RENDERED: APRIL 12, 2019; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000806-WC

BETTY JO ROBINSON APPELLANT

v.

PETITION FOR REVIEW OF A DECISION
OF THE WORKERS' COMPENSATION BOARD
ACTION NO. WC-16-65271

KROGER; HONORABLE TANYA
PULLIN, ADMINISTRATIVE LAW
JUDGE; and WORKERS' COMPENSATION
BOARD APPELLEES

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS, LAMBERT, AND K. THOMPSON, JUDGES.

LAMBERT, JUDGE: Betty Jo Robinson has petitioned this Court for review of the opinion of the Workers' Compensation Board (the Board) affirming the decisions of the Administrative Law Judge (ALJ) dismissing her claim against Kroger. We vacate and remand.

Robinson filed an application for resolution of an injury claim on December 10, 2016, related to an alleged injury to her right wrist and hand. Robinson, born in 1970, had been working as a delicatessen clerk for Kroger in Louisville, Kentucky, since September 2013. She alleged that on October 1, 2016, "she had been frying chicken in the deli when she noticed her right wrist was painful and swollen and her fingers were numb." Robinson sought treatment from Dr. David T. Schulz at Norton Occupational Medicine, and she provided the history of her condition as set forth in the October 14, 2016, office visit report as follows:

> This is a 46 yo female who presents to the clinic with right wrist pain and tingling in the fingers. This person works in the deli at Krogers. She has been working there for 3 years and works 6 days a week for 8 hours. She is right hand dominant. She was a stay at home mother prior to this job. On the date of injury she was moving racks of chickens to be roasted. Each pan can have 6 chickens on them at a time. While performing this task she suddenly developed right wrist pain. She denies hitting the wrist no slip fall or trauma [sic]. She [was] taking pans in and out of multiple ovens when this occurred. She had swelling and pain on the outside of the wrist. With the swelling she started to develop tingling in the fingers and up the arm. She has had no hand or wrist issues prior to this. She denies any history of injury to the elbow, shoulder or neck. She was seen in a clinic and evaluated. She was referred to hand surgery. She was evaluated there and had blood work drawn. She saw her PCP [primary care physician] who recommended FMLA [Family Medical Leave Act]. She presents her[self] to this clinic after going to another who contacted me about this person. She now presents with

> severe wrist pain. She had numbness in the fingers. She states the pain was sudden onset as was the tingling along with the swelling. She denies any crush type injury to the wrist. PMH [past medical history] HTN [hypertension] obesity asn [asparagine] asthma, neg for diabetes, thyroid [disease], or peripheral neuropathy. PSH [past surgical history] Non contributory.

Based upon his examination, Dr. Schulz diagnosed her with right wrist tendonitis and overuse syndrome, recommended the use of a sling and no use of her right upper extremity, and prescribed pain medication. Robinson had been seen that morning in the Immediate Care Center by Dr. Jeri R. Reid, who thought she had carpal tunnel syndrome.

In her deposition, Robinson described her work in the deli at Kroger, where she began working in September 2013. Prior to that, she had not worked outside of the home. At Kroger, her job duties went from slicing meat, to working in the bakery, to cooking and frying. After a year and a half, she began working on a full-time basis and performed all three duties. Robinson also described the onset of problems with her wrist and hand. She said that her problems "really got bad when I was frying chicken" on October 1, 2016, although the injury report stated that the problems began while she was slicing meat. She was experiencing tingling, numbness, and sharp pain on the outside of her wrist that went up her arm to her elbow. She noticed the symptoms a few days before October 1st. Robinson went on to describe the medical treatment she had sought for her wrist and hand

problems, including a visit to the Immediate Care Center on October 1st, when she was told she had carpal tunnel syndrome and was taken off work for one day. Robinson returned to Kroger on October 3rd wearing a splint, but her problems stayed the same. She testified that her last day of work at Kroger was October 12, 2016, and that she had not received any benefits since she had left. Robinson wore a splint every day and underwent surgery to repair a torn ligament in January 2017. She did not believe any of the surgeries helped her, stating that she still experienced pain in her right hand and arm and tingling outside of her right wrist.

