THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE SOUTH CAROLINA
WORKERS' COMPENSATION COMMISSION

WCC File No. 1307602
Unpublished Opinion No. 2018-UP-349
(S.C. Court of Appeals Filed August 1, 2018)
Appellate Case No. 2018-001866

Verma Tedder,

Claimant, Petitioner,

v.

Darlington County Community Action
Agency, Employer, and State Accident Fund,

Respondents.

BRIEF OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

QUESTION PRESENTED

I. **DID THE COURT OF APPEALS PROPERLY AFFIRM THE EXCLUSION OF PETITIONER'S VOCATIONAL EVALUATION WHERE SHE REFUSED TO SUBMIT TO A VOCATIONAL ASSESSMENT BY RESPONDENTS' EXPERT, AND WHERE SHE WAS WARNED OF THE CONSEQUENCE OF HER FAILURE TO COOPERATE?**

STATEMENT OF THE CASE

This is an admitted accident case decided by the Workers' Compensation Commission on a Form 21 filed September 5, 2014. While originally claiming injury to her right arm, right hand, right knee, left leg, and back, Petitioner ultimately abandoned all of her claims except for the injuries to her left knee and lower back. Following a surgery on her left knee and follow-up physical therapy, her authorized provider, Dr. Robert Elvington, Jr. declared her to have reached maximum medical improvement as of August 26, 2014, assigned her a three percent permanent physical impairment to her left knee, and released her with no restrictions. (A. 192 – 194; A. 360 – 363). At about the same time, Dr. W.S. Edwards, Jr. saw Petitioner in a follow up appointment for her low back pain. He declared her to be at maximum medical improvement as of July 3, 2014, assigned her five percent impairment rating to her lower back, and released her with no restrictions. (A. 360).

Respondents filed a Form 21 on September 5, 2014, to stop payment to Petitioner for Temporary Total Disability ("TTD"). (A. 36 – 37). The Commission scheduled a hearing on October 29, 2015. Petitioner then filed a Form 58 claiming for the first time that she was totally and permanently disabled. (A. 232 – 234). As a result, the Commission notified the parties that mediation would be required pursuant to S.C. Reg. 67-1802. The October hearing was continued to permit mediation. (A. 237 – 238). The parties mediated

on February 23, 2015. Thereafter, the hearing date was rescheduled for May, but then was continued based on scheduling conflicts of counsel, each time with the consent of all parties including counsel for Petitioner. (A. 403 – 411).

While the mediation and hearings were pending scheduling, Petitioner scheduled additional assessments with experts of her choice. Petitioner participated in a Functional Capacity Evaluation which showed sub-maximal effort on her part and self-limiting throughout the testing. (A. 372 – 394). She also underwent a Vocational Evaluation to support her claim for permanent and total disability. Respondents received these reports as part of Petitioner's April 17, 2015 submissions. In response, Respondents requested that Petitioner submit to evaluation with their Vocational Expert. After weeks of Petitioner refusing to cooperate with Respondents' request, Respondents filed a Motion to Compel her to submit to a Vocational Evaluation with their expert. (A. 412 – 415). On August 7, 2015, the Commission responded by denying Respondents' Motion but warning Petitioner that if she chose "not to submit to [Respondent]s' evaluation, neither party's Vocational Report w[ould] be considered by the undersigned Commissioner." (A. 3).

Petitioner elected not to submit to evaluation by Respondents' expert, and instead, at the hearing on August 20, 2015, before the Single Commissioner, asked that the Commissioner reconsider her ruling regarding the Vocational Evaluation which the Commissioner denied based, in part, on Petitioner's "myriad of credibility issues." (A. 21). The Single Commissioner noted she "fully considered the time lag before [Respondents] requested a vocational evaluation," but she refused to consider Petitioner's Vocational Evaluation so as not to "reward [Petitioner's] unwillingness to submit to a vocational evaluation for" Respondents. (A. 21).

Following the submission of evidence and the hearing, the Single Commissioner found Petitioner sustained a ten percent permanent partial disability to her left knee, an eight percent permanent partial disability to her back, and that Petitioner was not permanently and totally disabled under either section 42-9-10 or section 42-9-30(21) of the South Carolina Code. The Single Commissioner ordered a total of 43.5 weeks of compensation for the injuries. (A. 5 – 23).

