Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: May 9, 2014

CLAIM NO. 201395443

NANNIE BOWLING PETITIONER

VS. **APPEAL FROM HON. STEVEN G. BOLTON, ADMINISTRATIVE LAW JUDGE**

LAUREL CREEK HEALTH CARE CENTER
and HON. STEVEN G. BOLTON
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING IN PART & REMANDING

* * * * * *

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

ALVEY, Chairman. Nannie Bowling ("Bowling") seeks review of the opinion and order rendered February 17, 2014 by Hon. Steven G. Bolton, Administrative Law Judge ("ALJ"), finding she sustained injuries to her left arm and elbow on January 25, 2013 while working for Laurel Creek Health Care Center ("Laurel Creek"), but dismissing her claim for additional

temporary total disability ("TTD") benefits, permanent partial disability ("PPD") benefits, and future medical benefits. The ALJ also dismissed her claim for a left shoulder injury. No petition for reconsideration was filed.

On appeal, Bowling argues the ALJ erroneously dismissed her claim for a left shoulder injury because it was included in her allegation of left arm and elbow injuries. Bowling argues Laurel Branch was on notice of the alleged left shoulder injury. She stated, "The Employer was put on notice that her injury included the shoulder even before Bowling knew herself that Dr. (Arthur) Hughes diagnosed a shoulder injury in addition to an elbow injury as a result of her fall." Because the ALJ's determination Bowling did not sustain permanent injuries to her left elbow and arm, and his dismissal of the allegation of a left shoulder injury are supported by the record, we affirm. However, because the ALJ failed to make a determination of entitlement to future medical benefits pursuant to FEI Installation Inc. v. Williams, 214 S.W.3d 313 (Ky. 2007), we affirm in part and remand for further determination.

Bowling filed a Form 101 on July 1, 2013 claiming she sustained injuries to her left arm and elbow on January 25, 2013 when she tripped over a vacuum cleaner at work. The Form 101 did not mention a shoulder injury, nor did she

ever move to amend her claim to include such allegation. In the Form 104 work history, Bowling indicated her work history consisted of working as a machine operator, inspector, and industrial housekeeper.

Bowling testified by deposition on November 27, 2013, and at the hearing held December 17, 2013. Bowling is a resident of Manchester, Kentucky. She is a high school graduate, but has no specialized training or additional education. She testified she has no other chronic health problems, nor does she treat for ongoing conditions except to take Buspar for her nerves. She indicated the nerve condition is not work-related, and her counsel indicated she had no intention of amending her Form 101 to include a claim for a psychological issue. She specifically stated she had never previously sustained an injury to he left upper extremity.

Bowling is right hand dominant. She stated her job at Laurel Creek consisted of mopping, taking out garbage, vacuuming and cleaning offices and resident rooms. Prior to her accident, she was required to clean privacy curtains in patient rooms, but indicated she can no longer lift them. She stated she occasionally experiences severe aching and numbness, and has tremors or a shaking in her

left arm. She also stated she experiences some numbness, and has a knot on her left elbow.

On January 25, 2013, she fell backward over a vacuum cleaner at work. She sought medical treatment the following day at Medical Associates of Southeastern Kentucky. She subsequently treated with Ms. Karen Cheek, APRN; Dr. Liaquat Malik; Dr. William Lester; and Dr. Ronald Burgess.

At the time of her deposition, Bowling had already seen Dr. Arthur Hughes for evaluation at the request of her attorney. At her deposition, Bowling denied injuring either shoulder when she fell on January 25, 2013. She specifically stated she had only injured her left hand, and fractured her left elbow when she fell. She stated she initially experienced pain from her left wrist to just above her left elbow. At the hearing, Bowling testified of her difficulty with her left wrist, elbow and shoulder. She admitted she did not report she injured her left shoulder to Laurel Creek, Dr. Mahboob[1], Ms. Cheek, Dr. Lester or Dr. Burgess. Likewise, she has had no treatment for her left shoulder.

