

OPINION ENTERED: OCTOBER 26, 2012

CLAIM NO. 201179029

DEBRA MCINTOSH

PETITIONER

VS.

APPEAL FROM HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

EAST KENTUCKY VETERANS CENTER
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and SMITH, Members.

SMITH, Member. Debra K. McIntosh ("McIntosh") appeals from the May 11, 2012 Opinion and Order rendered by Hon. John B. Coleman, Administrative Law Judge ("ALJ"), dismissing her claim for a right knee injury sustained in a fall on July 30, 2011 while employed with East Kentucky Veterans Center ("East Kentucky"). McIntosh argues the ALJ erred in determining her fall was idiopathic and, therefore, not compensable. McIntosh also appeals from the ALJ's June 20,

2012 Order denying her petition for reconsideration. For the reasons set out below we affirm.

McIntosh's Form 101 filed on October 21, 2011, alleges on July 30, 2011 as she was "walking down the hallway to go to the cafeteria, she slipped and fell, twisting her knee and in turn causing her injury." She testified by deposition on November 28, 2011 and at the formal hearing on March 21, 2012 where she explained:

Q. Now, tell us what happened on - I know you've already testified about this, but tell the Judge briefly what happened on July 30th, 2011.

A. Okay. We was [sic] going to work. We clocked in at 5:23, and I was going up the hall and we was [sic] almost to the door where we go into the kitchen and I fell and my shoulder hit the wall. And the three girls that was [sic] with me, they said it sounded like a football player hit the floor I hit the floor so hard.

...

Q. Now, previous to that, had you had problems with your knee?

A. Yes.

Q. And, who had treated you?

A. Dr. Nadar.

Q. And, you had actually had a surgery, hadn't you?

A. He did a scope.

Q. A scope?

A. Uh-huh (affirmative).

Q. And, that was - were you still treating with Dr. Nadar at the time of this incident?

A. No.

Q. Okay.

A. Well, yeah, I take that back. Yes, I had seen him on - I guess it was a couple weeks before I went back to work. He let me go back to work with restrictions, but they wouldn't let me come back to work with restrictions, so I had to wait two more weeks to go back to him so I could tell him to let me go back to work without restrictions. So, when I go back and take my papers back, they asked me if I agreed with that, with no restrictions, and I said, no, I don't agree with it, but that's the only way I could go back to work, is that they would let me come back without restrictions.

Q. But, you were having some difficulties with your knee, but the doctor had released you without restrictions [sic] go back to work and you did go back to work?

A. After I went back - he gave me restrictions to go back to work, but they wouldn't let me, so I had to call back over there and wait two more weeks so that he could fill out me [sic] a paper without restrictions.

Q. All right. Now, did something change on July 30th, 2011 that was different with your knee than it was before? What's the difference - what was

different after you had that incident than before?

A. After I had the incident and after I fell at work, it is just - it hurts me worse [sic]. I can just be walking through the house and it'll just go out under me.

On cross examination, McIntosh confirmed her previous testimony that she had experienced no falling episodes prior to the alleged work injury. She was then presented with medical records showing that she had complained of falling on several occasions as far back as February 2006. She acknowledged that a CT scan of the brain was performed because "I remember they thought I had a balance problem, but I didn't."

McIntosh also acknowledged that in 2002, "I was walking down my driveway and I krilled [sic] my ankle and it broke it." Also she remembered, "[I]t was probably 2008 or 06 or - I was putting up Christmas lights and I fell over the hill and broke it above the ankle again."

McIntosh denied any bouts of dizziness except for "the other day, I was in the kitchen and my sugar went low and I had a little dizzy spell...." Although she acknowledged a September 14, 2011 MRI report noted a history of syncope and abnormal gait, she maintained, "[A]gain, you know, they

thought I had a balance problem, but it didn't show anything."

McIntosh had a prior right knee injury resulting from a fall on December 10, 2010 at her doctor's office. However, she denied the accuracy of the report dated "12-23" from the emergency room at Pikeville Medical Center which recorded, "States right knee pain after fall two weeks ago. Patient states she has chronic falls due to imbalance."

McIntosh states she does not remember what caused her to fall. She does remember telling Dr. Callahan two days later that she fell as her knee buckled.

