Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 23, 2015

CLAIM NO. 200991125

KIMBERLY S. EMMONS PETITIONER

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

KROGER
and HON. JONATHAN WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Kimberly S. Emmons ("Emmons") appeals from the June 18, 2015, Opinion and Award and the August 4, 2015, Order on Plaintiff's Petition for Reconsideration of Hon. Jonathan Weatherby, Administrative Law Judge ("ALJ"). In the June 18, 2015, Opinion and Award, the ALJ determined Emmons has not suffered from a worsening of condition and rejected her claim for additional income benefits. However,

the ALJ found the medication regimen prescribed by Dr. Ellen Ballard reasonable and necessary and awarded medical benefits.

On appeal, Emmons asserts the ALJ misunderstood and/or misapplied the law and facts.

The Form 101 alleges "Kimberly Logsdon" [Emmons] injured her head, neck, and left upper extremity on March 18, 2009, in the following manner:[1]

> Plaintiff suffered work-related injury to her Head, Neck and Left Upper Extremity when she tripped over a crate and fell forward causing a harmful change evidenced by objective medical evidence resulting in permanent impairment by the 5th Edition AMA Guides.

In her August 30, 2010, brief in the initial proceedings, Emmons requested an award of permanent total disability (“PTD”) benefits or, in the alternative, permanent partial disability (“PPD”) benefits.

In the November 15, 2010, Opinion, Award, and Order, Hon. Joseph Justice, ALJ ("ALJ Justice") awarded temporary total disability ("TTD") benefits, PPD benefits, and medical benefits. He opined, in part, as follows:

> The ALJ has found that Plaintiff is not totally disabled due to the injury that

[1] At the April 22, 2015, hearing, Emmons testified that she used to be Kimberly Logsdon.

she received on March 18, 2009. Plaintiff may be disabled from a variety of conditions that she has, even though she has been initially denied by the Social Security Administration. She is 5'4" tall and weighs 290 pounds. She has a history of congestive heart failure, high blood pressure, asthma, bronchitis, cardiac catherization, intubation, pneumonia, possible acute renal failure, chronic back pain with arthritis, large spurs of the thoracic spine, and other fairly serious conditions. She is only 49 years of age. She has a high school education. She has had supervisory positions with Kroger. She has done customer care, processed Western Union transactions, and cashier work. Plaintiff has done very skilled work of a very light or sedentary nature. Although her job duties required her to lift up to 50 pounds that would have not been a regular part of her duties.

Additionally, no physician has placed restriction on her that would totally disable Plaintiff. Dr. Becherer, the operating surgeon, thought she should avoid overhead activity or do it on a limited basis. Dr. Becherer noted that Plaintiff's fractures had healed, and the fusion was functionally a solid fusion. On October 9, he released her to return to light duty work. There is no indication in the records that her condition had later worsened to the point that his opinion of her ability to do light work had changed. He did defer to Dr. Chou on restrictions. Dr. Chou encouraged her to stay active and keep working, and released her to work with restriction of no lifting over 25 pounds. Dr. Banerjee said she could do a job that required bending, walking, and talking to people and being more social. It would be best if she had

> restrictions of lifting 25 to 30 pounds. Her job required lifting of weights more than 25 to 30 pounds. The ALJ has reviewed this claim under the direction of Ira A. Watson Department Store v. Hamilton.

Emmons filed a "Motion to Reopen For Change And Worsening Condition, Increased Impairment and Total Occupational Disability," dated August 1, 2014, in which she alleged a worsening of condition to permanent total disability.

In his June 2, 2010, report introduced in the proceedings before ALJ Justice, Dr. Timir Banerjee stated Emmons had reached maximum medical improvement ("MMI") and opined as follows:

> She does not need any aggressive medical, surgical or chiropractic treatment. She should follow up with her family Dr. who can prescribe occasional pain medicine for her. She should not continue to take narcotics on a long-term basis because it causes habituation, make [sic] her sluggish and won't make her feel like doing any kind of activities as is the case with her. Neurontin at a higher dose does not help neuropathic pain and may cause complications. Please see enclosed literature.
>
> She can return to an occupation, which does not involve any overhead work and [sic] more active she is the better off she is going to be. Her main difficulties at the present time may be because of a cardiac status and squeaky voice rather than the neurological

status. There is absolutely no reason why she could not return to work from the neurological point of view.

