

Commonwealth of Kentucky

Court of Appeals

NO. 2007-CA-002151-WC

FRANCES D. ATKINS

APPELLANT

v. PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-04-66890

SPECIALIZED ALTERNATIVES FOR
FAMILIES AND YOUTH; HON. IRENE STEEN,
ADMINISTRATIVE LAW JUDGE; WORKERS'
COMPENSATION BOARD

APPELLEES

OPINION AFFIRMING

** ** * * * * *

BEFORE: MOORE AND WINE, JUDGES; BUCKINGHAM,¹ SENIOR JUDGE.

WINE, JUDGE: Francis D. Atkins petitions for a review of a decision of the Workers' Compensation Board (Board) which affirmed the administrative law judge's (ALJ) order dismissing her claim for future income and medical benefits against her employer, Specialized Alternatives for Families and Youth (SAFY). Atkins argues that the ALJ clearly erred in rejecting the testimony of her physicians in favor of the testimony of

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.

SAFY's physicians and a surveillance video which called into question Atkins' claims of permanent impairment. Finding that there was substantial evidence supporting the ALJ's findings and conclusions, we affirm.

Atkins began working for SAFY as a social worker/family youth specialist in May 2004. Her job consisted of placing and supervising at-risk teenagers in foster homes and monitoring those children previously placed in foster homes. The job required extensive driving by Atkins in her own car for which she was reimbursed \$.32 a mile. On December 10, 2004, Atkins was involved in a motor vehicle accident in the course of her employment. She was driving her van to pick up a child at a school in Vanceburg, Kentucky, when a pickup truck pulled out in front of her causing a head-on collision. Atkins recalled hitting her head on the steering wheel and her left knee on the dashboard.

She was taken by ambulance to the hospital emergency room where she was x-rayed, and discharged. According to Atkins, she awoke the next morning with pain all over her body and was taken to King's Daughters Medical Center, where she was x-rayed, given pain medication and advised to follow up with her family physician. Atkins had complaints concerning pain in her neck, back, hip, left shoulder and problems with blurred vision and difficulty sleeping.

Atkins saw her family physician in December 2004, and began treatment with Dr. Bal Bansal, a neurologist, who ordered diagnostic studies and prescribed medication. He referred her to Dr. Touma, who diagnosed a torn meniscus and recommended left knee surgery. She subsequently sought a second opinion from Dr. Tibbs who recommended physical therapy and referred her to Dr. Maier who

administered a steroid injection to her left shoulder. Atkins has been treated by chiropractors for her cervical and lumbar spine. She has also been treated for a psychiatric condition. Atkins has not returned to work since the December 10, 2004, accident.

In support of her claim, Atkins relied on the medical records and reports of Dr. Bansal, her treating neurologist; Dr. Ray Garman, her chiropractor; Dr. Robert Fluskey; and Dr. James Phifer, a clinical neuropsychologist and licensed clinical psychologist. Dr. Bansal diagnosed Atkins with concussive syndrome resulting in poor concentration and memory problems, apathy, lack of motivation, low frustration level, rapid mood swings, sleeping difficulty, tinnitus, lightheadedness and noise hypersensitivity. He also diagnosed post-traumatic chronic cervical sprain, chronic thoracic sprain, chronic lumbosacral sprain and post-traumatic injury to the left shoulder and the left knee. Dr. Bansal assessed a 35% impairment rating due to Atkins' injuries to her head, neck, shoulder and knee, all which he attributed to the work-related automobile accident. Dr. Bansal opined Atkins could not return to her former job as a social worker or any other sustained employment and placed stringent restrictions on her physical activities.

Dr. Garman's report diagnosed left shoulder post-traumatic rotator cuff and tendinitis improved following a corticosteroid anesthetic injection. He also diagnosed multiple cervical, thoracic and lumbar disc injuries, and he assessed a 10% whole person impairment rating. Dr. Fluskey assessed a 5% impairment rating for the upper extremity and a 5% impairment rating for the lower extremity, for a 10% whole person impairment. He also assessed a 28% whole person impairment with regard to the injuries Atkins

sustained in the automobile accident of December 10, 2004. Dr. Fluskey recommended that Atkins not lift more than 10 or 15 pounds and that she not ride in a car for long periods of time. He did not believe Atkins would be able to return to her former employment.

In his report, Dr. Phifer, the neuropsychologist, assessed a 5% impairment rating. He also diagnosed cognitive disorder/post-concussive disorder. However, he stated that Atkins exhibited an inconsistent effort on the neuropsychological testing and he felt her test results represented an underestimate of her current level of cognitive functioning.

Atkins also testified in her own behalf. She stated that she was previously awarded social security disability benefits in 2003 for anxiety and depression. Atkins testified she continues to have problems with pain in her neck, left shoulder, back, left leg, and hip. She stated that she has difficulty lifting and limited strength in her left arm. Atkins also testified that she has a problem with nervousness, nausea, anxiety and depression. She described having a poor memory and a tendency to make bad decisions. Her husband, Robert Atkins, confirmed her testimony, stating that Atkins changed dramatically since the accident and has a very limited ability to engage in daily activities.

Atkins further testified that she works at a coffee shop/health food store which she owns with her husband. At the hearing, Atkins was questioned about a surveillance video of her taken by an investigator employed by SAFY. The video includes scenes of Atkins working at the store, including carrying and setting up tables, bending, stooping and lifting. Atkins admitted that she occasionally engaged in these

activities, but she suffered great discomfort afterwards. She also stated that she tries to help out in the store when she can, but she has to rest frequently.

