IN THE SUPREME COURT OF TENNESSEE
SPECIAL WORKERS COMPENSATION APPEALS PANEL
AT KNOXVILLE
OCTOBER 9, 2002

BARBARA PRITCHETT V. WAL-MART STORES, INC., LARRY BRINTON, JR., DIRECTOR OF THE DIVISION OF WORKERS' COMPENSATION CLAIMS, and TENNESSEE DEPARTMENT OF LABOR, SECOND INJURY FUND

Direct Appeal from the McMinn Circuit Court
No. 19,594 John Hagler, Circuit Judge

Filed May 20, 2003

No. E2001-01257-WC-R3-CV

This workers' compensation appeal has been referred to the Special Workers' Compensation Appeals Panel in accordance with Tenn. Code Ann. § 50-6-225(e) for hearing and reporting of findings of fact and conclusions of law. The employee appeals the dismissal of her claim for workers' compensation benefits asserting that the trial court erred in admitting findings of the Social Security Administration, and in finding that her injury was non-compensable. We affirm.

Tenn. Code Ann. § 50-6-225(e) (1999) Appeal as of Right; Judgment of the McMinn County Circuit Court is Affirmed.

HOWELL N. PEOPLES, SP. J., delivered the opinion of the court, in which WILLIAM M. BARKER, JUSTICE, and JOHN K. BYERS, SR. J., joined.

David H. Dunway, David H. Dunway & Associates, LaFollette, Tennessee, for the Appellant, Barbara Pritchett.

Terry L. Bernal, Allen, Kopet & Associates, Chattanooga, Tennessee, for the Appellee, Wal-Mart Stores, Inc.

MEMORANDUM OPINION

Facts

Barbara Pritchett was employed by Wal-Mart Stores, Inc. ("Wal-Mart") as a jewelry department manager in its Athens, Tennessee store. She suffered a work-injury on May 2, 1992 when a sign she was hanging fell and struck her in the area of her shoulder and neck. She was treated for the injury by Dr. Alan McMurray Weems, who released her to return to work on March 15, 1993. Ms. Pritchett filed suit for worker's compensation benefits for the injury in the Chancery Court of McMinn County and was awarded ten percent permanent partial disability to the body as a whole. She returned to work and was injured again in April 1993 when she tried to help a co-worker who passed out and was falling down stairs. (During the proceedings, several different dates in April were given as occasion of this incident.) It is this second injury that has generated this appeal from the Circuit Court. Ms. Pritchett was treated for this injury also by Dr. Weems, who placed her at maximum medical improvement on September 8, 1993. She was seen and/or treated by several other physicians, including a psychiatrist, whose testimony was introduced at the trial.

Ms. Pritchett filed the present suit alleging that the accident in 1993 injured her right shoulder. On oral motion at the trial, she was allowed to amend to claim that her neck was also injured. The trial court found that Ms. Pritchett

> "has already received a disability award for any impairment resulting from an aggravation or second injury of her first neck injury, that she has failed to prove that the second injury advanced or progressed her first injury, that she has failed to prove causation by her employment, that she has failed to prove that her disability is any greater than that set in her first hearing, and that she has failed to prove that her depression is caused by her second injury, but that she is entitled to reasonable medical expenses pursuant to her original award of benefits in accordance with the worker's compensation statute."

Standard of Review

Review of the findings of fact made by the trial court is *de novo* upon the record of the trial court, accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. Code Ann. § 50-6-225(e)(2); *Tucker v. Foamex, L.P.*, 31 S.W.2d 241, 242 (Tenn. 2000). The application of this standard requires this Court to weigh in more depth the factual findings and conclusions of the trial courts in workers' compensation cases to determine where the preponderance of the evidence lies. *Cleek v. Wal-Mart Stores, Inc.*, 19 S.W.3d 770, 773 (Tenn. 2000). "When the trial court has seen the witnesses and heard the testimony, especially where issues of credibility and the weight of testimony are involved, the appellate court must

extend considerable deference to the trial court's factual findings." *Richards v. Liberty Mut. Ins. Co.*, 70 S.W.3d 729, 732 (Tenn. 2002). However, this Court is in the same position as the trial judge in evaluating medical proof that is submitted by deposition, and may assess independently the weight and credibility to be afforded to such expert testimony. *Id.*

Issues

1. Did the trial court err in admitting findings of the Social Security Administration or allowing the plaintiff to be questioned concerning the language contained in her social security award notice?

2. Did the trial court err in finding that the plaintiff's work injury was non-compensable?

Discussion

I.