Robinson filed the April 5, 2017, report of Dr. Jules J. Barefoot's independent medical evaluation. Robinson reported that her typical work activities in mid-September 2016 included repetitive lifting, grasping, and carrying, with an extensive use of her upper extremities. In late September, she began developing wrist pain that was increasingly severe. She believed that having to lift baskets of six chicken breasts repetitively was the cause of her wrist pain. Dr. Barefoot described the medical treatment Robinson sought, including physical therapy, a short-arm cast, an MRI arthrogram, and surgery, and he reviewed Robinson's medical records. The MRI arthrogram of Robinson's right wrist performed on December 20, 2016, showed degenerative changes and fraying. Dr. Barefoot did not believe Robinson had reached maximum medical improvement because she was still in treatment and therefore did not include an impairment rating. He

concluded that it was "more likely than not these work activities accelerated or hastened her underlying dormant asymptomatic condition into its symptomatic painful disabling reality." Her work activities required "repetitive flexion and extension as well as supination and pronation of her forearm" and were the type "that would be expected to, over time, cause injury to her TFCC [Triangular Fibrocartilage Complex], as noted on her MRI report[.]" Robinson's history and medical records established that "her workplace activities were the cause of her initial wrist pain for which she sought medical treatment."

Robinson filed the medical records of Baptist Health Medical Group Family Medicine which was the report of an office visit dated October 12, 2016, as well as physical therapy records. She also filed the medical records of Dr. Antony Hazel at Louisville Arm & Hand, who performed a right wrist arthroscopy and TFCC debridement. Robinson later filed an August 29, 2017, letter from Dr. Hazel, in which he indicated she had been under his care since the previous November. He stated "[g]iven that she did not have previous wrist pain, her symptoms may have been related to her activity at work. While exact causality can be difficult to assign, central TFCC tears can be associated with repetitive action and this work can aggravate this condition."

Kroger denied Robinson's claim, alleging disputes existed as to the amount of compensation owed to her, causation, notice, and the statute of

limitations. In support of its defense, Kroger filed the April 4, 2017, report and the June 6, 2017, follow-up report of Dr. Richard DuBou's independent medical examination. Dr. DuBou did not believe Robinson's TFCC tear was related to her work at Kroger and that she should reach MMI by mid-April, after she had three months of therapy and recovery. He recommended Robinson undergo a functional capacity evaluation after she had finished physical therapy to know what her abilities were. In his June follow-up report, Dr. DuBou indicated that he did not know how Dr. Barefoot determined that Robinson's TFCC injury was related to her work. Dr. DuBou believed the evidence pointed to a degenerative tear of the TFCC because it would be unlikely for it to have occurred in two years. "With her doing mostly nonforceful movements in her two years of working at Kroger, I believe these are degenerative, but not related to her work at Kroger. Pushing a rack [of six chickens] again is not very hard work."

The ALJ scheduled a benefit review conference (BRC) in August. After the BRC, the contested issues remained benefits, causation, average weekly wage, medical expenses, whether Robinson had sustained an injury as defined by the Act, and temporary total disability benefits. A final hearing was scheduled. Prior to the final hearing, the parties agreed to bifurcate Robinson's claim. The ALJ discussed this at the final hearing, where the parties agreed the contested

issues would be causation, medical expenses, injury as defined by the Act, and TTD. The parties filed simultaneous briefs setting forth their respective positions.

The ALJ entered an opinion and order on the bifurcated issues on November 18, 2017. After considering the medical and lay testimony, the ALJ relied upon Dr. DuBou's medical opinion that was supported by Dr. Hazel's treatment records to conclude that Robinson had not met her burden of proving she had sustained a work-related cumulative trauma injury to her right wrist and hand. Dr. Hazel only stated that Robinson's symptoms "may" be related to her activity at work, and specialist Dr. DuBou believed it was a degenerative tear not related to her work. The ALJ also pointed to Dr. Hazel's treatment records that stated her symptoms did not improve after three months of not working.

Robinson filed a petition for reconsideration, stating that the ALJ's determination that the TFCC tear was a degenerative condition did not resolve whether she had sustained a work-related injury because the arousal of a pre-existing dormant condition into disabling reality constituted a compensable injury, citing *McNutt Constr./First Gen. Servs. v. Scott*, 40 S.W.3d 854 (Ky. 2001). Dr. Barefoot stated that the physical requirements of Robinson's job accelerated her dormant condition into a painful disabling reality, while Dr. DuBou did not address whether her work aroused the degenerative condition. Dr. Hazel stated that TRCC

tears could be associated with repetitive action and could be aggravated by work. Kroger objected to the motion.

The ALJ ruled on the petition in an order dated January 2, 2018. In a lengthy discussion, the ALJ extensively reviewed the medical evidence and Robinson's testimony as to her work responsibilities. The ALJ again relied on Dr. DuBou's statement, in which he indicated he did not know how Dr. Barefoot had determined Robinson's injury was related to her work, to note that Dr. DuBou made "it clear that he considered whether Plaintiff's work brought into disabling reality a dormant condition[.]"

