

OPINION ENTERED: MARCH 29, 2013

CLAIM NO. 201200452

LEXIE PITTMAN

PETITIONER

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

WEBASTO
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART, REVERSING IN PART,
AND REMANDING

* * * * *

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

ALVEY, Chairman. Lexie Pittman ("Pittman") appeals from the November 16, 2012 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"), and from the December 19, 2012 order denying her petition for reconsideration. Pittman argues the ALJ failed to render sufficient findings of fact and erred in relying on the opinion of Dr. Joseph Zerga, who apportioned one half of her

impairment to a pre-existing thyroid condition. Because we determine a carve-out for pre-existing impairment is not supported by substantial evidence, we affirm in part, reverse in part, and remand.

Pittman testified by deposition on June 18, 2012 and at the formal hearing held September 25, 2012. She stated she began her employment with Webasto in July 2003 building sunroofs for automobiles where she eventually developed problems with her wrists which she reported to human resources. Pittman was placed in another position, but continued to experience wrist pain. Pittman indicated her job duties involved putting parts into a track and attaching them with screws. Her job involved overhead reaching and placing parts on a line. Pittman stated her job caused pain and numbness, radiating up her arms and into her shoulders. She continued to experience problems after moving to a different line in 2011.

She was eventually removed from the line and evaluated by Dr. Gregory Snider, who sent her to physical therapy, which provided little benefit. Injection therapy provided by Dr. Martin Favetto only provided temporary relief. She has not worked anywhere since August 15, 2011, due to unavailability of light work.

She noted improvement of her left hand while off work, but continues to experience problems in the right hand. She rates the pain in her wrists as a nine or ten on a scale from one to ten, and continues to experience numbness and difficulty with gripping and twisting.

At the formal hearing, Pittman introduced a recent normal thyroid test. Pittman indicated she is tested routinely and has taken the same dosage of Synthroid for years.

Dr. Frank Burke performed an independent medical evaluation ("IME") on May 5, 2011. Pittman complained of numbness and tingling in the median distribution of both hands, with some improvement since ceasing work. Dr. Burke diagnosed progressive development of carpal tunnel syndrome bilaterally. He assessed a 6% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"). Dr. Burke stated Pittman had no pre-existing condition but if she did, it was a dormant condition brought into disabling reality by her work activities.

Dr. Joseph Zerga performed an IME on June 19, 2012. Pittman complained of bilateral arm pain and numbness. She stated she first noticed problems with her hands in 2010 when she was moved to the "manual" line. She last worked in

August 2011, and has noted some improvement. Dr. Zerga obtained an EMG/NVC study which revealed normal results with the exception of a slightly prolonged median F wave which he stated could be a sign of early carpal tunnel syndrome.

Dr. Zerga diagnosed bilateral distal paresthesias of the upper extremities consistent with carpal tunnel with negative diagnostic testing. Dr. Zerga stated Pittman had reached maximum medical improvement, but felt her condition may further improve from being off work and receiving thyroid replacement medication. Dr. Zerga addressed the cause of Pittman's impairment as follows:

In my opinion, the patient's condition was preexisting due to her hypothyroidism. I don't have Dr. Johnson's records to give a more definite opinion regarding her thyroid condition, but she tells me she has been on treatment for approximately two years. It is very common for thyroid treatment to take some time before a patient metabolically returns to normal. Therefore, I think over time she will continue to improve.

Dr. Zerga assessed a 4% impairment rating pursuant to the AMA Guides, apportioning 2% to the thyroid condition and 2% to her work injury. He stated Pittman needs no restrictions and is capable of returning to her previous work.

Dr. Ronald Burgess performed an IME on December 9, 2011. He found full range of motion and no visible

swelling. He noted a September 19, 2011 nerve conduction study was normal. Pittman reported significant complaints of paresthesias and pain in the bilateral hands and reported a loss of vibration sense bilaterally, which Dr. Burgess opined could be an early change of a peripheral neuropathy secondary to pernicious anemia. Dr. Burgess found no evidence of a change to either upper extremity related to Pittman's job duties at Webasto. He believed Pittman needed an evaluation for the possibility of a low serum vitamin B12 level and the onset of pernicious anemia. He indicated Pittman required no restrictions based upon a work-related injury and had no impairment pursuant to the AMA Guides.

In his November 16, 2012 Opinion and Award, the ALJ made the following findings relevant to this appeal:

**Pre-existing Disability/Impairment
and Work-relatedness/Causation**

6. In order to be characterized as an active disability, an underlying pre-existing condition must be symptomatic and impairment ratable pursuant to the AMA Guidelines immediately prior to the occurrence of the work-related injury. *Finley v. DBM Technologies*, 217 SW3d 261 (2007).

7. The Defendant, maintains the burden of proving the existence of a pre-existing condition. *Wolf Creek Collieries v. Crum*, 673 SW2d 735 (Ky. App. 1984).

8. In support of this argument, the Defense offers the opinion of neurologist, Dr. Joseph Zerga. Dr. Zerga has opined that the Plaintiff's condition is in part due to her pre-existing and non-work-related hypothyroidism.

9. Dr. Zerga went on to assess an impairment rating but determined that 50% of the Plaintiff's impairment should be attributed to the pre-existing condition.

