

OPINION ENTERED: January 25, 2013

CLAIM NO. 201076929

JEAN ABELL ROBERTS¹

PETITIONER

VS.

**APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE**

LOUISVILLE COUNTY METRO GOVERNMENT
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING IN PART,
VACATING IN PART, AND REMANDING**

* * * * *

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

¹As the opinion and notice of appeal refer to the claimant as Jean Abell Roberts, we have styled this opinion in conformity with the ALJ's opinion and award and the notice of appeal. However, because the Form 101 and the claimant's deposition and hearing testimony establish her legal last name is Abell, we will refer to the claimant as Abell in the body of this opinion. At the hearing, Abell testified her last name is Abell, she is married, and her husband's last name is Roberts; however, she had not changed her last name to Roberts. Thus, her legal name is Jean Abell.

STIVERS, Member. Jean Abell ("Abell") appeals the July 19, 2012, opinion and award of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") in which the ALJ awarded temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Abell filed a petition for reconsideration which was overruled in part and sustained in part by order dated August 21, 2012, from which she also appeals.

The Form 101 indicates Abell injured her cervical spine on September 2, 2010, while working for Louisville County Metro Government ("Louisville"). Her injury occurred in the following manner:

Plaintiff suffered [a] work-related injury when she lifted a basket of file folders causing injury to her Neck [sic] a harmful change evidenced by objective medical evidence resulting in permanent impairment by [sic] the 5th Edition AMA Guides.

The May 15, 2012, benefit review conference ("BRC") order lists the following contested issues: "benefits per KRS 342.730; average weekly wage; unpaid or contested medical expenses; credit for unemployment; TTD."

On appeal, Abell asserts several errors. First, Abell asserts the ALJ erred by apportioning an impairment to a pre-existing cervical spine condition. Second, she asserts the evidence compels a finding of an 18% whole

person impairment. Third, Abell asserts the evidence does not support the ALJ's finding she retains the physical capacity to return to the type of work she was performing at the time of her injury. Fourth, she asserts the ALJ erred by denying a referral to a rehabilitation specialist. Finally, Abell asserts the ALJ erred by denying her additional TTD benefits.

Regarding the first argument on appeal, Abell asserts neither Dr. Martin Schiller nor Dr. Banerjee opined her pre-existing cervical spine condition was both symptomatic and impairment ratable; thus, the record does not contain substantial evidence in support of apportionment for a pre-existing cervical spine condition.

In the July 19, 2012, opinion and award, in determining Abell had a pre-existing active condition, the ALJ relied upon Dr. Schiller's impairment rating and apportionment for a pre-existing cervical spine condition.

The ALJ stated as follows:

With respect to the impairment rating of the Plaintiff, the ALJ finds the opinion of Dr. Schiller to be thorough and persuasive. Dr. Schiller most recently examined the Plaintiff and essentially concurs with Dr. Guarnaschelli who assessed the Plaintiff at 15% to 18% whole person impairment. Dr. Schiller stated that he assigned the minimum rating in that range because of a lack of clinically

significant radiculopathy. Dr. Schiller apportioned 4% of the 15% impairment to a pre-existing condition leaving the Plaintiff with an 11% whole person impairment. Dr. Schiller referenced Table 15-7-II B in determining that the Plaintiff had a 4% functional impairment rating prior to the injury. This thorough and well-reasoned opinion has persuaded the ALJ. The Plaintiff's whole person impairment is therefore found to be 11%.

While Kentucky law holds the arousal of a pre-existing dormant condition into disabling reality by a work injury is compensable, an employer is not responsible for a pre-existing active condition present at the time of the alleged work-related event. McNutt Construction/First General Services v. Scott, 40 S.W.3d 854 (Ky. 2001). The correct standard regarding a carve-out for a pre-existing active condition is set forth in Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). In Finley v. DBM Technologies, supra, the Court instructed in order for a pre-existing condition to be characterized as active, it must be both symptomatic and impairment ratable pursuant to the AMA Guides immediately prior to the occurrence of the work-related injury. The burden of proving the existence of a pre-existing active condition is on the employer. Finley v. DBM Technologies, supra.

As Louisville was the party with the burden of proof and was successful before the ALJ, the sole issue in this appeal is whether substantial evidence supports the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Substantial evidence has been defined as some evidence of substance and relevant consequence, having the fitness to induce conviction in the minds of reasonable people. Smyzer v. B.F. Goodrich Chemical Co., 474 S.W. 2d 367, 369 (Ky. 1971). This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Kentucky Utilities Co. v. Hammons, 145 S.W. 2d 67, 71 (Ky. 1940). Although the opposing party may note evidence that would have supported a conclusion that is contrary to the ALJ's decision, such evidence is not an adequate basis for reversal on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974).

