Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 15, 2016

CLAIM NO. 201285818

MELINDA KEOWN PETITIONER

VS. **APPEAL FROM HON. CHRIS DAVIS, ADMINISTRATIVE LAW JUDGE**

METHODIST HOSPITAL
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Melinda Keown ("Keown") appeals from the Opinion on Remand dated August 7, 2015, rendered by Hon. Chris Davis, Administrative Law Judge ("ALJ"). Keown also appeals from the September 14, 2015 order denying her petition for reconsideration, and an August 7, 2015 order denying her motion to reopen proof. The ALJ determined Keown suffered only a temporary injury producing no

permanent impairment rating as a result of a December 9, 2011, work-related incident. Keown now appeals, arguing the ALJ abused his discretion in refusing to reopen proof, incorrectly applied the law regarding pre-existing disability, and failed to make sufficient findings of fact supported by substantial evidence. For the reasons set forth herein, we affirm.

Keown filed a Form 101 alleging a work-related lifting injury occurring on December 9, 2011 while she was employed as a paramedic. The claim was litigated and, by order dated December 23, 2013, the ALJ dismissed for failure to prove work-relatedness. Keown appealed. By opinion dated May 16, 2014, this Board determined the parties had stipulated a work-related injury occurred on December 9, 2011. Therefore, we remanded the claim to the ALJ for determination of whether the injury was temporary or permanent. Respondent, Methodist Hospital, then sought review before the Court of Appeals. In an opinion dated May 8, 2015, the Court of Appeals affirmed this Board's decision. Upon remand, the ALJ concluded the December 9, 2011 work-related incident caused only a temporary injury resulting in no permanent impairment.

At the time of injury, Keown was employed by Methodist Hospital as a paramedic. On December 9, 2011,

she and a colleague were lifting an obese patient when she fell. She immediately felt pain in her right arm and shoulder, which radiated to her hand. She completed an accident report.

Keown did not seek immediate medical care, but waited for an available appointment with her family physician on December 30, 2011. Dr. Debra Wallace took a history of a work-related accident, and Keown reported pain between her shoulder blades and neck. At a January 13, 2012 appointment with Dr. Wallace, Keown continued to report upper back pain, but did not specifically report right shoulder pain. Dr. Wallace diagnosed musculoskeletal pain. Keown returned to full duty work and continued to treat with Dr. Wallace. However, her symptoms had not improved by April, 2012, and she was then placed on light duty work.

During this period, Keown also treated with her chiropractor, Dr. Stuart Lockwood. Dr. Lockwood's medical records document treatment from June 1999 through January 2012 for various neck and back complaints. In May and June 2011, Keown reported right shoulder pain. Keown's first visit to Dr. Lockwood following the December 9, 2011 incident was on January 13, 2012. She visited him three times in January 2012, reporting neck and thoracic pain.

Keown was not pleased with her progress with Dr. Wallace and requested a referral to Dr. Judith Canlas, an occupational physician. Dr. Canlas performed an EMG and diagnosed carpal tunnel syndrome. Dr. Canlas ordered physical therapy, which Keown found fruitless, so she returned to Dr. Wallace for further consultation. Dr. Wallace then referred Keown to pain management with Dr. Randall Oliver and to Dr. Criss Yelton, for consultation regarding the carpal tunnel syndrome.

Dr. Oliver treated Keown for neck, upper back and right shoulder pain with injections. After several visits with Dr. Oliver in 2012, he diagnosed myofascial pain syndrome and recommended a TENS unit for the neck. He stated he is unable to provide an opinion as to the causation of Keown's pain.

During the same period of time, Keown treated with Dr. Yelton, an orthopaedic surgeon. She originally visited Dr. Yelton on March 8, 2012 for a mass in her right small finger. At a follow-up visit on April 5, 2012, she reported upper back pain. She returned on June 7, 2012 for evaluation of pain and numbness in her right hand. Dr. Yelton's office notes indicate Keown reported shoulder pain. However, Dr. Yelton also recorded full range of motion in her shoulder. Dr. Yelton performed a right

carpal tunnel release surgery on June 27, 2012. She responded well to this surgery, however, according to Keown, it did not alleviate her right shoulder symptoms.

Methodist Hospital also submitted records from Dr. Jacob O'Neill, a colleague of Dr. Yelton who evaluated Keown on May 7, 2002, for upper back, neck and shoulder pain. Dr. O'Neill diagnosed chronic cervical spine and thoracic strain, and recommended a breast reduction.

