

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: July 19, 2019

CLAIM NO. 201801333

BOBBIE JOE BERRY

PETITIONER

VS.

APPEAL FROM HON. TANYA PULLIN,  
ADMINISTRATIVE LAW JUDGE

AT&T AND  
HON. TANYA PULLIN,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
AFFIRMING

\* \* \* \* \*

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

**ALVEY, Chairman.** Bobbie Joe Berry (“Berry”) appeals from the March 25, 2019 Opinion and Order rendered by Hon. Tanya Pullin, Administrative Law Judge (“ALJ”), dismissing her claim against AT&T. The ALJ determined Berry failed to prove she sustained an injury as defined by the Act. Berry also appeals from the April 23, 2019 order denying her petition for reconsideration.

On appeal, Berry argues the ALJ erred in finding she did not sustain a work-related injury. Because we determine the ALJ did not err as a matter of law, and because her decision is supported by substantial evidence and no contrary result is compelled, we affirm.

Berry filed a Form 101 on September 13, 2018 alleging she sustained cardiac and psychological injuries on October 23, 2017 due to overwhelming stress placed upon her by the management staff at work. We note Berry did not file a Form 104 employment history form in support of her claim.

Berry testified by deposition on October 15, 2018, and at the hearing held January 25, 2019. Berry was born on November 23, 1976, and she currently resides in Jeffersonville, Indiana. Berry completed two years of college, and obtained a CNA certification. She had worked for AT&T five to six years prior to her alleged October 23, 2017 injury. She worked in an escalated customer service position requiring her to sit at a desk, take telephone calls, and assist with training new employees. Prior to her employment at AT&T, Berry worked as a cashier at a Shell gas station.

On October 23, 2017, Berry experienced dizziness and chest pain, which she reported to her supervisor. When the chest pain escalated, she sought medical treatment. She attributed the chest pain to anxiety and harassment at work. She testified that her husband also worked at AT&T. He had previously been promoted to manager in another division. She also testified she was required to do “extra” work duties. She testified that after her husband’s promotion, three other team leaders began harassing her. After his promotion, she was not permitted to

enter certain sections of the floor where he worked, and she received “public” admonishments. She agreed that the primary stress she experienced was her inability to speak to her husband during work hours, supervisors spreading falsehoods about her, and being told to perform “extra” work duties during her breaks. She testified the stress began in 2016 primarily due to her extra job duties.

On October 23, 2017, Berry was advised her husband was fired due to his sexual harassment of other employees. Afterward, she hyperventilated and developed chest pain, dizziness, and had an increased heart rate. She left for the day after receiving the news. Her symptoms increased as she was heading home, and she immediately sought medical treatment, and later underwent a cardiac stress test. She eventually had a heart catheterization. She missed time from work, but returned in January 2018. After returning to work, her stress increased, and she sought treatment and counseling at multiple facilities. She was off work and received short-term disability benefits from January 2018 until May 2018. She testified she continued to take heart medication, and she experiences tachycardia. She testified she has experienced significant weight gain since October 23, 2017.

Berry experienced an unrelated right leg injury on June 28, 2018 when she became dizzy, fell, and caught her foot in the door at home. At her deposition, Berry testified that but for her unrelated leg injury, she could return to work, and she had no restrictions except for those to her right leg and foot. She again received short-term disability benefits from June 2018 until she was allowed to return to work in November 2018. By the January 25, 2019 hearing, Berry had returned to work at AT&T without restrictions. She stated she is not earning as much as she did prior to

October 23, 2017. She no longer has psychological problems, and experiences only occasional tachycardia.

