Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 17, 2014

CLAIM NO. 201293882

MARCIA GEMMELL PETITIONER

VS. **APPEAL FROM HON. JEANIE OWEN MILLER, ADMINISTRATIVE LAW JUDGE**

WALGREENS
and HON. JEANIE OWEN MILLER,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Marcia Gemmell ("Gemmell") appeals from the May 20, 2014 Opinion and Award and the June 18, 2014 Order on Reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge ("ALJ"). The ALJ found Gemmell suffered a work-related injury which resulted in no permanent impairment. She awarded temporary total

disability ("TTD") benefits and medical benefits. On appeal, Gemmell argues she is entitled to permanent partial disability ("PPD") benefits. For the reasons explained herein, we affirm.

Gemmell suffered two work-related injuries while employed as a photo lab technician at Walgreen's. The first occurred on December 15, 2011. Gemmell was on a business-related phone call when she tripped over a stack of canisters containing photo paper. She injured her low back and right knee. Dr. Dana Soucy treated her conservatively with medication and physical therapy. She returned to work on light duty until February, 2012.

While she was still attending physical therapy for the back injury, Gemmell suffered a second work-related accident. On February 23, 2012, she fell in the Walgreen's parking lot while entering for her 8:00 am shift. She twisted her right ankle as she fell, and landed on her right lower back. Gemmell was able to work until 1:00 pm, when the pain became intolerable. This accident is the subject of the current claim and appeal.

Dr. Joseph Dobner, an orthopedist in Dr. Soucy's practice group, diagnosed a right ankle sprain and ordered physical therapy. A subsequent MRI revealed tears in three ligaments. In April 2012, Dr. Soucy ordered an ankle brace.

His notes indicate Gemmell reached maximum medical improvement ("MMI") for her right ankle condition as of October 8, 2012. In a November 21, 2012 office note, Dr. Soucy stated there was no change in Gemmell's diagnosis, and she did not need to return for any future office visits. He also stated she suffered "no impairment".

A month later, Gemmell sought treatment with Dr. Michael Allen, a podiatrist. Following a December 29, 2012 MRI, Dr. Allen diagnosed an ankle sprain and ligament injury. He recommended she continue wearing the ankle brace, and administered injections. At the Final Hearing on March 28, 2014, Gemmell testified she is still treating with Dr. Allen, and he discussed possible surgery to repair her ligaments.

Meanwhile, Gemmell continued to treat for her lumbar condition. She received epidural steroid injections on July 25, 2012 and August 22, 2012. Following an MRI, Dr. Soucy's impression was multilevel degenerative disc disease and sponylosis, with a central L1-2 annular tear. He diagnosed a lumbar sprain/strain and extended her regimen of physical therapy. Later, on February 12, 2012, he prescribed a TENS unit for chronic back pain and radiculitis.

A significant amount of evidence was admitted concerning Gemmell's medical history prior to the injuries at Walgreens. Records from Dr. Allen's office indicate she was being treated for a number of podiatric conditions, including plantar fasciitis and hammer-toes, throughout 2011. Also, many of the records concerned Gemmell's history of slip and fall accidents. Between 2002 and 2010, she was treated for six slip and fall accidents for which she received treatment of her shoulders, ankles, and feet.

Dr. Anthony McEldowney performed an independent medical evaluation ("IME") on January 4, 2014 at Gemmell's request. He opined Gemmell's lumbar spine condition had reached MMI as of August 1, 2013, but she had not yet reached MMI for her right ankle condition. Referencing the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), he assigned a 5% impairment for the lumbar condition, but declined to assign an impairment rating for the ankle. He imposed physical restrictions for the lumbar condition, and opined Gemmell could not return to her previous work. Dr. McEldowney also strongly recommended she follow-up with her foot surgeon to discuss a possible repair of the torn ligaments.

Dr. Gregory Gleis performed an IME of Gemmell on February 18, 2014. He opined she reached MMI for her lumbar spine condition when she finished her course of physical therapy on June 8, 2012. He found no evidence of permanent injury to the spine, and therefore opined she had 0% impairment pursuant to the AMA Guides.

