

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 10, 2015

CLAIM NO. 201281053

BLUEGRASS OAKWOOD

PETITIONER

VS.

APPEAL FROM HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE

BARBARA GUFFEY
HON. ROBERT L. SWISHER,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Bluegrass Oakwood, Inc. appeals from the August 19, 2014 Opinion, Award and Order and the September 25, 2014 Order on Petition for Reconsideration of Robert L. Swisher, Administrative Law Judge ("ALJ"). The ALJ awarded Barbara Guffey ("Guffey") temporary total disability ("TTD") benefits, permanent partial disability benefits, and medical

benefits for a work-related lumbar spine injury. On appeal, Bluegrass Oakwood argues the ALJ made insufficient findings of fact to support the award of TTD benefits. For the reasons set forth herein, we affirm.

Bluegrass Oakwood is a residential facility providing 24-hour support and supervision to adults with developmental disabilities and mental illnesses. Guffey was employed as a residential associate, and was assigned to care for six men. She was required to assist the men in dressing and bathing, and to perform housekeeping work in the group home.

On June 13, 2012, Guffey was in the process of assisting a resident out of bed and into a wheelchair when he pulled her down. She was pinned against the wall, with the resident on top of her. She immediately felt a twist in her back.

Guffey visited her family physician, Dr. Carol Peddicord, the following day. Dr. Peddicord diagnosed lumbago, cervicgia and strains, and referred her to physical therapy. Dr. Peddicord also recommended an MRI of the lumbar spine.

At Dr. Peddicord's recommendation, Guffey remained off work for a week. She returned to work on June 19, 2012 at light duty. She completed the first day of light duty

work but was in significant pain by the end of her shift. She returned to Dr. Peddicord the next day and was again taken off work. She also began treating with Dr. Chad Henderson, a chiropractor.

Guffey continued to treat with Dr. Peddicord for about year, then was referred to Dr. Amr El-Naggar. Dr. El-Naggar reviewed a lumbar MRI, which he noted to be of poor quality. He nonetheless detected "obvious facet arthrosis bilaterally at L3-4 and on the left side at L4-5 and L5-S1." He ordered a new lumbar MRI scan, which was performed on August 26, 2013. Dr. El-Naggar found no evidence of disc herniation or nerve root impingement, and did not recommend surgery. He suggested lumbar epidural steroid injections, which Guffey initially refused.

Dr. Frank Burke conducted an independent medical evaluation ("IME") on November 21, 2013, at Guffey's request. He reviewed her medical records and performed a physical examination. Dr. Burke noted the August 26, 2013 MRI revealed spurring of the facets with ligamentous hypertrophy and mild narrowing of the neural foraminal exit bilaterally. As a result of her June 13, 2012 injury, he diagnosed a lumbosacral strain with the development of a lumbar radiculopathy with residuals. Dr. Burke did not identify a precise date Guffey reached maximum medical

improvement ("MMI"), although he stated in his report that she "can be rated". Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assessed a 7% whole person impairment rating for her low back condition, and assigned restrictions of no crawling, climbing or repetitive bending.

Dr. Daniel Primm conducted an IME on June 3, 2014. He reviewed medical records and performed a physical examination. He noted Guffey had pain to palpation over the lower paravertebral muscles. He diagnosed chronic mechanical low back pain and low back strain. Dr. Primm also noted Guffey had been treated for an active low back condition prior to the June 13, 2012 incident. Referencing the AMA Guides, he assigned a 3% impairment rating based on Guffey's subjective symptoms, but attributed 0% of this impairment to the work-related accident. In Dr. Primm's opinion, the work incident may have aggravated her prior condition temporarily, but he found no evidence of permanent aggravation or traumatic injury.

Dr. Richard Sheridan conducted an IME on December 4, 2012. He reviewed a history of Guffey's work-related injury, reviewed her medical records, and performed a

physical examination. He concluded she was at MMI and had no permanent impairment as a result of the work accident.

At the final hearing, Guffey testified her pain is constant and severe. It interferes with her ability to perform housekeeping and sleep comfortably. She does not feel she could return to her position as a residential associate. Though she initially refused epidural injections, she now wants to consider them because her pain is so severe.

Guffey also acknowledged she has had back pain in the past, but described those prior incidents as muscle strains that "felt totally different." She also emphasized she was having no back pain immediately prior to the work incident, and had performed her duties at Bluegrass Oakwood without difficulty.

Relying on Guffey's testimony regarding her physical complaints and the medical opinions of Drs. Peddicord, Henderson and Burke, the ALJ concluded she suffered a work-related lumbar spine injury. He adopted the 7% whole person impairment rating assessed by Dr. Burke. He also determined she does not retain the physical capacity to return to her work as a residential associate at Bluegrass Oakwood, and had no pre-existing active lumbar spine condition at the time of the work accident.

In considering TTD benefits, the ALJ reiterated his finding Guffey "has not, at any time subsequent to June 13, 2012, reached a level of improvement which would allow a return to her regular and customary duties as a residential associate with Bluegrass Oakwood." He next considered the date at which Guffey reached MMI, and explained:

The only physicians who specially addressed the issue of maximum medical improvement are Dr. Primm (who felt that [Guffey] reached that status no later than three months following what he described as a strain occurring at work in June of 2012) and Dr. Sheridan (who simply indicated in his report of December 4, 2012 that [Guffey] "has reached maximum medical improvement in relation to her lumbar complaints"). In his report of November 21, 2013, Dr. Burke was of the opinion that [Guffey] "can be rated" even though she had not had the recommended lumbar epidural steroid injections. Implicit in Dr. Burke's assignment of impairment rating at the time of his evaluation is a finding that he felt [Guffey] was at that time at maximum medical improvement. When [Guffey] last saw Dr. El-Naggar, August 26, 2013, he felt that she would benefit from lumbar epidural steroid injections although [Guffey] at that time did not have insurance to pay for that treatment.

