

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 25, 2014

CLAIM NO. 201280638

DENTAL HEALTH ASSOCIATES, INC.

PETITIONER

VS.

APPEAL FROM HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

CAROLYN ANN GILVIN
and HON. WILLIAM J. RUDLOFF,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
VACATING AND REMANDING

* * * * *

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

ALVEY, Chairman. Dental Health Associates, Inc. ("DHA") seeks review of the opinion and award rendered January 15, 2014 by Hon. William J. Rudloff, Administrative Law Judge ("ALJ") awarding Carolyn Gilvin ("Gilvin") temporary total disability ("TTD") benefits, permanent total disability ("PTD") benefits, and medical benefits. DHA also appeals

from the January 30, 2014 order denying its petition for reconsideration.

On appeal, DHA argues the ALJ erred in finding Gilvin sustained a work-related neck injury because all evidence of record demonstrates her cervical spine problems are not work-related. DHA also argues the ALJ erred as a matter of law in considering Gilvin's non-work-related condition as the basis for awarding PTD benefits, and he used an improper standard in determining she is totally disabled. Because the ALJ erred in finding Gilvin's neck condition is work-related, and she is permanently totally disabled, in part, due to that condition, we vacate and remand for a determination of her occupational disability based solely upon her work-related injuries.

Gilvin filed a Form 101 on July 1, 2013 alleging she sustained bilateral carpal tunnel syndrome, a left shoulder injury, and a cervical injury on April 12, 2012 due to cumulative trauma. Gilvin stated her job required sitting, reaching, lifting, twisting, turning, pulling and pushing. Her work history reflects she worked as a case coordinator in a dental office from July 2002 through November 30, 2012. She previously worked as a medical claims processor for an insurance company.

Gilvin testified by deposition on October 14, 2013, and at the hearing held December 18, 2013. She was born on April 12, 1962, and resides in Paris, Kentucky. She is a high school graduate with an Associate's Degree from Fugazzi Business College. In addition to her work in the dental office, and as a medical claims processor, she has worked as a waitress, receptionist, baby sitter, hot walker for a horse farm, clerk in a meat market and for an answering service.

When she was initially hired by DHA in July 2002, Gilvin's job required her to input billing information. Her job additionally required preparing payroll, and making bank deposits. She described her job at DHA consisted of typing eight to ten hours per day, three days per week, and four and a half hours on her remaining workday. She stated she was also required to lift bundles of files weighing in excess of thirty pounds. She also testified her job consisted of using the telephones, scheduling and working with charts. She resigned on November 30, 2012 because she was not allowed to work part-time, and she was unable to take leave pursuant to the Family Medical Leave Act.

Gilvin stated she treats for unrelated anxiety, depression and diabetes in addition to her work-related conditions. She stated her hands, left shoulder and neck

became problematic around April 12, 2012. She denied any complaints or problems with her hands or wrists prior to April 12, 2012, despite records from her family physicians indicating she had such problems in 2008 and 2009. She stated no physician has provided a specific diagnosis for her left shoulder problems.

Gilvin stated Dr. Margaret Napolitano treated her right wrist, including a carpal tunnel release, and released her on August 20, 2012. She then treated with Dr. William O'Neill for the left wrist. Dr. O'Neill performed a left carpal tunnel release, after which time she missed approximately two weeks of work due to hand and neck pain. She stated her hands have improved since she ceased working, but she still experiences pain and locking of her thumbs. She stated she does not believe she can return to her previous job.

Joanie Juett ("Juett"), the office manager for DHA, testified by deposition on October 25, 2013. Juett worked at DHA prior to 2004. She returned to DHA on a part-time basis in 2009, and full-time in 2010. She has training as a dental assistant and as a nurse. She has also completed computer and business coursework. She stated Gilvin's job as a front desk coordinator consisted of working with billing, collections, scheduling, answering the

telephone, and processing payments. Juett stated Gilvin's job duties fell within the restrictions assessed by Dr. Owen. She stated Gilvin's job only required use of a computer keyboard approximately two to three hours per day. She stated Gilvin did not report a neck injury. She further stated Gilvin resigned because part-time work was unavailable.

