Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 15, 2015

CLAIM NO. 200772699

BRENDA K. ELKINS PETITIONER

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

LKLP CAC, INC.
and HON. JOHN B. COLEMAN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION AND ORDER
DISMISSING APPEAL
* * * * * *

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

STIVERS, Member. Brenda K. Elkins ("Elkins") appeals from the October 29, 2014, Opinion and Order on Remand of Hon. John B. Coleman, Administrative Law Judge ("ALJ") dismissing her claim seeking income and medical benefits for a cervical spine injury. Elkins also appeals from the December 8, 2014, Order overruling her petition for reconsideration.

Elkins alleged injuries to her neck and back as well as a psychological injury resulting from a September 27, 2007, motor vehicle accident occurring in the course of employment with LKLP, CAC, Inc.

In an August 17, 2011, Opinion, Award, and Order, the ALJ determined Elkins sustained a work-related lumbar injury resulting in a 21% impairment rating.[1] The ALJ dismissed her claims for the psychological injury and the cervical spine injury.

During the pendency of the claim, the ALJ ordered a university evaluation relating solely to the cervical injury which was performed by Dr. Craig Roberts with the University of Louisville Medical School. In the August 17, 2011, decision, the ALJ rejected the opinions of Dr. Roberts in determining Elkins did not sustain a work-related cervical spine injury reasoning as follows:

> The first issue to be discussed by the Administrative Law Judge is the issue of work relatedness and causation in regards to the cervical spine complaints. This is an interesting issue as the plaintiff clearly made her first complaints in the medical records several months after the automobile collision of September 27, 2007. It is perfectly understandable why the defendant contests the work relatedness of that condition as the plaintiff had

[1] Elkins underwent surgery on the lumbar spine performed by Dr. Michael Rohmiller.

numerous opportunities to voice her concern regarding her cervical spine complaints to her medical providers. The defendant correctly points out that the first cervical complaints in the medical records comes in March of 2009 with Dr. Rohmiller, the treating neurosurgeon. He expressed his belief that the condition is related to the automobile accident as the automobile accident had aroused degenerative changes in the plaintiff's cervical spine. He indicated his belief that the condition was masked by the plaintiff's treatment for her lumbar condition which was of primary concern until that time. Dr. Kelley's opinion was that the accident may have aroused the degenerative changes but it would be difficult to place causation on the automobile accident. After the plaintiff asked for interlocutory relief, the matter was referred to a university evaluator. Dr. Roberts' evaluation report indicates the first records he reviewed began January 25, 2009. The records from Summit Medical Group were not available at the time of the evaluation to be furnished to the evaluator as they were not filed of record until May 17, 2011. Even at that time they were filed by the defendant employer. Without the benefit of the records indicating an absence of cervical complaints the university evaluator related the cervical condition to the automobile accident occurring over two years prior to his evaluation. Dr. Zerga evaluated the plaintiff and felt the cervical condition was simply a degenerative condition of spondylosis and spinal stenosis without any relation to the work injury. The testimony of Dr. Zerga indicates his belief that the absence of the medical records of complaints for seventeen months following the work

accident is critical in making a determination of causation. When questioned about the plaintiff noting neck and head pain on the incident report he indicated that it was not unusual for individuals to be sore or make multiple complaints immediately following an accident. However, the seventeen month absence in the medical records is much more critical in making such a determination. The plaintiff argues in her brief that Dr. Zerga had misread the records from Summit Medical Group from September 27, 2007. However, the ALJ has also reviewed this record and cannot find any evidence whatsoever that the plaintiff made a complaint of cervical spine pain on that day or any other day for that matter. In fact, the record in question of September 27, 2007 indicates the physician had circled low back under the musculoskeletal section with the other signs or symptoms being low back and leg pain. Even the enumerated items at the bottom does not make any mention of cervical spine pain. In addition, there is a complete absence of any diagnostic tests performed in regards to the cervical spine. The defendant correctly points out that the plaintiff's argument in regards to the cervical spine condition being masked by the lumbar condition also has flaws. For instance, when the plaintiff originally had a subsidence of the lumbar pain and was released to return to full duty work by the treating physician. She did not return with complaints of cervical pain. However, she did return with complaints of lumbar spine pain a few days later.

Expert opinions in medical evaluation reports rendered pursuant to KRS 342.315 may not be disregarded by the fact finder. To the extent that a