Dr. Schiller's independent medical examination ("IME") report dated April 12, 2012, was introduced by Louisville. Dr. Schiller opined Abell had pre-existing degenerative changes in the cervical spine and assessed a 4% impairment rating for the pre-existing cervical spine condition. He further opined the 4% for the pre-existing condition should be subtracted from the 15% impairment rating he assessed. However, Dr. Schiller clearly indicated

Abell's pre-existing cervical spine condition was "asymptomatic."

Dr. Schiller's opinions regarding Abell's pre-existing cervical spine condition only partially meet the requirements set forth in Finley v. DBM Technologies, supra, as Dr. Schiller assessed an impairment rating for Abell's pre-existing cervical spine condition but opined the pre-existing condition was *asymptomatic*. Thus, Dr. Schiller's opinions, standing alone, do not comprise substantial evidence in support of the ALJ's carve out for a pre-existing cervical spine condition. This issue was thoroughly addressed in Abell's petition for reconsideration which was overruled by the August 21, 2012, order. As the ALJ clearly stated in the July 19, 2012, opinion and award that he relied upon Dr. Schiller's opinions in order to apportion 4% of the impairment to a pre-existing cervical spine condition, we vacate that portion of the opinion and award carving out a 4% impairment for a pre-existing condition and remand for further findings consistent with the mandates of Finley v. DBM Technologies, supra. On remand, the ALJ shall support the carve out of a 4% pre-existing active impairment by citing medical evidence in the record that addresses Abell's alleged pre-existing active cervical spine

condition being symptomatic at the time of the September 2, 2010, injury. If such medical proof does not exist, the carve out for a pre-existing active condition is not supported by substantial evidence and not appropriate.

Abell's second argument on appeal is that the evidence "compels" an 18% impairment rating for her cervical spine condition. Abell asserts Drs. Banerjee and John Guarnaschelli agree on an 18% impairment rating for her cervical spine condition. Abell further asserts Dr. Schiller, the physician upon which the ALJ relied for an 11% impairment rating, informed her to "'guess' as to whether he was using the sharp or dull side of the instrument to determine her sensation." Additionally, Dr. Schiller recommended Abell continue to use Neurontin "which is prescribed to treat nerve pain and the symptoms of radiculopathy." Thus, as argued by Abell, Dr. Schiller's opinions regarding Abell having normal sensation and no clinically significant radiculopathy cannot constitute substantial evidence.

Dr. Schiller's April 12, 2012, IME report specifies he examined Abell and assessed a 15% whole person impairment rating from which he subtracted 4% for the alleged pre-existing cervical spine condition for a total impairment of 11%. This alone comprises substantial

evidence in support of the ALJ's reliance on Dr. Schiller's impairment rating. The allegations raised on appeal regarding Dr. Schiller's examination, methodology, and agreement with the use of Neurontin are issues that go to the weight to be assigned Dr. Schiller's testimony which is a question solely to be decided by the ALJ in his role as fact-finder. See Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). These issues do not affect the admissibility of Dr. Schiller's report. The ALJ is certainly under no obligation to second-guess Dr. Schiller's examination methodology, diagnoses, and recommendations regarding medication merely because they differ from other medical opinions in the record. The ALJ has the authority to pick and choose from among differing medical opinions. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149 (Ky. App. 2006). Thus, the ALJ's reliance upon Dr. Schiller shall remain undisturbed.

That said, as stated earlier herein, Dr. Schiller's opinions do not constitute substantial evidence in support of the ALJ's determination of a 4% impairment for a pre-existing condition, and the carve out for a 4% pre-existing impairment is vacated. The ALJ's determination the work injury resulted in an 11% impairment which was derived from Dr. Schiller's April 12, 2012, IME report and

the award of PPD benefits based on the impairment must also be vacated. On remand, regarding the presence of a pre-existing active impairment, in the event the ALJ cannot identify proof in the record indicating Abell's pre-existing condition was symptomatic at the time of the September 2, 2010, injury, and the ALJ still desires to rely upon Dr. Schiller's opinions regarding an impairment rating, he must adopt the 15% impairment rating in calculating the award.

Abell's third argument on appeal is the evidence compels a finding she does not retain the physical capacity to return to the type of work she was performing at the time of the injury. The ALJ determined as follows in the July 19, 2012, opinion and award:

After reviewing the Plaintiff's job description, Dr. Schiller further opined that the Plaintiff should be able to do the work even with the restrictions imposed by Dr. Guarnaschelli. The ALJ therefore finds that the Plaintiff retains the ability to perform the type of work being done at the time of her injury.

A review of Dr. Schiller's April 12, 2012, IME report does not reveal language consistent with the ALJ's finding. While the ALJ concluded Dr. Schiller's opinions indicate Abell "should be able to do the work even with the restrictions imposed by Dr. Guarnaschelli," we are unable

to locate such language anywhere in Dr. Schiller's report.