In support of her claim, Berry filed the June 27, 2018 records from Brook Hospital. The records note Berry was admitted on June 8, 2018 and she was discharged on June 27, 2018. She was diagnosed with major depression-recurrent, panic disorder, post-traumatic stress disorder ("PTSD"), personality: deferred, hypertension and an irregular heartbeat. Included in those records was the August 15, 2018 note from Dr. Timothy Burke. Dr. Burke noted Berry had a two-year history of depression, panic attacks and PTSD. He noted her condition has deteriorated after an attempted return to work, and she attempted suicide in May 2018. Afterward she was treated at Our Lady of Peace. Dr. Burke noted Berry "still reported symptoms of PTSD including hyperarousal, flashbacks, nightmares and hypervigilance stemming from childhood sexual abuse." Dr. Burke indicated Berry was taking Prozac, Elavil and Abilify.

Dr. David Changaris, a neurosurgeon, evaluated Berry on May 1, 2018. Dr. Changaris found Berry's cardiovascular disease worsened due to her hostile work environment. He also found she has depression and anxiety consequent to the cardiac dysfunction caused by her work environment. He opined her tachycardia prevented a return to work, and she qualified for a 15% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5<sup>th</sup> Edition ("AMA Guides"). Dr. Changaris stated Berry's hostile work environment is the equivalent of a physical exertion. Dr. Changaris additionally found the hostile work environment caused Berry to experience heart

malfunctioning which led her to develop chest pain and tachycardia. He found Berry reached maximum medical improvement (“MMI”) as of May 1, 2018. Dr. Changaris stated Berry could not work with groups of people until her cardiac symptoms, anxiety, and depression resolved.

Berry also filed Dr. Changaris’ January 7, 2019 supplemental report. Dr. Changaris reviewed Dr. David Keedy’s report. He noted that Dr. Keedy is a cardiologist. He stated their opinions are very similar regarding Berry’s tachycardia caused by her hostile work environment. He also revised the impairment rating he assessed to 30% based upon the AMA Guides; however, he stated the ALJ could choose to rely on either of the impairment ratings he assessed.

AT&T filed Dr. Mohamed Khodein’s August 21, 2018 report. Dr. Khodein performed a psychiatric consultation as part of an evaluation for whether Berry should undergo lap band surgery. He noted Berry reported she had been unable to lose weight, and experienced problems with her joints and back. He also noted Berry reported previous bouts of depression which was in remission. Berry reported she had no suicidal thoughts, and denied any prior suicide attempts. He diagnosed Berry as having an adjustment disorder with depressed mood secondary to her obesity without any homicidal psychosis. He also diagnosed a major depressive disorder, in remission, without any suicidal or homicidal psychosis. He noted she had a history of back pain and tachycardia. He recommended Berry undergo the proposed lap band surgery.

Berry also filed the report from the December 13, 2017 heart catheterization performed by Dr. Aris Chalhoub. Dr. Chalhoub opined Berry had

normal left ventricular wall motion. On January 19, 2018, Dr. Chalhoub noted Berry reported no chest pain, no arm pain on exertion, no palpitations, and no heart murmurs. On December 13, 2017, it was noted Berry had no acute cardiopulmonary disease. On November 28, 2017, an echocardiogram was reported as normal.

AT&T also filed Dr. Keedy's December 8, 2018 report. Dr. Keedy opined Berry did not sustain a cardiovascular injury due to an October 23, 2017 work injury. He stated, "She did develop multiple episodes of chest pain, shortness of breath, and tachycardia which were in turn most likely secondary to a hostile work environment." He noted Berry has a history of tobacco abuse, borderline hypertension, and a family history of premature coronary atherosclerosis. He additionally noted a heart catheterization was performed to rule out coronary artery disease. Dr. Keedy disagreed with Dr. Changaris that Berry may have a psychological condition stemming from her hostile work environment which could be manifested by chest pain, hypertension, palpitations and tachycardia. He stated she had reached MMI if she is not exposed to the hostile work environment. He also stated she does not qualify for a functional impairment rating.

At the Benefit Review Conference held on January 8, 2019, the parties preserved for determination several issues including benefits per KRS 342.730, work-relatedness/causation, injury as defined by the ACT, credit for STD, and TTD benefits. The parties agreed Berry retains the physical capacity to return to the type of work performed at the time of the injury.

