

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 20, 2015

CLAIM NO. 201174122

JUDITH PARMLEE

PETITIONER

VS.

APPEAL FROM HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

ANDERSON VICTORY HAVEN TRAINING CENTER
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Judith Parmlee ("Parmlee") appeals from the November 17, 2014, Opinion, Order, and Award of Hon. Grant S. Roark, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits already paid, permanent partial disability ("PPD") benefits, and medical benefits. No petition for reconsideration was filed. On

appeal, Parmlee asserts the ALJ erred by finding her psychological impairment is not work-related.

The Form 101 alleges on September 18, 2011, Parmlee injured her left shoulder, neck, and head in the following manner: "While replacing a belt ["belt" was crossed out and "pin" was handwritten in its place with "JP" above it] on a wind row turner. I slipped and tore my rotator cuff on left shoulder and hit my head when I fell." On May 23, 2014, Parmlee filed a pleading styled "Notice of Amendment to Perform 101" in which Parmlee asserted she also suffered a psychological impairment due to the head injury sustained on September 18, 2011.¹

The August 12, 2014, Benefit Review Conference ("BRC") order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation ["psych" is handwritten]; notice ["psych" is handwritten]; exclusion for pre-existing disability/impairment ["psych" is handwritten].

In a July 15, 2014, Independent Psychiatric Examination ("IPE") report, Dr. Timothy Allen diagnosed the following:

¹ Parmlee also filed a "Motion to Amend/Clarify" on May 23, 2014, to amend her Form 101 to correct her birthdate.

Mild Neurocognitive Disorder, due to multiple etiologies (multiple traumatic brain injuries, alcoholism)

Persistent Depressive Disorder with anxious distress, moderate

Dr. Allen reached the following conclusions regarding Parmlee's alleged work-related psychological condition:

- Ms. Parmlee has a Mild Neurocognitive Disorder from multiple sources (multiple head traumas, alcoholism, microvascular disease) which has shown improvement since the UK evaluation of August 2013.
- She has long-standing symptoms of depression and anxiety. She took antidepressants and benzodiazepines periodically since at least 1989 consistent with a Persistent Depressive Disorder.
- The Mild Neurocognitive Disorder was only minimally impacted by her injury of September 2011. If she were impaired by a brain injury in September 2011 you would expect the most severe symptoms immediately afterwards with slow improvement for 1 year and possible slight improvement over the second year. Her symptoms seemed at their worst in 2013 and better in 2014, suggesting a different cause of the symptoms in 2013.
- The Persistent Depressive Disorder was exacerbated by the work injury and resulting physical problems (i.e. shoulder injury.) She had significant improvement with treatment and a relapse when treatment was discontinued.

- She should continue Paxil and possibly restart Buspar. Due to her relapse off the medication she should be expected to continue it for the foreseeable future.
- Lamictal is a mood stabilizer, approved for use in Bipolar Disorder. It is not indicated in her condition. Bipolar disorder was likely diagnosed due to her report of anger outburst, but she has had no evidence of the manic episodes required for this diagnosis. Her anger is more likely a consequence of depression and personality characteristics.
- She was at MMI in January 2014 but had a relapse after discontinuing medication. She should achieve it again with medication in 3-6 months.
- She has no psychiatric work restrictions.

Regarding an impairment rating, Dr. Allen expressed the following opinions:

Ms. Parmlee has not reached Maximum Medical Improvement ["MMI"] for Mental Disorders. The AMA guides cautions [sic] against assigning an impairment rating prior to the achievement of MMI. Ms. Parmlee discontinued treatment in February 2014 and will benefit restarting medication.

If a current percentage is necessary for the adjudication of this case, I believe Ms. Parmlee currently has a Class II, mild impairment for Mental Disorders. The AMA Guides to the Evaluation of Permanent Impairment 5th Ed., does not provide percentages to apply to mental disorders. If we apply the AMA Guides 2nd edition criteria then, I believe she has a 10% whole

body impairment, 5% of which is directly due to psychiatric causes related to the injury on 9/18/11. It is difficult to definitely predict the amount of benefit she may get from treatment, but I would expect this percentage to be reduced by approximately half, giving her a 2.5% permanent whole body impairment due to the work related incident. It may be advisable to re-evaluate her after 6 months of medication for a more certain determination.

She has a Class I impairment of the Central Nervous System. According to AMA Guides, 5th edition Chapter 13, tables 13-5 and 13-6, she has a 5% impairment due to mental status changes related from multiple etiologies. There is no contribution from the work injury of September 2011.