The ALJ finds Dr. Primm's assessment that maximum medical improvement was achieved within three months of the date of injury to be non-persuasive in light of [Guffey's]'s very credible testimony with respect to her ongoing and worsening symptoms and complaints. Likewise, Dr. Sheridan's

assessment as of December 4, 2012, that [Guffey] was at maximum medical improvement is unpersuasive in light of [Guffey's] ongoing treatment by Dr. Peddicord and the subsequent recommendation by Dr. El-Naggar that [Guffey] undergo additional diagnostic testing resulting in a recommendation for lumbar epidural steroid injections. Considering the totality of the evidence, the ALJ finds that Dr. Burke's assessment of an impairment rating based on his review of medical records and physical examination findings on November 21, 2013, most accurately demonstrates the time at which [Guffey] reached maximum medical improvement. At least at that time she had decided that she was not going to undergo the injections recommended by Dr. El-Naggar (although she has subsequent[ly] reconsidered and may now be willing to undergo those injections). The ALJ finds, therefore, that [Guffey] reached maximum medical improvement as of November 21, 2013, and that temporary total disability benefits have been underpaid as to duration. Specifically, the ALJ finds that [Guffey] was temporarily totally disabled from June 13, 2012, through November 21, 2013, and that she is entitled to an award of temporary total disability benefits encompassing that period at the weekly rate of \$306.73.

Bluegrass Oakwood petitioned for reconsideration, which was denied as a request for reconsideration on the merits of the claim.

On appeal, Bluegrass Oakwood first argues the ALJ made insufficient findings of fact regarding the issue of TTD benefits. TTD benefits are payable until such time as

the claimant reaches MMI or a level of improvement that would permit a return to employment. KRS 342.0011(11)(a); Central Kentucky Steel v. Wise, 19 S.W.3d 567, 659 (Ky. 2000). When both elements are not satisfied, the claimant is not entitled to TTD benefits. In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that, until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury.

Contrary to Bluegrass Oakwood's assertions, the ALJ entered sufficient findings of fact regarding Guffey's capacity to return to her customary work. In reaching this conclusion, he stated his reliance on Guffey's testimony as to her functional capacity and Dr. Burke's report. It was not necessary, as Bluegrass Oakwood argues, for the ALJ to consider Guffey's ability to perform jobs for which she has prior experience or education. "[T]he employment in which the injury occurred is the relevant employment for determining a worker's entitlement to TTD under Central Kentucky Steel v. Wise." Miller v. Square D Co., 254 S.W.3d 810, 813 (Ky. 2008). In a series of recent cases, albeit unpublished, the Court of Appeals has reemphasized that a "return to work" for purposes of TTD benefits means the type

of work the employee was performing at the time of the injury. See e.g. Nesco Resource v. Arnold, 2015 WL 1284630 (Ky. App. 2015); Mull v. Zappos.com, Inc., 2014 WL 3406684 (Ky. App. 2014); Tipton v. Trane Commercial Systems, 2014 WL 4197504 (Ky. App. 2014).¹

Thus, the requisite analysis is whether Guffey is physically capable of returning to her position at Bluegrass Oakwood, not merely capable of returning to "some form of work." The ALJ stated his reliance upon Dr. Burke's medical opinion and Guffey's testimony. This analysis is sufficient to inform the parties of the basis of his decision and permit meaningful appellate review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988).

Bluegrass Oakwood next argues the ALJ was without authority to select November 21, 2013 as the date Guffey reached MMI. The issue of whether a physician's AMA Guides impairment rating is properly assessed and credible is a matter of discretion for the ALJ. REO Mechanical v. Barnes, 691 S.W.2d 224 (Ky. App. 1985). Although Dr. Burke did not expressly state a date upon which Guffey reached MMI, he did state she "can be rated". The ALJ interpreted this statement to mean Dr. Burke believed Guffey was at MMI as of

¹ These unpublished opinions of the Kentucky Court of Appeals are cited pursuant to CR 76.28(c).

the date of his examination, November 21, 2013. Furthermore, he articulated why he rejected earlier MMI dates offered by Drs. Sheridan and Primm. As fact-finder, the ALJ is entitled to draw such reasonable inferences from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). See also Day Holding/Nursing Staffing v. Rogers, 2010 WL 4243296 (Ky. App. 2010)(affirming ALJ's decision to infer MMI had been reached as of date treating physician released claimant to work, even though the selected date was different than the MMI date opined by the IME physician who assessed the impairment rating ultimately relied upon by the ALJ).²

Bluegrass Oakwood further argues that, even if the ALJ did have authority to select an impairment rating not expressly stated by a physician, he nonetheless erred in choosing November 21, 2013 as Guffey's date of MMI. It claims Dr. Burke's statement Guffey "can be rated" means only that she achieved MMI at some point between the injury and his examination date.

We disagree that the ALJ abused his discretion in determining a date of MMI. In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to

² This unpublished opinion of the Kentucky Court of Appeals is cited pursuant to CR 76.28(c).

determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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).

We conclude the ALJ provided a reasonable explanation for his rejection of the MMI dates suggested by Drs. Sheridan and Primm. Contrary to Bluegrass Oakwood's assertion, the ALJ did not rely solely on the fact Guffey had not received epidural injections to reject the MMI dates suggested by Drs. Sheridan and Primm. Rather, he based his determination on "the totality of the evidence", taking into account both Dr. Burke's report as well as Guffey's explanation of the progression of her condition. We find no error.

For the foregoing reasons, the August 19, 2014 Opinion, Award and Order and the September 25, 2014 Order on Petition for Reconsideration of Robert L. Swisher, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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