The ALJ rendered a decision on March 25, 2019. She determined Berry did not sustain her burden of proving she sustained a work-related injury as

defined by the Kentucky Workers' Compensation Act. The ALJ specifically found as follows:

The claimant in a Workers' Compensation case bears the burden of proof and risk of non-persuasion for every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W. 3d 192, 195 (Ky. 2008); Snawder v. Stice, 556 S.W. 2d 276 (Ky. App. 1979). Essential elements include the work-relatedness/causation of any injury. Burton v. Foster Wheeler Corp., 72 S.W. 3d 925 (Ky. 2002); Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W. 2d 165 (Ky. App. 1980).

In this particular case, the medical opinions vary on whether Plaintiff suffers from a work-related injury to her heart and psychological injuries. When the medical evidence is conflicting, the question of which evidence to believe is the exclusive province of the ALJ. Kingery v. Sumitomo Electric Wiring, 481 S.W. 3d 492 (Ky. 2015).

Dr. Changaris diagnosed Plaintiff with "cardiovascular disease worsened by the hostile work environment and depression and anxiety consequent to the cardiac dysfunction caused by the work environment." Dr. Changaris opined on causation saying, "Based upon client history, medical records, and physical examination, the above impairment (s) is solely due to the hostile work environment, which brought into disabling reality underlying cardiovascular disease and subsequent underlying anxiety-depression." Dr. Keedy opined Plaintiff "did not sustain any cardiovascular injury secondary to her work injury of October 23, 2017." Dr. Keedy noted that Plaintiff's catheterization and echocardiogram "were completely normal."

In this particular case, the medical opinion of Dr. Keedy is more persuasive to the ALJ. Even though Dr. Keedy did not examine Plaintiff, his opinion is more persuasive to the ALJ because his opinion is consistent with the medical records of Dr. Chalhoub, Plaintiff's treating cardiologist. Dr. Changaris' opinion lacks the weight to persuade the ALJ because he seemed to identify

tachycardia as the impairment/injury and pointed to table 3-8 (page 42) of the Guides which is the section of the Guides that relates to “congenital heart disease.” Then in his supplemental report, Dr. Changaris referenced table 3-11 (page 56) of the Guides in which every class of impairment in that table requires “arrhythmia documented by ECG.” Dr. Changaris reviewed only records from The Brook Hospital and Cardiovascular Specialists. Further, Dr. Changaris said, “The client reported no prior history of depression before the accident of record.” The medical treatment records do not substantiate that report by Plaintiff. The June 8, 2018 treatment record from The Brook Hospital-KMI includes “two-year history of depression, panic attacks and PTSD.” The records from The Brook Hospital also noted that from age 12 to present, Plaintiff had issues with bulimia. Dr. Changaris reported “no history of smoking” whereas Dr. Chalhoub, Plaintiff’s treating cardiologist, reported “history of tobacco abuse” and “smoking status current every day smoker, smoker (1PPW).”

In Osborne v. Pepsi , 816 S.W. 2d 643 (Ky. 1991), the Supreme Court of Kentucky said that physicians’ conclusions may be based on firsthand knowledge, such as his own examination or tests of the patient, or upon secondhand knowledge such as patient’s statements or reports performed by others. The Osborne Court said, “When a medical opinion is based solely upon history, the trier of fact is not constricted to a myopic view focusing only on the physician’s testimony. Other testimony bearing on the accuracy of the history may be considered. After all, funneling a statement through a second party provides no additional credibility enhancement. The recitation of a history by a physician does not render it unassailable. If the history is sufficiently impeached, the trier of fact may disregard the opinion based on it.” In this case the treatment records of The Brook Hospital and Dr. Chalhoub impeach Plaintiff’s history to Dr. Changaris.

