Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 3, 2014

CLAIM NO. 201263579

MARTHA NELSON PETITIONER

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

CARDINAL COUNTRY STORES
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

ALVEY, Chairman. Martha Nelson ("Nelson") seeks review of the opinion and award rendered February 14, 2014 by Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ") awarding temporary total disability ("TTD") benefits, and medical benefits, but denying her claim for permanent partial disability ("PPD") benefits. Nelson also appeals

from the March 20, 2014 order on reconsideration finding she did not suffer a compensable shoulder injury.

On appeal, Nelson argues the ALJ's finding of no impairment or injury to the right shoulder was not supported by substantial evidence because it was not specifically referenced in the report of Dr. David J. Jenkinson, upon which he relied. We disagree and affirm because substantial evidence in the record supports the ALJ's determination and a contrary result is not compelled.

Nelson filed a Form 101 on July 15, 2013 alleging she injured her upper and lower back on October 24, 2012, when she slipped and fell on a wet floor at the end of a counter while working as a cook for Cardinal Country Stores ("Cardinal"). Nelson began working for Cardinal in 2000, and last worked there on the date of the accident. This is the only job she has ever held.

Nelson testified by deposition on November 27, 2013, and at the hearing held December 17, 2013. She was born on January 24, 1964, and is a resident of Prestonsburg, Kentucky. Nelson is a high school graduate. She stated she never had any back problems prior to the accident, but was treating for unrelated left knee pain.

Nelson had typically worked for Cardinal from 7:00 a.m. to 4:00 p.m., but her hours were reduced approximately

a month and a half prior to the accident. Her job at Cardinal involved cooking, cleaning, washing dishes, sweeping, mopping and waiting on customers. At the time of the accident she had mopped the floor, but had not allowed it enough time to dry. As she walked around the counter to wait on a customer, her feet slipped from under her causing her to fall. She experienced immediate low back pain, and was helped up by a co-worker. She stated her right shoulder began bothering her later that evening.

Nelson was taken to the hospital by her daughter, and subsequently sought treatment with Dr. Anbu K. Nadar, who she stated she saw upon her attorney's recommendation. Dr. Nadar ordered an MRI, prescribed medication, ordered physical therapy and administered one injection. Nelson stated she continues to have back pain which is aggravated by prolonged standing or sitting, stair climbing and bending. She stated she has intermittent pain in her right leg, and reported leg numbness on three occasions. She also complained of a tightness or pain between her shoulders. She stated she does not believe she can return to her job at Cardinal due to problems with standing, bending, lifting, pulling and tugging.

In support of her claim, Nelson filed Dr. Nadar's July 9, 2013 report, and his office notes. In his report,

Dr. Nadar stated Nelson injured her back and right shoulder when she slipped and fell working for Cardinal. He diagnosed her with dorsal, lumbar and right shoulder strains. He assessed a 10% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition, ("AMA Guides"), of which he assessed half to the lumbar strain, and half to the dorsal strain. He assigned no impairment to the right shoulder. He advised Nelson to avoid heavy lifting, bending, twisting, climbing and crawling.

Nelson filed Dr. Nadar's office notes for treatment from October 30, 2012 through June 18, 2013. On October 30, 2012, Dr. Nadar noted Nelson's complaints of persistent back pain with some pain down the right hip to the knee with intermittent numbness. She indicated she had some previous back pain which required treatment. He noted a lumbar CT-scan, and a right shoulder x-ray were both negative. He diagnosed dorsolumbar strain and right shoulder sprain. Subsequent records note muscle tenderness in the back, with complaints of pain in the scapula and rotator cuff, with normal range of motion. A January 9, 2013 MRI revealed degenerative changes in the back. Dr. Nelson's records do not reflect right shoulder complaints or treatment subsequent to the November 27, 2012 office visit.

Nelson also filed the emergency room records from the Highland Regional Medical Center on October 24, 2012. Those records do not indicate Nelson's complaints, but do reflect a lumbar CT-scan and right shoulder x-rays were ordered. The records also reflect a prescription for Naproxen 500 mg. The remainder of the documentation provides general information regarding muscle strains and cautions regarding taking medication.

Cardinal filed the April 8, 2013 report of Dr. Jenkinson who evaluated Nelson at its request. Dr. Jenkinson noted the history of injury occurring October 24, 2012 when she fell and struck her lower back and the region around her right shoulder blade. At the time of the evaluation, she complained primarily of pain in her lower back with radiation into her right leg. She also complained of tightness between her shoulder blades. On examination he noted full range of motion in both the upper and lower extremities. He noted normal grip strength and lightly callused hands which he stated indicated she was involved in some ongoing manual activity.