In his report, Dr. Schiller states as follows:

I have read Ms. Abell's job description. She feels that she could do a job that would allow her to work without raising her left arm over her head and without repetitive motion of the left arm and without lifting greater than 20 to 25 pounds. I think that it would be reasonable to follow Dr. Guarnaschelli's (the treating doctor's) recommendation, and that these restrictions be followed.

This language is not consistent with the ALJ's conclusion. Thus, we vacate the ALJ's finding Dr. Schiller opined Abell retains the ability to perform the type of work being done at the time of her injury and remand for additional findings of fact. On remand, should the ALJ choose to rely on Dr. Schiller in determining Abell retains the capacity to perform the same type of work she performed at the time of the injury, he must cite to specific and definitive language within Dr. Schiller's report that supports this conclusion.

Abell's fourth argument on appeal is the ALJ erred by relying on Dr. Peter Kirsch to deny a referral to a rehabilitation specialist. Abell asserts Dr. Kirsch should not be relied upon as he performed only a medical records review. Relative to this issue, the ALJ determined as follows in the July 19, 2012, opinion and award:

The Defendant argues that the recommendation and referral by Dr. Guarnaschelli for physical medicine and rehabilitation is not reasonable and necessary. This argument is supported by the utilization review denial by Dr. Kirsch dated October 27, 2011 which concluded that while the Plaintiff may benefit from the referral, but that it is not clear that the benefit would be due to the results of the work injury. This opinion is consistent with other evidence in the record indicating that the Plaintiff's weight and pre-existing arthritis are significant health barriers for her that are unrelated to the work injury. This is likewise the case with the sleep study that concluded that the Plaintiff suffers from significant sleep apnea. It was adequately demonstrated that the Plaintiff's sleep apnea has no relation to the work injury as concluded in the utilization review conducted by Dr. Olash. The ALJ therefore finds that the sleep study is not compensable and that the denial of the referral to physical medicine and rehabilitation was proper.

Dr. Guarneschelli's medical records dated May 31, 2011, and August 24, 2011, indicate his recommendations for referral to a rehabilitation specialist. However, Dr. Kirsch's Utilization Review, Notice of Denial, dated October 27, 2011, reflects he did not recommend acceptance of Dr. Guarneschelli's referral to a rehabilitation specialist by stating as follows: "I fail to find adequate indications to support the above request based on the objective criteria for the injury suffered." A review of

this document reveals Dr. Kirsch personally signed the last page of the document. This comprises substantial evidence in support of the ALJ's denial of a rehabilitation specialist. See Special Fund v. Francis, supra. The fact Dr. Kirsch performed a records review and not an examination, goes to the weight to be assigned his opinion which is a question solely to be decided by the ALJ in his role as fact-finder. See Luttrell v. Cardinal Aluminum Co., supra. This fact does not affect the reports admissibility.

Abell's final argument is the ALJ's denial of additional TTD benefits based upon the opinions of Drs. Banerjee and Guarnaschelli was erroneous. Concerning the issue of entitlement to TTD benefits, the ALJ stated as follows:

15. Temporary total disability is defined in KRS 342.0011(11)(a) as the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement which would permit a return to employment.

16. Both Dr. Guarnaschelli and Dr. Banerjee recommended that the Plaintiff gradually return to work following her recovery from surgery. Dr. Guarnaschelli released the Plaintiff to work within her restrictions on July 13, 2011. Likewise Dr. Banerjee placed the Plaintiff at MMI on July 15, 2011. These concurring opinions regarding the

Plaintiff's ability to return to work constitute the most convincing evidence on the point and it has convinced the ALJ. The ALJ therefore finds that the Plaintiff is not entitled to additional TTD. It is also noted as it is undisputed that the Plaintiff began receiving unemployment compensation benefits in the weekly amount of \$322.00 following her termination from the employ of the Defendant. The Defendant is not entitled to any credit against the TTD paid pursuant to KRS 342.730(5) as the unemployment benefits began at a later date.

KRS 342.0011(11)(a) defines temporary total disability as follows:

'Temporary total disability' means the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment.

The above definition has been determined by our courts of justice to be a codification of the principles originally espoused in W.L. Harper Construction Company v. Baker, 858 S.W.2d 202 (Ky. App. 1993), wherein the Court of Appeals stated generally:

TTD is payable until the medical evidence establishes the recovery process, including any treatment reasonably rendered in an effort to improve the claimant's condition, is over, or the underlying condition has stabilized such that the claimant is capable of returning to his job, or some other employment, of which he is

capable, which is available in the local labor market. Moreover, . . . the question presented is one of fact no matter how TTD is defined.