In support of her claim, Gilvin filed records from Dr. Dirk Franzen, Dr. O'Neill, Dr. Napolitano, Dr. Robert Taylor, and Paris Physical Therapy. Dr. Franzen's records reflect treatment for cervical complaints from December 14, 2012 through March 19, 2013. He noted an MRI revealed spondylitic changes at C5-C6 and C6-C7 with some posterior osteophytes. He diagnosed cervical spondylosis and radiculopathy for which he ordered physical therapy and pain medications. He noted the physical therapy helped with her pain, but her numbness and tingling were more prominent, so he referred her for a trial of injections. DHA filed the February 20, 2013 note from Dr. Franzen indicating Gilvin's cervical spondylosis with some radicular symptoms and pain is not related to her carpal tunnel syndrome. At no time did Dr. Franzen relate Gilvin's cervical problems to her work.

Dr. O'Neill's records filed with the claim reflect treatment from August 29, 2012 through February 19, 2013. When Dr. O'Neill first saw Gilvin, he noted complaints of pain and numbness in the left hand, radiating up to her elbow, shoulder and neck area. On October 29, 2012, Dr. O'Neill stated Gilvin had undergone carpal tunnel releases to both wrists, and her left arm symptoms did not improve with surgery. Dr. O'Neill's initial treatment record reflects Gilvin should not use her left hand. He later indicated she could do light duty work with no overhead activity.

Dr. Napolitano's records from April 12, 2012 through August 20, 2012 reflect Gilvin is right hand dominant, and developed pain, numbness, and tingling in both hands within the month prior to her first office visit. Dr. Napolitano performed a right carpal tunnel release in May 2012. She stated Gilvin's wrist problems were work aggravated, although she stated she could not answer whether they were solely and directly related to her employment. In July, she noted Gilvin's right hand had improved significantly, and her symptoms were primarily in the left. In August 2012, Dr. Napolitano planned for Gilvin to have a left wrist injection, and allowed her to return to work. DHA filed records from Dr. Napolitano indicating Gilvin had

reached maximum medical improvement ("MMI") from her right carpal tunnel condition, and was released to return to work with no restrictions. Dr. Napolitano opined Gilvin had no permanent disability from her right carpal tunnel syndrome.

Gilvin saw Dr. Taylor at the Lexington Back and Neck Clinic on May 7, 2012 where EMG/NCV testing was performed. Dr. Taylor noted she had moderate to severe median neuropathy on the right and left, and moderate median neuropathy at the left wrist. The records from Paris Physical Therapy dated February 5, 2013 confirmed Gilvin's cervical disc derangement.

Gilvin was evaluated by Dr. James Owen on August 16, 2013. In his report dated August 26, 2013, Dr. Owen stated Gilvin developed cramps and sensory abnormalities in her thumbs, especially on the right, in March 2012. He stated the right carpal tunnel release eased her pain, and she was released to return to work on August 20, 2012 with no permanent disability. He noted she complained of pain in the left forearm radiating to her thumb. She reported a five year history of neck problems. Dr. Owen diagnosed persistent hand pain with bilateral grip weakness and mild dysesthesia, but no significant two-point discrimination abnormality associated with bilateral carpal tunnel surgery. He also noted persistent neck pain with non-verifiable

radicular symptomatology. In reference to the cervical spine, he noted the neurologic examination he conducted was negative for reflex or sensory abnormalities.

Regarding causation, Dr. Owen related Gilvin's carpal tunnel syndrome to her work. He stated "diabetes is a predisposing factor for carpal tunnel syndrome, and therefore was dormant, non-disabling, brought into disabling reality by the excessive use of her computer." Regarding the cervical spine, Dr. Owen opined, "The cervical spine itself, I feel, does not appear to be work related and there was no trauma associated, no car wrecks, etc." He stated Gilvin had reached MMI, and assessed an 8% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") for her wrist complaints. He stated Gilvin does not retain the capacity to return to work and should avoid lifting, handling, and carrying objects with either hand greater than 16 kg.

Gilvin also filed an undated, hand-written note from Dr. Owen stating she could not return to work as a financial counselor which required the persistent use of a computer. In addition to the restrictions enumerated above, Dr. Owen stated Gilvin should avoid repetitive use

of either hand for typing or other activities requiring constant fine finger movement or gripping.