Petitioner appealed the Single Commissioner's ruling to the Appellate Panel. Following a February 22, 2016 hearing and a *de novo* review of the facts, the Appellate Panel issued its Order on April 20, 2016. (A. 24 – 35). The Appellate Panel concurred with and affirmed the decision of the Single Commissioner. The Court of Appeals then affirmed the Appellate Panel on August 1, 2018, and Petitioner petitioned this Court for a writ of certiorari which was granted on February 21, 2019.

FACTS

Petitioner was a teacher's aide for sixteen years with Respondent Darlington County Community Action Agency. On March 29, 2013, Petitioner was supervising three-year-old children on the playground when one of the children ran in front of her, causing her to fall to the ground on her left side.

Petitioner initially claimed injuries to her right arm, right hand, right knee, left leg, and lower back. She was seen at McLeod Urgent Care, (A. 250 – 268), and went to physical therapy. (A. 278 – 288). She was then seen at McLeod Occupational Health, (A. 307 – 308), who referred her to Pee Dee Orthopaedic. (A p. 328).

Petitioner was examined and treated by Dr. Elvington examined Petitioner, diagnosed her with a medial meniscus tear of the left knee, (A. 331 – 333), and performed

a partial medial meniscus meniscectomy on September 4, 2013. (A. 334). On December 3, 2013, Dr. Elvington provided limited work restrictions for Petitioner. (A. 342).

Thereafter, Petitioner followed up with Dr. Elvington and continued to complain of right knee pain. Dr. Elvington ultimately opined during his Deposition on March 4, 2014, that any right knee complaints were not related to her admitted injury. (A. 100 – 136).

Post-surgery, Dr. Elvington continued to evaluate and treat Petitioner and referred her for a course of physical therapy with Lowe's Physical Therapy. (A. 281 – 306). On August 26, 2014, Dr. Elvington found her to be at maximum medical improvement for her left knee injury with a permanent impairment rating of three percent (3%) and no restrictions. (A. 360). Petitioner testified at the hearing that she was not aware of any restrictions on her ability to return to work after her August 26, 2014 appointment with Dr. Elvington. (A. 196, lines 1-8). Nevertheless, Petitioner never returned to work and continues to insist she is permanently and totally disabled.

Dr. Edward, an orthopedic spine specialist with Pee Dee Orthopedics, saw Petitioner during this time. On July 3, 2014, Dr. Edwards noted: "[Petitioner] was reassured there is no evidence of underlying compressive pathology or instability that would require surgical intervention. Use of good body mechanics and careful lifting techniques are emphasized. She is at maximum medical improvement [for her lower back injury] and has a 5% impairment of her spine based on her industrial injury. No specific restrictions are necessary. She is discharged." (A. 360).

Petitioner's attorney referred her to Tracy Hill, P.T., of Columbia Rehabilitation Clinic, Inc. for a Functional Capacity Evaluation ("FCE") on September 12, 2014. Hill noted that "a five position hand grip test was performed and graph results did not resemble

a bell-shaped curve indicating sub-maximum efforts. Coefficients of variation at position 2 of the right hand were above 15% indicating sub-maximal effort..." Petitioner repeatedly self-limited throughout the testing, and she herself – not the evaluator – ultimately terminated the test based on her own subjective complaints of pain. (A. 372 – 394).

On September 19, 2014, Petitioner met with J. Adger Brown for a vocational evaluation. She refused to submit to evaluation by Respondents' vocational expert, leading both the Single Commissioner and the Appellate Panel to refuse to consider her expert's report.

At the hearing before the Single Commissioner, Petitioner "ambulated laboriously" with a cane though no doctor had prescribed her a cane and her pre-surgery notes indicated she had only a "mildly antalgic" gait, and later, had a "normal" gait. (A. 250 – 268 and 328 – 369).

The Appellate Panel in its Decision and Order concurred with the Single Commissioner regarding Petitioner's substantial credibility problems, noting that Petitioner "did not make a good witness on her own behalf," referring to the Single Commissioner's note of the same finding based on the Commissioner's observations of Petitioner's demeanor and testimony at the hearing. Specifically, the Appellate Panel's Order noted that Petitioner had previously "completed and/or signed a form in which she denied any prior workers' compensation claims or impairment ratings." (A. 31, Finding 19(c)). In fact, Petitioner had filed a previous workers' compensation claim for injuries to her right knee, for which an impairment rating was assigned and for which she received a settlement, as well as a prior personal injury lawsuit for injuries to her back, which was likewise settled. (A. 30).