McIntosh relies upon the medical report of Robert C. Hoskins, M.D., who examined her on January 30, 2012. McIntosh related to Dr. Hoskins that "we clocked in that morning and we were walking down the hall and my knee just gave out from under me and I fell." She went to the emergency room later on that day where she was diagnosed with right knee effusion. She saw Dr. Nadar several days later and reported she "ran into a wall and fell hurting her right knee." Dr. Nadar had diagnosed a right knee contusion and strain and a left arm contusion.

McIntosh told Dr. Hoskins she had previously fallen at her home in December 2010, stating "I was going up the steps at home and I fell and landed on my right knee." She

reported Dr. Nadar evaluated her on February 16, 2011 and noted her complaints of "popping & catching about the right knee" which she attributed to her fall in December. Dr. Nadar diagnosed right knee internal derangement and mild osteoarthritis. When her right knee failed to respond to conservative treatment, McIntosh underwent surgery on April 7, 2011 in the form of partial lateral meniscectomy and chondroplasty.

McIntosh related that Dr. Nadar had returned her to work with light restrictions on June 9, 2011. However, upon her insistence, Dr. Nadar gave her a release with no restrictions on July 6, 2011. She returned to work on July 23, 2011. McIntosh also admitted to Dr. Hoskins that, although she had been returned to work without any restrictions, she continued to have pain about the right knee for which she took pain medication in the evening when she arrived home from work.

Dr. Hoskins conducted a physical examination and diagnosed, "(R)ight knee sprain/strain with lingering pain & weakness from a fall sustained at work on 07-30-11 superimposed upon a history of arthroscopic partial lateral meniscectomy & chondroplasty (04-07-11)" and "(R)ight knee osteoarthritis." He determined that McIntosh's injury was the cause of her complaints noting:

Ms. McIntosh's right knee impairment was caused by the fall at work on 07-30-11 as described in section B (Plaintiff History) above superimposed upon preexisting [sic], active, and somewhat disabling right knee pain that was [sic] had been sufficient enough to warrant taking pain medication at the time of the fall on 07-30-11, but had not been severe enough to preclude working without restrictions. It is clear that the fall Ms. McIntosh sustained on 07-30-11 aggravated her underlying state and converted it from a partially disabling condition to a fully disabling reality.

Dr. Hoskins assessed a 9% whole person impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

East Kentucky relies upon the medical report of Richard Sheridan, M.D., who evaluated McIntosh on January 25, 2012. She related a history of falling as she was walking down the hall to the kitchen on July 30, 2011. Dr. Sheridan's report also includes reference to a 2010 fall McIntosh sustained at work. Upon physical examination Dr. Sheridan issued the following discussion and opinion:

1. My diagnosis of the patient's alleged injury of 7/30/11 is tear right medial meniscus.
2. I do believe that Ms. McIntosh's prior right knee surgery and condition increased the likelihood that her knee would give out on future occasions.

3. I believe the patient's diagnosis is related to the incident which occurred on July 30, 2011.

4. For the type of injury sustained by this patient, I would have expected her to reach maximum medical improvement three months postoperatively, if she is going to have surgery. If she is not going to have the surgery she is at maximum medical improvement now.

5. I anticipate her functional impairment to her right knee for this injury is 1% whole person, 2% right lower extremity impairment from Table 17-33 on page 544 of the AMA Guides Fifth Edition. That is in reference to the anticipated medial meniscectomy which I think she requires.

6. I believe she merits a 1% whole person impairment, 2% right lower extremity impairment for the previous surgery that she had on her right knee which was a lateral meniscectomy.

