Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 5, 2014

CLAIM NO. 201259608

CAROLYN MAYS PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

CARTER COUNTY BOARD OF EDUCATION
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

* * * * * *

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

RECHTER, Member. Carolyn Mays ("Mays"), *pro se*, appeals from the March 19, 2014 Opinion and Order of Hon. Scott R. Borders, Administrative Law Judge ("ALJ"). Mays and her employer, the Carter County Board of Education ("CCBE"), reached a settlement agreement whereby she waived her right to income benefits, vocational rehabilitation and her right

to reopen. In the agreement, the parties agreed to submit the issue of reasonableness and necessity of past and future medical benefits to the ALJ for adjudication. The ALJ ultimately dismissed her claim for past and future medical benefits. No petition for reconsideration was filed.

In her notice of appeal, Mays presents two arguments. She asserts the ALJ erred in failing to discuss the fact she had received Social Security disability payments prior to the final hearing, and that Dr. Bal Bansal's report was "not correct." In her subsequently filed brief, Mays also emphasizes the physical nature of her work at CCBE. CCBE responds simply that Mays has not presented any legitimate appealable issues.

Mays was employed as a custodian at East Carter County High School from 2005 through April 9, 2013. On November 27, 2012, Mays testified she was dust mopping and picked up a desk in order to clean under it. When she did so, her back locked up and she could not move her legs. She was able to complete her shift, but in pain.

She sought treatment the following day at King's Daughters Urgent Care Center, and was later treated at Our Lady of Bellefonte Primary Care Center. She was diagnosed with a lumbar strain/sprain on December 2, 2012. At a December 6, 2012 follow-up visit, her diagnosis remained the

same. She was off work for eight days, and then returned to work without restrictions until April 13, 2013.

Mays next visited Our Lady of Bellefonte Primary Care Center on March 7, 2013, at which time an MRI revealed multilevel disc degenerative changes with multilevel disc bulging, with facet arthropathy and mild central disc protrusion at L5-S1. She testified her back pain worsened and she was having extreme difficulty performing her job duties by April, 2013. She returned to Our Lady of Bellefonte Primary Care Center on April 9, 2013 and was taken off work. She was diagnosed with back pain, degenerative joint disease, bulging disc and muscle spasms. She was treated with medication and injections. Her condition remained the same for the next several months, according to records through July 17, 2013.

Mays submitted records from Dr. Bal Bansal, who examined her on October 15, 2013. He diagnosed lumbosacral radiculopathy which he opined is causally related to the November 27, 2012 work-related incident. He assigned a 13% functional impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). He stated she retained the physical capacity to return to the type of work she was performing at the time of her accident. Dr.

Bansal's October 15, 2013 report does not specifically address whether she is in need of additional medical treatment.

Attached to her notice of appeal, Mays has submitted a letter from Dr. Bansal dated November 23, 2013. In that letter, he recommends physical therapy three times a week for two months. He also changes his prior position, and states she is unable to return to her position as a custodian. Finally, he states, "later on, I will decide whether she is going to need lumbar epidural steroid injections. I will give her three lumbar epidural steroid injections two weeks apart." However, it does not appear this letter was ever filed in the record. The ALJ does not refer to this letter in his Opinion and Order.

At CCBE's request, Mays was evaluated by Dr. Henry Tutt and Dr. Rick Lyons. Dr. Tutt evaluated Mays on June 26, 2013. He reviewed Mays' medical history, and opined she has long-standing thoracic and lumbar degenerative osteoarthritic disease with long-standing thoracic kyphosis and multilevel lumbar degenerative osteoarthritic disc and joint changes. He concluded the November 27, 2012 work incident caused a transient exacerbation of the symptoms relative to that pre-existing, active condition. Dr. Tutt

opined Mays did not need any additional medical treatment for the exacerbation of her ongoing lumbar spine condition.

Dr. Lyon reached a similar conclusion following his October 31, 2013 examination of Mays. He diagnosed myofascial low back pain which was temporarily exacerbated by the work incident. He concluded she did not sustain a functional impairment rating as a result of the work injury, and that she is not in need of any future medical treatment.

CCBE paid Mays temporary total disability benefits from April 10, 2013, her last day of work, through July 8, 2013. All of Mays' medical expenses were paid from the date of injury through January 30, 2014, in the amount of $10,173.38. She settled her claim for income benefits and vocational rehabilitation for $15,000.

