Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 2, 2013

CLAIM NO. 201100497

BRENDA TRUITT PETITIONER

VS. **APPEAL FROM HON. OTTO DANIEL WOLFF, IV, ADMINISTRATIVE LAW JUDGE**

SMITHFIELD FOODS, INC.
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

and

SMITHFIELD FOODS, INC. CROSS-PETITIONER

VS.

BRENDA TRUITT CROSS-RESPONDENT
and HON. OTTO DANIEL WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENT

OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING
* * * * * *

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

STIVERS, Member. Brenda Truitt (“Truitt”) appeals and Smithfield Foods, Inc. (“Smithfield”) cross-appeals from the January 14, 2013, opinion and order and the March 4, 2013, order ruling on her petition for reconsideration of Hon. Otto Daniel Wolff, IV, Administrative Law Judge ("ALJ"). In the January 14, 2013, opinion and order, the ALJ dismissed Truitt's claim for income and medical benefits for the following alleged injuries: right upper extremity, right shoulder, cervical spine, headaches, left shoulder, and depression. However, the ALJ determined Truitt sustained a work-related right wrist strain and the temporary total disability ("TTD") benefits already paid by Smithfield "amply covers any period of time Plaintiff was at temporary total disability status."[1] The ALJ also awarded medical benefits for Truitt's right wrist strain.

In the March 4, 2013, order ruling on Truitt's petition for reconsideration, the ALJ determined Truitt was entitled to TTD benefits for her right wrist strain at the rate of $394.80 from May 23, 2011, through July 27, 2011.

On appeal, Truitt argues the ALJ erred by not finding her alleged complex regional pain syndrome ("CRPS")

[1] As acknowledged in the March 4, 2013, order ruling on Truitt's petition for reconsideration, the ALJ mistakenly made this determination despite the February 6, 2012, benefit review conference ("BRC") order indicating Smithfield paid no TTD benefits.

of the right arm is work-related.[2] Truitt also argues the ALJ erred by failing to find her alleged psychiatric condition and bilateral shoulder and neck problems are work-related.

On cross-appeal, Smithfield asserts the ALJ's award of TTD benefits should be reversed.

In her brief in response to Smithfield's cross-appeal, Truitt asserts she is entitled to TTD benefits spanning the period from May 23, 2011, until March 11, 2012, or, at a minimum, July 27, 2011.

The Form 101 alleges Truitt was injured on June 7, 2010, in the following manner and sustained the following injuries:

> Plaintiff was running 8600 alone, ham about 10 pound [sic] came down line; dropped approximately 6 inches. I [sic] thought it was missing the plate so Plaintiff tried to help catch it. Plaintiff suffered injuries to right hand and arm and neck. Thereafter, Plaintiff became [sic] having trouble with left hand and arm due to overuse.

On September 8, 2011, Truitt filed a "Motion to Amend" the Form 101 to include a claim for depression and headaches which by order dated September 16, 2011, Hon.

[2] This condition is also known as Reflex Sympathic Dystrophy (RSD).

Richard Joiner, Administrative Law Judge ("ALJ Joiner") sustained.

On December 5, 2011, Truitt filed another "Motion to Amend" the Form 101 to include a claim for shoulder injuries which by order dated January 4, 2012, ALJ Joiner sustained.

The February 6, 2012, benefit review conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; exclusion for pre-existing disability/impairment; and TTD. The BRC order indicates Smithfield paid $8,961.78 in medical expenses and no TTD benefits.

The record reveals Truitt returned to light-duty work at Smithfield immediately following the June 7, 2010, incident. At the November 13, 2012, hearing, Truitt testified she was terminated by Smithfield in approximately June 2011, explaining:

> A: When they fired me, I think was- Gee, I don't know exactly what date it was.
>
> Q: Well, did you- Did they put you off on the Family Medical Leave Act...
>
> A: Yes, they did.
>
> Q: ...in May of 2011?
>
> A: Yes, they did.

Q: Were you terminated thereafter?

