Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 2, 2014

CLAIM NO. 201175788

JEAN ANN SLAUGHTER PETITIONER

VS. **APPEAL FROM HON. EDWARD D. HAYS, ADMINISTRATIVE LAW JUDGE**

SUBWAY
and HON. EDWARD D. HAYS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Jean Ann Slaughter ("Slaughter") seeks review of the September 30, 2013, opinion, award, and order of Hon. Edward D. Hays, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits and medical benefits for approximately one week but dismissing her claim for permanent partial disability ("PPD") benefits and future medical benefits against Subway. Slaughter also

appeals from the December 13, 2013, order overruling her petition for reconsideration.

There is no dispute Slaughter, the manager of Subway at Grayson, Kentucky, fell injuring her ankle on August 29, 2011, while working at Subway. At her January 21, 2013, deposition, Slaughter described how the injury occurred and its immediate effects:

> A: When they got a Coke order in at Subway and I went back to pick the – put the Coke order up. And when the Coke comes in, it comes in the big cases, 24 cases. And I had put a couple of them up. And I swung around and got another one, swung around to stack it, turned around to stack it, and my foot just went plumb to the side.
>
> Q: Okay. And I think you said 24 cases. But you meant like 24 –
>
> A: Twenty-four.
>
> Q: -- in a case?
>
> A: Yes. Sorry.
>
> Q: Okay. And it is 24 cans or 24 bottles?
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> A: Bottles.
>
> Q: All right. And you said as you swung around your ankle –
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> A: As I turned around, the ankle went plumb to the right, to the floor.
>
> Q: Okay. So it turned outwardly?
>
> A: Yes.

> Q: Okay. Well, I guess it turned inwardly and it –
>
> A: Outwardly.
>
> Q: Yes, okay.
>
> A: Yeah.
>
> Q: Did you fall?
>
> A: No.
>
> Q: What happened next?
>
> A: I – I kindly tried to – it took me down a little bit, made me sick at my – kind of sick at my stomach. And one of the girls that was working with me come back there. And she, you know, asked what was wrong and I told her. And they finally got me to sit down. And then I went down to the – to the clinic on the right, right below Subway.
>
> Q: Okay. Now, when your ankle injury happened, did you feel a pop or anything?
>
> A: No.
>
> Q: Okay. And where was your pain located?
>
> A: In the right ankle.

Slaughter also experienced some numbness on the top of her foot and the right side of her ankle. That same day she went to Grayson Urgent Care which was very near the Subway store. Grayson Urgent Care wrapped her ankle and provided her with crutches and medication.[1] Slaughter was taken off

[1] Slaughter could not identify the medication.

work for one week. She followed up with her family physician whom she saw twice in September. She took no pain medication when she returned to work.

Slaughter testified she worked the rest of the year and did not seek treatment of her ankle until she returned to Grayson Urgent Care on April 25, 2012. At that time she complained of swelling in both ankles.[2] In April, when she was seen at Grayson Urgent Care she was referred to Dr. Charles Gilliland, who put her foot in a brace for approximately two months and ordered physical therapy and an MRI. When her problems worsened she was referred to Dr. Kevin Kulwicki. Dr. Kulwicki referred her to Dr. Chris Woods in Huntington, West Virginia, who referred her to Dr. Kevin Brown, at the Scott Orthopedic Center. Slaughter was first seen by Dr. Brown on October 22, 2012. After reviewing the MRI, Dr. Brown recommended and performed surgery on October 30, 2012. Dr. Brown's October 30, 2012, operative note reveals Slaughter sustained a peroneal tendon rupture of the right ankle. Surgery consisted of "open repair of peroneal tendon rupture, right ankle with flexor tendon transfer."

[2] There appears to be no dispute that Slaughter did not work from January 2012 until April or May 2012 because of back problems unrelated to her work.

Since the surgery, Slaughter has continued to have significant problems with pain and swelling in the right ankle to the extent she does not believe she can return to her previous work at Subway. During recovery, Slaughter developed blood clots in her leg and both lungs. She was ultimately treated for these problems at St. Joseph Hospital in Lexington, Kentucky.

Slaughter denied telling Dr. Gilliland she stepped in a hole at her home injuring her ankle. She denied providing a history to Grayson Physical Therapy that she sprained her ankle a year ago but recently turned, twisted, and the ankle gave way. Slaughter also denied that she provided a history to Grayson Physical Therapy that she went to Grayson Urgent Care and had an x-ray which was negative, and then after a week it was fine. Similarly, she denied stating her ankle recently began to swell after long shifts at work.