Dr. Changaris said he based his causation opinion on client history, medical records and physical examination. Since his physical examination revealed regular rate and rhythm of Plaintiff’s heart and the medical records of Dr. Chalhoub are not consistent with

Dr. Changaris' conclusions, then the information given by Plaintiff to Dr. Changaris becomes even more important.

In general, the ALJ found Plaintiff to be an unreliable historian and witness. For example, in addition to those inconsistencies noted above, Dr. Chalhoub reported in Plaintiff's history "preeclampsia" contrary to Plaintiff's assertion at the Formal Hearing that she had never had high blood pressure prior to the incident of October 23, 2017. (Formal Hearing Transcript, P. 72).

Although related to coal workers' pneumoconiosis and coal dust, the Supreme Court of Kentucky wrote in Durham v. Peabody Coal, *supra*, that a worker's statements concerning the nature of exposure to coal dust may assist a physician, but such statements are not "objective medical findings" and "Nor are a worker's statements describing symptoms such as breathing difficulties." The reports by Plaintiff of chest pain or rapid heartbeat without objective medical findings are insufficient to establish an injury as defined by the Act.

Both Dr. Keedy and Dr. Changaris used imprecise language in their causation opinions. While Dr. Keedy's vagueness in his report, specifically the reference to tachycardia being secondary to work stress, reduces the weight the ALJ gives his medical testimony, the ALJ still finds his medical testimony more persuasive than that of Dr. Changaris because it is buttressed by the medical records in evidence, in particular Dr. Chalhoub's records and the records of The Brook Hospital. In his treatment record of November 30, 2017, Dr. Chalhoub charted, "Heart: rhythm is regular. First sound is normal. Second heart sound is present. No S3 or S4. No murmur." In that same treatment record, Dr. Chalhoub reported a "12-lead EKG reveals normal sinus rhythm with poor R-wave progression, otherwise, unremarkable." After a heart catheterization and stress test, Dr. Chalhoub concluded, "1) normal left ventricular wall motion and ejection fraction and 2) no significant obstructive coronary artery disease" and Pritzmatal's angina.

Plaintiff relies upon McCowan v. Matsushita Appliance Co., 95 S.W. 3d 30 (Ky. 2002). In that case, Plaintiff

suffered a heart attack which is a harmful change to the human organism. In this case at hand, Plaintiff did not present objective medical findings to evidence a harmful change to the human organism. The only diagnosis, Pritzmatal's angina, is based only on Plaintiff's report of symptoms. The reasons given above, the ALJ does not find Plaintiff's report of symptoms persuasive.

Therefore, based upon the medical opinion of Dr. Keedy, and the treatment records in evidence, the ALJ finds that Plaintiff has not met her burden of proving a work-related physical injury to her heart. Stress alone is not an injury as defined by the Act.

Because Plaintiff has not borne her burden of proving a work-related injury as defined by the Act, the other contested issues in this claim are moot.

Berry filed a petition for reconsideration arguing the ALJ misconstrued her position. She argued her compensable condition is not "stress", but is physical harm resulting from mental hostility and harassment at work. Berry asked the ALJ to specifically indicate whether she sustained any harmful physical changes resulting from her harassment and stress at work. Berry additionally requested the ALJ to identify the medical evidence she relied upon contradicting the opinions of Drs. Changaris and Keedy. Berry also asked the ALJ to provide numerous additional findings regarding various aspects of her decision, including the AMA Guides, and to determine whether she sustained at least a temporary injury.

