Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 22, 2013

CLAIM NO. 201295707

CHRISTINA BROGDON PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

ADECCO
and HON. CHRIS DAVIS
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Christina Brogdon ("Brogdon") appeals from the March 5, 2013 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ") and from the April 15, 2013 order denying her petition for reconsideration. The ALJ found Brogdon sustained a temporary injury to her right hand, wrist, arm and shoulder and awarded a period of temporary total disability benefits

and temporary medical benefits. On appeal, Brogdon argues the ALJ made an incorrect finding of fact on a key point and the decision regarding permanent partial disability is not supported by substantial evidence. We affirm.

Brogdon began working on the assembly line at Briggs and Stratton in October 2011 through Adecco, a temporary employment agency. Her work involved repetitive use of her right upper extremity to operate a lever and to push down on carburetors and install screws. She began to have problems with swelling in her right index finger after approximately four weeks. Brogdon indicated her condition progressively worsened and her hand would swell and turn blue. She developed burning in her forearm and hand, and a tingling sensation.

Brogdon eventually visited Dr. Susan Heffley, whose medical records documented treatment from February 9, 2012 through July 26, 2012. Brogdon was initially treated for hand, wrist and forearm pain. Dr. Heffley first recorded shoulder complaints on June 21, 2012. On July 25, 2012, Dr. Heffley noted Brogdon’s right arm symptoms worsened to the extent she was unable to work by April 2012. Dr. Heffley stated Brogdon’s condition had not improved since she ceased working.

Throughout the remainder of 2012, Brogdon was evaluated by several physicians, and received varying diagnosis. We recite only the portions of these numerous medical reports which are pertinent to consideration of this appeal.

Dr. Donald Lee examined Brogdon on April 10, 2012. He diagnosed a right forearm strain, and suggested a possible history of Raynaud's phenomenon or a rheumatoid-like condition. Believing this condition would not be caused or aggravated by her work, Dr. Lee concluded Brogdon could return to her regular work duties.

Dr. William E. Hogancamp examined Brogdon on July 3, 2012, now several months since she last worked at Briggs and Stratton. Brogdon complained of arm weakness with swelling up to her shoulder. Dr. Hogancamp found a positive Tinel's sign in the right upper extremity. He obtained MRI and EMG/NCV tests which were normal. He stated her symptoms were compatible with thoracic outlet syndrome, but her constant tenderness and pain with movement were unusual. Dr. Hogancamp referred Brogan to Dr. Thomas Naslund, a cardiovascular surgeon, for further investigation of the possible thoracic outlet syndrome.

In the meantime, Dr. Warren Bilkey conducted an independent medical evaluation on August 27, 2012. Dr.

Bilkey diagnosed a work related right shoulder strain. Like Dr. Hogancamp, Dr. Bilkey recommended further evaluation by a surgeon for a possible thoracic outlet compression. Still, he concluded she was at maximum medical improvement ("MMI") and authorized a return to work at light duty. Dr. Bilkey assigned a 5% impairment rating pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition, based upon pain and loss of range of motion in the shoulder.

Dr. Thomas Naslund examined Brogdon on November 26, 2012. Dr. Naslund opined Brogdon has neurogenic thoracic outlet syndrome that "probably is related to her repetitive use injury that she had described from her previous employment." Thoracic outlet syndrome is an anatomical abnormality that would be aggravated by the repetitive use of her arm. Hesitant to immediately proceed to surgical correction, he first recommended additional physical therapy. He offered no opinion regarding a permanent impairment.

Brogdon was last evaluated on December 11, 2012 by Dr. Richard DuBou, at Adecco's request. Dr. DuBou stated Brogdon's examination was "totally normal" without evidence of any abnormal physical findings except a bilateral decrease in wrist flexion. He found no

indication of thoracic outlet syndrome or other nerve compression. Dr. DuBou diagnosed upper extremity pain, subjective only, without any objective findings whatsoever. He indicated Brogdon was at maximum medical improvement with no permanent partial impairment, and that no restrictions were necessary.

The ALJ concluded Brogdon suffered a work-related injury to her right hand, wrist, arm, and shoulder, manifesting on November 23, 2011. However, he was convinced she "did not retain or sustain any permanent impairment rating or occupational disability, or need for future medical treatment, as a result of the work injury." The ALJ based this conclusion primarily on the evidence provided by Drs. Lee and DuBou.

