

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 2, 2015

CLAIM NO. 201494647

FARIMA FLORES

PETITIONER/CROSS-RESPONDENT

VS.

APPEAL FROM HON. UDELL B LEVY
ADMINISTRATIVE LAW JUDGE

PMR COMPANIES

RESPONDENT/CROSS-PETITIONER

HON. UDELL B LEVY

ADMINISTRATIVE LAW JUDGE

RESPONDENT

OPINION
AFFIRMING
* * * * *

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

RECHTER, Member. Farima Flores ("Flores") appeals and PMR Companies ("PMR") cross-appeals from the April 20, 2015 Opinion, Order and Award and the May 28, 2015 Order on Reconsideration rendered by Hon. Udell B. Levy, Administrative Law Judge ("ALJ"). The ALJ awarded medical expenses for Flores' bilateral hand and wrist injuries, but

determined her condition is not presently ratable pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”). Flores argues the ALJ erred in finding she does not qualify for a permanent partial impairment rating. PMR argues there is no medical evidence supporting the finding of a bilateral injury, and that there is insufficient evidence of a work-related cause. For the reasons set out below, we affirm.

Flores testified by deposition on July 30, 2014 and at the hearing held February 24, 2015. She was employed as an assistant manager for an apartment complex consisting of 622 units. Her work included preparing reports, revising and renewing contracts, inspecting apartments, bookkeeping, and processing evictions. Flores stated she never had problems with her hands prior to January, 2014 and denied any other injuries.

Flores first noticed pain in her right wrist while typing. She had no symptoms on the left until approximately one month later. She attributed the onset of the left hand problems to increased use to compensate for the right hand problems. She took Tylenol and Ibuprofen for her pain, but it worsened.

Flores visited Norton Immediate Care Center on January 19, 2014. After seeing her family doctor on January 22, 2014, she was referred for occupational therapy and came under the care of Dr. Tsu-min Tsai at Kleinert & Kutz on February 18, 2014. She received injections in both hands which helped for a few weeks. At the time of her deposition, Flores continued to have tingling in her hands when washing dishes or cleaning the bathroom. She did not have pain in her hands, but was afraid it would return if she performed typing.

At the hearing, Flores testified she did not treat with Dr. Tsai between April 2014 and August 2014. Dr. Tsai recommended surgery because her problems had persisted. Two days before the scheduled surgery, Flores informed Dr. Tsai she wanted to wait because she no longer had tingling in her hands. She ceased working for PMR on May 16, 2014 for reasons unrelated to her injury, and has not been employed since. She has no pain when she is not working, typing, or using a computer. If she performs repetitive activities, the pain returns but not with the same intensity. At the time she left PMR, Flores was under no restrictions and was not taking any medication.

Flores submitted medical records from Fairdale Family Medical, her primary care physicians. On January

22, 2014, she visited for evaluation and treatment of right wrist pain. She reported pain in her right arm had been increasing for two weeks and was related to typing at work. Flores also filed records from Occupational Physicians Services-Fern Valley Road. A discharge summary indicates Flores was seen on February 10, 2014 and diagnosed with overuse syndrome of both hands and bilateral carpal tunnel syndrome. Flores stated her condition was due to repetitive typing. She was cleared to perform regular job duties as tolerated.

Dr. Jules Barefoot performed an Independent Medical Examination ("IME") on June 18, 2014. Flores complained of continuous pain in her right hand and, to a lesser degree, in her left hand with diminished grip strength in her hands. On examination, Flores had a positive Tinel sign to percussion over the right cubital tunnel. She had paresthesias in the ring and little fingers of her right hand with normal sensation in the left hand. Grip strength was diminished in both hands. Dr. Barefoot diagnosed right ulnar neuropathy and indicated Flores would be at maximum medical improvement ("MMI") if no further treatment is available. He assigned an 8% impairment based upon motor and sensory deficits pursuant to the AMA Guides. Dr. Barefoot recommended additional

treatment with Dr. Tsai, and indicated she may need operative intervention.

