

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: January 8, 2014

CLAIM NO. 201300080

MELISSA LEACH

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

HAZARD ARH  
and HON. CHRIS DAVIS,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION  
VACATING AND REMANDING

\* \* \* \* \*

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

**ALVEY, Chairman.** Melissa Leach ("Leach") seeks review of the order granting Hazard ARH's petition for reconsideration issued on September 23, 2013 by Hon. Chris Davis, Administrative Law Judge ("ALJ"), amending the award of permanent partial disability ("PPD") benefits based upon a

1% impairment rating rather than on the 16% originally awarded in the decision rendered August 12, 2013.

On appeal, Leach argues the ALJ erred in amending the award of PPD benefits, and should have relied upon the 16% impairment rating assessed by Dr. James Owen. Dr. Owen first indicated Leach had not reached maximum medical improvement ("MMI") because he determined she needed additional treatment. He qualified his determination by stating if the additional treatment was not forthcoming, the impairment rating assessed would be appropriate. Therefore, absent additional treatment, it could be reasonably inferred Leach had reached MMI at the time of Dr. Owen's examination, and the ALJ could rely upon the impairment rating he assessed. We therefore vacate the ALJ's decision regarding Leach's impairment rating, and remand for an appropriate determination. We do not direct any particular result, and the ALJ may rely upon any valid impairment rating in the record.

Leach filed a Form 101 on January 18, 2013 alleging bilateral carpal tunnel resulting from repetitive use of her hands as a medical transcriptionist for Hazard ARH beginning in 2005, which manifested on July 14, 2012. She had previously worked in a similar position beginning in 1997. In support of her claim, Leach filed the August 8,

2012 record from Hazard ARH noting she had experienced tingling and numbness in her right hand for several years, which was getting worse. Nerve conduction studies from that visit demonstrated severe right carpal tunnel syndrome, for which surgery was performed.

Leach testified by deposition on April 15, 2013, and at the hearing held June 24, 2013. Leach was born on January 23, 1978, and is right hand dominant. She is a high school graduate, and completed vocational training as an administrative assistant. She continues to work for Hazard ARH, which she stated requires typing eight hours per day, six days per week. She began experiencing symptoms of mild pain six months before it became severe. She has had surgery on the right wrist, but not on the left. She has continued to experience pain in both wrists, and her symptoms are worse at the end of the day, with numbness and tingling every night. She wears splints on both wrists when the symptoms get bad, and she wears them to sleep at night. She expressed concern over her ability to perform her job into the indefinite future.

Leach submitted as evidence Dr. Owen's report from his March 1, 2013 evaluation. He noted she was initially evaluated for her complaints in July 2012 for complaints of cramping and pain in her fingers. He noted left hand

complaints, although not as severe as the right. He assessed her problems were due to the cumulative trauma of her job. Although he opined Leach had not yet reached MMI, Dr. Owen assessed a 16% impairment rating pursuant to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), and recommended additional testing and treatment. Regarding the impairment rating, Dr. Owen stated as follows:

Maximum medical improvement has not been reached. The 5<sup>th</sup> Edition Guides shows criteria for both postop EMG as well as one year from time of injury for evaluation of motor deficit. It should be noted in this situation that was only 2% upper extremity impairment that would potentially have been changed. The sensory abnormality would most certainly have been back to as good as it is going to get by six months and, therefore, I think the sensory aspect of it should be considered at maximum medical improvement. The range of motion of the wrists has not been afforded appropriate physical therapy techniques and, therefore, that may very well change as well given appropriate treatment. **If that treatment is not forthcoming, then the impairment rating as stated would be the appropriate rating.**  
(Emphasis added).

Dr. Owen recommended restrictions of avoiding activity which provokes pain or numbness in the involved fingers.

Hazard ARH filed the report of Dr. Ronald Burgess who evaluated Leach on May 1, 2013. Dr. Burgess stated

Leach had reached MMI, and assessed a 1% impairment rating based upon the AMA Guides. He stated Leach has idiopathic carpal tunnel syndrome caused by her gender and morbid obesity. He stated the use of a keyboard is not a risk factor for developing carpal tunnel syndrome and Leach can continue to work in her current job.

A benefit review conference ("BRC") was held on June 11, 2013. The BRC order and memorandum reflects the contested issues were benefits per KRS 342.730(2); work-relatedness/causation; notice; unpaid or contested medical expenses; injury as defined the Kentucky Worker's Compensation Act; and entitlement to temporary total disability benefits ("TTD").

In the August 12, 2013 opinion, award and order, the ALJ found Leach had sustained a work-related injury and awarded TTD benefits from August 8, 2012 to September 19, 2012. The ALJ also awarded PPD benefits based upon the 16% impairment rating despite referencing Dr. Owen's statement Leach had not reached MMI.

Hazard ARH filed a petition for reconsideration arguing the ALJ erred in relying upon the 16% impairment rating because Dr. Owen admitted she had not reached MMI, and therefore the rating was invalid. Hazard ARH cited to the unreported case of the Kentucky Supreme Court, Stevens

v. Coal Transport, 2003 WL 1478073 (Ky. Mar. 20, 2003)(No. 2002-SC-0259-WC), as modified (Mar. 25, 2003), which states, "AMA impairments are not assigned until after the injured worker has reached maximum medical improvement following an injury."

