

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 21, 2014

CLAIM NO. 201399321

MARIE BOGGS

PETITIONER

VS.

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

SYKES ENTERPRISES, INC.
and HON. GRANT S. ROARK,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING IN PART,
VACATING AND REMANDING

* * * * *

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

ALVEY, Chairman. Marie Boggs ("Boggs") seeks review of the opinion and order rendered December 2, 2013 by Hon. Grant S. Roark, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and medical benefits. Boggs

also seeks review of the January 9, 2014 order denying her petition for reconsideration.

On appeal, Boggs argues the ALJ erred by awarding PPD benefits based upon a 6% impairment rating, which was only a portion of the 35% impairment rating assessed by Dr. Arthur Hughes. We disagree and affirm in part because it was within the ALJ's discretion to rely upon part, but not all, of the impairment rating assessed, and no contrary result is compelled. Because the ALJ did not address the neck and mid-back injury alleged in the Form 101, we remand for additional findings.

Boggs filed a Form 101 on April 22, 2013 alleging on October 2, 2011 she sustained neck and mid-back injuries when she slipped and fell in a wet bathroom. She also alleged bilateral carpal tunnel syndrome due to repetitive trauma she sustained while working for Sykes Enterprises, Inc. ("Sykes"). Boggs is a high school graduate with some college coursework. She also has training as a nail technician. Her employment history includes working as a store clerk/manager, bank teller, baby sitter, and customer service representative. In support of her claim, Boggs filed the October 2, 2011 note from the Primary Care Centers of Eastern Kentucky indicating she had experienced a muscle spasm or strain between her shoulders and down her back.

She also submitted the February 6, 2013 and February 13, 2013 notes from Dr. Steven Carawan outlining treatment for her right carpal tunnel syndrome. She also filed the report of an EMG/NCV performed on January 14, 2013 diagnosing entrapment of the median nerve at the wrist on the left side consistent with carpal tunnel syndrome.

Boggs testified by deposition on August 15, 2013, and at the hearing held September 30, 2013. Boggs was born on April 19, 1967, and is a resident of Bonnyman, Perry County, Kentucky. Although she has never been restricted from driving, she stated she has been unable to drive occasionally due to hand numbness. She stated she experienced low back pain in February 2011 when she fell in her yard. On October 2, 2011, she sought treatment due to falling, or doing the splits in a bathroom at work. She stated she first experienced hand and finger numbness in the summer of 2012. On December 10, 2012, her hands became so numb she informed her supervisor she could no longer do her work.

Despite a right carpal tunnel release on February 13, 2013, Boggs stated she continues to have problems with her right hand, although it relieved the pain radiating from her shoulder to her wrist. She stated she is right hand dominant, but now uses the left hand more. In addition to

the surgery, she has had injections in her hand. Nerve studies were performed on January 4, 2013. Dr. Carawan, her treating hand surgeon, has never released her to return to work since her February 13, 2013 surgery. She is currently receiving no treatment, and no longer treats with over-the-counter anti-inflammatory medication due to stomach problems she has experienced from using them. She uses ice and heat alternatively.

Boggs testified she is unable to return to work as a receptionist because she cannot type. She stated she is unable to work as a bank teller because she cannot count money. She stated she cannot return to work as an assistant store manager because she is unable to stock shelves.

Dr. Hughes examined Boggs at her request on June 25, 2013. He noted she worked as a customer service representative for Sykes which required use of a telephone and a computer. He noted she began developing hand numbness approximately nine months after she started working for Sykes. He also noted the history of slipping in the bathroom which caused an onset of neck, right shoulder and upper back pain. Dr. Hughes diagnosed right carpal tunnel syndrome, status post right carpal tunnel release, residual hand dysfunction secondary to carpal tunnel surgery, and left carpal tunnel syndrome. Dr. Hughes assessed a 35%

impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He specifically outlined the impairment rating as follows:

- a. right carpal tunnel syndrome 18%
- b. right index finger reduced range of motion 5%
- c. right middle finger reduced range of motion 5%
- d. right ring finger reduced range of motion 5%
- e. right fifth finger reduced range of motion 5%
- f. reduced grip strength, right 6%
- g. left carpal tunnel syndrome, now asymptomatic 0%
- h. **combination of values 35%**
(Emphasis added)

Dr. Hughes restricted Boggs from using her right hand, except for simple tasks. He also stated she has limited ability to stand, walk and use stairs. He stated Boggs is required to hold objects with both hands and therefore cannot work at unprotected heights. He opined she does not retain the physical capacity to return to the type of work performed at the time of her injury.