The ALJ issued an order on April 23, 2019 denying the petition for reconsideration. The ALJ found Berry's petition for reconsideration was no more than a re-argument of the merits of the claim. She additionally stated she provided sufficient findings to permit meaningful review, citing to Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

On appeal, Berry argues the ALJ erred in dismissing her claim. As the claimant in a workers' compensation proceeding, Berry had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful, the question on appeal is whether the evidence compels a different result. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may reject any testimony and believe or disbelieve various parts of the evidence, regardless of 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, *supra*. As long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

We note that KRS 342.0011(1) defines injury as follows:

"Injury" means any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. "Injury" does not include the effects of the natural aging process, and does not include any communicable disease unless the risk of contracting the disease is increased by the nature of the employment. "Injury" when used generally, unless the context indicates otherwise, shall include an occupational disease and damage to a prosthetic appliance, **but shall not include a psychological, psychiatric, or stress-related change in the human organism, unless it is a direct result of a physical injury;** (Emphasis added).

"[I]n instances where the harmful change is psychological, psychiatric, or stress-related, it must directly result from the physically traumatic event." Lexington-Fayette Urban County Government v. West, 52 S.W.3d 564, 566 (Ky. 2001). In West, the Kentucky Supreme Court determined a "full-fledged fight in which a police officer and suspect are scuffling and rolling on the ground as an event that involves physical trauma, in other words, as a physically traumatic event." *Id.* at 567. Later, in Richard E. Jacobs Group, Inc. v. White, 202 S.W.3d 24 (Ky. 2006), the Court considered a police officer who alleged a psychological condition arising

from the shooting of an armed assailant, coupled with his exposure to the assailant's blood and other bodily fluids while administering CPR. The Court explained:

There is no requirement that a physically traumatic event must cause physical harm as well as the mental harm for which compensation is sought. It may involve a physical exertion rather than an impact from an outside force. Performing CPR and first aid on an individual with multiple gunshot wounds clearly requires physical exertion. Therefore, it constitutes a physically traumatic event for the purpose of KRS 342.0011(1), and any mental harm that directly results is compensable.

Id. at 27 (internal citations omitted).

In this instance, Berry argues she sustained a physical manifestation of a condition caused by stress, or in her words, harassment. There was no physical injury at work. Apparently, the precipitating factor for her shortness of breath, tachycardia, etc. was discovering her husband was fired for alleged sexual harassment of co-workers. While Berry has pointed to numerous events which she believes resulted in a physical injury, none involved an actual physical event. The ALJ specifically found that Berry failed to point to any physical injury or objective condition resulting from her multiple alleged grievances. The ALJ additionally noted the lack of objective evidence supporting Berry's claim. The ALJ also specifically found Berry was "an unreliable historian and witness."

Berry essentially requests a reversal of the ALJ's decision, and a finding that a "psychological, psychiatric, or stress-related change in the human organism" may make a subsequent physical manifestation compensable. In support of her contention, Berry relies upon the holding in McCowan v. Matsushita Appliance Co., 95 S.W.3d 30 (Ky. 2002). There the Kentucky Supreme Court, in a

4-3 decision, acknowledged that the definition of injury was amended in 1994 in an attempt to limit “mental-mental” claims, but determined the definition permitted “compensation if mental trauma or exertion caused a harmful physical change, and a harmful mental change directly resulted.” Id. at 31. The Court noted the trauma sustained by the claimant in that case was emotional rather than physical in nature, stating, “the harmful changes for which she sought compensation included the heart attack and its consequences.”

In her decision, the ALJ acknowledged Berry’s argument based upon the McCowan v. Matsushita Appliance Co. case. Unlike that case, the ALJ determined Berry failed to “present objective medical findings to evidence a harmful change in the human organism.” In dismissing Berry’s claim, the ALJ noted she was not persuaded by her self-reported symptoms. Dr. Keedy’s and Dr. Chalhoub’s opinions constitute substantial evidence supporting the ALJ’s dismissal of the claim, and no contrary result is compelled. Although Berry is able to point to evidence contrary to this determination, a different decision is not compelled.

Accordingly, the March 25, 2019 Opinion and Order, and the April 23, 2019 order on reconsideration rendered by Hon. Tanya Pullin, Administrative Law Judge are **AFFIRMED**.

ALL CONCUR.

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