromyalgia was not caused by her employment, but her symptoms were aggravated or exacerbated by work-related cervical strain. He stated the symptoms of thenar aching were probably related to incipient carpal tunnel syndrome. Dr. Snider indicated the balance of Jeffries' symptoms, including numbness in the ring fingers and neck pain, appeared to have begun in late November or December 2002. He felt Jeffries' prior treatment in Wisconsin had been for median neuropathy or intracarpal tendonitis. He believed Jeffries had attained maximum

medical improvement for her symptoms of fibromyalgia and that condition would not affect her work performance. Dr. Snider stated that typically chronic cervical sprain or strain is most consistent with DRE cervical Category II with a 5% whole person impairment. He stated only part of this impairment would be work-related, with the balance being related to fibromyalgia.

Jeffries introduced the September 19, 2005 EMG report of Dr. Hal Corwin. The study, requested by Dr. Kasdan, revealed bilateral ulnar neuropathy, moderate, at elbows, compressive with demyelination, no axon loss.

Jeffries introduced the report of Dr. James Templin, who evaluated her on November 14, 2005. He noted a September 19, 2005 EMG/NCV study revealed bilateral ulnar neuropathy, moderate at the elbows. An October 3, 2001 study was normal. An August 3, 2004 study showed no evidence of peripheral neuropathy, myopathy, or radiculopathy. Dr. Templin stated there was no evidence of neurogenic thoracic outlet syndrome. He diagnosed bilateral ulnar neuropathy, bilateral neck, shoulder, arm, and hand pain syndrome, history of thoracic outlet syndrome, chronic bilateral thumb pain, and upper extremity overuse syndrome. Dr. Templin believed Jeffries' complaints were the result of cumulative trauma. He assigned an 8% permanent whole body impairment, 4% for each hand. He stated Jeffries had no prior active impairment.

Clark & Ward introduced records from Dr. Mark E. Einbecker, who saw Jeffries on December 19, 2002 at the request of Dr. Grant. Dr. Einbecker recorded a history of three to four years of bilateral thenar aching with occasional numbness and tingling in the ring finger on both hands. Jeffries reported that it tended to worsen when she was under a lot of stress, spending a lot of time on the computer. She reported she was on the computer eight hours per day and had been doing this for several years. On examination, Jeffries had negative Phalen's, Tinel's, and carpal tunnel compression tests. She was noted to have excellent range of motion of the shoulder, elbow, wrists, and hand. She had reproducible symptoms with compression of the inferior border of the

pronator teres bilaterally. Resisted wrist flexion did not increase her symptomatology. Dr. Einbecker's assessment was that [Jeffries] had possible pronator syndrome/exercise induced carpal tunnel syndrome. Dr. Einbecker's January 28, 2003 note indicates Jeffries returned for follow up of bilateral thenar discomfort. He indicated he had spoken with Dr. Coleman and they agreed Jeffries appeared to have an exercise induced mild carpal tunnel syndrome. His records indicate an April 8, 2003 appointment was [canceled] by Jeffries.

Clark & Ward introduced the report of Dr. Robert Goldman, who saw Jeffries for a neurology consultation on September 26, 2001. Dr. Goldman's assessment was bilateral hand pain in the thenar eminence that was of unclear etiology. He noted carpal tunnel syndrome was a possibility although the symptoms were not classic for carpal tunnel with no significant numbness, weakness, or worsening at night. Jeffries reported some worsening in the last year, associated with doing a lot of typing. Jeffries also complained of occasional neck pain.

Clark & Ward introduced the report of Dr. Morton L. Kasdan, who evaluated Jeffries on September 19, 2006. Dr. Kasdan reviewed numerous medical records and diagnostic reports, obtained a medical and work history, and conducted testing and an examination. He diagnosed bilateral median neuropathy. In Dr. Kasdan's opinion, the neuropathy was not caused by Jeffries' work. Dr. Kasdan stated there was a lack of epidemiological studies that implicate the use of a computer keyboard to the incidence and prevalence of ulnar neuropathy. Dr. Kasdan stated Jeffries did not have an occupational injury or disease, but needed to be followed by a hand surgeon. He found no evidence that Jeffries had thoracic outlet compression. Dr. Kasdan stated that because of Jeffries' diffuse symptoms it might be worthwhile to obtain a Sed Rate and HLA-B27. Dr. Kasdan ordered diagnostic tests including cervical spine x-rays which were normal, and elbow films that showed no signs of joint effusion, hemarthrosis, or fracture. The cubital tunnels demonstrated no impingement. The elbow films were considered to be normal.

On May 17, 2006, the ALJ entered his Opinion and Order denying Jeffries' claim for benefits on the ground that she had failed to sustain her burden of proving that her injury was work-related. Specifically, the ALJ stated:

There seems to be a considerable amount of confusion concerning [Jeffries'] symptoms, the length of time during which she has experienced these symptoms, and the exact etiology of her symptoms. None of the medical experts seem to agree on exactly what is wrong with [Jeffries] or what caused it. [Jeffries'] testimony was that she began having problems in November of 2002 with the fourth and fifth finger of each hand with cramping, numbness and tingling. However, the December 19, 2002 record of Dr. Einbecker list[s] her complaints as a three to four year history of bilateral thenar aching with occasional numbness and tingling in the ring finger of both hands. The record from Dr. Goldman from 2001, before [Jeffries] was even residing in the Commonwealth of Kentucky, listed complaints which were similar to the complaints presented to Dr. Einbecker in December of 2002.