In the September 30, 2013, opinion, award, and order, after summarizing the lay and medical testimony, the ALJ entered the following analysis, findings of fact, and conclusions of law:

> Based on a review of the record of this claim, including the summary and discussion of the evidence as set forth hereinabove, the ALJ does hereby make

the following findings of fact and conclusions of law.

First, the stipulations made and entered into by and between the parties at the Benefit Review Conference on August 1, 2013, and as set forth on page 2 above, are approved and incorporated herein by reference as findings of fact.

The Plaintiff has the burden of proof and bears the risk of non-persuasion as to every essential element of her claim. The question presented in this case is whether the traumatic event of August 29, 2011, produced or caused the tearing of the peroneal tendons that were surgically repaired by Dr. Kevin Brown. The Plaintiff was treated three times within a week of the August 29, 2011, work injury to her right ankle. She then returned to work and sought no treatment for her ankle for a period of nine to ten months. The condition ultimately treated by Dr. Brown was of such a serious nature that Plaintiff could not possibly have performed her work duties and continued to remain on her feet during a nine-month period of time without having severe pain, weakness, and instability. The histories that support Plaintiff's claim were provided by the Claimant. The ALJ is certainly aware that Dr. Gilliland changed his records, but the ALJ is not convinced that the initial history was not the correct one. In any event, the ALJ is simply not persuaded that the August 29, 2011, incident resulted in the severe conditions for which Plaintiff was treated approximately a year later with surgery.

The ALJ does find that a work-related temporary injury occurred on

> August 29, 2011. The Plaintiff was paid temporary total disability benefits for a very short period of time (either one week or less) and a few medical bills were paid. The evidence by the Claimant's own admission was that, "After a week it was fine." The ALJ finds that Plaintiff sustained nothing more than a simple sprain of her right ankle and that it healed within a week, allowing her to return to her regular fulltime employment with Subway. She then continued to work for nine to ten months without incident. Plaintiff's injury was temporary in nature and she returned to baseline status one week after the injury occurred. She has already been compensated for the benefits to which she would be entitled.

The ALJ entered the following order:

> Based on the foregoing findings of fact and conclusions of law, it is hereby **ORDERED** that the Plaintiff's claim be and it hereby is **DISMISSED**. The Plaintiff has recovered for the one week of time lost from work and the medical treatment she received on three occasions within a period of a week following the work incident of August 29, 2011. The Defendant-Employer and/or its Workers' Compensation Insurance carrier shall have no further financial responsibility for the injury sustained by the Plaintiff on August 29, 2011.

Slaughter filed a petition for reconsideration requesting the ALJ identify the testimony he relied upon in stating she testified "after a week it was fine." In addition, Slaughter requested the ALJ identify the evidence he relied upon in finding she returned to work and sought

no treatment for her ankle for a period of nine to ten months. Slaughter represented she worked until December 31, 2011, and was off work until May 2012 and during this time she treated with various physicians. She asserted following her return to work her symptoms worsened and she saw Dr. Kulwicki who referred her to Dr. Brown who performed surgery. She insisted the medical records prove she had continued medical treatment since her accident. Slaughter argued the ALJ erred in not accepting Dr. Gilliland's corrected medical records.[3] Slaughter asserted no other evidence supports the incorrect history.

Finally, Slaughter requested the ALJ to provide the doctors he relied upon in finding she did not sustain a permanent injury. She contended this is an essential

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[3] On May 24, 2013, Slaughter filed a record from Dr. Gilliland dated January 14, 2013, stating the document was an addendum to his previous record and due to the constraints of his electronic medical record, he was unable to make the change directly to his previous note. Dr. Gilliland stated as follows:

> Upon entry into the record, I erroneously entered that the patient received her initial injuries at home while in fact her injuries were sustained while in a work related environment. This error was carried over into the next follow up note where she was referred for failure to respond to conservative treatment.
>
> Should there be any questions regarding this, please contact me for further details.

finding as the ALJ "cannot insert his own medical opinions."

