Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 8, 2014

CLAIM NO. 201201743

LINDA RAY PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

K-VA-T FOOD STORES, INC.
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Linda Ray ("Ray") appeals from the July 18, 2013, Opinion and Order and the August 23, 2013, Order on Reconsideration of Hon. R. Scott Borders, Administrative Law Judge ("ALJ"). In the July 18, 2013, Opinion and Order, the ALJ dismissed Ray's claim for both acute and cumulative trauma to her right shoulder for failure to "meet her burden of proving that her right shoulder condition is

causally related to her employment as a baker" for K-VA-T Food Stores, Inc. ("K-VA-T"). On appeal, Ray argues the ALJ erred by determining her right shoulder condition is not causally related to her employment.

The Form 101 alleges Ray injured her right shoulder and right arm on July 1, 2012, while working for K-VA-T. On March 19, 2013, Ray filed a Motion to Amend asserting her injuries "are also related to cumulative trauma." By order dated April 3, 2013, the ALJ sustained Ray's motion.

The Benefit Review Conference ("BRC") took place before the hearing on May 22, 2013, during which the following contested issues were listed: entitlement to benefits per KRS 342.730, unpaid or contested medical expenses, entitlement to TTD benefits, work-relatedness/causation, and injury as defined by the Act. The claim was bifurcated for the ALJ to resolve the issue of causation.

Concerning whether Ray met her burden of proving causation, the ALJ determined as follows:

> In the specific instance, after careful review of the lay and the medical testimony, the Administrative Law Judge finds persuasive and relies upon the opinion of Dr. Gregory Snider in finding that Plaintiff has not met her burden of proving that she suffered a

> rotator cuff tear to her right shoulder that was causally related to any cumulative or other trauma incurred by her within the course and scope of her employment working in the bakery at the Food City in Pikeville, Kentucky.
>
> In so finding, the Administrative Law Judge found the Plaintiff to be a very unreliable historian who basically had no idea when she was injured or how she was injured. She simply comes to the conclusion that she must have been injured at work because that is the only place she did anything that could have led to her problems. The Plaintiff appears to understate the effort involved in caring for her invalid sister or any other activities of daily living that she performed that could have led to her rotator cuff tear. In addition, the Plaintiff’s evaluating physician, Dr. Owen, was unable to respond to the question regarding causation of her condition which leads to the reasonable inference that Dr. Owen could not determine the cause of her condition. This opinion therefore seems to be in concurrence with the opinion of Dr. Snider. Further, Dr. Jones, the Plaintiff's family doctor, does not address causation in her medical reports either.
>
> Therefore, having found that the Plaintiff has failed to meet her burden of proving that her right shoulder condition is causally related to her employment as a baker for the Defendant Employer, her claim for Worker’s Compensation benefits shall be dismissed in its entirety.

In workers' compensation cases, the claimant bears the burden of proof and risk of nonpersuasion

regarding every element of his or her claim, including injury under the Act and causation. Durham v. Peabody Coal Co., 272 S.W.3d 192, 195 (Ky. 2008). In order to sustain that burden, a claimant must put forth substantial evidence, evidence sufficient to convince reasonable people, in support of each element. Id. This evidence has been likened to evidence that would survive a defendant's motion for a directed verdict. Id. Kentucky law holds when the party with the burden of proof before the ALJ was 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).

As fact-finder, the ALJ determines the quality, character, and substance of all the evidence and is the sole judge of the weight and inferences to be drawn from the evidence. Square D Co. v. Tipton, 862 S.W.2d 308, 309 (Ky. 1993); Miller v. East Ky. Beverage/Pepsico, Inc., 951

S.W.2d 329, 330 (Ky. 1997). He may reject any testimony and believe or disbelieve various parts of the evidence, regardless of whether it was presented by the same witness or the same party's total proof. Magic Coal Co. v. Fox, 19 S.W.3d 88, 98 (Ky. 2000). Additionally, if "the physicians in a case genuinely express medically sound, but differing, opinions as to the severity of a claimant's injury, the ALJ has the discretion to choose which physician's opinion to believe." Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006).

Here, as Ray was unsuccessful in proving causation, our task is to determine if the record compels a different result. Since it does not, we affirm.