Dr. Tsai's medical records were submitted. Flores presented on February 18, 2014 and gave a history of symptoms of pain in the right hand and left first compartment, with intermittent numbness and tingling. Tinel's sign was positive in the carpal tunnels and cubital tunnels, and carpal tunnel compression and Phalen's were positive bilaterally. Dr. Tsai diagnosed bilateral carpal tunnel syndrome and DeQuervains tenosynovitis. He administered Kenalog injections and provided braces. Flores was allowed to return to regular duty work. On February 27, 2014, Dr. Tsai noted wrist pain was improved following the injections. On April 3, 2014, Dr. Tsai indicated pain had resolved over the radial styloid and there was no paresthesia in the digits. Flores still had pain over the distal volar forearm. He felt the carpal tunnel syndrome had resolved but Flores still had cubital tunnel syndrome and thrombophlebitis in the right forearm. Flores returned to Dr. Tsai on August 19, 2014 with recurrent pain and numbness. He diagnosed mild carpal tunnel syndrome on the right, Dequervains, pronator teres syndrome, and cubital tunnel syndrome. He recommended surgery for right carpal tunnel, cubital tunnel, and

pronator teres releases. Flores cancelled this procedure before it was conducted.

Dr. Ronald Burgess performed an IME on March 27, 2014. Objectively, Flores had a normal physical examination with no clinical evidence of an entrapment neuropathy, tendon or joint abnormality. He noted she had a borderline drop in the nerve conduction study of the right ulnar nerve across the elbow, although it was still considered normal for impairment purposes. He diagnosed migratory upper extremity pain without clear objective evidence of abnormality.

In a July 9, 2014 supplemental report, Dr. Burgess indicated he reviewed Dr. Barefoot's IME report. Dr. Burgess determined Dr. Barefoot's report was not in conformity with the AMA Guides because he simply stated Flores' condition is work-related without objective correlation to her job duties. Dr. Burgess also disagreed with Dr. Barefoot's determination of grade 4 motor and sensory changes, noting the nerve conduction study was normal except for the slight drop in conduction velocity of the right ulnar nerve.

In an October 16, 2014 supplemental report, Dr. Burgess indicated he reviewed notes from Dr. Tsai. Dr. Burgess felt there was no objective evidence Flores had

carpal tunnel, pronator teres, or cubital tunnel syndrome and, therefore, the surgery recommended by Dr. Tsai is neither reasonable nor necessary. He further indicated the diagnoses are not related to her work history of typing, and therefore not work-related.

The ALJ's findings relevant to this appeal are as follows:

The evidence in this case shows that many of Plaintiff's job responsibilities as assistant manager required preparation of documents and maintaining information for hundreds of units at the Kingston Park Apartments. The Defendant has not refuted her testimony that the vast majority of her time required working at a keyboard. Based on her credible testimony, I find that Ms. Flores gradually developed symptoms in her right hand and wrist which increased, along with a spike in the number of reports she was required to prepare, into mid-January, 2014. By the middle of that month, Plaintiff realized the pain in her wrist and hand was associated with typing, and that the subsequent increase in symptoms in her left hand coincided with increased use as she rested her right hand.

The findings from the nerve conduction studies performed by Dr. Iyer constitute objective evidence of an entrapment syndrome. This is further supported by the positive findings which Dr. Tsai obtained bilaterally from Tinel's and Phalen's testing in the carpal and cubital tunnels, with carpal tunnel compression, and with Finklestein's testing. Objective findings were also

noted by Dr. Barefoot, who also concluded that Plaintiff's neuropathy was work related in that she was required to engage in data entry. Based on these findings, including Dr. Barefoot's conclusions regarding causation, I find that Plaintiff sustained bilateral neuropathies due to the repetitive keyboard functions she performed in her capacity as assistant manager for PMR Companies at the Kingston Park Apartments.

. . .

In addition to providing the definition of "impairment", the *AMA Guides* mandate that an impairment cannot be considered to be permanent until the underlying condition "has reached maximum medical improvement (MMI), meaning it is well established and unlikely to change substantially in the next year with or without medical treatment." In further defining MMI, the glossary to the Guides note that, "Over time, there may be change (in an injured worker's condition or state that had stabilized); however, further recovery or deterioration is not anticipated." Nevertheless, once MMI has been achieved, the *Guides* establish a standardized, objective approach to evaluating medical impairments. *Colwell v. Dresser Instrument Div.*, 217 S.W.3d 213 (Ky. 2006).

Ms. Flores is at MMI since she has declined further treatment. However, evaluating her impairment becomes somewhat difficult. Since she continued to have positive signs and symptoms when Dr. Barefoot evaluated her, I cannot conclude Plaintiff's condition was resolved, as Dr. Tsai suggests. It further appears from the evidence that Dr. Tsai reached that

conclusion soon after he had provided the steroid injections. Moreover, it appears the effects of the steroid injections had worn off by the time Ms. Flores presented with recurring symptoms on August 19, 2014 which led Dr. Tsai to recommend that she undergo right carpal tunnel, cubital tunnel, and pronator teres releases.