Counsel for Ms. Pritchett asserts that the trial court erred in admitting findings of the Social Security Administration and in allowing her to be questioned concerning language contained in her social security award notice. The record establishes that Ms Pritchett was first asked if she had applied for social security disability in 1992 by her own counsel during direct examination. On cross-examination, counsel for Wal-Mart offered the social security notice and counsel for Ms. Pritchett objected that "anything as far as social security is totally inadmissible in a work comp case. You can ask when you applied and things of that nature, but the award itself is totally inadmissible." The trial judge replied: "I'm not interested in that. I'm interested in what the basis of the social security claim was. That's relevant to this case. . . ." Counsel for Ms. Pritchett said: "I understand that, and I have no problem with that." Ms Pritchett subsequently testified that the notice granting her claim for social security disability stated that she was "currently disabled as of 2-1-93 due to nerves and depression." The judgment entered by the trial court recites in paragraph 9:

> In late 1992 or early 1993, while out of work, plaintiff filed for social security disability alleging that that she had been unable to work as of August 11, 1992, because of "shoulder and foot pain, vision problems, nerves, and depression." Plaintiff was awarded social security benefits on June 4, 1993 by the Social Security Administration which found that although her physical problems did not preclude her from working as a salesperson, her "nerves and depression" rendered her disabled as of February 1, 1993.

Counsel for Ms. Pritchett contends that it is clear that the trial court considered the findings of the Social Security Administration for the purpose of showing the existence or extent of any disability.

Jerry Lemler, M.D., a psychiatrist, testified, by deposition, that Ms. Pritchett related that she sustained an injury in March 1993 when she tried to assist a fellow employee who was falling. She told him that she considered herself to be in good health, including emotionally, prior to the accident in 1993. Based on that history, he expressed his opinion that the 1993 event was the cause of her "major depression, moderate." Kelly Walker, M.D., a psychiatrist, testified, by deposition, and was asked by counsel for Ms. Pritchett to assume (a) that Ms. Pritchett was injured on April 15, 1993 when she was trying to assist a fellow worker who was falling down some stairs, (b) that a right shoulder injury was attributed to that event, and (c) "to assume further that following that injury she developed emotional problems, and she had occasion to come under your care and treatment." Based on the assumptions, Dr. Walker expressed the opinion that the depression suffered by Ms. Pritchett was related to the 1993 work injury.

In this case, the employer disputed causation of Ms. Pritchett's injury, including the claim that depression resulted from the injury. A claimant has the burden of proving every element essential to the claim. *White v. Werthan Industries*, 824 S.W.2d 158 (Tenn. 1992). Causation of an injury and the connection to the employment must generally be based upon expert medical evidence. *Tindall v. Waring Park Ass'n*, 725 S.W.2d 935 (Tenn. 1987). In considering the depression claim, the trial court commented on the testimony offered to establish the claim, and noted, "the opinion of Dr. Jerry Lemler, who examined plaintiff more than five years after the second accident, is undermined by the history given to him." The trial judge also found "the opinion of Dr. Kelly D. Walker is equally flawed with respect to causation for failing to take into account the fact that plaintiff was claiming to be totally disabled as the result of depression prior to her second accident."

We agree with counsel for Ms. Pritchett that awards or findings of the Social Security Administration are not admissible for the purpose of showing the existence or the extent of an employee's permanent disability. *Bingham v. Dyersburg Fabrics Co., Inc.*, 567 S.W.2d 169, 171 (Tenn. 1978). In this case, the social security related evidence was not received on the issue of the existence or extent of Ms. Pritchett's disability. From the entirety of the record, however, it is clear that the trial court considered the evidence that Ms. Pritchett had made a claim for social security disability based on depression, and other medical conditions, prior to the time she sustained the injury giving rise to this worker's compensation claim. She had failed to disclose this information to the psychiatrists who testified. It was this fact that impacted the weight and reliability of the psychiatric testimony on the issue of causation of Ms. Pritchett's depression. Counsel has provided, and we are aware of, no authority that would bar evidence that a workers' compensation claimant has made an earlier claim for social security disability benefits based on the same mental or physical condition that now gives rise to the workers' compensation claim. We find no error in the actions of the trial court on this issue.

II.