A: After the- I think it was a month or so later that they fired me.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion regarding every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008). In order to sustain that burden, a claimant must introduce substantial evidence, evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to that which would survive a defendant's motion for a directed verdict. Id.

Kentucky law holds that when the party with the burden of proof before the ALJ is unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. 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). So long as any evidence of substance supports the ALJ’s opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Also, if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

Truitt's first argument on appeal is there is no medical evidence in the record establishing within a reasonable degree of medical certainty, the CPRS of Truitt's right arm is not work-related.

It is clear from the language in the January 14, 2013, opinion and order the ALJ relied exclusively upon the opinions of Dr. J. Martin Favetto in dismissing Truitt's allegation of CRPS. Regarding Dr. Bart Goldman's opinions, the ALJ clarifies his opinions comprise substantial

evidence supporting the determination Truitt's injuries, "*but for her wrist sprain and possibly CRPS*," were not caused by the June 7, 2010, work incident. The ALJ set forth the following findings regarding Dr. Goldman's opinions:

> ***The input of Dr. Goldman, who evaluated claimant on July 27, 2011, was that only Plaintiff's alleged CRPS could possibly be related to Plaintiff's work incident of June 7, 2010.*** Dr. Goldman also indicated Plaintiff's mechanism of injury (a right wrist strain) could not have affected Plaintiff's cervical spine. Dr. Goldman also indicated that, since there was no finding of a C6 radiculopathy on Dr. Bansal's August 19, 2010 EMG/NCV diagnostic test, Dr. Bansal's subsequent linking Plaintiff's C6 radiculopathy to her work incident could not be supported with the available facts. Dr. Goldman also addressed Plaintiff's contention of work-injury-related shoulder injuries. It was his opinion that a right rotator cuff tear simply could not be the result of the work incident as described by Plaintiff. He also explained that Plaintiff's alleged injury to her left shoulder, supposedly due to over compensating for her right rotator cuff tear, was not likely because the light-duty work Plaintiff did after her incident did not require her to do movements that would have caused an injury to the left shoulder. ***Dr. Goldman's opinions constitute substantial evidence for the determination Plaintiff's multiple alleged injuries, but for her wrist sprain and possibly CRPS, were not caused by her June 7, 2010 work incident.***

(emphasis added).

Thus, while the ALJ relied upon Dr. Goldman in dismissing Truitt's claim for other alleged injuries, he did not rely upon Dr. Goldman's opinions in dismissing Truitt's claim for CRPS.

In relying upon Dr. Favetto's opinions regarding the existence of CRPS, the ALJ stated as follows in the January 14, 2013, opinion and order:

> When Dr. Favetto examined Plaintiff he did not detect any indicators of CRPS. He explained CRPS manifested within the six months following an injury, and since it was nearly nine months after he [sic] incident when he examined her without finding any signs of CRPS, it was unlikely she had CRPS.

Because the ALJ's summary of Dr. Favetto's opinion is not completely accurate, we vacate and remand for additional findings of fact regarding the existence and work-relatedness of the alleged CRPS condition.

Regarding the existence of CRPS, Dr. Favetto opined:

> When I examined Ms. Truitt on March 29, 2011, I did not find any signs compatible with complex regional pain syndrome. She did have some vascular outlet compression, which can sometimes be confused with complex regional pain syndrome due to its change in circulation and coolness of the digits. As to whether the patient has complex regional pain syndrome right now, I

> cannot say. I have not seen her since March of this year.
> Is complex regional syndrome a possibility after an injury such as the one that Ms. Truitt reports? It is possible to develop compression regional pain syndrome following this type of an injury, but the symptoms are usually present within six months of the injury.

There is a clear inconsistency between the ALJ's findings in the January 14, 2013, opinion and order and Dr. Favetto's opinions. While Dr. Favetto, in his November 10, 2011, report, stated he "did not find any signs compatible with complex regional pain syndrome" during his examination of Truitt on March 29, 2011, he did not state that "it was unlikely she had CRPS." Dr. Favetto stated as follows: "As to whether the patient has complex regional pain syndrome right now, I cannot say. I have not seen her since March of this year."