It is best if she has restriction [sic] of lifting may be 25 to 30 pounds. She can certainly do a job which involves bending, walking, talking to people and being more social. She seems like a very pleasant person and she can certainly spread her charm around by being with others. In the past she has worked as a greeter and also the U-Scan person and there is no reason why she could not do that with opportunities to move around.

All my opinions are given within the realm of reasonable medical probability.

I respectfully disagree with Dr. Chou that she may need any dorsal column stimulator or pain pump or any such. However she needs compassionate and diligent encouragement to become more active. I think she should be told that she can still qualify for social security and she can still make some money and that may be beneficial to her physical as well as psychological well-being.

...

According to page 392 of the fifth edition of AMA guidelines using table 15-5 she has 28% impairment to the body as a whole because she is DRE category 4. 20% to 25% of the impairment should be from pre-existing dormant disk degeneration. But 75 to 80% should be because of the trauma and the nerve compression that she has sustained from the fall.

> She has undergone fusion of cervical spine C6-C7 subsequent to a fracture she had sustained after a fall at [sic] Kroger store.

In a June 2, 2010, "Medical Questionnaire," Dr. Banerjee was asked about Emmons' ability to return to work and replied: "It is important that she does for physical and social well being [sic] to avoid isolation & depression."

In a December 3, 2014, report, Dr. Banerjee set forth the following opinions:

> A. S/p fusion subsequent to fracture dislocation of C6-C7 facet. She has been stable.
>
> B. Chronic intake of narcotics has to be progressively tapered off. It has become a ritual. I think after 6 weeks of tapering by February 1, 2015 she should not take any more narcotic pills. Narcotic intake in non cancer patients like her is not necessary. Remaining active and gentle massage with ICY HOT or OLBA's oil will be helpful. She is progressively developing arthritis in multiple joints from obesity as is evidenced by her knee replacement. We must promote wellness and not illness by prescribing unnecessary narcotic pills.
>
> C. She has 28% impairment for the injury in question and that covers the numbness. Otherwise it would have been 25%. Table 15-15-18 can be all considered and then unfortunately we can't use ROM model. She has an injury. She has one level operation. There has

> been no progressive neurological deficit. She has had a satisfactory fusion. She has had chronic radiculopathy as a result of the C7 root contusion from jumped facet. This is old established and fixed deficit.
>
> D. She does not have a surgical lesion. She does not need any myelogram, CT scan or EMG. The myelogram caused her much pain and I don't believe that was medically necessary. I realize there was an attempt to identify surgical lesion. She does not need x-rays of her neck. She does not need trigger point or epidural or facet injections.

The May 9, 2014, report of Dr. Jonathan Hodes was introduced. Dr. Hodes opined that after reviewing Emmons' cervical myelography and CT scanning, he did not "find an anatomical correlate for her current symptomatology." He further opined as follows:

> I suspected that her arm dysesthesias are related to posttraumatic neuropathy.
>
> I explained to the patient that there is no surgical intervention that would improve her situation. I recommended that she return to Dr. Ellen Ballard for consideration of neuro modulating medications to see whether or not she would get some relief of her dysesthesias.

Numerous medical records of Dr. Thomas Becherer, both predating and postdating Emmons' Motion to Reopen were introduced. One such record is dated May 12, 2010, in which

Dr. Becherer opined as follows regarding MMI and an impairment rating:

> After a review of her chart and her most recent evaluation from yesterday, I believe she is at maximum medical improvement. There is nothing from a surgical standpoint that can be done to alter the course at this stage. Based on the AMA Guidelines 4th Edition, I feel she falls into, based on the DRE criteria for cervical, a category 4 and I feel she is appropriate for a 28% impairment rating.