The Court of Appeals affirmed the Panel decision based on the substantial evidence standard and deferring to the findings of a "myriad of credibility issues" displayed by Petitioner. The Court of Appeals also rejected Petitioner's argument that the Commission should have considered her vocational expert's report despite her refusal to submit to evaluation by Respondents' vocational expert where she had received forewarning from the Commissioner that her refusal would result in the exclusion of her expert's report. (A. 483 – 489).

ARGUMENT

The Administrative Procedures Act ("APA") governs appellate review of the South Carolina Workers' Compensation Commission's decisions. *Pierre v. Seaside Farms*, 386 S.C. 534, 540 (S.C. 2010); *Geathers v. 3V, Inc.*, 371 S.C. 570, 641 S.E.2d 29 (2007); *Shealy v. Aiken County*, 341 S.C. 448, 535 S.E.2d 438 (S.C. 2000) (*citing Lark v. Bi-Lo, Inc.*, 276 S.C. 130, 276 S.E.2d 304 (1981). Our appellate courts should reverse the Appellate Panel's decision ***only*** if Petitioner's substantial rights have been prejudiced because the decision was affected by an error of law or is clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. *Id.* "Substantial evidence is not a mere scintilla of evidence nor evidence viewed from one side, but such evidence, when the whole record is considered, as would allow reasonable minds to reach the conclusion the Full Commission reached." *Whigham v. Jackson Dawson Communs.*, 410 S.C. 131, 134–35, 763 S.E.2d 420, 422 (2014) (quoting *Shealy v. Aiken Cnty.*, 341 S.C. 448, 455, 535 S.E.2d 438, 442 (2000). In workers' compensation cases, the Appellate Panel is the ultimate fact finder. *Hunter v. Patrick Constr. Co.*, 289 S.C. 46, 47, 344 S.E.2d 613, 614 (1986). The final determination of witness credibility and the weight to be accorded evidence is

reserved to the Appellate Panel. *Ford v. Allied Chem. Co.*, 252 S.C. 561, 567, 167 S.E.2d 564, 567 (1969). It is not the task of this Court to weigh the evidence as found by the Appellate Panel. *Ellis v. Spartan Mills*, 276 S.C. 216, 219, 277 S.E.2d 590, 591 (1981). "Under the scope of review established in the APA, this [C]ourt may not substitute its judgment for that of the Appellate Panel as to the weight of the evidence on questions of fact, but may only reverse where the decision is affected by an error of law." *Fishburne v. ATI Sys. Int'l*, 384 S.C. 76, 85, 681 S.E.2d 595, 599 (Ct. App. 2009).

Here, the sole question before the Court is whether the decisions of the Court of Appeals and the Appellate Panel were controlled by an error of law as to the exclusion of Petitioner's vocational expert's report.

I. THE COMMISSION PROPERLY EXCLUDED PETITIONER'S VOCATIONAL EXPERT'S REPORT BECAUSE PETITIONER REFUSED TO UNDERGO EVALUATION BY RESPONDENTS' EXPERT.

The Court of Appeals correctly applied the substantial evidence standard of review from *Clemmons v. Lowe's Home Ctrs., Onc.-Harbison*, 420 S.C. 282, 287, 803 S.E.2d 268, 270 (2017) to find substantial evidence supported the Appellate Panel's decision and to conclude that there were no errors of law affecting the Appellate Panel's decision. *See Fishburne*, 384 S.C. at 85, 681 S.E.2d at 599. In doing so, the Court of Appeals agreed that the Appellate Panel properly excluded Petitioner's Vocational Report because she refused to undergo evaluation by Respondents' vocational expert. (A. 482 – 483).

Petitioner argues that that simply because she provided her hired expert's report to Respondents more than the ten days ahead of the scheduled hearing as required by S.C. Reg. 67-612(B)(2), neither the Single Commissioner nor the Panel had any discretion to

exclude the report as a sanction for her failure to submit to evaluation by Respondents' expert. Petitioner's arguments continue to ignore the well-settled law that administrative agencies are required to meet minimum standards of due process and that "due process at least requires an opportunity to present favorable witnesses." *Smith v. South Carolina Dep't of Mental Health*, 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997) (*citing Brown v. South Carolina State Bd. of Educ.*, 301 S.C. 326, 391 S.E.2d 866 (1990) and *Tall Tower, Inc. v. South Carolina Procurement Review Panel*, 294 S.C. 225, 363 S.E.2d 683 (1987)).