university evaluator’s testimony favors a particular party, it shifts to the opponent the burden of going forward with evidence which rebuts the testimony. If the opponent fails to do so, the party whom the testimony favors is entitled to prevail by operation of the presumption. Stated otherwise, the clinical findings and opinion of the university evaluator constitutes substantial evidence with regards to medical questions which, if un-contradicted, may not be disregarded by the fact finder. *Magic Coal Company v. Fox,* S.W.3d 88 (Ky. 192000) [sic]. In order to reject a university evaluator's clinical findings and opinions, the administrative law judge must state a reasonable basis for rejecting such clinical findings and opinions. *Bullock v. Goodwill Coal Co.* 214 S.W.3d 890 (Ky. 2007). In this particular instance, I note the university evaluator’s opinion in regards to causation did not have the benefit of the medical records which were produced between September 27, 2007 and January 25, 2009. It appears the university evaluator relied upon the history of continuous cervical complaints given to him by the plaintiff. This history is called into question by the complete absence of complaints in the medical records from the period of September 27, 2007 through March 6, 2009. If a physician relies on an incorrect history, an Administrative Law Judge may disregard his expert opinion which was based upon that history. *Osborne v. Pepsi-Cola,* 816 SW2d 643 (Ky., 1991). In this particular instance, the history relied upon by the university evaluator is simply not supported in the medical records. As such, the opinion of the university evaluator is rejected. An employee has the burden of proof and

> the risk of non-persuasion to convince the trier of fact of every element of his workers' compensation claim. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App., 1979). In this particular instance, I am not convinced the plaintiff has met her burden of proof in showing the cervical condition is related to the automobile accident of September 27, 2007. In doing so, I reject the opinion of the university evaluator as the history relied upon by the university evaluator is not supported in the medical records. I am not convinced by the plaintiff's testimony that the cervical complaints continued throughout that period of time. Therefore, plaintiff's claim for cervical spine complaints must be dismissed.

Elkins appealed the dismissal of the psychological and cervical injuries. This Board and the Court of Appeals affirmed the ALJ's decision. The Kentucky Supreme Court rendered an April 17, 2014, opinion, 2013-SC-000032-WC, Designated Not To Be Published, affirming in part and reversing in part. The Supreme Court affirmed the dismissal of Elkins' psychological claim. However, it reversed the dismissal of the cervical spine injury stating and directing as follows:

> Elkins first argues that the ALJ erred by rejecting the university evaluator's opinion which found that her cervical spine injury was work-related. She contends that the ALJ mistakenly believed that she did not complain of neck pain until several years after her work-related accident.

Elkins says that she told her primary physician on the day of the accident that she had neck pain and that her injury report, filed on October 24, 2007, makes the same claim.

An ALJ cannot simply disregard a university evaluator's expert opinion. KRS 342.315(2) states:

> [t]he clinical findings and opinions of the designated evaluator shall be afforded presumptive weight by administrative law judges and the burden to overcome such findings and opinions shall fall on the opponent of that evidence. When administrative law judges reject the clinical findings and opinions of the designated evaluator, they shall specifically state in the order the reasons for rejecting that evidence.

The expert opinion of a university evaluator must be "afforded presumptive weight," and if rejected, the ALJ must specifically set forth a "reasonable basis" for his decision. *Magic Coal Co. v. Fox,* 19 S.W.3d 88, 94 (Ky. 2000).

The ALJ rejected the university evaluator's opinion in this matter believing that he failed to review medical records from the date of the accident to January 25, 2009. The ALJ believes that if the university evaluator had reviewed those records, he would have noted that there was nothing within those records showing that Elkins complained of a neck or cervical spine injury. However, as shown by her injury report, Elkins did state that she suffered a neck injury as of October 24, 2007, less than a

> month after the accident. Additionally, Dr. Rohmiller, Elkins's surgeon, believed that any cervical spine injury was a direct result of the accident. Finally, Dr. Shraberg upon being shown the medical record created from Elkins's trip to her primary physician on the day of the accident, admitted that there was a notation in the record which indicated that she did report discomfort in her neck. The ALJ erred by not relying on the university evaluator's opinion because there was no reasonable basis to reject his opinion. This portion of the ALJ's opinion and award must be reversed and remanded for further proceedings consistent with this decision. On remand we request the ALJ make specific findings regarding the neck pain notations on the medical record from the initial visit to her primary physician.

Slip Op. at 4-5.

In an October 29, 2014, Opinion and Order on Remand the ALJ engaged in an in depth analysis as required by the Supreme Court and again dismissed Elkins' claim for a cervical injury.

On November 19, 2014, Elkins filed a Motion for Leave to File a Petition for Reconsideration Out of Time accompanied by a Petition for Reconsideration of the Opinion on Remand. In the Motion to File a Petition for Reconsideration Out of Time, Elkins' counsel asserted he was advised the ALJ would handle the decision on remand directly without any input from the parties, and he awaited

further word from the ALJ. Elkins' counsel stated he planned a trip to South Carolina from November 6, 2014, through November 17, 2014. Elkins' counsel represented:

> The Opinion by the Administrative Law Judge was rendered October 29, 2014, and arrived just prior to counsel's departure, and through inadvertence, counsel failed to calendar a Petition for Reconsideration in this matter until returning on November 17, 2014. Counsel states that the foregoing is true and correct and that nothing was done or left undone for the purposes of delay. Further, counsel states that no injustice will be done by allowing the Plaintiff's petition.

Elkins' petition for reconsideration challenged the ALJ's decision on the merits and requested the ALJ reconsider his rejection of her claim for benefits due to the cervical injury.