SAFY relied on medical reports from Drs. Henry Goodman, Patrick Leung, Richard Sheridan, Gregory Gleis, and Robert Granacher; a utilization review report by Dr. Michael Nemastil; a peer review report generated by Dr. Kenneth Graulich; a vocational report from Dr. Luca Conte; and the surveillance video and testimony proffered by Tim Schureman, an investigator employed by Kentucky Employers Mutual Insurance Company. Drs. Leung, Sheridan, Granacher, Nemastil, and Graulich found no objective evidence that Atkins had any permanent impairment and concluded that she had fully recovered from the automobile accident. Dr. Sheridan opined that Atkins reached maximum medical improvement (MMI) as of January 6, 2005, and did not require any further medications or treatment. Dr. Granacher went so far as to state that he believed Atkins was malingering and likely “faking her mental state for primary and secondary gain.”

Drs. Goodman and Gleis found some evidence of cervical injury, but did not believe that it would interfere with Atkins’ ability to return to her previous employment. Similarly, the vocational expert, Dr. Conte, concluded that Atkins did not suffer any additional occupational disability as a result of the work injury. He felt she was capable of performing a variety of jobs including social work. Finally, Schureman testified that he conducted the video surveillance and had taken the photographs of Atkins over a two-year period from December 2004 to November 2006.

After reviewing the evidence, the ALJ dismissed Atkins’ claim, finding as follows:

Based upon the record herein and after having had the opportunity to see and speak with the Plaintiff herein and after having reviewed the videotape, I find that Plaintiff had failed in her burden of proof in this matter to show that she suffers from any permanency from the accident herein. I find persuasive that Plaintiff has grossly overstated her complaints and even her own neuropsychologist noted that there were inconsistencies and invalid test scores. Dr. Granacher seems to outright say that Plaintiff is malingering her mental state. Although I am only a layperson, my own observations and conversations with Plaintiff leads me to conclude that Plaintiff is perfectly capable of returning to her former work as a social worker, should she so choose. She has absolutely no problem carrying on a lengthy conversation and had full grasp of her surroundings. As the saying goes: "A picture is worth a thousand words" and I must say that the videotape totally belies Plaintiff's claims of inability to do much of anything. I am relying on the Defendant's evidence in dismissing this claim in its totality. The persuasive evidence from the Defendant's doctors clearly shows that Plaintiff is not in need of any further treatments, of any kind, relative to the accident. I further find that Plaintiff had reached MMI as of the date Plaintiff was evaluated by Dr. Sheridan.

The ALJ stated that Atkins was entitled to keep temporary total disability and medical benefits as previously paid, but dismissed her claim for income and future medical benefits in its entirety. On appeal, the Board found that the ALJ's decision was supported by substantial evidence. Atkins now petitions for review to this Court.

Atkins takes particular issue with the ALJ's reliance on the surveillance video evidence. She argues that SAFY, with its superior resources, was able to expend considerable time and money to support its denial of the claim with the videotaped evidence. She contends that the taping done over an extended period is misleading and does not adequately reflect the difficulty with which she performed the activities depicted on the tape. She also points to the evidence indicating the seriousness of the motor vehicle accident and the medical proof supporting a finding of an impairment rating

based on her work injuries. She submits she is entitled to an award of a 35% impairment based on her evidence, or at least a 5% impairment based on evidence submitted by SAFY.

Since Atkins had the burden of proof before the ALJ but was unsuccessful, the issue on appeal is whether the evidence compels a different conclusion. *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 arrive at the same conclusion reached by the ALJ. *REO Mechanical v. Barnes*, 691 S.W.2d 224 (Ky.App. 1985). As fact-finder, 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 (Ky. 1993). Similarly, it is within the ALJ's discretion alone to judge the weight to be accorded to and inferences to be drawn from the evidence. *Miller v. East Kentucky Beverage/Pepsico, Inc.*, 951 S.W.2d 329 (Ky. 1997); *Luttrell v. Cardinal Aluminum Co.*, 909 S.W.2d 334 (Ky.App. 1995). Mere evidence 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 below, 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, 643 (Ky. 1986).

Like the Board, we cannot find that the ALJ "has committed an error in assessing the evidence so flagrant as to cause gross injustice." *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685, 688 (Ky. 1992). The ALJ clearly gave great weight to the surveillance video. However, Atkins has never argued that it was improperly admitted. Schureman testified about the circumstances surrounding the surveillance and the making

of the video. Atkins does not argue that the editing of the video misrepresents her activities. Furthermore, Atkins was given an opportunity to explain her activities depicted on the video. Thus, while the surveillance video was clearly prejudicial to Atkins, it was not unfairly so.

Moreover, the ALJ did not rely exclusively on the surveillance video to deny Atkins' claim for benefits. SAFY introduced extensive medical testimony supporting its claim that Atkins did not sustain any permanent impairment as a result of the work incident. When considered with the medical evidence, the surveillance video constituted substantial evidence supporting the ALJ's findings. Consequently, this Court is without authority to set aside the ALJ's decision.

Accordingly, the September 28, 2007, opinion of the Workers' Compensation Board affirming the ALJ's May 2, 2007, opinion dismissing Atkins' claim is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dwight O. Bailey
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BRIEF FOR APPELLEE,
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