In the order on reconsideration issued September 23, 2013, the ALJ amended his decision by finding as follows:

1. Page 5, Section 6 ARH Regional Medical Center of the ALJ's SUMMARY OF THE EVIDENCE is HEREBY stricken from the OPINION, AWARD AND ORDER rendered on August 12, 2013.

2. Page 7 of the ALJ's FINDINGS OF FACT AND CONCLUSIONS OF LAW shall be amended as follows: Pursuant to the opinion of Dr. Burgess she warrants a 1% impairment rating. Dr. Owen's 16% impairment rating is inappropriate as the plaintiff had not reached maximum medical improvement when he offered his opinion regarding same.

3. Page 8 of the ALJ's FINDINGS OF FACT AND CONCLUSIONS OF LAW shall be amended as follows: the plaintiff's permanent partial disability award shall be  $\$612.00$  (AWW)  $\times$   $\frac{2}{3}$  (workers' compensation rate)  $\times$  .01 (impairment rating)  $\times$  .65 (grid factor) =  $\$2.65$  per week, for 425 weeks from July 14, 2012, and excluding all periods of temporary total disability benefits actually owed.

4. Page 8, Section 1 of the ALJ's ORDER shall be amended as follows: The plaintiff, Melissa Leach, shall recover

of the Defendant-employer, Hazard ARH, and/or its insurance carrier, the sum of \$2.65 per week, as permanent partial disability benefits, from July 14, 2012, for 425 weeks, and excluding any periods of temporary total disability benefits, with 12% interest on any past due portions and with the Defendant taking a credit for any benefits paid.

On appeal, Leach argues the ALJ erred in reweighing the evidence, and in disregarding Dr. Owen's opinion regarding impairment because he stated it was rendered prior to her reaching MMI. Leach also notes Dr. Owen specifically stated if the recommended treatment was not forthcoming, her impairment rating was appropriate. She argues neither the post-operative EMG nor the physical therapy recommended by Dr. Owen was provided, and therefore the rating he assessed could be relied upon.

Leach, as the claimant in a workers' compensation case, bore the burden of proving each of the essential elements of her cause of action before the ALJ, including the extent and duration of any disability generated by the work injury alleged, and entitlement to future medical expenses. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979).

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 sole authority to judge 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); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is not adequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, supra.

That said, the ALJ may not reverse himself on findings of fact. While the scope of the ALJ's authority in ruling on a petition for reconsideration is not strictly limited to the correction of clerical errors, he does not have the authority to reverse himself on the merits of the claim. Garrett Mining Co. v. Nye, 122 S.W.3d 513 (Ky. 2003); Beth-Elkhorn Corp. v. Nash, 470 S.W.2d 329 (Ky.

1971). In Wells v. Beth-Elkhorn Coal Corp., 708 S.W.2d 104, 106 (Ky. App. 1985), the Court of Appeals stated:

The Board is limited in its granting of the petition in one respect, however. The petition may not be granted if it appears that the Board has reconsidered the case on its merits and/or changed its factual findings. [Citation omitted]

Here, the ALJ initially awarded benefits based upon the impairment rating assessed by Dr. Owen, despite noting Leach had not reached MMI. In his order on reconsideration he stated he erred in relying upon Dr. Owen's impairment rating, and amended his award to rely upon the rating assessed by Dr. Burgess.

Dr. Owen opined Leach had not reached MMI because she needed additional physical therapy and an EMG. He further stated if this treatment was not forthcoming, the 16% impairment rating he assessed was appropriate. In her brief, Leach asserted the recommended treatment and testing were not provided. Because the additional treatment was not forthcoming, it would be reasonable to infer Leach had indeed reached MMI, and the impairment rating assessed by Dr. Owen can be relied upon.

On remand, the ALJ is directed to determine whether the additional treatment recommended by Dr. Owen was

provided. If not, he may determine Leach has reached MMI, and therefore he may award PPD benefits based upon either the impairment rating assessed by Dr. Owen, or the one assessed by Dr. Burgess. This Board may not and does not direct any particular result because we are not permitted to engage in fact-finding. See KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Accordingly, the September 23, 2013 order on reconsideration is **VACATED**, and this claim is **REMANDED** for entry of an amended opinion in conformity with the views expressed herein.

STIVERS, MEMBER, CONCURS.

RECHTER, MEMBER, DISSENTS AND WILL NOT FURNISH A SEPARATE OPINION.

**COUNSEL FOR PETITIONER:**

HON MCKINNLEY MORGAN  
921 SOUTH MAIN STREET  
LONDON, KY 40741

**COUNSEL FOR RESPONDENT:**

HON JOEL W AUBREY  
303 N HURSTBOURNE PKWY, STE 110  
LOUISVILLE, KY 40222

**ADMINISTRATIVE LAW JUDGE:**

HON CHRIS DAVIS  
410 WEST CHESTNUT ST, STE 700  
LOUISVILLE, KY 40202