Brogdon filed a petition for reconsideration. By order dated April 15, 2013, the ALJ summarily denied the petition. On appeal, Brogdon cites factual errors in the Opinion and Order, and argues the ALJ's decision is not based on substantial evidence.

We begin with the standard of our review. Brogdon, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of her cause of action, including extent and duration of any disability generated by the alleged work injury.

Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Brogdon was unsuccessful in her burden, the question on appeal is whether the evidence is so overwhelming 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).

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 (Ky. 1979). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

Turning first to the alleged factual errors contained in the opinion, Brogdon directs our attention to the ALJ's consideration of Dr. Naslund's opinion. The ALJ

found Dr. Naslund had diagnosed neurogenic thoracic outlet syndrome and "thought this condition might be related to repetitive use injury as described by Brogdon." In fact, Dr. Naslund opined the thoracic outlet syndrome "*probably* is related to her repetitive use injury that she had described from her previous employment."

We do not disagree with Brogdon's observation of the significant and qualitative differences between a possibility and a probability. *See e.g.* Kelly Contracting Co. v. Robinson, 377 S.W.2d 892, 894 (Ky. 1964). However, we believe the ALJ's description of Dr. Naslund's opinion to be, at most, harmless error. Dr. Naslund offered an opinion as to whether Brogdon suffers from thoracic outlet syndrome, a diagnosis which would explain Brogdon's work-related injury as a *manifestation* of this condition. However, Dr. Naslund did not offer any opinion as to whether the work injury caused a permanent impairment. Insofar as Dr. Naslund's diagnosis offered a possible cause of the symptoms Brogdon suffered while working, Brogdon could not have been prejudiced by any mischaracterization of Dr. Naslund's opinion because the ALJ agreed she suffered a work-related injury. Moreover, the ALJ did not rely on Dr. Naslun's opinion to reject Brogdon's assertion of permanent partial disability, because he did not offer

one. Even accepting the ALJ's wording as imprecise, Brogdon was not prejudiced and therefore any error was harmless.

Brogdon next argues the ALJ's decision is not supported by substantial evidence. Brogdon contends the opinions of Dr. DuBou do not constitute substantial evidence because he exhibited a "gross misunderstanding" of the basic facts of the claim. Specifically, Dr. DuBou gave great significance to the fact she is left hand dominant but suffered an injury to her right upper extremity. He emphasized repetitive stress syndrome, if caused by work, normally occurs first in the dominant extremity. However, it is uncontested Brogdon used a right handed lever.

Brogdon also directs our attention to DuBou's statements that her injury occurred after only two or three weeks and that her symptoms did not change after she stopped working. Dr. DuBou stated these facts indicate her work was not a significant cause of her symptoms, and noted very few repetitive stress syndromes occur that rapidly. However, Brogdon testified her symptoms arose after four weeks of employment and progressively worsened over the next month and a half. Further, she asserts she had gradual but steady improvement after being taken off work by Dr. Heffley.

While Brogdon alleges deficiencies in Dr. DuBou's understanding of the facts in her case, those alleged deficiencies are irrelevant because they did not relate to the issue of permanent impairment. These "facts", though inaccurate, contributed to Dr. DuBou's belief that Brogdon did not suffer from repetitive stress syndrome. The ALJ obviously rejected Dr. Dubou's opinion in this regard because he found Brogdon suffered a work-related injury.

The ALJ did rely on Dr. DuBou's finding that Brogdon suffered no permanent condition. But that opinion did not rest on an understanding (or, misunderstanding) of how Brogdon performed her work or when her symptoms manifested. Rather, this conclusion was based on his clinical examination and testing. We note it is within the ALJ's discretion to believe or disbelieve various parts of the evidence, regardless of whether it comes from the same witness. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

Here, the record contains substantial evidence supporting the ALJ's finding Brogdon's work caused only a temporary injury without resulting in permanent impairment. No contrary result is compelled. The ALJ specifically relied upon Dr. Lee's and Dr. DuBou's opinions in making his determination, both of whom found no permanent injury. Dr. DuBou reviewed the appropriate medical records and

conducted a physical examination which was essentially normal. While Brogdon is able to point to evidence that could have supported a finding in her favor, the evidence falls far short of compelling a finding in her favor. The record contains substantial evidence supporting the ALJ's findings and we therefore may not reverse.

Accordingly, the March 5, 2013 Opinion, Order and Award rendered by Hon. Chris Davis, Administrative Law Judge and the April 15, 2013 order denying her petition for reconsideration are **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, NOT SITTING.

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