

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-000981-WC

PATRICIA L. SHAW

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-05-01544

JANE TODD CRAWFORD HOSPITAL; HON.
HOWARD E. FRASIER, ADMINISTRATIVE
LAW JUDGE; AND WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION
AFFIRMING IN PART,
AND VACATING AND REMANDING IN PART

** ** * ** * **

BEFORE: DIXON AND VANMETER, JUDGES; GRAVES,¹ SENIOR JUDGE.

VANMETER, JUDGE: Patricia L. Shaw petitions for the review of a Workers'

Compensation Board's opinion affirming and remanding an Administrative Law Judge's

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

(ALJ's) opinion and order dismissing Shaw's consolidated claims for benefits. For the following reasons, we affirm in part, and vacate and remand in part.

Shaw began working as a licensed practical nurse (LPN) at Jane Todd Crawford Hospital in 1990. While working, Shaw injured her right shoulder in 2000 and her neck in 2001. The parties settled Shaw's ensuing workers' compensation claims in January 2003, agreeing that she had impairment ratings of 10% for her right shoulder injury and 25% for her neck injury. They agreed that Shaw was entitled to a lump sum payment of \$38,265.30.

After her injuries, Shaw returned to her LPN duties "on the floor," although with some limitations. She subsequently became a nurse for one of the hospital's psychiatrists but eventually, due to physical limitations, she was placed at a desk job as a nurse coder. While working at this position in November 2003, Shaw began experiencing pain and numbness in her fingers and dropping things. She was diagnosed with carpal tunnel syndrome, underwent a left side carpal tunnel release in June 2004, and eventually returned to work as a nurse coder. However, Shaw resigned in late April 2006 and has not worked anywhere since.

Shaw filed a workers' compensation claim for carpal tunnel syndrome in October 2005. While that claim was pending, she also filed a motion to reopen her right shoulder and neck claims pursuant to KRS 342.125(1)(d), which provides that an ALJ may reopen and review any award on the ground of

[c]hange of disability as shown by objective medical evidence of worsening or improvement of impairment due to a

condition caused by the injury since the date of the award or order.

In support of her motion to reopen, Shaw attached the opinion of Dr. Vickie C. Lowe (formerly Whobrey) that Shaw's

left carpal tunnel syndrome is indirectly related to her previous work injuries. Because of the right shoulder and cervical spine injuries, she was more reliant upon her left hand and arm to perform her customary activities. When she started doing the clerical and computer activities full time, the left carpal tunnel symptoms became unbearable. I think the repetitive motion/overuse-type of issues combined with the chronic limitations that she had with her right hand and arm contributed to the left median neuropathy at the wrist.

The ALJ consolidated the claims and granted Shaw's motion to reopen, finding that she had set forth a *prima facie* case for reopening pursuant to KRS 342.125. *See Dingo Coal Co. v. Tolliver*, 129 S.W.3d 367, 370 (Ky. 2004) (only after ALJ finds that movant offered prima facie evidence of one of the grounds for reopening listed in KRS 342.125(1), and grants motion to reopen, will the opponent be put to the expense of litigating the merits of an assertion that the claimant is entitled to additional income benefits under KRS 342.730). No argument is made that the ALJ erred by granting Shaw's motion to reopen.

The parties submitted medical evidence in the consolidated matter, including three doctors' medical reports that had been filed prior to the January 2003 settlement of Shaw's claims for injuries to her right shoulder and neck. Here, we summarize those three doctors' reports, quoting from the ALJ's summary of the evidence. First, Dr. Gregory Gleis opined that Shaw had a "25% impairment under

cervical spine DRE category IV and 18% impairment under the ROM.” While Shaw was not at maximum medical improvement on her right shoulder injury, “she would be entitled to 10% whole body impairment for the right upper extremity.” Second, Dr. Kenneth J. S. DeSimone opined that Shaw had a “17% whole body impairment to the right upper extremity” but that her cervical spine injury was unresolved. Dr. DeSimone could not give a partial/permanent disability rating at the time because Shaw was still under active treatment. Third, Dr. Vickie C. Whobrey opined that Shaw had a 28% whole body impairment—25% under DRE cervical category IV and 4% to the right upper extremity.

