Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 11, 2015

CLAIM NO. 201270677

DEBORAH FRANCISCO PETITIONER

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

KENTUCKY UTILITIES COMPANY
HON. OTTO D. WOLFF, IV,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

RECHTER, Member. Deborah Francisco ("Francisco") appeals from the dismissal of her claim by Hon. Otto D. Wolff, IV, Administrative Law Judge ("ALJ"). Francisco argues the ALJ erred by not relying on the Supreme Court's holdings in Brummitt v. Southeastern Kentucky Rehabilitation Industries, 156 S.W.3d 276 (Ky. 2005) (holding an individual continuing

to perform the same repetitive activity after a gradual injury manifests may sustain subsequent gradual injuries) and Special Fund v. Clark, 998 S.W.2d 487 (Ky. 1999) (holding an ALJ must consider the effect of work performed within the two-year period before the claim was filed). We affirm.

Francisco filed her claim on April 4, 2014 alleging cumulative trauma injuries to her neck and right upper extremity on July 16, 2012 as a result of repetitive work as a customer service representative for Kentucky Utilities Company ("KU"). The ALJ, in a November 24, 2014 Order of Dismissal, determined Francisco was aware in 2008 that her neck and right shoulder problems were due to her work. Based upon Francisco's testimony and records from Dr. Donald Miller, her chiropractor, the ALJ found the statute of limitations commenced to run sometime between 2006 and 2008. Thus, her neck and right shoulder claim is barred by expiration of the applicable statute of limitations.

KU and Francisco filed petitions for reconsideration. KU argued the ALJ was required to make a specific finding whether Francisco's employment in the two years prior to the filing of her claim caused any additional cumulative trauma to her neck and shoulder and whether it caused any new harmful change to the human organism.

Relying on Brummitt, Francisco likewise argued she is entitled to a finding that she continued to perform repetitive work activities after her gradual injury became manifest, resulting in continual harmful change within the two years prior to the filing of her claim.

On December 30, 2014, the ALJ issued his Order on Petition for Reconsideration rescinding the November 24, 2014 order and granting additional time for the parties "to address any issues they deem appropriate." On February 27, 2015, the ALJ issued his Order on Petitions for Reconsideration overruling Francisco's petition for reconsideration and sustaining KU's petition. The ALJ found there is no persuasive medical proof linking Francisco's symptoms to her work at KU between April 2012 and January 2013 when she ceased her employment.

Because she has not specifically appealed the sufficiency of the evidence upon which the ALJ concluded there was no causal relationship between Francisco's condition and her work activities, we will only briefly address the medical proof of causation. Francisco submitted the opinion of Dr. Arthur L. Hughes, which the ALJ rejected. Dr. Hughes testified he did not have any corroboration or objective basis to find a causal relationship between Francisco's work and her alleged cumulative trauma injury.

Dr. Hughes also acknowledged there was no objective medical findings to show Francisco's shoulder and neck worsened due to her work activities or to connect the conditions to her work activities.

Instead, the ALJ relied upon the medical opinions submitted by KU. Dr. Phillip Tibbs evaluated Francisco and attributed her symptoms to degenerative disc disease and fibromyalgia and indicated "a lot of her issues are associated with her morbid obesity." Dr. Bart J. Goldman noted the right shoulder complaints significantly predated the alleged date of injury, and Dr. Christian Latterman noted her symptoms started in 2010 when she was involved in a severe motor vehicle accident. The ALJ noted Dr. David E. Muffly indicated the complaints of neck and right shoulder pain were not caused by the work at KU. Dr. Muffly opined "I do not detect any harmful change caused by a specific job injury and I do not detect any harmful change associated with cumulative trauma disorder."

Finally, the ALJ stated he had considered Brummitt and Special Fund v. Clark, and concluded Francisco had not proven she experienced cumulative trauma producing an injury during her work for KU between April 4, 2012 and January 9, 2013.

KU filed a second petition for reconsideration. It first sought clarification as to whether the ALJ was reinstating the finding from the November 2014 order that the claim for cumulative trauma occurring more than two years prior to the filing of the claim is barred by the statute of limitations, or whether the ALJ was now finding Francisco did not sustain an injury as defined by the Act from alleged cumulative trauma.

Francisco filed a notice of appeal on March 23, 2015. By order dated April 15, 2015, the Board placed the appeal in abeyance and remanded for ruling on KU's outstanding petition for reconsideration. On May 5, 2015, the ALJ rendered his Remand Order on Petition for Reconsideration finding as follows:

> As intended, the February 27, 2015 Order dismissed Plaintiff's claim, solely on the issue of whether Plaintiff sustained an "injury" at any time while working for Defendant.
>
> So as to clarify the Order, it was and is determined Plaintiff never sustained a cumulative trauma or acute injury while working for Defendant.
>
> The determination Plaintiff never sustained a cumulative trauma injury while working for Defendant is based upon the input of Drs. Tibbs, Goldman, and Muffly, and, to some extent Dr. Latterman. Their input was set forth in the February 27, 2015 Order.

> It should also be again noted Dr. Hughes' input carried little weight for the reasons set forth in the Order.

On appeal, Francisco argues she is entitled to a finding that she continued to perform repetitive work activities after her gradual injury became manifest, that she suffered continual harmful change due to repetitive trauma within the two year period prior to the filing of her claim on April 4, 2014, and that she is entitled to be compensated for that period of injury. However, the ALJ determined Francisco suffered no compensable, work-related cumulative trauma injury at any point while working for KU. In light of this finding, Brummit is inapplicable.

Again, Francisco has not specifically appealed the finding she suffered no cumulative trauma injury while employed at KU. However, to be sure, we note this finding is supported by substantial evidence. Dr. Hughes acknowledged in his deposition that there were no objective medical findings showing her neck and back conditions were connected to or worsened by her work activities. Dr. Muffly opined there was no harmful change caused by a specific work injury, nor did he detect any harmful change associated with a cumulative trauma disorder. Dr. Muffly also noted the right shoulder tendonitis findings were present in 2006 and had not progressed. Francisco acknowledged, and records

from Dr. Donald E. Miller, D.C. document, treatment for neck and shoulder symptoms from 2003 until 2010. There is ample evidence Francisco's work did not result in the alleged injuries. There being substantial evidence in the record supporting the ALJ's finding, it cannot be said the evidence compels a finding in her favor. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the February 27, 2015 and May 5, 2015 orders rendered by Hon. Otto D. Wolff, IV, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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