In April 2013, Keown moved to Alabama and visited Dr. Jeffrey Fadil, a primary care physician for shoulder pain who ordered an MRI. The August 28, 2013 MRI report revealed a full thickness detachment of the supraspinatus tendon and partial tearing of the subscapularis. It also revealed probable degenerative fraying of the superior and posterior labrum. Thereafter, Keown underwent a rotator cuff repair procedure.

At Methodist Hospital's request, Dr. Robert Weiss conducted an independent medical evaluation ("IME") on May 23, 2012. He performed a physical examination and medical records review. He diagnosed cervicalgia and pain in the right shoulder, and found no indication of a permanent impairment. As to causation, Dr. Weiss stated, "[i]t appears her treatment and evaluation were related to the

work injury, but I would really have nothing further to recommend at this point."

Dr. Jules Barefoot conducted an IME on November 14, 2012, at Keown's request. He performed a physical examination and reviewed her medical records. Dr. Barefoot noted diminished range of motion in Keown's right shoulder, as well as tenderness to palpation in that area. Based on this limited mobility, Dr. Barefoot assigned a 7% whole person impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition. He concluded the entire impairment rating is attributable to her December 9, 2011 work-related injury. He also recommended referral to an orthopedic surgeon.

Methodist Hospital submitted the IME report of Dr. Reid Wilson, dated September 30, 2013. Dr. Wilson reviewed the medical records of Dr. Lockwood, the August 28, 2013 MRI report and film, as well as the IME reports of Drs. Weiss and Barefoot. Dr. Wilson noted Keown had treatment for right shoulder pain as early as 1995 with Dr. Lockwood, and reported a ten-year history of right shoulder pain to Dr. Canlas.

Dr. Wilson studied Keown's August 28, 2013 MRI and concluded the focal tear of the supraspinatus tendon is

not consistent with an acute injury. He noted Keown's chronic tendonopathy and degenerative changes, such as thinning of articular cartilage, to reach this conclusion. Conceding he could not pinpoint exactly when the tear occurred, Dr. Wilson opined Keown suffers from chronic and degenerative changes expected with the natural aging process.

Dr. Barefoot submitted an addendum to his report after reviewing the reports from Drs. Wilson and Weiss. In the addendum, he noted the August 28, 2013 MRI and reaffirmed his previous findings.

After the claim was remanded to the ALJ from the Court of Appeals, Keown moved to reopen proof time in order to submit documentation of the surgical treatment she received for her torn rotator cuff. The ALJ denied the motion.

In the August 7, 2015 Opinion on Remand, the ALJ noted the Court of Appeals' determination that the parties stipulated a work-related injury occurred on December 9, 2011. Turning to the extent of the injury, the ALJ acknowledged that objective diagnostic testing demonstrates some condition in Keown's right shoulder. However, he was unconvinced the condition was caused by the December 9, 2011 incident. The ALJ pointed to the fact Dr. Yelton was

unable to assign an impairment rating or to affirmatively state whether any impairment rating is work-related. Dr. Weiss assigned no impairment rating, while Dr. Wilson found no difference in the condition of the shoulder pre- and post-injury. The ALJ further explained he was unconvinced by Dr. Barefoot's report, because he assigned an impairment rating based solely on decreased range of motion. When coupled with the ALJ's suspicion regarding Keown's credibility, he was not persuaded by Dr. Barefoot's report. The ALJ also noted Keown was treated by Dr. Lockwood for shoulder pain in the months leading up to the work incident. Keown described various complaints and pains following the incident, but only reported shoulder pain several months later.

The ALJ concluded the December 9, 2011 work accident resulted in a temporary injury producing no permanent impairment, which resolved by December 30, 2011. He determined Keown's visit to Dr. Wallace on December 30, 2011 is compensable, but found all other treatment non-compensable. Because she missed no time from work prior to December 30, 2011, he denied temporary total disability benefits.

Keown petitioned for reconsideration, requesting further findings of fact regarding the conclusion she

suffered no permanent impairment and the denial of the request to reopen proof. The ALJ denied the petition. Keown now appeals.