Boggs was evaluated by Dr. Rick Lyon, at Sykes' request on August 26, 2013. Dr. Lyon noted the October 2011 slip and fall in the bathroom, for which kyphoplasty was subsequently offered, but Boggs declined. Dr. Lyon noted Boggs had marked improvement after her carpal tunnel release which decreased the symptoms in her right shoulder. He also noted she continued to complain of numbness in the small, ring and middle fingers. He diagnosed myofascial cervical strain - resolved and myofascial thoracic strain - resolved. He disagreed with the impairment rating assessed by Dr. Hughes because he determined she does not meet the criteria for grip strength impairment, she has full range of motion, and studies do not verify or support the diagnosis of a nerve injury. He stated no objective findings exist to support the finding Boggs' carpal tunnel syndrome, which pre-existed her employment with Sykes, was worsened by her work there. Regarding her cervical and lumbar pain, he stated at worst she sustained an exacerbation from which she would have reached maximum medical improvement within three weeks, warranting no assessment of restrictions or impairment rating.

Sykes filed the September 1, 1998 office note of Dr. Craig Knox. Dr. Knox noted an EMG/NCV was within normal limits, but the median nerve was close to meeting the

criteria necessary for a diagnosis of carpal tunnel syndrome. He suspected she had mild carpal tunnel syndrome.

A benefit review conference ("BRC") was held on September 11, 2013. The BRC order and memorandum reflects the issues preserved were benefits per KRS 342.730; work-relatedness/causation; unpaid/contested medical bills; injury as defined by the Act; exclusion for pre-existing disability/impairment; entitlement to TTD benefits.

In a decision rendered December 2, 2013, the ALJ determined Boggs had sustained bilateral carpal tunnel syndrome caused by her work at Sykes. He awarded TTD benefits from January 5, 2013 through June 24, 2013, to which neither party objects. He stated the 35% impairment rating assessed by Dr. Hughes was excessive, and awarded PPD benefits at the rate of \$36.72 per week. The ALJ specifically found as follows:

Having reviewed the evidence of record, the Administrative Law Judge is ultimately more persuaded by the opinions of Dr. Hughes in this particular case. Although Dr. Lyon indicates plaintiff has a long history of prior wrist complaints, plaintiff's actual medical history is not as significant as Dr. Lyon suggests. From the available medical records, it does not appear plaintiff was ever previously diagnosed with carpal tunnel syndrome and there is no indication she previously underwent any nerve conduction studies. In addition, the

last time plaintiff presented with any wrist complaints prior to her employment with the defendant was at least several years previously. There is no indication plaintiff was on any restrictions for those complaints years prior. For these reasons, Dr. Lyon's opinions are not considered credible in this instance.

Extent & Duration/Prior Active Condition

The next issue is the extent of plaintiff's impairment/disability. As indicated above, Dr. Lyon's opinion that plaintiff has no impairment for her carpal tunnel syndrome is just not considered credible given plaintiff's symptoms, treatment records, and surgical repair.

However, Dr. Hughes' 35% rating is simply too excessive to be considered credible on the whole. A review of how he calculated his impairment rating suggests Dr. Hughes may have accounted for certain portions of plaintiff's condition several times, i.e., he may have "double-dipped." Instead, the Administrative Law Judge is persuaded by the 6% Dr. Hughes assigned for plaintiff's reduced grip strength as of[sic] this figure seems to account for the individual limitations of each finger which Dr. Hughes also rated separately and in addition to plaintiff's reduced grip strength. Moreover, a 6% rating is far more consistent with a typical postsurgical carpal tunnel claim. Accordingly, it is determined plaintiff has a 6% impairment rating for her right carpal tunnel syndrome.

In addition, it is determined plaintiff's carpal tunnel condition prevents her from returning to her work

as a customer service representative since the repetitive nature of those duties caused her to develop problems in the first place. This is also consistent with plaintiff's own testimony that she is unable to type in her current condition. Accordingly, plaintiff is entitled to application of the 3X multiplier in KRS 342.730(1)(c)1. Her awarded[sic] of benefits is therefore calculated as follows:

$$\begin{aligned} \$360 \times 2/3 &= \$240 \times .06 \times .85 \times 3 = \\ & \$36.72 \end{aligned}$$

It is also determined there is no basis to reduce any portion of plaintiff's award as being active prior to December 12, 2012. There is simply no evidence she had her prior, ratable condition to warrant a carve out of her award.