Dr. Thomas O'Brien evaluated Gilvin at DHA's request. In his report dated February 16, 2013, Dr. O'Brien diagnosed bilateral carpal tunnel syndrome which he found not causally associated with her work as a front desk coordinator. He stated, "The woman's carpal tunnel syndrome is due to a combination of her age and the soft tissue and bony anatomy of her carpal canal and her history of tobacco use." He stated her cervical degenerative changes have no causal relationship to her work.

DHA filed treatment records from Dr. Roberta Allison, Dr. James Ferrell, and Dr. Melville¹ for over sixty office visits between February 3, 1999 and July 3, 2012. Those records reflect treatment for various maladies including rashes, hypertension, anxiety, depression, low back pain, sinusitis, etc. The following notes reflect treatment for Gilvin's upper extremities:

March 11, 2008, carpal tunnel syndrome

April 30, 2009, complaints of numbness
in both upper extremities

June 14, 2010 acute left elbow problem
unresolved

¹ No first name mentioned.

June 23, 2011 complaints of discomfort in the left arm and shoulder, and carpal tunnel syndrome in the left hand

July 26, 2011 still having pain in left hand

Dr. Ronald Burgess evaluated Gilvin at DHA's request on October 21, 2013. He stated she is at MMI from her carpal tunnel releases. He opined her carpal tunnel syndrome is due to her gender, age, and early diabetes, and is unrelated to her work. He assessed a 3% impairment rating pursuant to the AMA Guides. Dr. Burgess disagreed with Dr. Owen's impairment rating, stating it improperly included loss of grip strength which is prohibited by the AMA Guides, specifically on page 494. Dr. Burgess stated Gilvin could return to her previous job without restrictions, and any residual numbness is due to her cervical condition.

DHA also filed the vocational report of Dr. Ralph Crystal who evaluated Gilvin on December 16, 2013. He stated she could return to work to her previous job based upon the medical opinions. He did not believe Gilvin is disabled.

A Benefit Review Conference ("BRC") was held on December 13, 2013. The BRC order and memorandum reflects the issues preserved for determination included work-

relatedness/causation; benefits per KRS 342.730; statute of limitations; TTD overpayment; medical benefits; and PTD benefits.

On December 19, 2013, Gilvin filed a position statement stating as follows:

Due to the fact that no physician has related anything other than bilateral carpal tunnel syndrome to her work activities, the Plaintiff concedes that the problem with her neck and left shoulder are not work-related and therefore are not compensable, and she voluntarily dismisses those claims.

The ALJ rendered his opinion on January 15, 2014. The ALJ stated Dr. Owen found within reasonable medical probability, Gilvin's injuries were the cause of her complaints. He omitted Dr. Owen's statement the cervical condition was unrelated. The ALJ then found as follows:

I saw and heard the plaintiff Mrs. Gilvin testify at the Final Hearing and make the factual determination that she was a credible and convincing witness. Based upon her sworn testimony, both in her deposition and at the Final Hearing, and the persuasive and compelling medical evidence from Dr. Owen, all of which evidence is summarized in detail above, I make the factual determination that as a result of the plaintiff's work activities during her employment with the defendant she sustained work-related injuries to both hands and wrists and to her **neck**, which became occupationally disabling on April 12, 2012. Based upon the plaintiff's sworn testimony, I make

the factual determination that she continues to have weakness in both hands and painful symptoms, which significantly limit her physical activities with both upper extremities. (emphasis added).

The ALJ awarded TTD benefits from May 17, 2012 through July 11, 2012 at the rate of \$358.83 per week, and PTD benefits beginning November 30, 2012. DHA filed a petition for reconsideration on January 22, 2014 arguing the ALJ erred by considering unrelated neck and left shoulder problems in determining Gilvin is permanently totally disabled. DHA also argued the ALJ failed to consider Gilvin's age, education level, restrictions, and employability as required by Osborne v. Johnson, 428 S.W.2d 800 (Ky. 1968) in making his determination. The ALJ denied the petition for reconsideration in an order dated January 30, 2014, stating it was merely a re-argument of the merits of the claim.