I also have concerns concerning [Jeffries'] credibility. It is often difficult to explain to litigants and counsel why one witness is considered credible and another is not considered credible. No doubt many of the factors relating to the judgment of credibility by a trier of fact are subconscious and many are related to life experiences. Quite simply stated, I do not find [Jeffries'] testimony at the hearing to be credible. Also, when comparing [Jeffries'] testimony to the various medical records, I find enough inconsistencies, such as those just mentioned, to cause me to doubt [Jeffries'] credibility.

Reviewing all of the medical records, I am not convinced that any of the physicians know exactly what is causing [Jeffries'] current complaints. This could be because her complaints are sometimes inconsistent. She has been diagnosed with carpal tunnel syndrome, thoracic outlet syndrome, cervical problems, and ulnar neuropathy. She has also been found by others not to have carpal tunnel syndrome,

cervical spine problems, ulnar neuropathy, or thoracic outlet compression. [Jeffries], in her brief, criticizes Dr. Kasdan's report because he does not list an etiology of her problems. Dr. Kasdan's report apparently gives [Jeffries] the benefit of a doubt in believing that she does have some pain and attributes it to median neuropathy. However, he is of the opinion that the condition is not work related. Dr. Kasdan and Dr. Snider both recommended a work up by a rheumatologist.

As stated by Dr. Snider, who examined [Jeffries] on her behalf, the myofascial pain syndrome does not have a work related etiology but could be aggravated or exacerbated by work activity. It appears from the totality of the medical evidence that [Jeffries] has been having problems with her hands long before she came to Kentucky and became an employee of [Clark & Ward]. Her testimony and her argument is that this was not a similar problem but this claim is not substantiated by Dr. Einbecker's first examination. Based on the inconclusiveness of all the medical evidence and my concern concerning [Jeffries'] credibility, I have not been convinced that [Jeffries] has, as she complains, a work related injury resulting in a functional impairment rating. In this instance, I am most persuaded by the opinions of Dr. Kasdan that, while [Jeffries] may have some pain in her hands and arms, it is not caused by a work related activity or condition.

On appeal, the Board affirmed the ALJ's findings. Jeffries now seeks review in this Court.

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 found that Jeffries failed to establish that she had suffered a work-related injury.

Jeffries contends that the ALJ's decision was not supported by substantial evidence. She argues that though her claim is complicated by the existence of two separate conditions—*i.e.*, the prior thumb problem and the alleged new problem involving the fourth and fifth fingers of each hand—the majority of the medical diagnoses implicate ulnar nerve dysfunction. Jeffries further asserts that the ALJ should not have found Dr. Kasdan to be persuasive since he failed to account for the testing performed by Dr. Corwin, which she alleges was positive for ulnar nerve neuropathy and therefore consistent with her complaints regarding her fourth and fifth fingers.

We agree with the Board that Jeffries' argument completely ignores Dr. Kasdan's conclusion that there is a “lack of epidemiological studies that implicate the use of a computer keyboard to the incidence and prevalence of ulnar neuropathy.” Because of this, even if Dr. Kasdan had referenced Dr. Corwin's test results, he would not have attributed any ulnar problem revealed therein to Jeffries' work. Rather, because of his own stated belief that there is no medical proof of a link between use of a computer keyboard and ulnar neuropathy, Dr. Kasdan asserted the opposite—that Jeffries' condition was not created by her work at Clark & Ward.

The task before the ALJ in this matter clearly was difficult given the many divergent medical opinions reflected in the physicians' records introduced by the parties. We do not disagree with Jeffries that some of the medical evidence supports her

contention that her present condition may be unrelated to her prior thumb problem and could stem from her employment with Clark & Ward. However, the fact that there exists some evidence contrary to the ALJ's decision is not sufficient to reverse it. *Whittaker, supra*. Rather, it is incumbent upon Jeffries to demonstrate that there is *no* evidence of probative value to support his decision. *Special Fund v. Francis, supra*. This she cannot do because there is clearly evidence in the record supporting the ALJ's conclusions. Even if we viewed the evidence differently from the ALJ, the law provides him, not this Court, with the *sole* authority to judge the evidence and decide what weight, if any, to ascribe to it. *Square D Co., supra; Magic Coal Co., supra; Miller, supra*. Accordingly, we find that evidence relied upon by Jeffries, though supportive of her position, is neither uncontradicted nor so compelling as to prevent a reasonable person from arriving at the same conclusion reached by the ALJ.

Finally, because we agree with the ALJ that Jeffries failed to prove that she suffered a work-related injury, Jeffries' contention on appeal that the ALJ erred by not addressing her claim for sanctions based on the decision of Clark & Ward's workers' compensation carrier to cease coverage for her physical therapy treatments is moot. We therefore need not address it.

For the foregoing reasons, we affirm the November 7, 2006 Opinion of the Workers' Compensation Board.

ALL CONCUR.

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