In an August 1, 2013, medical report based on his examination, Dr. Becherer opined as follows:

> The patient was seen and examined with Dr. Becherer. We spent a great deal of time today counseling Ms. Emmons on the fact that due to her injury she did suffer nerve damage, still consistent with the C7 radiculopathy. She says Dr. Ballard did contemplate an EMG/NCV and though that certainly could be done, we would expect that it would reveal the C7 injury. Based on her clinical exam and the cervical x-ray there does not appear to be any need for further surgery so she would just need to be managed conservatively for the persistent pain. We discussed setting her up for an ENT evaluation because of the hoarseness of voice but she wants to hold off on that for now as she is not sure it will be covered under the Work Comp case. She did see an ENT after the surgery who wanted to send her to a specialist in Tennessee but she did not want to travel that distance. We also contemplated and discussed a pain management referral and she says that she would like to

> hold off and discuss that further with Dr. Ballard. There are more advanced pain management techniques with nerve stimulators that can be discussed with specialists who do that but she wants to talk to Dr. Ballard about that first. For now, we do not see any need for further surgery so we just need to see her in the future on an as needed basis.

The Medical Questionnaire completed by Dr. Becherer dated October 15, 2014, reflects he assessed a 28% impairment rating. Dr. Becherer further opined Emmons does not warrant restrictions "over and above those that were previously assessable at the time of the previous ALJ decision rendered on November 15, 2010."

There are several medical reports in the record from Dr. Ellen Ballard. In a report dated January 13, 2015, Dr. Ballard opined as follows:

> In reference to your note of January 12, 2015, you have asked for me to elaborate on Ms. Emmons' condition and how this is a worsening of her work-related condition. Ms. Emmons had a significant injury to her cervical spine involving a fractured facet, which required surgery. It is part of the natural progression of change that occurs in a cervical spine after fusion that there are increased changes above and below the level of a fusion because the motion of the cervical spine has been altered. This increased motion causes degenerative changes in the cervical spine manifested by spurs, decreased disc height and narrowing of

> the neural foramen where the nerve root exits into the extremities. Ms. Emmons has been my patient for many years and has had worsening of her symptoms in her cervical spine and left upper extremity to the extent that she now has had changes which have worsened her condition and, therefore, increased her level of impairment. This is the reason that the patient was sent for range of motion testing and the reason that she was assigned a higher impairment rating. These changes were degenerative in nature but they were, in her case, accelerated by the fact that she had a work injury and increased strain above and below the level of the fusion as a direct result of her work injury.

In a December 9, 2014, report, Dr. Ballard opined Emmons' current total whole person impairment rating is 41%. Dr. Ballard further opined that because she is Emmons' treating physician, she is in the "best position to evaluate her condition."

In the June 18, 2015, Opinion, Order, and Award, the ALJ set forth the following findings of fact and conclusions of law:

> 9. The issues in this matter are to be determined based almost solely upon whether the opinion of Dr. Ballard is to be believed moreso than that of Dr. Bannerjee. Dr. Ballard has opined that she is in the best position to assess the Plaintiff because she has been treating the Plaintiff for several years and has watched and documented the deterioration of her condition. Dr. Banerjee has opined that the Plaintiff’s condition has not worsened

> and that she should not have been evaluated by the range of motion method. It should be noted that Dr. Banerjee examined the Plaintiff prior to the original award as well.
>
> 10. The ALJ notes that Dr. Ballard is not known for liberal opinions regarding Plaintiffs but finds that her explanation for the use of the range of motion method is circular and less than convincing. She opines that the Plaintiff has a worsening of condition based upon the range of motion method and states that the range of motion method should be used because of a worsening of condition.
>
> 11. The ALJ finds that the opinion of Dr. Banerjee, as supported by the opinions of Drs. Becherer and Hodes as well as the diagnostic imaging which is essentially unchanged, is more convincing and credible. The ALJ also finds that the detailed description of the Plaintiff of her symptoms and daily activities is almost identical to that given at the final hearing before Judge Justice prior to the initial award.
>
> 12. The ALJ therefore finds based upon the foregoing reasoning that the Plaintiff has not suffered a worsening of condition and her claim therefor shall be and hereby is **DISMISSED**.