Counsel for Ms. Pritchett also contends that the trial court erred in finding that the injury of April 19, 1993 was not compensable. It is undisputed that the incident did cause an injury. Ms. Pritchett contends that the injury was to her neck and right shoulder. The issue is whether the injury resulted in any compensable permanent impairment. Because she had a pre-existing injury, she must present expert medical testimony to establish that there has been some anatomical change in the pre-existing condition or that the employment caused an actual progression or advancement of the underlying condition. *Sweat v. Superior Industries, Inc.*, 966 S.W.2d 483 (Tenn. 1997). A mere increase in pain or symptoms does not generally qualify as a compensable injury. *Cunningham v. Goodyear Tire and Rubber Company*, 811 S.W.2d 888 (Tenn. 1998); *Smith v. Smith's Transfer Corp.*, 735 S.W.2d 221 (Tenn. 1987).

The deposition of Dr. Weems was taken on September 23, 1994 for the workers' compensation suit filed in Chancery Court on the injury of May 2, 1992. The same deposition was submitted as evidence in the present case. Dr. Weems testified that Ms. Pritchett had been given an MRI procedure on May 22, 1992 that showed a bulging disc at C5-6, and that x-rays and MRIs showed acromioclavicular degenerative arthritis in both shoulders before her injury of April 1993. Dr. Weems declined to address the shoulder joints, saying that was the province of an orthopedic physician. Dr. Weems testified that Ms. Pritchett had a six percent medical impairment from both the May 2, 1992 and April 1993 injuries. During the course of this deposition, counsel for Ms. Pritchett told Dr. Weems that she was not claiming an injury to the neck in the last injury, but only an injury to the shoulder. Dr. Weems said:

> "I'm not saying any thing about her shoulder. I've checked to make sure there was no re-injury to her neck, if anything it was an exacerbation, and the impairment rating will stand for both injuries as it refers to a neurologic injury. As it refers to an expert orthopedic opinion, I will not give you that information.
> Q. With regard to the last injury in time which is where this other employee fell, are you telling the Court that she had any new injury to her neck at all?
> A. No. That's what I – I waited to see if she was going to recover spontaneously, she didn't so I re-evaluated her with repeat studies showing no worsening, nothing new."

William E. Kennedy, M.D., an orthopedic surgeon, testified that he performed an examination of Ms. Pritchett on February 8, 1993 after the sign fell and struck her. She complained of intermittent pain in the neck and chronic persistent pain in the right shoulder. Contrary to Dr. Weems, Dr. Kennedy testified that he "did not find any objective evidence of any permanent physical impairment as a result of her neck condition or her right shoulder on that occasion." Dr. Kennedy saw Ms. Pritchett again on August 7, 1998. Asked for his opinion whether Ms. Pritchett had suffered any permanent injury as a result of the accident on April 19, 1993, he stated that "she had

suffered permanent injury to her neck and the residual pain of which she was complaining in the shoulder was referred pain from the neck." He assigned a permanent impairment rating of 14 percent to the body as a whole.

A Form C-32 report from Jonathan N. Degnan, M.D., was introduced at the trial. Dr. Degnan examined Ms. Pritchett at the request of her attorney. He reported a history of an injury when a sign fell on her and an injury when she tried to catch a patient who was falling. He found an impairment of 14 percent to the body without specifying what percentage of impairment resulted from the falling sign and whether any additional impairment or physical limitations resulted from the incident involving the falling co-worker.

The expert medical evidence is equivocal and does not preponderate against the finding of the Circuit Court that Ms. Pritchett failed to show a progression or aggravation of her pre-existing condition beyond that for which she had already been compensated in the Chancery Court proceeding.

Conclusion

The judgment of the trial court is affirmed. Costs of this appeal are taxed against Barbara Pritchett and her surety, if any.

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Howell N. Peoples, Special Judge

IN THE SUPREME COURT OF TENNESSEE
AT KNOXVILLE

BARBARA PRITCHETT v. WAL-MART STORES, INC.

Filed May 20, 2003

No. E2001-01257-SC-WCM-CV

JUDGMENT

This case is before the Court upon motion for review pursuant to Tenn. Code Ann. § 50-6-225(e)(5)(B), the entire record, including the order of referral to the Special Workers' Compensation Appeals Panel, and the Panel's Memorandum Opinion setting forth its findings of fact and conclusions of law, which are incorporated herein by reference;

Whereupon, it appears to the Court that the motion for review is not well-taken and should be denied and

It is, therefore, ordered that the Panel's findings of fact and conclusions of law are adopted and affirmed, and the decision of the Panel is made the judgment of the Court.

Costs on appeal are taxed to the appellant.

IT IS SO ORDERED this 20th day of May, 2003.

PER CURIAM

Barker, J. - Not participating.