Robinson appealed the ALJ's rulings to the Board, which affirmed in an opinion entered April 27, 2018. The Board rejected Robinson's arguments that the ALJ failed to set forth sufficient factual findings as to whether her work caused her condition to become symptomatic or that the "uncontroverted" medical evidence supported a finding that she had sustained a work-related injury. The Board held that Dr. DuBou's opinions, in conjunction with Robinson's testimony and Dr. Hazel's reports, provided substantial evidence to support the ALJ's decision that she had not. This petition for review now follows.

Our review in this matter is premised on the Supreme Court of Kentucky's statement describing the role of this Court in workers' compensation actions. In *Western Baptist Hospital v. Kelly*, 827 S.W.2d 685 (Ky. 1992), the

Supreme Court directed that this Court's function is to correct a decision of the Board only where we perceive that "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." *Id*. at 687-88.

The Supreme Court later addressed this standard in *McNutt*, 40 S.W.3d at 860:

> KRS 342.285(2) provides that when reviewing the decision of an ALJ, the Board shall not reweigh the evidence and substitute its judgment for that of the ALJ with regard to a question of fact. The standard of review with regard to a judicial appeal of an administrative decision is limited to determining whether the decision was erroneous as a matter of law. *See American Beauty Homes v. Louisville & Jefferson County Planning & Zoning Commission*, Ky., 379 S.W.2d 450, 457 (1964). Where the ALJ determines that a worker has satisfied his burden of proof with regard to a question of fact, the issue on appeal is whether substantial evidence supported the determination. *Special Fund v. Francis*, Ky., 708 S.W.2d 641, 643 (1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. *Smyzer v. B.F. Goodrich Chemical Co.*, Ky., 474 S.W.2d 367 (1971). Although a party may note evidence which would have supported a different conclusion than that which the ALJ reached, such evidence is not an adequate basis for reversal on appeal. *McCloud v. Beth-Elkhorn Corp.*, Ky., 514 S.W.2d 46 (1974). The crux of the inquiry on appeal is whether the finding which was made is so unreasonable under the evidence that it must be viewed as erroneous as a matter of law. *Special Fund v. Francis*, *supra*, at 643.

Here, however, the ALJ found in favor of Kroger, meaning a different standard applies:

> If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made.
>
> Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Francis, 708 S.W.2d at 643. Furthermore, "[t]he ALJ, as the finder of fact, and not the reviewing court, has the sole authority to determine the quality, character, and substance of the evidence. Where, as here, the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ." *Square D Co. v. Tipton*, 862 S.W.2d 308, 309 (Ky. 1993) (citations omitted).

Robinson argues that the medical evidence of record establishes that her TFCC tear was dormant until her work at Kroger aroused it into disabling reality. Kentucky Revised Statutes (KRS) 342.0011 defines an "injury" as "any

work-related traumatic event or series of traumatic events[.]" And in *McNutt*, *supra*, the Supreme Court confirmed that under the 1996 Act:

> Where work-related trauma causes a dormant degenerative condition to become disabling and to result in a functional impairment, the trauma is the proximate cause of the harmful change; hence, the harmful change comes within the definition of an injury. We are not persuaded that the legislature's decision to abolish Special Fund apportionment with regard to traumatic injury claims had any effect on the longstanding principle that a harmful change to a worker's body which is caused by work is an "injury" for the purposes of Chapter 342.

McNutt, 40 S.W.3d at 859 (footnote omitted). Robinson points to Dr. Barefoot's opinion that her dormant condition was brought into disabling reality by the physical requirements of her job at Kroger as well as Dr. Hazel's opinion that such injuries (TFCC tears) can be caused by repetitive action and aggravated by this work. Dr. DuBou, Robinson claims, never addressed the specific issue of whether her underlying dormant condition was aroused by her work.

We agree with Robinson that the medical evidence compels a different result in this case. Dr. Barefoot specifically concluded that Robinson's dormant condition was aroused into disabling reality by her work at Kroger. While Dr. DuBou disagreed with the conclusion that Robinson's TFCC injury was related to her work, he did not specifically address whether her underlying degenerative condition was aroused by her work activities. His conclusion addressed whether Robinson had sustained a traumatic injury, not whether a dormant condition had

been aroused. Both the ALJ and the Board held that Dr. DuBou's statements in his reports confirmed that he had considered whether Robinson's work played any role in her condition. We find the evidence of record compels a different result because Dr. DuBou did not consider the issue of arousal as the ALJ and the Board held. Therefore, we must vacate the Board's opinion.

For the foregoing reasons, the opinion of the Workers' Compensation Board affirming the decision of the Administrative Law Judge dismissing Robinson's claim is vacated, and this matter is remanded to the Board to address whether Robinson's repetitive work aroused her pre-existing, dormant condition into disabling reality.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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