In an August 8, 2014, supplemental report, Dr.

Allen expounded further:

As you are aware, I evaluated Judith Parmlee at your request on July 21 and 22, 2014. I found Ms. Parmlee to suffer from a Mild Neurocognitive Disorder and a Persistent Depressive Disorder. I believe that her Mild Neurocognitive Disorder was due to multiple factors, including a long history of alcohol abuse, microvascular disease of the brain, and numerous mild head traumas through her life. I do not believe that the work injury correlated directly with her current cognitive impairments.

I found her to have a Persistent Depressive Disorder, which was longstanding. This predated her work injury of September 2011. I believe she had an exacerbation of her depressive

symptoms following the shoulder injury. She was taking Valium prior to the injury and had taken other medicines for depression previously in her life. She had a worsening of her mood after the injury, but she returned to her pre-injury baseline (and possibly even reached a higher level) related to her mood symptoms by February 2014 while taking Paxil, Buspar and Lamictal. She had a subsequent worsening of her mood after discontinuing those medications abruptly for financial reasons. She restarted Paxil in June 2014 with some improvement.

I recommended she continue Paxil and restart Buspar if necessary. I found no indication for Lamictal. The Paxil she has recently taken is equivalent to Zoloft, which she took in 2004 for depression. There is very little medical record available regarding her functioning from 2004 until 2010, other than the fact that she was prescribed Valium, making exact assessment of her prior symptoms difficult. However, with the available information, it seems likely that continued treatment with Paxil in the future would be recommended regardless of her work injury. The fact that she improved after her injury and worsened again after stopping medicine in February 2014 suggests the current treatment is related to longstanding Persistent Depressive Disorder and not the acute exacerbation that began in 2011.

In a June 19, 2014, Independent Medical Evaluation report, Dr. Douglas Ruth diagnosed: "Alcohol abuse, Cognitive disorder due to chronic alcohol abuse, Marijuana abuse." Concerning causation, Dr. Ruth opined

that "[n]one of Ms. Parmlee's psychiatric conditions are directly and causally related to the alleged work injury of 9/18/11." Regarding an impairment rating, Dr. Ruth determined as follows:

Ms. Parmlee does not suffer psychiatric impairment as a result of the 9/18/11 injury. With respect to that injury then, according to the Fifth Edition of the AMA Guides to the Evaluation of Permanent Impairment, Table 14-1 on page 363 in chapter 14, she has a class 1 psychiatric impairment rating with respect to that injury.

Dr. Ruth attributed all of Parmlee's psychological impairment to pre-existing active psychological conditions.

Relative to the issue of Parmlee's alleged work-related psychological impairment, the ALJ determined as follows in the November 17, 2014, Opinion, Order, and Award:

As a threshold issue, the employer disputes plaintiff suffered any neuro-cognitive or psychiatric injury due to her fall at work on September 18, 2011. It readily acknowledges the fall and plaintiff's resulting shoulder injury. However, defendant maintains plaintiff did not suffer a head injury at that time and that there was no resulting cognitive or psychiatric injury. In support of this position, the employer points out plaintiff's medical history shows problems with balance, dizziness, depression and possible bipolar

disorder which entirely pre-existed the fall at work. It also points out plaintiff's alleged neuro-cognitive problems did not surface in any medical treatment records until more than a year later, which is not what would be expected from a head injury according to Dr. Ruth and Dr. Allen.

Having reviewed the evidence of record, the Administrative Law Judge is ultimately persuaded by the opinions of Dr. Allen. He examined plaintiff and reviewed her medical history. He concluded that plaintiff first reported cognitive problems in December, 2012, more than a year after the accident. He opined that if such problems were due to the fall and a head injury, the most severe symptoms would have appeared immediately after the injury and gradually get better, which was exactly the opposite for plaintiff. Based on his examination and review of the records, Dr. Allen concluded plaintiff did not suffer any permanent head injury. Given the totality of evidence available, Dr. Allen's opinions in this regard are considered most credible. It is therefore determined plaintiff's alleged cognitive and/or psychiatric problems are not work-related and are not compensable.

On appeal, Parmlee asserts the ALJ erred by finding her psychological impairment is not work-related.

Parmlee asserts as follows:

The ALJ relied primarily on Dr. Allen's report in coming to the conclusion that Ms. Parmlee did not have work-related psychological impairment. The ALJ cited Dr. Allen's report to conclude that Ms.