In overruling the petition for reconsideration, the ALJ stated as follows:

> This claim is before the Administrative Law Judge on the Plaintiff's Petition for Reconsideration of Opinion, Award and Order (the Opinion) rendered by the undersigned Administrative Law Judge on September 30, 2013. The Plaintiff's petition requests specific additional findings of fact and requests the Administrative Law Judge to identify the specific evidence on which the Administrative Law Judge relied in making certain findings of fact.
>
> (1) The Plaintiff requested the ALJ to identify the evidence on which the ALJ found Claimant to have acknowledged "after a week it was fine." The Grayson Physical Therapy records dated July 20, 2012, state under the topic of "History of Present Condition/Mechanism of Injury" the following: "pt reports she sprained her ankle a year ago and recently. She turned, twisted and it gave way. She reported the pain to be immediately. She then left the urgent care and had an x-ray which was negative. <u>After a week it was fine</u>, however recently it has begun swelling after long shifts at work" (emphasis added).
>
> (2) Defendant requested the ALJ to identify the specific evidence on which the ALJ relied in stating on page 10 that the Plaintiff had returned to work and sought no treatment for her ankle for a period of 9-10 months. On page 29 on the transcript of hearing dated

August 1, 2013, the Claimant acknowledged she sought no treatment relative to her ankle between September 6, 2011, and at least April 25, 2012. This would be a period of about 7 ½ months. When the Plaintiff did seek treatment in April of 2011, she complained of bilateral ankle swelling, not the specific injury which she had sustained to her right ankle (Formal Hearing, page 29, Dr. Jenkinson, page 5-6). Further, Dr. Jenkinson's records indicate there was no record of complaints relative to the ankle for "approximately 9 months." The notes of Dr. Peter Kirsch, who did a peer review on October 1, 2012, noted Plaintiff had no treatment on her right ankle September 6, 2011 through June 29, 2012.

(3) The Plaintiff complains it was error for the ALJ to reject Dr. Gilliland's corrective medical records. The ALJ has the authority to accept all evidence from a physician or to accept a portion of a physician's testimony or evidence, while rejecting other portions. The ALJ is not required to accept all of a particular witness's testimony or evidence. The ALJ considered the circumstances under which the "correction" to Dr. Gilliland's records was made and finds the original record to have more credibility.

(4) The Plaintiff requested the ALJ identify the physicians on whom he relied in finding that Plaintiff did not sustain a permanent injury. First, the ALJ would note that it is the Plaintiff's burden to prove every essential element of his claim, one of which elements is that he did sustain a permanent injury. The Defendant-Employer is not required to prove that

> a permanent injury was not sustained. Nevertheless, the ALJ's finding is supported by the opinions of Dr. Kirsch, Dr. Jenkinson, and Dr. Garman. It is significant to note that the ALJ did not find that no injury occurred, but merely that no injury occurred that resulted in permanent impairment. The ALJ found a work-related temporary injury did in fact occur on August 9, 2011.
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> For the reasons cited herein, it is hereby ORDERED and ADJUDGED that Plaintiff's Petition for Reconsideration be and is OVERRULED and DENIED.

On appeal, Slaughter posits Dr. Gilliland's July 10, 2012, record stating she fell in a hole at home was crucial to the ALJ's decision. She contends without this evidence "there is no basis for the Defendant's Independent Medical Examination's opinions." She notes the first MRI she had on July 6, 2012, showed torn ligaments and tendons. Slaughter contends Dr. Gilliland's amendment is not an opinion, but is a correction of an error which is uncontradicted. She argues the ALJ does not have the authority to reject Dr. Gilliland's uncontradicted amendment to his record. Further, the ALJ also did not have the right to disregard uncontradicted conclusions of a medical expert and reach a different conclusion. Slaughter insists a medical expert's conclusions may not be disregarded unless rebutted and therefore the ALJ abused

his discretion by disregarding Dr. Gilliland's amended record. We affirm.

As the claimant in a workers' compensation proceeding, Slaughter 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). Since Slaughter 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 that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d

329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). The ALJ 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 adversary party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000). Although a party may note evidence that would have supported a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986).

The medical record generated by Dr. Gilliland when he first saw Slaughter on July 10, 2012, contains the following history:

Chief Complaint

Patient presents with

· Ankle Pain

New Patient. Months ago sprung Right Ankle. Had issues on & off since then.

Ankle Pain

The incident occurred at home. The injury mechanism was a twisting injury and an inversion injury. The pain is at a severity of 8/10. The pain is moderate. The pain has been worsening since onset. Associated symptoms include a loss of motion and muscle weakness. Pertinent negatives include no inability to bear weight, loss of sensation, numbness or tingling. She has tried ice and rest for the symptoms. The treatment provided no relief.

Significantly, the Grayson Physical Therapy initial examination record of July 20, 2012, contains the following history:

History of Falls: No

History of Present Condition/Mechanism of Injury: Pt reports she sprained her ankle a year ago and recently. She turned, twisted and it gave way. She reported the pain to be immediately. She then went to Urgent Care and had an X-ray which was negative. After a week it was fine, however recently it has begun swelling after long shifts at work. Recent MRI reveals complete tear of right peroneus longus, partial tear of peroneus tertius, complete tear of ATF and partial complete tear of calcaneofibular ligagment.