Keown first argues it was abuse of discretion for the ALJ to deny her motion to reopen proof. Keown sought to admit evidence concerning the surgical repair of the tears identified in the April 2013 MRI. The ALJ explained, in the Opinion on Remand, he did not find it necessary to reopen proof time because he accepted Keown had a condition in her right shoulder, having previously reviewed her MRI report establishing such. Rather, the primary issue was whether the condition related to the December 9, 2011 incident.

As fact-finder, the ALJ enjoys the discretion to control the taking and presentation of evidence. When there is sufficient evidence in the record to address the contested issues at the time the claim is taken under submission, the ALJ is not required to reopen proof. T.J. Maxx v. Blagg, 274 S.W.3d 436 (Ky. 2008). The ALJ was presented medical records for treatment during the 18 months following the work incident, including the August 2013 MRI. Dr. Barefoot provided an addendum to his IME report in light of the MRI findings. Thus, the fact Keown suffered a right shoulder condition was not disputed. The

ensuing treatment of that condition is not relevant to causation. Furthermore, in her motion to reopen proof time, Keown provided no specific reason her medical records relating to her surgery should be considered, other than the bare statement they are "important and relevant." Under these circumstances, we find no abuse of the ALJ's discretion.

Keown next argues the ALJ did not follow the instructions of the Court of Appeals. She points to the following statement by the ALJ contained in the Opinion on Remand: "As it specifically relates to this claim the Court has stated that substantial evidence of record exists to find that the Plaintiff has no work-related impairment." In its opinion, the Court did not specifically state substantial evidence exists to find Keown suffers no work-related impairment and, in this regard, Keown's assertion on appeal is somewhat accurate. However, this argument is based on an oversimplification of the Court of Appeals' opinion as well as the ALJ's decision. When read in its entirety, it is clear the ALJ understood the Court of Appeals' mandate. The Court of Appeals determined the ALJ erred in dismissing the claim, but did not direct a particular result as to the extent of the injury or

impairment, if any. The ALJ's decision did not fall outside the parameters set forth by the Court of Appeals.

Keown next argues the ALJ incorrectly applied the law regarding pre-existing disability. She argues the ALJ failed to recognize and apply the rule that pre-existing degenerative changes are compensable if work-related. Further, Keown contends the ALJ failed to recognize and apply the rule that non-work-related degenerative changes may be aroused into disabling reality by a work-related accident. She argues the medical evidence establishes a dormant condition which was aroused into disabling reality by the December 9, 2011 incident.

Though couched as an error in the ALJ's application of the law, this argument is essentially a request for this Board to reweigh the evidence in Keown's favor. As the 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). 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). In order to reverse the decision of the ALJ, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The ALJ's ultimate determination is well-supported by the evidence. Within his discretion, the ALJ is entitled to question Keown's credibility. Furthermore, the medical evidence from Dr. Wilson, alone, is sufficient to support the decision. Dr. Wilson reviewed Keown's MRI and explained his belief she did not suffer an acute injury. Though declining to assign a specific impairment rating, Dr. Wilson added, "based on the MRI findings, previous treatment, and medical history at least 50% of the underlying pathology is secondary to her chronic condition." The ALJ was not required, as Keown suggests, to accept this statement and further deduce the remaining

50% of her impairment is work-related. Rather, the ALJ acted within his discretion in relying upon Dr. Weiss to conclude Keown suffered no permanent impairment in her right shoulder. The circumstances of Keown's medical treatment, and her failure to report any shoulder pain for nearly five months after the incident, further support the ALJ's conclusion. Given the contradictory nature of the evidence presented in this case, it cannot be concluded the proof compelled a result in Keown's favor. The ALJ's decision is supported by substantial evidence and therefore, will not be disturbed.

In her final argument, Keown emphasizes the ALJ incorrectly identifies Danelle Colwell, a nurse who reviewed her medical records, as a physician. This error is minor and, because the ALJ did not base his decision on Colwell's opinion, it is harmless.

Keown also attacks the ALJ's reliance on Dr. Weiss' opinion because he did not review her MRI report and "did not really address her shoulder complaints." Dr. Weiss' report notes Keown's history of right shoulder pain, and he conducted a comprehensive physical examination. We find Keown's argument goes to the weight afforded to Dr. Weiss' opinion, rather than its general reliability as substantial evidence.

For the reasons set forth herein, the August 7, 2015 Opinion on Remand, the September 14, 2015 order denying petition for reconsideration and the August 7, 2015 order denying motion to reopen proof, rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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