10. The ALJ therefore finds in accordance with the credible opinion of Dr. Zerga, that 50% of the Plaintiff's impairment is due to the pre-existing condition of hypothyroidism which is also not causally work-related.

Benefits per KRS 342.730

11. Plaintiff offers the opinion and impairment rating of Dr. Frank Burke in order to establish that the plaintiff has a whole person impairment of 6% and that she does not retain the ability to return to the type of work being performed at the time of injury. Dr. Burke also opined that the Plaintiff could benefit from a full neurologic evaluation.

12. Dr. Zerga conducted a neurologic evaluation of the Plaintiff and assessed a 3% impairment due to carpal tunnel in the right upper extremity and 1% for the left upper extremity for a combined 4%. As stated above however, Dr. Zerga apportioned 50% of this rating as being due to Plaintiff's thyroid condition resulting in a 2% whole person impairment. Dr. Zerga also opined that the Plaintiff needs no work restrictions and that she

is capable of returning to the same type of work.

13. The ALJ finds that the impairment rating offered by Dr. Zerga is more credible and convincing in this matter and therefore concludes that the Plaintiff has a 2% whole person impairment related to the work injury and that she is capable of returning to the same type of work.

Pittman filed a petition for reconsideration on November 29, 2012, raising essentially the same arguments she now raises on appeal. In his December 19, 2012 order, the ALJ noted his finding regarding impairment was based upon Dr. Zerga's opinion, which he opined constituted objective medical evidence. The ALJ declined to modify the award.

On appeal, Pittman argues the ALJ failed to render sufficient findings of fact. Pittman notes the ALJ observed she had submitted a thyroid test which he failed to mention in the findings of fact and conclusions of law. Thus, Pittman contends she cannot verify these facts were considered by the ALJ, and if they formed the basis for his decision. She contends normal thyroid results "would suggest a finding more in line with the report of Dr. Burke."

Pittman also argues the ALJ erroneously relied upon faulty medical evidence. Pittman concedes the ALJ correctly

stated the standard for determining whether a condition is considered pre-existing and active. However, citing Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004), Pittman contends Dr. Zerga's opinions do not constitute substantial evidence on this question since he did not have a complete medical history. Pittman contends Dr. Zerga's faulty medical report clearly prejudiced the ALJ, and therefore the ultimate decision was fundamentally unfair.

Kentucky law holds the arousal of a pre-existing dormant condition into disabling reality by a work injury is compensable. However, 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, 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 employer bears the burden of proving the existence of a pre-existing active condition. Finley, supra.

As Webasto, the party with the burden of proof, was successful before the ALJ, the sole issue on 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).

Webasto introduced Dr. Zerga's June 19, 2012 report. Dr. Zerga opined Pittman had a 4% impairment rating, of which half was apportioned to the pre-existing thyroid condition. The ALJ was well within his role as fact-finder in choosing the rating assessed by Dr. Zerga rather than that assessed by Dr. Burke. However, Dr. Zerga did not address whether the pre-existing thyroid condition produced an impairment ratable carpal tunnel condition immediately prior to the work-related trauma, nor did he address whether the pre-existing condition was active or dormant.

Dr. Zerga's opinions regarding Pittman's pre-existing thyroid condition only partially meet the requirements set

forth in Finley, supra. Although Dr. Zerga apportioned a part of the impairment rating for Pittman's pre-existing thyroid condition, he failed to address the fact her hand/wrists were symptomatic prior to the work trauma. Thus, Dr. Zerga's opinions, standing alone, do not comprise substantial evidence supporting the ALJ's carve out for a pre-existing thyroid condition. Webasto failed to meet its burden of showing the pre-existing thyroid condition produced a symptomatic, impairment ratable condition in Pittman's hands/wrists immediately prior to the work injury.

Nothing in the record indicates Pittman's wrist condition was symptomatic prior to the repetitive trauma at Webasto. Her testimony indicates she first experienced problems with her hands and wrists while working at Webasto. Dr. Burke stated there was no pre-existing impairment and, if there was a pre-existing condition, it was dormant prior to the work injury.

The carve-out for a pre-existing active condition is not supported by substantial evidence and is not appropriate. As the ALJ clearly relied upon Dr. Zerga's opinions in apportioning half of the impairment to a pre-existing thyroid condition, we reverse that portion of the

opinion and award. On remand, the ALJ shall award benefits based upon the 4% impairment rating assessed by Dr. Zerga.

Accordingly, the November 16, 2012 Opinion and Award rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge, and the December 19, 2012 order on reconsideration are **AFFIRMED IN PART, REVERSED IN PART**, and this matter is **REMANDED** for entry of an amended opinion and award in conformity with the views expressed herein.

STIVERS, MEMBER, CONCUR.

SMITH, MEMBER, NOT SITTING.

COUNSEL FOR PETITIONER:

HON THERESA GILBERT
163 W SHORT ST #555
LEXINGTON, KY 40507

COUNSEL FOR RESPONDENT:

HON JAMES E SKAGGS
333 W VINE ST #1100
LEXINGTON, KY 40507

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R. WEATHERBY
2780 RESEARCH PARK DRIVE
LEXINGTON, KY 40511