Emmons filed a petition for reconsideration on July 1, 2015, asserting the ALJ misunderstood or misinterpreted the opinions of Dr. Ballard. Emmons' petition for reconsideration was overruled by order dated August 4, 2015.

On appeal, Emmons asserts the ALJ misunderstood Dr. Ballard's opinions and argues as follows:

> ALJ Weatherby misunderstood Dr. Ballard's opinion. Dr. Ballard was asked to assess Ms. Emmons' current permanent impairment. Dr. Ballard's opinion there had been a change in Ms. Emmons' condition was not based on the increased impairment rating. To the contrary, Dr. Ballard based her opinion Ms. Emmons' condition had changed on the objective physical examination findings, the objective testing and Ms. Emmons' symptoms and need for additional treatment.

We affirm.

The burden of proof in a motion to reopen based on a worsening condition falls on the party seeking to increase the award. Griffith v. Blair, 430 S.W.2d 337 (Ky. 1968); Jude v. Cubbage, 251 S.W.2d 584 (Ky. 1952). Since Emmons 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). 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 June 18, 2015, Opinion and Award firmly establishes the ALJ relied upon the opinions of Dr. Banerjee, Dr. Becherer, and Dr. Hodes in determining Emmons' condition has not worsened to the extent she is permanently totally disabled. The ALJ has the discretion to determine all reasonable inferences to be drawn from the evidence, and it was reasonable for the ALJ to reach his decision based on the above-cited medical 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). Dr. Banerjee's impairment rating of 28%, set forth in the June 2, 2010, medical report, remained the same in his December 3, 2014, post-reopening medical report. In his December 3, 2014, medical report, Dr. Banerjee also opined Emmons "has been stable." Similarly, Dr. Becherer's 28% impairment rating remained the same both before and after the reopening. Notably, Dr. Becherer opined Emmons' current restrictions would be no different than assessed prior to ALJ Justice's decision. In his May 9, 2014, office note, Dr. Hodes indicated that he does "not find an anatomical correlate for her current symptomatology." Additionally, he opined there is no surgical intervention that would improve her situation. The ALJ may properly infer from the entirety of these medical

opinions that Emmons' condition has not worsened thereby meriting an award of PTD benefits.

Significantly, in the June 18, 2015, Opinion and Award, the ALJ stated he relied upon Emmons' testimony, both before and after reopening, and opined Emmons' description of her "symptoms and daily activities is almost identical to that given at the final hearing before Judge Justice prior to the initial award."

Even though Dr. Ballard, in her January 13, 2015, report, opined Emmons has changes "which have worsened her condition and, therefore, increased her level of impairment," the ALJ is not obligated to rely on this opinion. Where evidence in a workers' compensation claim is conflicting, the ALJ as fact-finder is free to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W. 2d 15 (Ky. 1977).

A review of Emmons' testimony at the July 29, 2010, hearing reveals the following testimony regarding her symptoms:

> Q: Do you think you could go back to doing the customer service work that you performed before your work injury?
>
> A: No.
>
> Q: What parts would you have problems with?

A: Lifting, standing, walking; everything. I just couldn't do it.

Q: What happens when you try to walk for too long?

A: It hurts.

Q: Does the pain increase?

A: It gets worse.

Q: Is there anything you can do to alleviate that pain once it gets started?

A: I wear a zapper. It's called a T.N.S. unit. I wear that for about two hours a day, and then I take it off, and then I put it back on two hours later, but I'm on medication too.

Q: What kind of medication?

A: I'm on Lortab 10's.

Q: Now, describe for the judge what an average day is like for you now.

A: Well, I wake up, and I'm constantly in pain all the time. I don't go nowhere. I sit at home. I'm either in my recliner or laying in the bed, or I'm sitting at the kitchen table.