The ALJ determined Mays suffered a transient lumbar strain of her previously symptomatic multilevel thoracolumbar degenerative osteoarthritis. In reaching this conclusion, he relied upon the opinions of Drs. Tutt and Lyon. Additionally, the ALJ relied upon the fact Mays had suffered a 1988 work-related low back injury at a previous job, for which she was assessed a permanent functional impairment rating. Also, at the time of the November 27, 2012 work incident, she was taking Celebrex for joint pain. Accordingly, the ALJ dismissed the claim for past and future

medical benefits. No petition for reconsideration was filed.

Though represented by counsel before the ALJ, Mays now appeals *pro se*. We will attempt to address each issue raised in her letters, which were accepted as a notice of appeal and brief to this Board. Because Mays is proceeding *pro se*, we will also attempt to explain the fundamental legal principles controlling how this Board must decide an appeal.

In the Kentucky's workers' compensation system, the ALJ functions as both judge and jury. When performing the duties of a jury, the ALJ is commonly referred to as the "fact-finder." As fact-finder, the ALJ reviews the evidence submitted by the parties and decides which testimony from the various witnesses is more credible and best represents the truth of the matter or matters in dispute. The ALJ, as judge, then applies the law to the facts as he determines them to be true. As a matter of law, the facts as decided by the ALJ cannot be disturbed on appeal by this Board so long as there is substantial evidence of record to support the ALJ's decision. *See* KRS 342.285(1); Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

We understand Mays is frustrated regarding the dismissal of her claim. As a rule, in every worker's compensation claim, both sides resolutely contend they have presented evidence of "the truth" concerning those matters at issue. It is for this very reason in cases where the evidence is conflicting, the facts concerning an issue as determined by the ALJ are afforded vast deference as a matter of law on appellate review.

Mays, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of her cause of action before the ALJ. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Mays was unsuccessful in her burden of proving her case, the question on appeal is whether the evidence is so overwhelming, upon consideration of the record as a whole, as to compel a finding in her favor. 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001). As fact-finder, the ALJ has the sole authority to determine the weight, credibility and

substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ may 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id.

Here, the record contains substantial evidence supporting the ALJ's dismissal of Mays' claim for past and future medical benefits. He clearly understood the lay and medical testimony, including the fact that Mays performed a very physical job. In making his determination, the ALJ relied upon the reports of Drs. Tutt and Lyon. Both physicians specifically stated the November 27, 2012 work-related injury would not require any future medical treatment. This constitutes substantial evidence supporting the ALJ's dismissal, and a contrary result is not compelled. The ALJ properly considered all evidence of record, weighed

that evidence, and reached a decision supported by substantial evidence and in conformity with the law. Thus, we are without authority to direct a different result.

Mays specifically questions why the ALJ did not address the fact she had received Social Security disability prior to her hearing. She states she was awarded disability benefits "based on the same reports Dr. Tutt and Dr. Lyons received." The CCBE submitted proof from Drs. Tutt and Lyon, both of whom believed the work incident caused only a temporary strain of Mays' existing low back condition. For purposes of Social Security disability benefits, these reports may be sufficient to establish Mays is no longer able to work, regardless of whether the cause is related to her work. However, for purposes of workers' compensation benefits in this matter, Mays was required to prove she is in need on ongoing medical care *as a result of the work injury*. The ALJ relied on the reports of Drs. Tutt and Lyon to conclude that the work injury caused only a temporary exacerbation of Mays' pre-existing condition which would not require future medical care.

Mays also questions why the ALJ stated, in his Opinion and Order, that Dr. Bansal did not recommend any future medical treatment. As stated above, Dr. Bansal's subsequent letter to Mays' attorney, recommending future

medical treatment, does not appear in the record and it is unclear whether it was filed and/or considered by the ALJ. However, the ALJ also acknowledged that Dr. Bansal's original report included a permanent impairment rating. Had it been accepted as persuasive, Dr. Bansal's report would have justified an award of future medical benefits. Thus, even if the ALJ did not consider Dr. Bansal's subsequent letter because it was never filed, we do not believe his result would not have been altered. For this reason, the error, if any, was harmless.

For the foregoing reasons, the March 19, 2014 Opinion and Order of Hon. Scott R. Borders, Administrative Law Judge is hereby **AFFIRMED**.

ALL CONCUR.

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