As for the “new” medical evidence,² Dr. Lowe opined that Shaw’s left carpal tunnel syndrome was indirectly related to her previous right shoulder and neck injuries, as set forth above in regard to Shaw’s motion to reopen. Dr. Lowe further opined that Shaw had a “6% whole body impairment for the carpal tunnel symptoms of the left upper extremity.”

Dr. Gleis opined that “there was no objective medical evidence of a worsening of impairment of [Shaw’s] cervical spine and right shoulder injuries.” Nor would those injuries or her work activities have caused carpal tunnel symptoms. Rather, Shaw had other risk factors for carpal tunnel such as obesity, diabetes, and hypothyroidism.

² As with the three previous’ doctors opinions, we quote from the ALJ’s summary of the evidence in summarizing these opinions.

Dr. George H. Raque, Jr., who performed Shaw's left side carpal tunnel release, opined that both Shaw's "prior right shoulder and cervical spine injuries, and her more recent repetitive motion activities with clerical and computer work could have been contributing factors to her carpal tunnel condition. However, he admitted that 'there's no way to sort it out' to a reasonable medical probability of which one caused her carpal tunnel condition. He was not aware of any other contributing factors to her condition."

Based upon this and other medical evidence,³ the ALJ concluded that Shaw had a 28% whole body impairment at the time she settled her right shoulder and neck claims.⁴ He also held that any additional worsening of Shaw's impairment was a result of her carpal tunnel symptoms which were not work related. To that end, the ALJ held that the symptoms were not caused by her right shoulder injury, her neck injury, or her repetitive clerical work. As such, the ALJ dismissed Shaw's consolidated claims.

Upon reviewing the ALJ's opinion and order, the Board affirmed the following decisions of the ALJ: "1) Shaw's carpal tunnel syndrome is not work-related; 2) there has been no increase in Shaw's occupational disability since the date of the settlement; and 3) at the time of the settlement, Shaw was physically incapable of returning to her pre-injury employment." However, the Board remanded the matter to the

³ The ALJ also summarized the opinions of Dr. Frank O. Bonnarens and Dr. Sanjiv Mehta, which are unnecessary to the resolution of the arguments on appeal.

⁴ We note that evidence of a greater permanent impairment rating is not the only way a claimant may show a worsening of impairment. *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 218 (Ky. 2006). However, we use it here as a baseline.

ALJ for analysis pursuant to *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). This petition for review followed.

A workers' compensation claimant has the burden of proving every element of her claim, *Jefferson County Pub. Sch./Jefferson County Bd. of Educ. v. Stephens*, 208 S.W.3d 862, 866 (Ky. 2006), including the merits of her claim at reopening, *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213, 219 (Ky. 2006). Since Shaw failed to meet her burden here, the issue on appeal is "whether the evidence was so overwhelming, upon consideration of the entire record, as to have compelled a finding in [her] favor." *Wolf Creek Collieries v. Crum*, 673 S.W.2d 735, 736 (Ky.App. 1984). Compelling evidence is that which is so overwhelming, no reasonable person could reach the same conclusion as the ALJ. *Neace v. Adena Processing*, 7 S.W.3d 382, 385 (Ky.App. 1999).

First, Shaw argues that the ALJ erred by finding that her carpal tunnel syndrome was not caused by her typing activities or a worsening of her right shoulder and neck injuries. We disagree.

As set forth above, the ALJ granted Shaw's motion to reopen her right shoulder and neck claims based on Dr. Lowe's opinion that Shaw's left carpal tunnel syndrome was "indirectly related" to her previous work injuries. Additional proof was taken, including the opinions of Dr. Raque and Dr. Gleis. The ALJ concluded, based upon Dr. Gleis's opinion, that Shaw's left carpal tunnel syndrome was not work related, in that it was not caused by her typing activities or a worsening of her prior right shoulder and neck injuries. Obviously, as fact-finder an ALJ has the sole authority to judge the

weight and inferences to be drawn from the evidence. *Miller v. East Ky. Beverage/Pepsico, Inc.*, 951 S.W.2d 329, 331 (Ky. 1997). He also has the sole discretion to determine the quality, character, and substance of the evidence. *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993). And he 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, 96 (Ky. 2000). Accordingly, the ALJ did not err by concluding that Shaw's carpal tunnel symptoms were not work related, relying upon Dr. Gleis's opinion.