Additionally, while Dr. Favetto expressed the opinion in the November 10, 2011, report that he "did not find any signs compatible with complex regional pain syndrome" during his March 29, 2011, examination, the report generated from that examination fails to mention CRPS.

On remand, while the ALJ may rely upon Dr. Favetto's opinions in dismissing Truitt's claim for work-

related CRPS, the ALJ must have a proper understanding of Dr. Favetto's opinions and reports and must set forth substantial evidence which supports such a determination. If after reviewing Dr. Favetto’s reports, the ALJ determines Dr. Favetto’s opinions do not constitute substantial evidence supporting a determination Truitt does not have work-related CRPS, he must find the condition work-related. Dr. Bansal diagnosed work-related CRPS and assessed a 5% impairment rating for the condition. Dr. Goldman, although equivocal, appears to agree with the diagnosis.

Next, Truitt asserts the ALJ erred by not finding her alleged psychiatric condition work-related.

Smithfield introduced the December 2, 2011, Independent Psychiatric Evaluation ("IPE") report of Dr. Timothy Allen in which he set forth the following diagnoses and assessment:

> Axis I: Dysthymic Disorder Adjustment Disorder with Depressed Mood, resolved
> Axis II: Deferred
> Axis III: Chronic Right Arm Pain
> Axis IV: Moderate-occupational and medical problems
> Axis V: GAF 65 current, highest in last year 65

Dr. Allen also set forth the following conclusions:

> 1. Ms. Truitt had long-standing Dysthymic Disorder. She developed

> Adjustment Disorder after she quit working but it has resolved due to improvement in her pain, prescription of low dose Viibryd, and psychotherapy.
>
> 2. She is at MMI.
>
> 3. She should maintain Viibryd and would likely benefit from full dosing (40mg per day.)She also should continue psychotherapy for up to 20 sessions total.
>
> 4. She has no psychiatric work restrictions.

Regarding an impairment rating for an alleged work-related psychological condition, Dr. Allen opined as follows:

> Ms. Truitt currently has a Class I, minimal psychiatric impairment. The AMA Guides to the Evaluation of Permanent Impairment 5th Ed, does not provide percentages to apply to mental disorders. If we apply the AMA Guides 2nd edition criteria then, she has a 5% whole body impairment due [sic] pre-existing Dysthymic Disorder.

On appeal, Truitt asserts the only support for Dr. Allen's finding of pre-existing impairment is "prior treatment of Mountain Comp Care." However, Truitt asserts there are no records to support this prior treatment.

In his IPE report, Dr. Allen opined as follows:

> Ms. Truitt reported no problems prior to her work injury of 6/7/10, despite her treatment for depressed mood at Mountain Comp Care in the past and a series of stressors including divorce

> and medical problems (TIA, carpal tunnel syndrome.)

We are unable to guess what a physician has relied upon in rendering his or her opinions, nor can we alter the ALJ's determination regarding credibility. Indeed, it is exclusively within the province of the ALJ to determine the credibility of witnesses. Square D Co. v. Tipton, supra. The ALJ must determine whether reliance upon certain information causes Dr. Allen to be a credible witness. The ALJ determined Dr. Allen's opinions were credible, and this Board has not been presented with a compelling reason to disturb this determination.

Truitt's final argument on appeal is that the ALJ erred by finding Truitt's alleged shoulder and neck problems were not work-related.

Dr. Goldman's July 27, 2011, independent medical evaluation ("IME") report comprises substantial evidence in support of the ALJ's determination Truitt's shoulder and neck problems are not work-related. As previously noted, Dr. Goldman opined as follows: "Based on this description of injury I can find no way to relate problems with her left shoulder, her cervical region or her right shoulder to the injury in question." Additionally, Dr. Goldman assessed a 0% impairment rating for Truitt's neck and shoulder

problems. For this reason, we will not evaluate the ALJ's reliance upon other evidence in the record in reaching his decision concerning the alleged injuries to Truitt’s neck and shoulders.