Q: Are you able to do any of your household chores and that kind of thing?

A: Some.

Q: Which ones can you do?

A: I do the dishes, and I put them like in the dash [sic] washer, but vacuuming, no.

Q: How about your own grocery shopping?

A: No. Steve does that.

...

Q: About how long do you think you could walk before you start to have increased pain?

A: How long of a walk do you say?

Q: Yes, ma'am.

A: I could walk maybe a block, and then that's it. I am out of breath.

Judge Justice: Where do you have your pain when you walk?

A: In my neck. It's constantly in my neck going down to my left arm.

Q: Does it go all the way into your fingers?

A: Yes.

Q: Which fingers?

A: These two fingers here (indicating).

Q: You are indicating your pointer finger and your middle finger on your left hand?

A: Yes.

Q: About how long can you sit in one position before you need to shift?

...

A: 15, 20 minutes maybe.

Q: What do you do to relieve your symptoms after you've been sitting

> there for 15 or 20 minutes and it starts to get worse?
>
> A: I take the rest of my pain medicine, and then I go lay down.
>
> Q: About how many days in an average week do you have to do that where you have to just go lay down for a while?
>
> A: It's every day.
>
> Q: Every day?
>
> A: Yeah.

At the April 22, 2015, hearing, Emmons testified as follows regarding her condition:

> Q: What kind of symptoms are you continuing to have now?
>
> A: Neck, and I've got pain shooting down my left arm, going down all the way to my two fingers. And I got new symptoms on my right thumb.
>
> Q: When I asked you what kind of symptoms, you said neck. What kind of symptoms in your neck? What does it feel like?
>
> A: Throbbing, pain all the time, consistent pain.
>
> Q: And you indicated down your left arm. Can you explain for us where in the left arm?
>
> A: It starts from my- well, it starts from my shoulder and goes all the way down to my left arm all the way down-
>
> ...

A: To my two fingers and, like, to my right thumb.

Q: Okay. And when you-

A: (Interrupting) My left thumb. Excuse me.

Q: And when you were indicating and you said your shoulder and you actually you gestured to both shoulders? Do you have symptoms in both shoulders?

A: Yes. Yes.

Q: And the pain in your arm, you indicated kind of outside of your biceps area or your upper arm?

A: Yes.

Q: And then you indicated the top of your forearm; is that correct?

A: Yes.

Q: How often do you have the pain into your arm?

A: It's every day. Never goes away.

Q: Then, is it fair to say it's all day?

A: Yes.

Q: Do you have any- other than pain, any other symptoms in your neck?

A: Just pain.

Q: Okay. What about-

A: (Interrupting) And then the tingling, I've got tingling starting from the upper part of my left shoulder part-

> ...
>
> A: - going all the way down to my fingers.
>
> ...
>
> Q: So we talked about pain and tingling. Any other symptoms that you notice in your neck or your arm?
>
> A: (Shakes head negatively.)
>
> Q: What about symptoms in your hand or your fingers, any other symptoms?
>
> A: Numb, these are my two fingers on my left side, fingers are numb. These are numb. And then now it's going into this one.
>
> Q: And you indicated the two fingers are the index and middle finger. And when you say now it's going into this one, you were indicating your thumb?
>
> A: My thumb.
>
> Q: How do you spend your days?
>
> A: I spend them sitting most of the day. I try to get up, but I walk just a little and either- if I'm sitting in my recliner or in- laying in the bed.

Emmons' testimony recited herein in conjunction with the medical evidence from Drs. Banerjee, Hodes, and Becherer, strongly imply Emmons' condition has not worsened to the extent she is permanently totally disabled. Since substantial evidence comprised of both medical and lay testimony supports the ALJ's determination, it would be

improper for this Board to impose a different interpretation of the evidence and reverse the ALJ's decision.

Accordingly, the June 18, 2015, Opinion and Award and the August 4, 2015, Order on Plaintiff's Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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