Respondents retained their own vocational expert two months prior to the final hearing to evaluate Petitioner's report and perform its own independent evaluation. Petitioner ignored repeated requests for her to be evaluated, and, even after the Single Commissioner warned her that her refusal to submit to evaluation would result in her expert's report being excluded, she continued to refuse to cooperate or be evaluated by Respondents' expert. Had the Single Commissioner and Appellate Panel considered Petitioner's Vocational Report, Petitioner would have been rewarded for her obduracy in refusing to cooperate and would not have been in keeping with traditional notions of fair play and due process, especially considering that the sole question in the case was the extent of Petitioner's injuries. Both the Single Commissioner and Appellate Panel rightfully disregarded the conclusions of Petitioner's vocational report as a sanction for her failure to comply, and the Court of Appeals agreed, citing *Smith v. S.C. Dep't of Mental Health*, 329 S.C. 485, 500, 494 S.E.2d 630, 638 (Ct. App. 1997) (citing S.C. Const. art. 1, § 3).

Specifically, the Court of Appeals correctly construed the ten days' notice requirement from S.C. Code Ann. Regs. 67-612(B)(2) (2012) as being a prerequisite to admissibility and not as establishing admissibility as a matter of right. In fact, subsection I

of regulation 67-612 indicates parties do not "waive any evidentiary objections to the introduction of a particular exhibit" simply by the exhibit being included within the requisite timeframe. Indeed, the Court of Appeals correctly ruled that the regulation is, "merely a prerequisite to the admission of an expert's report into evidence and does not take away the single commissioner's authority to exclude such a report for other reasons." (A. 481 – 482). To hold otherwise would mean that any purported expert opinion offered by a claimant, if served with ten days' notice, would automatically be admissible regardless of whether the Commission found it inadmissible for other reasons. *See, e.g.*, *Gadson v. Mikasa Corp.*, 368 S.C. 214, 228, 628 S.E.2d 262, 269 (Ct. App. 2006) (noting "the admissibility of the expert's testimony are matters within the trial court's sound discretion"). This is not a situation where the Single Commissioner improperly excluded testimony necessary to make an informed decision. Both the Single Commissioner and the Appellate Panel had all the information it needed to make an informed decision. The addition of Petitioner's vocational expert's report would have actually deprived Respondents of their rights to "a full and fair hearing" because they were denied the opportunity to have their independent expert evaluate Petitioner. S.C. Const., art. 1, § 22 ("No person shall be finally bound by a judicial or quasi-judicial decision of an administrative agency affecting private rights except on due notice and an opportunity to be heard.").

Petitioner's argument that the Court of Appeals' and the Appellate Panel's rulings on this issue are "tantamount" to a finding that enforcement of S.C. Code § 42-15-80 violates Respondents' due process rights misses the point entirely. The parties are ***not*** before this Court on the issue of whether the Single Commissioner had the authority to

order evaluation by Respondents' vocational expert under S.C. Code § 42-15-80, but rather, whether, in the face of Petitioner's demand to submit her own vocational expert (not a physician or surgeon), she should have agreed to submit to evaluation by Respondents' independent vocational expert. What the Commissioner did was require Petitioner to either engage in fair play and submit to additional evaluation by Respondents' expert, or not submit her own additional vocational expert's report. Our courts have long permitted claimants to attempt to prove total disability without medical evidence using vocational experts. *See e.g., Linen v. Ruscon Constr.Co.*, 286 S.C. 67, 68–69, 332 S.E.2d 211, 212 (1985); *Sanders v. Meadwestvaco*, 371 S.C. 284, 291–92, 638 S.E.2d 66, 70 (Ct. App. 2006); *Simmons v. City of Charleston*, 349 S.C. 64, 74, 562 S.E.2d 476, 481 (Ct. App. 2002); *McCollum v. Singer Co.*, 300 S.C. 103, 107–08, 386 S.E.2d 471, 474 (Ct. App. 1989); *Lyles v. Quantum Chem. Co.*, 315 S.C. 440, 445–46, 434 S.E.2d 292, 294–95 (Ct. App. 1993). However, nothing in those cases stands for the proposition that where claimants seek to support their cases with vocational expert testimony, they may do so without permitting the respondents the opportunity to meet that evidence with experts of their own. In fact, in at least one case where a claimant's vocational expert testified, that claimant also submitted to evaluation by the carrier's vocational expert allowing the issues to be joined fairly. *Dinkins v. Lowe's Home Ctrs., Inc.*, 396 S.C. 556, 558–59, 722 S.E.2d 808, 810 (Ct. App. 2012).