Regarding Gemmell's right ankle, Dr. Gleis opined she reached MMI on July 11, 2012, five months after the date of injury. He believed any treatment after this date was solely for pain complaints, and not because the ankle needed further evaluation or treatment. He opined she could return to her position at Walgreens without restrictions. Dr. Gleis indicated Gemmell had no permanent impairment rating as a result of the right ankle injury.

In his report, Dr. Gleis specifically addressed Dr. McEldowney's diagnosis of "grade one ankle sprain". He noted his physical examination revealed no range of motion or strength deficits. Furthermore, Dr. Gleis emphasized, in addition to Drs. Soucy and Allen, he found no instability in Gemmell's right ankle.

Gemmell submitted the March 28, 2014 rebuttal report of Dr. McEldowney. Because Gemmell was receiving no further treatment for her ankle, Dr. McEldowney opined she had reached MMI and assigned a 3% impairment rating for her

ankle condition. Additionally, he reaffirmed his finding of instability in her right ankle, emphasizing that a prior MRI revealed ligament tears. Finally, Dr. McEldowney suggested Dr. Gleis misunderstood the diagnosis related estimate ("DRE") method of impairment assessment and, for this reason, found no permanent impairment for Gemmell's lumbar condition.

In analyzing whether Gemmell had a permanent impairment as a result of the February 23, 2012 incident, the ALJ explained:

> There are several medical opinions in the record concerning the permanent impairment of [Gemmell]. Dr. McEldowney assigned 8% (3% plus 5%) whole body impairment and opined Gemmell did not retain the capacity to return to the work she performed at the time of the injury. Dr. Gleis and Dr. Soucy both opined Gemmell had 0% impairment per the AMA Guides. Given the evaluator status of Dr. McEldowney and Dr. Gleis, their respective opinions are not as convincing to the undersigned as is the treating physician, Dr. Soucy, and the medical history of Gemmell.
>
> Gemmell has had an unusual history of falls, some idiopathic and some for apparent reasons. Gemmell had been seen by no fewer than six different physicians for either foot, back or other orthopedic ailments (including elbow and shoulder) in the last decade. Significant to this fact finder was the opinion from Dr. Soucy, a treating orthopedic surgeon, that Gemmell could return to work, she had no impairment,

> no permanent work restrictions and that she did not need to make a future appointment.

Gemmell filed a petition for reconsideration, requesting the ALJ to acknowledge that Dr. Soucy's impairment rating was not based on the AMA Guides. She also requested further findings of fact regarding the ALJ's conclusion she suffered no permanent impairment as a result of her ankle injury. The ALJ denied the petition, stating she "found no error in [her] reliance upon Dr. Gleis and Dr. Soucy."

On appeal, Gemmell contends the ALJ erred in failing to award PPD benefits. She identifies three specific errors contributing to the denial. First, she argues the ALJ erred in considering her medical history. She next claims the ALJ erroneously relied upon medical opinions which were not based on the AMA Guides. Finally, she concludes the ALJ "blindly" accepted Dr. Gleis' opinion, constituting reversible error.

As stated above, significant evidence of Gemmell's prior medical history was submitted, which the ALJ summarized. In her analysis, she also noted Gemmell's "unusual history" of falls and orthopedic ailments. Gemmell correctly notes pre-existing, active impairment was not listed as a contested issue at the benefit review

conference. On appeal, she claims the ALJ's consideration and summary of her prior medical evidence "tainted" the ALJ's consideration and ultimate decision.

Though Walgreens never argued Gemmell had a pre-existing active impairment, it presented her prior medical history as part of its case on causation. It claimed her ongoing pain complaints were due to her pre-existing conditions, not her workplace injuries. Thus, Gemmell's prior medical history was relevant and we find no error in its admission. Furthermore, as discussed *infra*, the ALJ's ultimate ruling is not so flagrantly against the weight of the evidence to suggest it is the result of undue prejudice. That the ALJ ruled against Gemmell is simply insufficient to suggest bias or prejudice, particularly as a result of evidence that was properly admitted.