Dr. Jenkinson noted, "There is no evidence that she sustained any significant structural injury to any body part." He noted she had subjective complaints without

evidence of any objective abnormality. Regarding her treatment, Dr. Jenkinson stated as follows:

> I believe the emergency room assessment with x-rays was reasonable and necessary. I also believe that the follow-up care by Dr. Nadar with MRI scan was reasonable and necessary in view of her subjective complaints. I believe a short course of physical therapy would have been appropriate at the time it was prescribed. Given the fact that all investigations have been negative for significant abnormality and that she has continued subjective complaints in the absence of objective abnormality then it is my opinion that further treatment is not reasonable and necessary.

Dr. Jenkinson opined Nelson reached maximum medical improvement ("MMI") within two to three weeks after the October 24, 2012 accident. He stated she had clearly reached MMI by the date of his examination. He stated she requires no additional treatment. He assessed a 0% impairment rating pursuant to the AMA Guides.

On January 24, 2014, the ALJ entered an order amending the Form 101 to reflect the allegation of a right shoulder injury pursuant to a motion filed by Nelson on December 18, 2013.

The ALJ rendered an Opinion and Award on February 14, 2014. He awarded TTD benefits from October 25, 2012 through April 8, 2013, the date of Dr. Jenkinson's

examination, at the rate of $314.00 per week. The ALJ relied upon the 0% impairment rating assessed by Dr. Jenkinson, who he found more credible than Dr. Nadar, in denying PPD benefits. The ALJ did not specifically address Nelson's right shoulder complaints, but noted she had suffered a lumbar sprain which had resolved.

Nelson filed a petition for reconsideration on February 26, 2014 arguing the ALJ failed to consider the shoulder injury. She also argued the ALJ should have relied upon the 10% impairment rating assessed by Dr. Nadar instead of the 0% impairment rating assessed by Dr. Jenkinson because he is the treating physician and in a better position to evaluate her condition.

The ALJ rendered an order on reconsideration on March 20, 2014. He reiterated he found Dr. Jenkinson more convincing. He specifically found as follows:

> 2. Dr. Jenkinson concluded that the Plaintiff did not sustain a significant injury to any body part and the ALJ finds that this statement is conclusive and convincing regarding the Plaintiff's shoulder complaints.
>
> 3. The ALJ therefore finds based upon the most convincing medical evidence that the Plaintiff did not suffer a compensable injury to the right shoulder.

On appeal, Nelson argues the ALJ erred in relying upon Dr. Jenkinson, in particular regarding the right shoulder complaints. Nelson argues Dr. Jenkinson failed to address the right shoulder in his report. Dr. Jenkinson indicated he had reviewed the x-ray of the right shoulder. The report clearly reflects he conducted a complete examination of the back, the lower extremities, and the upper extremities, which included range of motion. It is further noted that although the ALJ did not specifically discuss the right shoulder in his original decision, he did so in the order on reconsideration.

As the claimant in a workers' compensation proceeding, Nelson 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). Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). Since she was unsuccessful before the ALJ regarding PPD benefits and the alleged right shoulder injury, the question on appeal is whether the evidence compels a finding in Nelson's favor. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Compelling evidence is defined as evidence 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).

In rendering a decision, KRS 342.285 grants the ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59 (Ky. 2008). The ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). 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 function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings are so unreasonable they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 79 (Ky. 1999).

The ALJ determined Nelson sustained a lumbar injury which has resolved, and later found she did not suffer a compensable injury to the right shoulder in the order on reconsideration. The ALJ awarded income and medical benefits for the temporary lumbar injury. He also awarded medical benefits which are not limited to the period of TTD benefits.

Contrary to Nelson's arguments, the ALJ's decision regarding the right shoulder is supported by Dr. Jenkinson's report. It is further noted Dr. Nadar, Nelson's treating physician, made no mention in his records of the shoulder after the November 27, 2012 office visit, except for his later report. It is further noted Dr. Nadar did not address the shoulder in his report where he assessed impairment ratings for the spine. It was reasonable for the ALJ to conclude Nelson sustained no compensable injury to the right shoulder. Therefore, we determine the ALJ's decision is supported by substantial evidence, and a contrary result is not compelled.

Accordingly, the decision rendered February 14, 2014, by Hon. Jonathan R. Weatherby, Administrative Law Judge, and the March 20, 2014 order on the petition for reconsideration are hereby **AFFIRMED**.

ALL CONCUR.

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