On cross-appeal, Smithfield asserts the ALJ erred by awarding TTD benefits in the March 4, 2013, order ruling on Truitt's petition for reconsideration. Smithfield asserts there is no evidence in the record indicating Truitt was temporarily totally disabled due to a right wrist strain during the period TTD benefits were awarded. Smithfield argues Truitt failed to provide any evidence she was restricted from work beyond May 22, 2011, "solely because of right wrist sprain/strain."

In the March 4, 2013, order on Truitt's petition for reconsideration, the ALJ determined as follows regarding maximum medical improvement (“MMI”) for Truitt's right wrist sprain and her entitlement to TTD benefits for this injury:

> The last point for which Plaintiff seeks reconsideration is written to be [sic], “It was error not to find Plaintiff temporary total disabled until March 1, 2012.” A review of the February 6, 2012 BRC Order reveals Defendant did not pay TTD benefits to Plaintiff, and Plaintiff’s entitlement to TTD benefits was indicated to be an issue. Despite it having been noted in the BRC Order that Defendant did not

pay TTD benefits to Plaintiff, the ALJ did mistakenly write in the January 14, 2013 Opinion and Order, "Defendant's payment of TTD benefits amply covers any period of time Plaintiff was at temporary total disability status, and therefore no additional payments of TTD benefits by Defendant shall be required." Obviously the BRC stipulation contradicts the ALJ's comment in the Opinion and Order. Therefore [sic] does constitute a patient error on the face of the Opinion and Order, and therefore, Plaintiff's Petition on this point is sustained.

Temporary Total Disability is defined in KRS 342.0011 (11) (a) as meaning, "The condition of and employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment."

Plaintiff has the burden of proof to present persuasive evidence she was entitled to receive TTD benefits after May 22, 2011 as a result of her June 7, 2010 work-related right wrist sprain/strain. Though Plaintiff sprained/strained her right wrist in the June 7, 2010 work incident, she continued to work for Defendant in a light-duty capacity until May 22, 2011.

As previously noted there is an error on the face of the Opinion and Order, but, after again reviewing the file, the medical records, Plaintiff's testimony, and Dr. Bansal's deposition transcript, it is problematic to ascertain exactly when Plaintiff attained MMI status for her right wrist sprain/strain.

In his March 1, 2012 deposition Dr. Bansal testified he last saw Plaintiff on February 17, 2012, and at that time she appeared to be, assuming she received no additional medical treatment, at MMI status for all of her alleged work-related problems. But, it is unclear exactly what medical problems Dr. Bansal considered Plaintiff's work-related problems to be. There are very few, if any, indication [sic] Dr. Bansal treated or even considered Plaintiff's work-related medical problems to include a right wrist sprain/strain. In fact, Dr. Bansal testified Plaintiff injured her "right arm" and "twisted her neck as well," but does not mention her right wrist as being a problem reported to him by Plaintiff. (Depo. p. 4). His impression of Plaintiff's problems was, "I thought the patient had a severe radiculopathy on the right side as well as a disc problem that she probably ruptured on the day of the accident. Then I thought she had complex regional pain syndrome Type I on the right side and I thought she had a rotator cuff tear of the right shoulder. She was feeling depressed…" His impression did not include a right wrist sprain/strain. Dr. Bansal's diagnosis was, "That she is suffering from C/6 radiculopathy on the right side, a rotator cuff tear, most likely, of the right shoulder, complex regional pain syndrome Type I of the right arm, depression associated with her chronic pain, and disability associated with the physical problems". (Depo. p. 8). Based upon Dr. Bansal's testimony, it appears he did not consider Plaintiff's right wrist sprain/strain as a component of Plaintiff's work injury. Therefore, Dr. Bansal's input regarding when Plaintiff attained MMI status for

her right wrist sprain/strain work injury carries little weight.