Gemmell next argues the ALJ improperly relied upon medical opinions which were not based on the AMA Guides. In concluding Gemmell suffered an injury which did not result in a permanent impairment rating, the ALJ stated her reliance upon Drs. Soucy and Gleis, although she indicated she placed more importance on Dr. Soucy's opinion as the treating physician. In his November 11, 2012 note, Dr. Soucy opined Gemmell could return to work without

restrictions and had "no impairment." He did not reference the AMA Guides in making this assessment.

Gemmell argues the ALJ relied on Dr. Soucy in violation KRS 342.730(1)(b). However, that provision states that an award for PPD benefits must be calculated by using a "permanent impairment rating caused by the injury or occupation disease as determined by the" AMA Guides. *See also* Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). However, the ALJ did not award PPD benefits. For this reason, we are unable to agree that the ALJ violated KRS 342.730 in relying upon Dr. Soucy's records.

Furthermore, the ALJ also relied upon Dr. Gleis' opinion that Gemmell had no permanent impairment due to her lumbar spine or ankle conditions. There is no doubt his opinion is based on the AMA Guides, which he expressly states in his report. As such, his opinion constitutes the requisite substantial evidence to support the ALJ's conclusion. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Notwithstanding the ALJ's concurrent reliance on Dr. Soucy's opinion, the ultimate decision is well supported by Dr. Gleis' opinion alone.

Finally, Gemmell argues the ALJ's "blind acceptance" of Dr. Gleis' opinion is reversible error. As

part of this argument, she contends Dr. Gleis improperly interpreted the AMA Guides in assigning no permanent impairment rating for her lumbar spine and right ankle conditions.

With respect to Gemmell's lumbar spine condition, Dr. Gleis noted he found "no subjective or objective radiculopathy." Gemmell argues that DRE Lumbar Category II, relied upon by Dr. McEldowney, specifically exempts "radiculopathy" as an element. However, Dr. Gleis assigned the 0% impairment rating on DRE Category I. His clinical findings, specifically his notation of "no lumbar muscle guarding, muscle spasm, or dysmetria", are consistent with DRE Category I criteria.

Essentially, Gemmell's argument rests on the fact that Dr. McEldowney found evidence of radiculopathy, while Dr. Gleis found none. Gemmell attempts to argue that Dr. Gleis did, in fact, find radicular complaints because she indicated leg pain in her intake documents. However, we find this fact insufficient to establish Dr. Gleis' opinion is incompetent or that he otherwise disregarded the AMA Guides. *See* Jones, 189 S.W.3d at 154.

Similarly, Dr. Gleis did not misinterpret the AMA Guides where he failed to find any evidence of instability in Gemmell's right ankle. His clinical exam revealed no

range of motion or strength deficit. Based on these findings, he assigned no permanent impairment rating. The fact Dr. McEldowney disagreed with this clinical finding does not render Dr. Gleis' report incompetent. Furthermore, the ALJ was entitled to rely upon Dr. Gleis' opinion notwithstanding Dr. McEldowney's conflicting opinion. "Although the proper diagnosis of a medical condition and the proper interpretation of the AMA Guides are medical questions, an ALJ must decide the legal significance of conflicting medical evidence." Tokico (USA), Inc. v. Kelly, 281 S.W.3d 771, 775 (Ky. 2009).

This appeal is, in essence, a request of this Board to reweigh the evidence in Gemmell's favor, which we may not do. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). Conflicting medical evidence was presented concerning the lasting effects of her work-related accidents. The ALJ enjoyed the discretion to weigh the evidence and draw reasonable inferences therefrom. Miller v. East Kentucky Beverage/Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997). While Gemmell presented Dr. McEldowney's IME report to support her case, the ALJ was free to rely instead upon the records of Drs. Gleis and Soucy. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Upon review of the entire record, we do not believe the evidence compels a finding of permanent

partial disability. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984).

Accordingly, the May 20, 2014 Opinion and Award and the June 18, 2014 Order on Reconsideration rendered by Hon. Jeanie Owen Miller, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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