W.L. Harper Construction Company v. Baker at 205.

In Central Kentucky Steel v. Wise, 19 S.W.3d 657 (Ky. 2000), the Kentucky Supreme Court further explained that “[i]t would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.” Central Kentucky Steel v. Wise at 659. In other words, where a claimant has not reached maximum medical improvement (“MMI”), TTD benefits are payable until such time as the claimant’s level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event.

More recently, in Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to a continuation of TTD benefits so long as he remains disabled from his customary work or the work he was performing at the time of the injury. The court in Magellan Behavioral Health v. Helms, supra, stated:

In order to be entitled to temporary total disability benefits, the claimant

must not have reached maximum medical improvement **and** not have improved enough to return to work.

. . . .

The second prong of KRS 342.0011(11)(a) operates to deny eligibility to TTD to individuals who, though not at maximum medical improvement, have improved enough following an injury that they can return to work despite not yet being fully recovered. In Central Kentucky Steel v. Wise, [footnote omitted] the statutory phrase 'return to employment' was interpreted to mean a return to the type of work which is customary for the injured employee or that which the employee had been performing prior to being injured.

Id. at 580-581.

In Double L Const., Inc. v. Mitchell, 182 S.W.3d 509, 513-514 (Ky. 2005), with regard to the standard for awarding TTD, the Supreme Court elaborated as follows:

As defined by KRS 342.0011(11)(a), there are two requirements for TTD: 1.) that the worker must not have reached MMI; and 2.) that the worker must not have reached a level of improvement that would permit a return to employment. See Magellan Behavioral Health v. Helms, 140 S.W.3d 579, 581 (Ky.App. 2004). In the present case, the employer has made an 'all or nothing' argument that is based entirely on the second requirement. Yet, implicit in the Central Kentucky Steel v. Wise, supra, decision is that, unlike the definition of permanent total disability, the definition of TTD does not require a temporary inability

to perform 'any type of work.' See KRS 342.0011(11)(c).

. . . .

Central Kentucky Steel v. Wise, supra, stands for the principle that if a worker has not reached MMI, a release to perform minimal work rather than 'the type that is customary or that he was performing at the time of his injury' does not constitute 'a level of improvement that would permit a return to employment' for the purposes of KRS 342.0011(11)(a). 19 S.W.3d at 659.

In Dr. Banerjee's May 13, 2011, report, he stated as follows regarding an MMI date: "I think we should consider her MMI 6 months from the time of the operation and that should be about July 15, 2011." Also in the record is Dr. Guarnaschelli's July 13, 2011, report in which he opined as follows regarding Abell's return to work:

At this point she has outlined to me, per her discussions with her attorney, Ms. Cotton, a return to work schedule in which she returns to work on a half-time basis for several weeks and then pending that, 4 hours per day, then 6 hours per day and then a return to 8 hours per day. This certainly sounds to be a reasonable approach for her return to work and would really be preferable to that of a total full-time work return immediately.

Abell's assertion Dr. Guarnaschelli recommended a "gradual return to work" is irrelevant in light of Dr. Banerjee's opinion regarding MMI. Once Abell has reached

MMI, TTD benefits must cease. When a claimant has not reached MMI, only then is the type of work the claimant is released to perform- i.e. minimal work vs. customary work- scrutinized. See Central Kentucky Steel v. Wise, supra. Dr. Banerjee's opinion regarding MMI constitutes substantial evidence, and the ALJ is entitled to rely upon this opinion in determining the extent of TTD benefits to be awarded. Thus, the award of TTD benefits is supported by substantial evidence and shall not be disturbed.

Accordingly, those portions of the July 19, 2012, opinion and award and the August 21, 2012, order ruling on the petition for reconsideration determining Abell is not entitled to a referral to a rehabilitation specialist and additional TTD benefits are **AFFIRMED**. However, those portions of the July 19, 2012, opinion and award and the August 21, 2012, order ruling on the petition for reconsideration regarding the ALJ's determination Abell has a pre-existing active impairment of 4%, the injury resulted in an 11% impairment and the award of PPD benefits based on an 11% impairment, and Abell's PPD benefits are not to be enhanced pursuant to KRS 342.730(1)(3)(c) are **VACATED** and this matter is **REMANDED** to the ALJ for entry of an amended opinion and award in accordance with the views expressed herein.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON ELIZABETH A SCHOTT
429 W MUHAMMAD ALI BLVD #1102
LOUISVILLE KY 40202

COUNSEL FOR RESPONDENT:

HON DENIS KLINE
333 GUTHRIE GREEN #203
LOUISVILLE KY 40202

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY
SPINDLETOP OFFICE COMPLEX
2780 RESEARCH PARK DR
LEXINGTONKY 40511