The only medical expert who specifically indicates Plaintiff attained MMI status for all her conditions (which would include her right wrist injury sprain/strain), but for a possible CRPS injury, was Dr. Goldman. On July 27, 2011 Dr. Goldman performed an IME and wrote, “She has reached maximum medical improvement for all other conditions.” Dr. Goldman was obviously aware of Plaintiff’s right wrist injury. He reported a right wrist injury as being a component of her work-related injuries. In Dr. Goldman’s HISTORY section of his IME report, he specifically noted Plaintiff sustained a hyperextended right wrist injury, experienced immediate pain in her wrist, and felt grinding in her right wrist. In the DISCUSSION section of his report, he noted, “Ms. Truitt describes a hyperextension injury to her right wrist…” Having acknowledged Plaintiff’s alleged work-related injuries included a right wrist hyperextension injury, he opined that as of the day of his July 27, 2011 exam, Plaintiff had attained MMI status for all her medical conditions, but for a possible CRPS Type I injury. Dr. Goldman’s input regarding when Plaintiff attained MMI status for her work-injuries, including her hyperextension injury to her right wrist, is most persuasive. Therefore, it is determined Plaintiff attained MMI status for her right wrist injury on July 27, 2011.

Based upon Dr. Goldman’s determination Plaintiff attained MMI status for her work-related right wrist hyperextension injury as of July 27, 2011, Plaintiff is entitled to receive TTD benefits at the weekly rate of $394.80 ($ 592.20 X

> 2/3 = 394.80) from May 23, 2011 (the day following her ceasing to work for Defendant) through July 27, 2011.

KRS 342.0011(11)(a) defines "temporary total disability" as follows:

> "Temporary total disability" means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

KRS 342.0011(11)(a) sets out two requirements for an award of TTD benefits. First, the worker must not have reached MMI. Second, the worker must not have reached a level of improvement that would permit him to return to the type of work he was performing when injured or to other customary work. Absent either requirement, a worker is not entitled to TTD benefits. Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004); Bowerman v. Black Equipment Co., 297 S.W.3d 858 (Ky. App. 2009).

Consistent with the definition of temporary total disability, the courts have repeatedly instructed TTD benefits are generally payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning

to his job, or some other employment, of which he is capable, which is available in the local labor market. W.L. Harper Construction Company, Inc. v. Baker, 858 S.W.2d 202 (Ky. App. 1993). In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Supreme Court held it would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work, but not the type that is customary or that he was performing at the time of his injury. A release to perform “minimal work” does not constitute a “return to work” for purposes of KRS 342.0011(11)(a).

A review of Dr. Goldman's July 27, 2011, report reveals the following language in the "discussion" section: "Ms. Truitt describes a hyperextension injury to her right wrist when a weight of 10-15 pounds fell on her right hand." However, Dr. Goldman failed to list a hyperextension injury to the right wrist in his diagnoses, and, as noted by Smithfield in its cross-appeal, Dr. Goldman put Truitt at MMI "for all other conditions" except for "possible CRPS type 1." With Dr. Goldman's undeniably vague assessment of MMI "for all other conditions," we can only safely assume Dr. Goldman's MMI date pertains to degenerative disease of the cervical spine and possible bilateral impingement syndrome, and the remaining diagnoses set forth in the July

27, 2011, IME report. Further, there is no finding by the ALJ that Truitt was prevented by the injury from performing the type of work she was performing at the time of injury or could not perform other customary work. Therefore, we vacate the ALJ's determination of an MMI date of July 27, 2011, and the award of TTD benefits and remand for additional findings.

On remand, the ALJ must set forth additional findings regarding Truitt's entitlement to TTD benefits supported by the evidence in the record and consistent with the law regarding entitlement to TTD benefits.

Accordingly, the ALJ’s determination of MMI, the award of TTD benefits, and the ALJ’s dismissal of Truitt’s claim for work-related CRPS as set forth in the January 14, 2013, opinion and order and the March 4, 2013, order ruling on Truitt's petition for reconsideration are **VACATED.** Those portions of the January 14, 2013, opinion and order and the March 4, 2013, order ruling on the petition for reconsideration relating to the dismissal of Truitt’s claim for a psychological injury and injuries to her shoulders and cervical spine are **AFFIRMED**. This claim is **REMANDED** to the ALJ for additional findings consistent with the views set forth herein.

ALL CONCUR.

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