During the August 1, 2013, hearing, Slaughter acknowledged she sought no medical treatment for her ankle

between September 6, 2011, and April 25, 2012. The medical records initially generated by Dr. Gilliland and Grayson Physical Therapy clearly confirm that just prior to being seen by Dr. Gilliland and Grayson Physical Therapy, Slaughter had turned and twisted her ankle causing it give way. Thus, the ALJ's conclusion the work injury of August 29, 2011, did not cause the right ankle injury necessitating surgery is amply supported by the aforementioned medical records and portions of Slaughter's testimony.

As noted in the December 13, 2013, order, the ALJ also relied in part upon Dr. Jenkinson's opinions in determining Slaughter did not have an injury which resulted in permanent impairment. In his report generated as a result of a medical examination conducted on February 12, 2013, Dr. Jenkinson noted as follows:

> The history of injury that was provided on 08/29/11 is not consistent with an incident that would be responsible for major ligament and tendon disruption of the ankle.
>
> There is no evidence that she had any significant difficulty with her foot and ankle from early September 2011 until she again complained of symptoms in May or June 2012. Even then it appears that she first presented with complaints of bilateral foot pain of recent onset related to prolonged standing or walking at work.

Dr. Jenkinson's opinions constitute substantial evidence further supporting the ALJ's decision.

In addition, as noted by the ALJ in the September 30, 2013, opinion, Dr. Brown testified his opinion as to cause of the need for ankle surgery was based solely upon the history he obtained from Slaughter. Significantly, in his May 13, 2013, deposition, Dr. Brown provided the following testimony regarding the nature of the immediate complaints he would have expected following the occurrence of an acute peroneal tendon rupture:

> Q: Okay. Now, if she would have had this acute peroneal tendon rupture in August of 2011, would you expect her to have complaints in the months following that injury?
>
> A: Certainly.
>
> Q: Would you have expected a physician to note those complaints if she was making them?
>
> A: I would like to think so, yes.
>
> Q: Okay. If a patient had an acute peroneal tendon rupture, would you expect physicians to refer to diagnostic studies or to a specialist?
>
> A: I would expect, yes.
>
> Q: Okay. Now, would you expect there to be positive objective findings in the treatment records if a patient had a peroneal tendon rupture?
>
> A: More than likely, yes.

> Q: Okay. Would you expect a physician to know such things as muscle weakness, ankle deformity or instability if a patient has an acute peritoneal rupture?
>
> A: Weakness and instability, more than likely, yes.
>
> Q: Okay. Now, I know you indicated you hadn't reviewed treatment records. Specifically, have you reviewed any records of Dr. Gilliland, particularly one dated July 10th, 2012?
>
> A: No, sir, I haven't.
>
> Q: Are you aware that in that report, Dr. Gilliland states that the patient, Ms. Slaughter, quote, "Fell in a hole greater than three months prior," end quote?
>
> A: I'm not aware of that at all.
>
> Q: Okay. Would a fall in a hole be a mechanism of injury that could cause a peroneal tendon rupture?
>
> A: It can.

A review of the ALJ's decision reveals he not only relied upon Dr. Gilliland's note of July 10, 2012, but also upon the fact Slaughter returned to work and sought no treatment from September 2011 until April 2012. The ALJ also noted the condition treated by Dr. Brown was of such a serious nature that he did not believe Slaughter could possibly have performed her work duties and continued to remain on her feet for a nine month period without having severe symptoms. In the September 30, 2013, opinion, the

ALJ noted Dr. Gilliland changed his record but he was not persuaded by that change. In the December 13, 2013, order, the ALJ referenced the July 20, 2012, note of Grayson Physical Therapy which obtained a history from Slaughter that one week after the injury her ankle was fine.

Dr. Gilliland's July 10, 2012, record, Grayson Physical Therapy's July 20, 2012, record, the opinions of Drs. Brown and Jenkinson, and Slaughter's testimony as recited herein, constitute substantial evidence in support of the ALJ's determination the injury of August 29, 2011, was not significant and did not result in a permanent impairment and the need for future medical benefits. Clearly, the ALJ's decision was not based solely upon Dr. Gilliland's July 20, 2012, record.

Because the ALJ's decision is supported by substantial evidence and the record does not compel a contrary result, we are without authority to disturb his decision on appeal. Special Fund v. Francis, supra.

Accordingly, the September 30, 2013, opinion, award, and order and the December 13, 2013, order ruling on the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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