The ALJ did not rule on Elkins' motion for leave to file a petition for reconsideration outside the fourteen day period mandated by KRS 342.281. In a December 8, 2014, Order, the ALJ denied Elkins' petition for reconsideration. Elkins then filed a notice of appeal on January 6, 2015. Both parties have filed a brief. Because Elkins' petition for reconsideration was not filed within fourteen days of the date of the ALJ's decision causing her notice of appeal to be untimely, we *sua sponte* dismiss her appeal.

KRS 342.281 reads, in relevant part, as follows:

> Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission.

803 KAR 25:010 Section 1(4)(a)1 designates final orders and opinions of the Administrative Law Judge shall be deemed filed three days after the date set forth on the final order or opinion. Since the opinion was rendered October 29, 2014, it was deemed filed on November 1, 2014. However, since November 1, 2014, fell on a Saturday the ALJ's decision was deemed filed as of Monday, November 3, 2014. Thus, Elkins had fourteen days from November 3, 2014, or November 17, 2014, to file a petition for reconsideration. As Elkins' counsel admits the petition for reconsideration was not filed within the fourteen day statutory prescribed period, the petition for reconsideration was thus a nullity and did not stay the running of the time for filing an appeal.

Pursuant to KRS 342.285, an award or order of the ALJ as provided in KRS 342.275 shall be conclusive and binding as to all questions of fact if a petition for reconsideration is not filed as provided for in KRS 342.281. KRS 342.281 provides for the filing of a petition for reconsideration "[w]ithin fourteen (14) days from the date of the award, order, or decision" of the ALJ. Because Elkins did not file a petition for reconsideration "as provided for" in KRS 342.281, the ALJ's decision is conclusive and binding as to all questions of fact.

KRS 342.285 further provides that "either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award." The Kentucky Administrative Regulation, 803 KAR 25:010 § 21 (2)(a), provides any party aggrieved by a decision of an ALJ may file a notice of appeal to the Board within thirty days of the date it is filed. The statute and regulation are mandatory and jurisdictional.

As Elkins did not timely file a petition for reconsideration and her notice of appeal was not filed within thirty days from the date of the ALJ’s opinion, this Board does not have jurisdiction to consider the appeal as it relates to the merits of the claim. In Rice v. McCoy,

590 S.W.2d 340, 341, 342 (Ky. App. 1979), the Court of Appeals held as follows:

> KRS 342.281 is mandatory; a showing of good cause offers no relief from its provisions. In *Johnson v. Eastern Coal Corporation*, Ky., 401 S.W.2d 230, 231 (1966), the court held that "strict compliance with this section is mandatory to obtain a full Board review."
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> Appellee's petition for reconsideration was untimely filed and the Board properly overruled it. We note that a dismissal would have been the more appropriate ruling by the Board; however, overruling the petition accomplished the same result.
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> Since the petition for reconsideration was untimely taken, any right of appeal to the circuit court was lost. KRS 342.285 is jurisdictional. "The language of the statute is plain as to the time in which to appeal. The time within which a petition for review must be filed is mandatory, and if it is not complied with the circuit court acquires no jurisdiction." [citation omitted]

Because the petition for reconsideration was not timely filed it did not stay the running of the time to file a notice of appeal, and thus the finality of the ALJ's Opinion and Order on Remand. In fact, we note that on December 8, 2014, the date the ALJ denied the petition for reconsideration, his decision on remand was final and not

subject to appeal. Thus, the ALJ had no choice but to overrule the petition for reconsideration. In Tube Turns Division of Chemetron v. Quiggins, 574 S.W.2d 901, 903 (Ky. App. 1978), the Court of Appeals held as follows:

> We hold K.R.S. 342.281 to mean that any party may file a petition for reconsideration within 14 days from the date of the award which, in this case, was June 21, 1976.
>
> . . .
>
> Neither the statute nor the Board's regulation extend the time or provide for the filing of a petition for reconsideration more than 14 days after the date of the award, which means the original order, award or decision and the date of its entry. We do not construe the statute as permitting a party to file a petition for reconsideration or, in effect, a second petition for reconsideration more than 14 days from the date of the original award, except where the subsequent order contained an error not present in the original award and, therefore, could not have been raised by the first petition for reconsideration. [citation omitted]

Based on the foregoing, Elkins' appeal was untimely as the notice of appeal was not filed within thirty days from the date of entry of the ALJ's Opinion and Order on Remand. Elkins' appeal had to be filed by December 3, 2014, and it was not filed until January 6, 2015, thus, the issues raised by Elkins are not properly

before the Board. Since this Board does not have jurisdiction to consider her appeal, it must be dismissed. *See also* Stewart v. Kentucky Lottery Corp., 986 S.W.2d 918 (Ky. App. 1998).

Accordingly, the Elkins' appeal of the October 29, 2014, Opinion and Order on Remand is **DISMISSED**.

ALL CONCUR.

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HON. FRANKLIN A. STIVERS,
MEMBER, WORKERS' COMPENSATION BOARD

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