While it is not clear from the record when the surgery was scheduled, Ms. Flores testified that she decided to postpone the procedure two days before it was to occur because she no longer had tingling in her hands. She had no pain and was not taking any medications for her injury by the time her case was heard on February 24, 2015. Even when the pain returned due to using her hands repetitively, it was not with the same intensity.

Based on her current lack of symptoms, Plaintiff does not have a permanent impairment that is ratable according to the *AMA Guides*. Dr. Barefoot evaluated Ms. Flores before she returned to Dr. Tsai and eventually declined to have surgery due to improvement in her symptoms. He based his impairment rating on Plaintiff's pain and paresthesias. She can't be found to have a ratable impairment since she no longer has those symptoms.

On the other hand, the reason Plaintiff does not have symptoms is because she is no longer working and engaging in repetitive hand movements to the same extent that was required while she was working as assistant manager for Defendant. Even though she does not have the same intensity of pain when it returns due to excessive use, the fact remains that Ms. Flores' symptoms have not completely subsided.

Therefore, although her condition is no longer ratable under the *AMA Guides*, the evidence further shows that Plaintiff continues to have residual impairment under the Fifth Edition's definition. Given that she has been found to have reached MMI, Ms. Flores' impairment must be considered permanent.

Accordingly, the ALJ limited Flores to an award of future medical benefits.

Flores filed a petition for reconsideration, arguing the ALJ misinterpreted the evidence and erred in failing to make appropriate findings concerning the issue of permanent injury. PMR also petitioned for reconsideration, arguing the ALJ erred in finding Flores met her burden of proof regarding causation of her neuropathies.

The ALJ, in his May 28, 2015 order on reconsideration clarified his findings as follows:

Notwithstanding the determination that the repetitive work Plaintiff performed caused her to develop bilateral carpal tunnel syndrome, it appears from the evidence that Ms. Flores' left sided symptoms have resolved. However, Dr. Barefoot diagnosed her with a right ulnar nerve neuropathy because she has continued to have positive signs and recurrent symptoms, including pain and paresthesias, in her right upper extremity. But by her own testimony, Plaintiff's symptoms continue to wax and wane which renders Dr. Barefoot's

rating, based on her degree of motor and sensory deficits, somewhat inconsistent. Moreover, while the AMA Guides at p. 495 offer three scenarios for rating permanent impairment, they require the determination be made "after an optimal recovery time following surgical decompression..." (Emphasis added). Since Plaintiff has not undergone surgical decompression, I do not find that her impairment is ratable pursuant to the *AMA Guides, Fifth Edition*. KRS 342.0011(35) and (37).

On appeal, Flores argues the ALJ erred by finding she does not qualify for a permanent impairment rating. Flores contends the ALJ incorrectly reads the *AMA Guides* as requiring surgery before an individual can qualify for an impairment rating for carpal tunnel syndrome. She emphasizes that Dr. Barefoot clearly disagrees with the ALJ's understanding of the *AMA Guides*. Flores requests that the Board remand with directions for the ALJ to provide an analysis of her permanent partial impairment rating.

As the claimant in a workers' compensation proceeding, Flores had the burden of proving each of the essential elements of her cause of action. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Because she was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. *Wolf*

Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). "Compelling evidence" is defined as evidence that is 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). The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The evidence does not compel a finding that Flores retains an impairment rating pursuant to the AMA Guides. Assessment of an impairment rating is not considered permanent until a patient reaches MMI. See AMA Guides, 5th Edition, Chapter 1.2a, p. 2, and Chapter 15, p. 373. Dr. Barefoot evaluated Flores on June 18, 2014, and recommended additional medical treatment. He expressed that she would have an 8% impairment if no further treatment was available. As noted by the ALJ, Flores had a recurrence of her pain and numbness and sought additional treatment in August 2014. Dr. Tsai recommended surgery. Because her condition improved, Flores declined to proceed with the procedure. Clearly, there is substantial evidence indicating Flores was not at MMI at the time of Dr.

Barefoot's evaluation and assessment of an impairment rating. She testified her condition improved in August after treatment with Dr. Tsai and before the date surgery was scheduled to be performed in September. The only other physician to offer an opinion was Dr. Burgess, who assigned a 0% impairment rating. Although the ALJ on reconsideration indicated the condition was not ratable because Flores had not had surgery, we read that portion as addressing the fact surgery had been recommended but not performed. The ALJ was not retracting his earlier findings regarding the timing of Dr. Barefoot's assessment of Flores' condition and whether her condition was at MMI at that time. We conclude the ALJ relied on substantial evidence and a comprehensive understanding of all the proof in determining Flores has no permanent impairment rating. The evidence does not compel a contrary result.