The rulings on this issue by the Single Commissioner, the Appellate Panel, and the Court of Appeals are all practical, rational, and in keeping with traditional notions of fair play and substantial justice. If a claimant wants to submit a vocational expert, the carriers and defendants should be permitted to meet that testimony with vocational expert

evaluations of their own. Moreover, "the admissibility of the expert's testimony are matters within the [Appellate Panel]'s sound discretion." *Gadson v. Mikasa Corp.*, 368 S.C. 214, 228, 628 S.E.2d 262, 269 (Ct. App. 2006); *Fields v. Regional Med. Ctr. Orangeburg,* 363 S.C. 19, 25, 609 S.E.2d 506, 509 (2005); *Payton v. Kearse*, 329 S.C. 51, 61, 495 S.E.2d 205, 211 (1998). The Appellate Panel's decision on the admission of expert testimony will not be reversed on appeal absent an abuse of discretion. *Gadson*, 368 S.C. at 228, 628 S.E.2d at 269; *Ellis v. Davidson*, 358 S.C. 509, 595 S.E.2d 817 (Ct. App. 2004). Here, the Single Commissioner and the Appellate Panel decided to assign no weight to Petitioner's Vocational Report because she refused to submit to further examination by Respondents' expert. The Single Commissioner specifically cited Petitioner's "myriad credibility issues" and considered the timing of Respondents' request. (A. 21). Ultimately, the Single Commissioner decided against assigning weight to Petitioner's Vocational Report in order not to "reward" Petitioner for bad behavior and to protect Respondents' due process rights. This Court is bound by those findings. *Ford*, 252 S.C. at 567, 167 S.E.2d at 567 (noting the final determination of witness credibility and the weight to be accorded evidence is reserved to the Appellate Panel).

Additionally, even if this Court were to disagree with the Court of Appeals on this single point, the failure of the Appellate Panel to consider the vocational report was harmless as the report was neither controlling nor supported by any of the other medical evidence in the record. Expert testimony is to be considered like any other testimony. *Tiller v. Nat'l Health Care, Ctr. Of Sumter*, 334 S.C. 333, 340, 513 S.E. 2d, 843, 846 (1999). While medical testimony is entitled to great respect, it should not be held

conclusive irrespective of other evidence, and the fact finder may disregard it if the record includes other competent evidence. *Id.* at 340, 513 S.E. 2d at 846. Petitioner's own medical providers demonstrate that, post-surgery and physical therapy, she had no work restrictions in contrast to what the vocational expert found. The August 26, 2014 Addendum by Dr. Elvington does not mention any permanent work restrictions. (A. 362). Furthermore, Petitioner's vocational expert opined "that it is her back that is most painful and most limiting." (A. 400). Yet, Petitioner's authorized treating physician, Dr. Edwards, noted in his exam in which he found her to be at maximum medical improvement that she was a "pleasant female in no acute distress, rises easily from sitting to standing; decreased loradosis; reluctant to reverse loradosis without forward flexion; returns upright with muscular dysrhythmia; motor strength in the lower extremities is 5 of 5; reflexes are 2 plus and symmetric; hip motion is full and painless; peripheral pulses full; no dermatol paresthesias; no sciatic stretch signs; no long track findings and gate is normal." (A. 360). Dr. Edwards further interpreted the MRI of Petitioner's spine as showing (a) no stenosis or other abnormality, (b) "no serious pathology," (c) no compressive pathology, (d) no need for surgical intervention or invasive treatment, and (e) no need for restrictions. (A. 359 – 360). The overwhelming evidence is that Petitioner is not permanently and totally disabled as a result of her admitted injury of March 29, 2013, and, even if Petitioner's vocational report had been admitted and considered, it would not have materially changed the findings of the Appellate Panel or of the Court of Appeals. Therefore, its exclusion, even if error, is harmless and should not justify the reversal of the Appellate Panel's findings or the reversal of the Court of Appeals'

decision.

CONCLUSION

For the reasons stated, Respondents request that this Court affirm the judgments of the Court of Appeals and the Appellate Panel in all respects.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, the undersigned, an employee of the Sumter County law firm of Lee, Erter, Wilson, Holler & Smith, LLC, attorneys for the Respondents, do hereby certify that I have this ____ day of April, 2019 served a copy of the BRIEF OF RESPONDENT by personally depositing the same in the U.S. Postal Service addressed to:

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