A different result is not compelled by Shaw's argument that the ALJ "misconstrued" Dr. Raque's and Dr. Lowe's opinions, as the ALJ cited extensively from Dr. Lowe's report and Dr. Raque's deposition in his summary of the evidence. Indeed, nearly every sentence in the ALJ's summary of Dr. Raque's deposition ends with a citation to a specific page in the deposition. And again, it was within the ALJ's purview to choose to believe Dr. Gleis's opinion, regardless of the other doctors' opinions.

Obviously the ALJ's finding that Shaw's carpal tunnel symptoms were not work related, i.e., not caused by her right shoulder injury, her neck injury, or her repetitive clerical work, disposed of her October 2005 workers' compensation claim for carpal tunnel syndrome. This finding also disposed of her claim that her carpal tunnel symptoms were a worsening of her right shoulder and neck injuries. Thus, the ALJ's comparison of Shaw's impairment at settlement versus her impairment post-settlement was unnecessary, as was his holding that at the time of the January 2003 settlement of her

right shoulder and neck claims, Shaw lacked the physical capacity to perform the work she had done at the time of her right shoulder and neck injuries. Accordingly, we need not address Shaw's argument on appeal that the ALJ erred by so holding.⁵

Next, Shaw argues that the Board erred by remanding the matter to the ALJ for analysis pursuant to *Fawbush v. Gwinn*, 103 S.W.3d 5 (Ky. 2003). We agree in part.

KRS 342.730(1)(c)1 permits an injured worker who lacks the physical capacity to return to the type of work performed at the time of injury to receive a triple permanent partial disability benefit. KRS 342.730(1)(c) 2 encourages one who retains the physical capacity to return to the type of work performed at the time of an injury to do so and to earn the same or a greater wage. It accomplishes that purpose by authorizing a basic income benefit for permanent partial disability during such periods of employment, but doubling the income benefit during any period that the employment ceases. In *Fawbush*, 103 S.W.3d at 12, the Kentucky Supreme Court held that in a case in which the evidence supports the application of either KRS 342.730(1)(c)1 or 2, the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision. As *Fawbush* did not involve a reopening, however, it is distinguishable from the matter here.

⁵ Nor is it necessary for us to address Shaw's argument that the ALJ misconstrued *Parris v. Staffing Alternative, Inc.*, No. 2004-SC-0009-WC (Ky. Oct. 21, 2004) in comparing her impairment at settlement versus her impairment post-settlement. Further, if the ALJ improperly applied the standard set forth in KRS 342.125(1)(d) to the merits of Shaw's claim, after he already granted Shaw's motion to reopen, any error is harmless pursuant to our analysis as set forth above.

Rather, in cases involving reopenings, such as this one, KRS

342.730(1)(c)4 provides:

Notwithstanding the provisions of KRS 342.125, a claim may be reopened at any time during the period of permanent partial disability in order to conform the award payments with the requirements of subparagraph 2. of this paragraph.

Obviously there is no mention of subparagraph 1 in this subsection. As such, although KRS 342.730(1)(c)4 provides an independent ground for reopening a claim for additional benefits under KRS 342.730(1)(c)2, it does not provide an independent ground for reopening for additional benefits under KRS 342.730(1)(c)1. Accordingly, the Board erred when it remanded the matter to the ALJ with directions to apply the *Fawbush* analysis to determine which of the two subparagraphs is applicable.

However, since KRS 342.730(1)(c)4 permits a claim to be “reopened at any time during the period of permanent partial disability in order to conform the award payments with the requirements of” KRS 342.730(1)(c)2, and the ALJ did not decide whether Shaw was entitled to additional benefits under that provision, we affirm the Board’s decision insofar as it remanded the matter to the ALJ for consideration of the applicability of KRS 342.730(1)(c)2 and 4 to Shaw’s claim.

The Workers’ Compensation Board’s opinion is affirmed in part, and vacated and remanded in part for further proceedings consistent with the views expressed herein.

ALL CONCUR.

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