The ALJ relied, in part, upon the opinions of Dr. Gregory Snider in finding Ray had failed to meet her burden of proving causation. Dr. Snider's Independent Medical Examination ("IME") report dated March 25, 2013, and his April 12, 2013, deposition were introduced by K-VA-T. In the IME report, Dr. Snider opined as follows regarding causation:

> Ms. Ray clearly has a rotator cuff tear and is in need of treatment, at the least physical therapy (PT) and at the most surgery. There is no documentation of an acute injury either at work or elsewhere. Ms. Ray specifically denies having had any incident-related onset.

> Of concern is that she has a disabled and bedridden sister at home for whom she has been caring. It is easily possible that her shoulder injury could have arisen from avocational causes. Regardless of cause, Ms. Ray's shoulder injury is at MMI unless she can find a way to finance rehabilitation and/or surgery.

However, during his deposition, Dr. Snider testified as follows:

> Q: Doctor, having reviewed the records from Dr. Jones and the records from Dr. Hall and received a history from Ms. Ray, as reported by Ms. Ray, within a reasonable degree of medical certainty or probability is there any documentation upon which any physician can state with certainty as to whether or not Ms. Ray's rotator cuff tear was due to her work at home or due to any cumulative work over a period of time at Food City?
>
> A: The short answer to that would be no.
>
> Q: And why is that Doctor?
>
> A: There simply isn't any information in the medical record that helps us determine what, if any, specific thing occurred that caused this problem to develop.
>
> Q: And Doctor, when you evaluated Ms. Ray and reviewed the records, did you assume that her work in the bakery at Food City required repetitive lifting, pulling- pulling, overhead overwork and lifting weights up to or in excess of 50 pounds?

> A: I would have assumed most of those things, yes.
>
> Q: Any of those things you wouldn't have assumed?
>
> A: Not necessarily, no.
>
> Q: Now, Doctor, as an occupational medicine physician, have you seen a number of patients over the years or performed a number of evaluations in which the patient has performed physical manual labor such as pushing, pulling, lifting overhead on a consistent basis?
>
> A: Yes.
>
> Q: Do these activities in and of themselves result in a rotator cuff tear?
>
> A: No. There's nothing about any of those activities that would, for lack of a better word, guarantee the outcome of rotator cuff tear.

The ALJ was also persuaded by the February 2, 2013, Form 107-I medical report of Dr. James C. Owen in which Dr. Owen offered no explanation regarding causation. In the sections of the Form 107 entitled “Causation” and “Explanation of Causal Relationship,” the questions were unanswered. Additionally, the ALJ also relied upon the fact Ray's own family doctor, Dr. Laura Paula Ashby-Jones, D.O., did not address causation. A review of Dr. Jones' medical

records, attached to the hearing transcript, reveals no opinions regarding causation.

Also convincing to the ALJ is the fact that Ray "had no idea when she was injured or how she was injured." Our review of Ray's testimony, both in the March 6, 2013, deposition and the May 22, 2013, hearing is consistent with this. At her deposition, Ray testified as follows:

> Q: At or about the time of your alleged injury, what were you doing?
>
> A: Cooking, I guess. I don't really know because I don't know when I got hurt.
>
> Q: Alright, and that, that I guess is going to be an issue as you know, but your application says that you sustained an injury on July 1 of 2012. Do you recall any type of injury occurring on that date?
>
> A: No.
>
> Q: Do you know where the July 1, 2012 date came from for your application for your injury?
>
> A: No, I don't.
>
> ...
>
> Q: Was there ever or was there a time at work when you lifted something or went to move something or did something that you felt like you had injured your arm?
>
> A: I don't remember.

At the hearing, Ray testified as follows:

> Q: You don't know what day you had an injury?
>
> A: No.
>
> Q: You don't have any idea when you had an injury?
>
> A: No, it happened in July...
>
> Q: Now...
>
> A: Okay- you say that it happened in July and that's- and you tie it to July because that's when you had an x-ray?
>
> A: Yes.

The above-cited evidence constitutes substantial evidence in support of the ALJ's dismissal of Ray's claim for both an acute and cumulative trauma injury to her shoulder due to her failure to prove her right shoulder condition is causally related to her work. Since the evidence does not compel a different result, the ALJ’s decision cannot be disturbed.

Accordingly, the July 18, 2013, Opinion and Order and the August 23, 2013, Order on Reconsideration are **AFFIRMED**.

ALL CONCUR.

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