In an Opinion and Order issued May 11, 2012 dismissing McIntosh's claim, the ALJ stated in part as follows:

The first issue which must be discussed is the issue of whether the plaintiff sustained an injury as defined by the Act. The defendant argues the plaintiff's injury did not arise out of her employment, but was instead personal or idiopathic in nature. The defendant points to the plaintiff's testimony that she was simply walking down the hallway when she fell landing on her right knee. She did not describe tripping over any object nor did she indicate that her position in the hallway placed her in any area of danger. The defendant presented

additional medical evidence indicating that the plaintiff had a prior history of right knee problems and in fact had recently undergone a right knee surgery. In fact she had only returned to work the week prior to this event. The defendant further produced medical evidence indicating the plaintiff had made prior complaints of her knee feeling weak as well as having chronic falls due to imbalance. In addition, there was prior medical evidence of the plaintiff having syncopal episodes with collapse. The defendant further presented proof from Dr. Sheridan that the plaintiff's pre-injury knee condition likely led to her fall. KRS 342.0011 (1) requires the claimant to prove that an injury arises both out of and in the course of employment. In order to determine whether a workplace injury arises out of employment, consideration must be given to three categories of risk: 1.) risks distinctly associated with employment; 2.) risks that are idiopathic or personal to the worker; and 3.) risks that are neutral. *Larson's Workers Compensation Law*, Section 4 (2006). In Kentucky, there is a presumption that an unexplained workplace fall arises out of employment unless the employer presents substantial evidence to show otherwise. The employer cannot prevail in such a case unless it shows affirmatively that the fall was not work related. *Workman v. Wesley Manner Methodist Home*, 462 S.W.2d 898 (Ky. 1971) and *Vacuum Depositing, Inc. v. Dever*, 285 S.W. 3d 730 (Ky. 2009). In addition, a truly idiopathic fall may still be compensable if the workplace causes an increased risk of injury under the positional risk doctrine. *Indian Leasing Company v. Turbyfill*, 577 S.W.2d 24 (Ky. App.1971). However, if an employer asserts that a workplace

fall is idiopathic, it must meet the presumption with substantial evidence to that effect. If the employer does so, the Administrative Law Judge must weigh the conflicting evidence, including the permissible inference that a workplace fall arises out of the employment. The burden of persuasion remains on the worker. See *Jefferson County Public Schools/Jefferson County Board of Education v. Stephens*, 208 S.W. 3d a 62 (Ky. 2006). The plaintiff argues that this is an unexplained fall entitling her to the presumption of work relatedness. The plaintiff further points to the positional risk theory in support of her claim of work relatedness. However, the plaintiff's testimony makes it clear that she did not trip or slip, but simply fell. The medical evidence presented by the defendant makes it clear that the plaintiff had previously experienced falls due to syncopal episodes, or imbalance as well as prior weakness and giving way of the knee. It is clear in this instance the cause of the plaintiff's fall was purely personal in nature and not connected or caused by her work environment. Further, there is no indication that she was placed at an increased risk while walking on a flat surface at the time of her injury. Therefore, it is clear the plaintiff's injury was idiopathic and noncompensable under KRS 342.0011. Her claim for income and medical benefits must be dismissed.

McIntosh filed a petition for reconsideration arguing the ALJ had misapplied the law as it relates to unexplained versus idiopathic falls. McIntosh argued her fall was unexplained rather than idiopathic and therefore created a

rebuttable presumption of work relatedness. She contended East Kentucky failed to submit affirmative substantial evidence to rebut the presumption. McIntosh also argued the ALJ shifted the burden of proof from a rebuttable presumption of work relatedness to a permissible inference.

On June 30, 2012, the ALJ denied the petition basing his order on "the medical evidence presented by the defendant as well as the plaintiff's own testimony."

On appeal, McIntosh argues her fall was not idiopathic but rather one of unexplained origin creating a rebuttable presumption of compensability. McIntosh notes she had returned to work without restrictions and was having no problems with either knee buckling or with syncope until the date of her fall and work. She points out Dr. Sheridan believed her fall was directly responsible for her torn right medial meniscus which now requires surgery.

In summary, McIntosh argues she simply began stumbling and could not regain her balance, that she fell into the wall with her left shoulder, and then fell to the ground landing on her right knee. There was no indication of her knee buckling or that she was dizzy -- episodes she had previously experienced. Therefore, this is nothing more than an unexplained fall for which she is entitled to benefits.

McIntosh, as the claimant in a workers' compensation case, had the burden of proving each of the essential elements of her cause of action before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was unsuccessful in her burden, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence which 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).