Parmlee first reported cognitive problems more than a year after the accident. However, Dr. Allen's report taken by itself is very misleading. The ALJ failed to consider that other medical records indicate that the onset of the memory problems were shortly after the accident. For instance, the office notes of Dr. Winchester dated February 19, 2013 stated that the onset of her memory loss was 17 months ago. That is consistent with the date of the injury on September 18, 2011.

Additionally, Dr. Allen specifically found that the Petitioner had a 10% whole body impairment and that 5% was directly due to psychiatric causes related to the injury on September 9, 2011. The ALJ clearly erred in failing to consider this portion of Dr. Allen's IME.

Kentucky law mandates when the party with the burden of proof before the ALJ is 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). So 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). For an unsuccessful claimant, this is a great hurdle to overcome.

If the fact-finder finds against the person with the burden of proof, his burden on appeal is infinitely greater. It is of no avail in such a case to show that there was some evidence of substance which would have justified a finding in his favor. He must show that the evidence was such that the finding against him was unreasonable because the finding cannot be labeled "clearly erroneous" if it reasonably could have been made. Thus, we have simply defined the term "clearly erroneous" in cases where the finding is against the person with the burden of proof. We hold that a finding which can reasonably be made is, perforce, not clearly erroneous. A finding which is unreasonable under the evidence presented is "clearly erroneous" and, perforce, would "compel" a different finding.

Id. at 643.

We are unable to conclude the evidence compels a different result than what was reached by the ALJ regarding Parmlee's alleged work-related psychological injury.

We acknowledge that in his July 15, 2014, IPE report, Dr. Allen assessed a 5% impairment rating "directly due to psychiatric causes related to the injury on 9/18/11." However, in that same report Dr. Allen found "Ms. Parmlee has not reached Maximum Medical Improvement for Mental Disorders" and theorized he would expect Parmlee's

impairment rating to be reduced by half with treatment. The ALJ could not have relied upon Dr. Allen's impairment rating without simultaneously relying upon another medical opinion in the record that supports an MMI date pre-dating Dr. Allen's July 15, 2014, report. Stated differently, should Dr. Allen's opinions be relied upon exclusively to resolve the issue of Parmlee's alleged work-related psychological injury as the ALJ has done here, the ALJ must reject Dr. Allen's preliminary impairment rating because it was assessed before Parmlee, in his opinion, reached MMI.

It is clear from the language of the November 17, 2014, Opinion, Order, and Award, the ALJ relied exclusively upon the opinions of Dr. Allen to conclude that "plaintiff's alleged cognitive and/or psychiatric problems are not work-related and are not compensable." This determination mirrors the language Dr. Allen used in his supplemental report of August 8, 2014, in which he found the work injury did not correlate with Parmlee's current cognitive impairments. Additionally, he found Parmlee's Persistent Depressive Disorder predated her September 2011 injury. Dr. Allen's finding and opinion set forth in the August 8, 2014, report comprise substantial evidence in support of the ALJ's finding Parmlee's cognitive and psychiatric problems are not work-related.

We are cognizant Dr. Allen's opinions are somewhat equivocal. However, the ALJ is free to choose the portions of the report upon which he will rely. Consequently, the ALJ may rely upon portions of Dr. Allen's report that support a finding Parmlee's psychological problems are not work-related while dismissing more equivocal portions of his report such as his reference to an "acute exacerbation" that occurred in 2011.

Significantly, Parmlee did not file a petition for reconsideration; thus, on questions of fact, the Board is limited to a determination of whether there is substantial evidence contained in the record to support the ALJ's conclusion. Stated otherwise, inadequate, and incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is identifiable evidence in the record that supports the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985); Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 2000). Parmlee failed to file a petition for reconsideration requesting the ALJ to make additional findings addressing and resolving the seemingly contradictory opinions contained in Dr. Allen's two reports. In addition, the opinions of Dr. Ruth as set forth herein constitute substantial evidence which supports the

ALJ's determination Parmlee's psychological condition is not work-related and, therefore, not compensable.

Accordingly, the November 17, 2014, Opinion, Order, and Award is **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON RONALD D BOWLING III
271 W SHORT ST STE 505
LEXINGTON KY 40507

COUNSEL FOR RESPONDENT:

HON STEVEN GOODRUM
771 CORPORATE DR STE 101
LEXINGTON KY 40503

ADMINISTRATIVE LAW JUDGE:

HON GRANT S ROARK
410 WEST CHESTNUT ST
SEVENTH FLOOR
LOUISVILLE KY 40202