Boggs filed a petition for reconsideration arguing it was patent error for the ALJ not to award PPD benefits based upon the entire 35% impairment rating, or in the alternative he should have awarded benefits based upon an 18% impairment rating. The ALJ denied the petition for reconsideration in an order dated January 9, 2014.

As the claimant in a workers' compensation proceeding, Boggs had the burden of proving each of the essential elements of her cause of action. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Here the ALJ determined only 6% of the 35% impairment rating assessed by Dr. Hughes was appropriate. The question on appeal is whether a

contrary result is compelled. 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). Similarly, the ALJ has the discretion to determine all reasonable inferences to be drawn from the 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). 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 supporting a different outcome than 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). It is within the authority of the ALJ to believe part of a witness's testimony while disregarding other parts of that same testimony. Magic Coal Co. vs. Fox, Ky., 19 S.W.3d 88 (2000); Codell Construction Co. vs. Dixon, Ky., 478 S.W.2d 703 (1972) and Republic Steel Corp. vs. Justice, Ky., 464 S.W.2d 267 (1971). 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).

Here, Dr. Hughes set forth various elements for which he assessed impairment ratings pursuant to the AMA Guides, then provided a combined rating. Dr. Lyon disputed whether the impairment ratings were appropriate and whether Boggs qualified for any impairment rating for her alleged injuries. The ALJ determined only one of the myriad impairment ratings assessed by Dr. Hughes was applicable and

appropriate. He adopted the rating assessed by Dr. Hughes, and based the award of PPD benefits upon this rating.

Boggs' argument the ALJ erred pursuant to the holdings in Kentucky River Enterprise, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), and Caldwell Tanks v. Ruark, 104 S.W.3d 753 (Ky. 2003) is misplaced. Those cases stand for the proposition only a medical expert can assess an impairment rating, and the ALJ can only perform a mechanical exercise in utilizing the AMA Guides which requires no medical expertise. That is precisely what the ALJ did in the case *sub judice*. The ALJ made no assessment of whether Dr. Hughes correctly calculated the impairment rating, nor is there any evidence he attempted to assess the rating himself. Rather, he adopted a portion of the rating assessed by Dr. Hughes, for the particular injury he found appropriate. This he was permitted to do.

In Alton Livingood v. Transfreight, LLC, 2014 WL 356605 (Ky. App. 2014), rendered by the Kentucky Court of Appeals (designated not to be published) upheld a similar determination from an ALJ who determined a 2% impairment rating for pain in addition to a 5% impairment rating for loss of range of motion was inappropriate. The Court of Appeals held as follows:

The determination of the witnesses' credibility and the weight to be given the evidence lies within the province of the fact-finder. *Uninsured Employers' Fund v. Garland* 805 S.W.2d 116, 118 (Ky. 1991). We do not find the ALJ's conclusion to be an independent interpretation of the Guides, or an unreasonable conclusion in light of the evidence.

In this instance, the ALJ relied upon the rating assessed by Dr. Hughes for that element of the rating he found appropriate. We do not find the ALJ's conclusion was an independent interpretation of the AMA Guides, nor was it an unreasonable conclusion in light of the evidence. Therefore, we find no error, and we affirm.

That said, this Board is permitted to *sua sponte* reach issues even if unpreserved but not raised on appeal. KRS 342.285(2)(c); KRS 342.285(3); George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004). In the Form 101, Boggs asserted two injury dates. She first alleged a neck and mid-back injury occurring on October 2, 2011 when she slipped and fell in a wet bathroom. She also alleged a cumulative trauma injury in the form of bilateral carpal tunnel syndrome with an onset date of December 10, 2012 due to the repetitive nature of her work. Although very little evidence was developed relating to the neck and mid-back injury, the alleged October 2, 2011 injury was not

addressed by the ALJ in his decision, and the record does not establish this claim was waived. Therefore, we must vacate and remand the ALJ's decision for a determination regarding that injury based upon the evidence of record. No particular result is directed; however, the ALJ must determine whether Boggs sustained a work-related mid-back and/or neck injury on October 2, 2011. If he determines an injury occurred on that date, the ALJ must also provide a determination regarding whether Boggs is entitled to either income or medical benefits, and if so, the duration.

Accordingly, the ALJ's award of TTD benefits, PPD benefits and medical benefits in relation to the December 10, 2012 injury is **AFFIRMED**. The ALJ's opinion and order is **VACATED** and **REMANDED** for entry of a decision regarding the alleged October 2, 2011 injury.

ALL CONCUR.

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