On cross-appeal, PMR argues the medical evidence does not support a finding of any injury other than a right ulnar nerve injury. PMR notes the only medical opinion on causation presented by Flores is the report of Dr. Barefoot, who stated she had a right ulnar nerve neuropathy related to her work. It further contends the cause of her conditions is not observable or apparent to a lay person and thus it was impermissible for the ALJ to rely upon

Flores' lay testimony as a basis for finding her conditions were caused by repetitive keyboard use. In fact, though Dr. Tsai diagnosed bilateral carpal tunnel syndrome, bilateral DeQuervains syndrome and right cubital tunnel syndrome, he documented that the visits were not workers' compensation treatment. Further, records from Fairdale Family Medical and Occupational Physicians Services simply indicate Flores felt her typing at work was the cause of her symptoms, but the records offer no medical opinion as to causation.

Additionally, PMR argues Dr. Barefoot's opinion does not constitute substantial evidence. PMR contends Dr. Barefoot's opinion on causation is based upon a mere temporal relationship between her work and the onset of her symptoms, and is not in conformity with the AMA Guides. It argues Dr. Barefoot's opinion is not sufficiently reliable to meet the admissibility requirements of Daubert v. Merrell Dow Pharm, Inc., 509 U.S. 579 (1993), and KRE 702.

Generally, causation is a factual question to be determined within the sound discretion of the ALJ, and the ALJ, as fact-finder, is vested with broad authority to decide such matters. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003); Union Underwear Co. v. Scarce, 896 S.W.2d 7 (Ky. 1995); Hudson v. Owens, 439 S.W. 2d 565 (Ky. 1969).

An ALJ is vested with the authority to infer work-related causation based upon a claimant's testimony as to work history and/or the history of a work-related event when coupled with a medical diagnosis. Dupree v. Kentucky Department of Mines and Minerals, 835 S.W.2d 887 (Ky. 1992).

Here, Flores' initial diagnosis at Occupational Physicians Services was overuse syndrome. The only evidence of any repetitive use of the upper extremities is Flores' testimony regarding her work activities. She denied any prior problems or injuries, and no history of prior medical treatment was introduced. There was no symptomatology until an increase in her typing and data entry activities at work. Especially in the absence of any prior symptoms or any alternate explanation for the repetitive trauma condition, the record contained sufficient evidence for the ALJ to reasonably conclude that repetitive activity at work is the cause of her symptoms. The fact that Dr. Burgess disagrees with Dr. Barefoot's opinion as to the cause of Flores' condition merely represents a conflicting medical opinion which the ALJ, as fact-finder, was free to reject. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000).

The ALJ's finding as to causation was not based solely on the temporal relationship between the work activities and Flores' symptoms. The nerve conduction studies and examination provided objective proof to support a finding of cumulative trauma injuries to the upper extremities. The AMA Guides defines impairment as being a "loss, loss of use, or derangement of any body part, organ system or organ function." The conflicting evidence permitted the ALJ to find Flores sustained permanent impairment pursuant to the AMA Guides' definition of impairment, even though that impairment did not rise to a ratable condition. Hence, we find no error.

We find PMR's assertion that pursuant to KRE 702, Dr. Barefoot is not competent to testify on the issue of causation to be without merit. On appeal, for the first time, PMR attempts to raise a challenge pursuant to Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579 (1993), wherein the United States Supreme Court held that the trial judge must ensure that all scientific testimony or evidence admitted is not only relevant, but reliable. The requirements of Daubert are applicable in workers' compensation proceedings. City of Owensboro v. Adams, 136 S.w.3d 446 (Ky. 2004).

In the case *sub judice*, no such challenge was made to Dr. Barefoot's testimony during the proceedings before the ALJ. Thus, PMR is precluded from challenging Dr. Barefoot's opinions and the admissibility of his report on this ground. Significantly, PMR failed to raise any Daubert objection prior to submission of this case for a decision, nor did it raise the issue at the benefit review conference conducted by the ALJ during which the ALJ identified all of the contested issues which he confirmed again during the final hearing. As a result, Flores was not afforded an opportunity to present evidence on the reliability of Dr. Barefoot's report under the Daubert standard. Accordingly, PMR waived any objection to admission of the report. See 803 KAR 25:010 Section 13(14)("Only contested issues shall be the subject of further proceedings.").

Accordingly, the April 20, 2015 Opinion, Order and Award and the May 28, 2015 Order on Reconsideration rendered by Hon. Udell B. Levy, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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