As fact-finder, the ALJ has the sole authority to determine the quality, character, and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods Inc. v. Burkhardt, 695 S.W.2d 48 (Ky. 1985). As fact-finder, the ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless whether it comes from the same witness or the same adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514

S.W.2d 46 (Ky. 1974). It must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W. 2d 641 (Ky. 1986).

The ALJ in the case *sub judice* determined that the fall McIntosh sustained was not of unexplained origin but was instead personal or idiopathic in nature. There is substantial evidence to support the ALJ's conclusions. McIntosh testified she was simply walking down the hallway when she fell, landing on her right knee. She did not trip or fall over any object and there was no evidence that her position in the hallway placed her in any area of danger. The medical evidence shows McIntosh had a prior history of right knee problems including a fall several months earlier for which she had undergone right knee surgery. In addition, McIntosh admitted a history of falling in 2002 and 2008. She also had a history of syncopal episodes and dizziness which contributed to her falls. Dr. Sheridan opined McIntosh's pre-injury knee condition likely led to her fall.

Where an employer produces substantial evidence to rebut the presumption of a work related fall, the presumption of work-relatedness is reduced to a permissible inference. Thus, the claimant retains the burden to prove

the fall arose out of the employment. Jefferson County Public Schools/Jefferson County Board of Education v. Stephens, 208 S.W. 3d 62 (Ky. 2006). At that point, an ALJ is required to consider the totality of the evidence, and may still draw an inference that the fall was work-related if the ALJ is convinced there is evidence to support that inference. Conversely, if the ALJ finds the weight of the evidence supports a conclusion the fall was the result of a purely individual cause, such as an internal weakness, and the employee's position at work did not contribute independently to the effects of the resulting harmful change, the ALJ can reasonably conclude the injury is not compensable. Workman vs. Wesley Manor Methodist Home, 462 S.W.2d 898 (Ky. 1971). In Workman, the Court explained as follows:

The case falls in the general category described by Larson as the 'unexplained fall' cases. See Larson, Workmen's Compensation Law, § 10.31. The essential problem was discussed in Coomes v. Robertson Lumber Co., Ky., 427 S.W.2d **809** (1968), in which this court held that an unexplained fall in the course of one's employment gives rise to a rebuttable presumption that it arose 'out of' the employment as well. Stated another way, when an employee during the course of his work suffers a fall by reason of some cause that cannot be determined, there is a natural inference that the work had something to do with it, in the sense

that had he not been at work he probably would not have fallen. Mindful of the statutory admonition to construe the law liberally, this and most other courts have elevated that inference to the status of a rebuttable presumption, or prima facie case, which means from a procedural standpoint that in the absence of evidence sufficient to cast substantial doubt in the mind of a reasonable man that the presumption is correct the employee is entitled to its benefit as a matter of law. In blunt terms this means that without such rebutting evidence the board cannot find against him on the issue of whether the accident arose out of the employment.

On the other hand, if the defendant employer comes forward with sufficient evidence that the work was not a contributing cause to raise a substantial doubt that it was, then the rebuttable presumption is reduced to a permissible inference and the board is free either to find or decline to find that it was. The countervailing defensive evidence need not be 'substantial' in that it would support a positive conclusion that the work was not a contributing cause; it need only cast enough doubt on the validity of the initial presumption in the case at hand to justify a reasonable man in disregarding it. (Footnotes omitted)

Here, after weighing the evidence, the ALJ simply found more credible the medical evidence documenting the pre-existing conditions and Dr. Sheridan's opinion regarding the cause of the fall. That evidence not only was sufficient to cast doubt on the validity of the presumption, but it also

constituted substantial evidence upon which to base the finding McIntosh's fall was idiopathic and not work-related.

Accordingly, the May 11, 2012 Opinion and Order and the June 20, 2012 Order on Reconsideration rendered by Hon. John B. Coleman, Administrative Law Judge are **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MCKINNLEY MORGAN
921 S MAIN ST
LONDON, KY 40741

COUNSEL FOR RESPONDENT:

HON K LANCE LUCAS
1511 CAVALRY LN STE 201
FLORENCE, KY 41042

ADMINISTRATIVE LAW JUDGE:

HON JOHN B COLEMAN
107 COAL HOLLOW ROAD SUITE 100
PIKEVILLE, KY 41501