As the claimant in a workers' compensation proceeding, Gilvin had the burden of proving each of the essential elements of her cause of action, including the extent of her disability. See KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Gilvin was successful in that burden, the question on appeal is whether there was substantial evidence of record to support the

ALJ's decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

Authority has long acknowledged in making a determination granting or denying an award of PTD benefits, an ALJ has wide ranging discretion. Seventh Street Road Tobacco Warehouse v. Stillwell, 550 S.W.2d 469 (Ky. 1976); Colwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). KRS 342.285 designates the ALJ as the finder of fact. Therefore, the ALJ has the sole discretion to determine the quality, character, and substance of evidence. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ, as fact-finder, may choose whom and what to believe and, in doing so, 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 party's total proof. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Brothers, 547 S.W.2d 123 (Ky. 1977).

In this instance, there is absolutely no evidence, much less substantial evidence, supporting the ALJ's award

of benefits, in part, due to Gilvin's cervical complaints. The ALJ was clearly mistaken when he stated he relied upon Dr. Owen in finding the "neck" condition work-related. As noted above, Dr. Owen found Gilvin's cervical condition is not work-related. This is consistent with ALL of the other medical opinions finding the neck and shoulder conditions are not work-related. This is also consistent with Gilvin's admission in her position statement that her neck and shoulder complaints are not work-related. This issue was raised by DHA in its petition for reconsideration, but the ALJ failed to address it.

Because the ALJ's decision is based, in part, on a misinterpretation of the medical evidence, it must be vacated, and the claim remanded for a determination of her occupational disability based solely upon Gilvin's bilateral carpal tunnel syndrome. In reaching his determination, the ALJ must also provide findings sufficient to inform the parties of the basis for his decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

On remand, the ALJ shall specifically address the impact of Gilvin's right and left carpal tunnel syndrome, whether those conditions resulted in any disability, and if so the extent. The ALJ shall discuss and cite to the specific medical testimony supporting his determination.

Regarding DHA's argument the ALJ erred in finding Gilvin permanently totally disabled, we note PTD is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. KRS 342.0011(11)(c). "Work" is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). The Kentucky Supreme Court set forth the following analysis in Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48, 51 (Ky. 2000) in determining whether a claimant is permanently and totally disabled:

An analysis of the factors set forth in KRS 342.0011(11)(b), (11)(c), and (34) clearly requires an individualized determination of what the worker is and is not able to do after recovering from the work injury. Consistent with Osborne v. Johnson, supra, it necessarily includes a consideration of factors such as the worker's post-injury physical, emotional, intellectual, and vocational status and how those factors interact. It also includes a consideration of the

likelihood that the particular worker would be able to find work consistently under normal employment conditions. A worker's ability to do so is affected by factors such as whether the individual will be able to work dependably and whether the worker's physical restrictions will interfere with vocational capabilities. The definition of "work" clearly contemplates that a worker is not required to be homebound in order to be found to be totally occupationally disabled.

We strongly emphasize, as we have on several occasions, a mere recitation of the factors set out in Ira A. Watson Department Store v. Hamilton, supra, without linking those factors to the specific facts at hand is not an appropriate analysis of a claimant's entitlement to PTD benefits. The ALJ must set forth exactly how the severity of Gilvin's injury, as well as how her age, work history, and education factored into his decision in determining whether she is permanently totally disabled.

On remand, the ALJ is directed to conduct an analysis in accordance with both the statutory and case law referenced above, and provide with specificity his rationale supporting his determination. On remand, the ALJ is further directed to specifically address how Gilvin's education factors into his decision. Although there may be substantial evidence in the record supporting the ultimate

determination Gilvin is permanently and totally disabled, the ALJ must provide an adequate explanation of the basis for his decision. This Board may not, and does not direct any particular result because we are not permitted to engage in fact-finding. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, supra.

Accordingly, the ALJ's determinations as set forth in the January 14, 2014 opinion and the January 30, 2014 order overruling DHA's petition for reconsideration are **VACATED**. This claim is **REMANDED** for additional findings and entry of an amended opinion consistent with the views expressed herein.

ALL CONCUR.

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