

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 8, 2013

CLAIM NO. 200691520

GAYLE J. JACKSON

PETITIONER

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

COPPAGE CONSTRUCTION CO., INC.
and HON. OTTO DANIEL WOLFF, IV
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

RECHTER, Member. Petitioner Gayle Jackson ("Jackson") appeals from the July 17, 2012 Opinion and Order entered by Hon. Otto D. Wolff, Administrative Law Judge ("ALJ"), denying her motion to reopen and granting Respondent's medical fee dispute. Jackson's petition for reconsideration was also denied by order dated August 23, 2012. For the reasons set forth herein, we affirm.

Jackson was an employee of Respondent Coppage Construction Co., Inc. ("Coppage") on March 27, 2006 when she was injured while operating a compactor. The machinery hit a piece of rock and suddenly jerked, throwing Jackson against a metal window bar. Her right arm bore the brunt of this impact. She was diagnosed with chronic right arm and hand pain syndrome, and chronic right wrist pain syndrome. Jackson and Coppage settled the ensuing claim, based on a 3% whole person impairment rating. The calculation contained no multipliers, and Jackson specifically agreed to waive her right to reopen for application of the multipliers. Jackson did not waive her right to future medical benefits. The settlement agreement was approved by Hon. Joseph Justice, Administrative Law Judge ("ALJ") on October 29, 2009. About seven months later, on June 9, 2009, Jackson moved to reopen for worsening of her condition. Having satisfied her *prima facie* burden, Jackson's case was assigned to ALJ Wolff for further adjudication.

The ALJ considered Jackson's motion to reopen, and ultimately concluded that she failed to establish her condition had deteriorated since the settlement, the worsening is permanent, or she is permanently and totally disabled. On appeal, Jackson argues the ALJ's conclusions

are clearly erroneous. A brief summary of the pertinent evidence is necessary for consideration of this argument.

In support of her motion to reopen, Jackson presented the report of Dr. James Lutz, who conducted an independent medical evaluation ("IME") on June 28, 2010. Dr. Lutz diagnosed Jackson with a contusion of her upper right arm and reflex sympathetic dystrophy ("RSD"). Categorizing her RSD as severe, Dr. Lutz equated Jackson's condition to an amputated right arm. He concluded she had reached "maximum medical improvement with devastating results" and assigned a 45% whole person impairment pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides").

Jackson was deposed on August 31, 2010, and described the condition of her right arm at that time. Jackson complained of "knots" on her right forearm, muscle spasms, redness in her forearm, tingling in her fingers, occasional numbness and swelling of the arm, and pain with movement. When asked how her condition had changed since the settlement of her claim, Jackson replied she previously had only experienced constant pain to her elbow. Now, the pain "moved up" to her shoulder and neck area. She was unable to specifically recall if she had experienced spasms in 2009.

Dr. Janalee Rissover treated Jackson both before and after her October 29, 2009 settlement. Dr. Rissover's notes following a June 5, 2009 examination indicate Jackson experienced spasms, knots, swelling, throbbing, tingling and pain which "occasionally shoots into the shoulder." At a March 19, 2010 visit with Dr. Rissover, Jackson complained of increased swelling and decreased range of motion in her wrist. By August 19, 2011, however, Dr. Rissover's records indicate an improvement in Jackson's condition. Dr. Rissover noted, "Certainly, her arm is looking better than it used to, when I first saw her in 2009."

Finally, Jackson submitted an IME report dated August 28, 2010 by Dr. Robert Shadel. Dr. Shadel concluded Jackson was totally disabled at the time of examination, but declined to opine whether the disability was permanent "[because] RSD is known to be treatable, is known to improve over time, and might in the future improve to the point where she regains sufficient function to again operate heavy equipment."

Coppage submitted an IME report by Dr. Michael Rozen, an orthopaedic surgeon who reviewed Jackson's medical records from the time of her 2006 injury through October 11, 2010. Dr. Rozen disagreed with the diagnosis of RSD, finding no objective criteria to support this conclusion.

He opined Jackson's 2006 accident resulted only in soft tissue contusions which had resolved well before his 2010 evaluation. He found no permanent functional impairment, and concluded Jackson had reached maximum medical improvement ("MMI").

Coppage also presented an IME report by Dr. Joseph Zerga, a neurologist. Dr. Zerga agreed with Dr. Rozen there were no objective findings to support a specific diagnosis. He also agreed Jackson had reached MMI, and assessed a 3% whole person impairment attributable to the 2006 injury. Dr. Zerga challenged Dr. Lutz's assessment as based solely on Jackson's subjective complaints and not on objective findings or clinical results. In a supplemental report apparently elicited in response to Dr. Rissover's diagnosis of complex regional pain syndrome, Dr. Zerga more specifically concluded Jackson "does not come close to a diagnosis of complex regional pain syndrome."

Finally, Coppage entered an opinion letter co-signed by Drs. Christopher Brigham and Craig Uejo dated January 17, 2012. Upon review of Jackson's medical records through January 17, 2012, they noted a lack of objective evidence or clinical findings to support any impairment rating or even a diagnosis. They assigned a zero percent impairment rating.

We now turn to Jackson's present appeal. In arguing that she is now totally and permanently occupationally disabled, Jackson bore the burden of establishing three factors to warrant a reopening of her claim: (1) she sustained a post-settlement worsening of disability from the injury; (2) the worsening is permanent; and (3) the permanent worsening caused her to become totally and permanently disabled. Coldwell v. Dresser Instrument Div., 217 S.W.3d 213, 219 (Ky. 2006). The change in disability must be demonstrated by objective medical evidence. KRS 342.125(1)(d).

Kentucky law holds when the party with the burden of proof before the ALJ was unsuccessful, the sole issue on appeal is whether the evidence compels a different conclusion. 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). As long as any evidence of substance supports the ALJ's opinion, it cannot be said the evidence compels a different result. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ's conclusions in this matter are supported by substantial evidence. As the ALJ noted,

Jackson's contention her condition has worsened is based largely upon her own description of symptoms. "A patient's complaints of symptoms clearly are not objective medical findings as the term is defined by KRS 342.0011(33)." Gibbs v. Premier Scale Co., 50 S.W.3d 754 (Ky. 2001). Both Dr. Rozen and Dr. Zerga specifically noted an absence of any objective medical evidence to support even a specific diagnosis, let alone a worsening of condition. These physicians also agreed any condition is not permanent, an opinion shared by Jackson's own expert, Dr. Shadel. The ALJ also noted a nearly complete lack of proof that Jackson is unable to perform any type of work. Again, Drs. Rozen and Zerga strongly dispute this suggestion, stating Jackson is, in fact, physically able to return to heavy machine operation.

In short, it is apparent Jackson's experts were unable to provide any clinical examinations to support the contention her condition had worsened. Moreover, Coppage presented convincing expert medical opinion in rebuttal. Upon consideration of the complete record, it cannot be said the evidence compelled a different result.

Jackson also argues the ALJ improperly granted Coppage's medical fee dispute. In that dispute, Coppage contested prescriptions of Elavil, Norco, Amitriptyline and

sympathetic blocks. It relied on the opinion of Dr. Zerga, who found no objective findings to support a specific diagnosis. In light of this opinion, Coppage argued, no reason existed to prescribe medication. We also note Dr. Rissover, who originally prescribed these medications, was no longer treating Jackson by the time the ALJ rendered his decision. The ALJ's decision rested on this substantial evidence and, therefore, will not be disturbed.

Accordingly, the July 17, 2012 Opinion and Order rendered by Hon. Otto Daniel Wolff, IV, Administrative Law Judge and the August 23, 2012 Order on Reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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