[1] It is presumed she meant Dr. Malik since Dr. Mahboob was not listed on any medical reports filed in the claim.

Bowling filed records from the Medical Associates of Southeastern Kentucky in support of her claim. The record dated January 26, 2013 indicates Bowling fell the day before landing on her left hand, and her elbow became swollen. She reported she tripped over the cord to the vacuum cleaner and fell backward.

Bowling next filed records from Dr. Lester who saw her on two occasions in February 2013. Dr. Lester noted complaints of left hand and arm pain. He ordered an MRI which indicated she had sustained a radial head fracture with moderate joint effusion.

Bowling filed Dr. Hughes' report dated September 25, 2013. Dr. Hughes noted left wrist and elbow problems. He diagnosed a fracture of the left elbow with persistent pain, swelling and limitation of motion; tremor of left hand with attempted left elbow extension; sensory alteration of the medial aspect of the left arm; tenderness of the left lateral epicondyle; and pain and restricted range of motion of the left shoulder. Dr. Hughes assessed a 7% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Of this rating, he assessed 2% to the left elbow injury, and 5% to the left shoulder restricted range of motion. Dr. Hughes noted she should

avoid activities involving repetitive flexion, extension, supination, or pronation of the left elbow. He also stated she should avoid lifting with the left arm but a functional capacity evaluation would be helpful in defining her lifting ability.

Laurel Creek filed many of the same records previously filed by Bowling. In addition, it filed Dr. Burgess' treatment records from March 4, 2013 through June 27, 2013. Dr. Burgess, an orthopedic surgeon, noted Bowling had sustained a radial head fracture of her left elbow on January 25, 2013. When he first saw Bowling, Dr. Burgess limited her to lifting no more than two pounds with the left arm. On March 23, 2013, he changed the limitation to five pounds. On April 15, 2013, he noted she had full range of motion at the left elbow, and limited her lifting to no more than fifteen pounds. On May 22, 2013, Dr. Burgess noted no objective evidence of pathology, and opined she should reach maximum medical improvement ("MMI") in six weeks. On June 27, 2013, Dr. Burgess stated Bowling had reached MMI, and assessed a 0% impairment rating based upon the AMA Guides. He stated she could continue regular duty, and no additional treatment was required.

A benefit review conference ("BRC") was held on December 4, 2013. The issues preserved at the BRC were

benefits per KRS 342.730; work-relatedness/causation of left shoulder; unpaid or contested medical expenses; TTD; notice of left shoulder; injury as defined by the Act; and extent and duration. The parties also stipulated Bowling had returned to work at wages equal to or greater than she was earning at the time of the accident.

The ALJ found it undisputed that Bowling sustained an injury to her left wrist and elbow on January 25, 2013 when she tripped and fell over a vacuum cleaner cord. He noted she received TTD benefits for the two weeks of work she missed, and noted she has worked for Laurel Creek since that time. The ALJ further determined all medical bills had been paid, despite the fact an issue had been preserved as to unpaid bills. The ALJ then noted Bowling had made no claim for a left shoulder injury in her Form 101, nor had she advised her employer or any treating physician of a shoulder injury. The ALJ noted Dr. Hughes assessed an impairment rating for the left shoulder. He further noted she denied a left shoulder injury at her deposition taken approximately one month after the examination by Dr. Hughes.

The ALJ misstated Bowling's attorney indicated she did not intend to amend the Form 101, as this actually was in reference to psychological claim, not her left shoulder.

However, it is noted Bowling at no time amended her claim to include a claim for a left shoulder injury. In dismissing the claim, the ALJ stated as follows:

> I find on the basis of the record taken as a whole that the opinion of Dr. Ronald C. Burgess, M.D., Plaintiff's treating orthopedic surgeon, is the most complete, compelling and persuasive evidence in the record as to the Plaintiff's injuries, treatment thereof and current condition. I find that she reached MMI on June 6, 2013, was returned to full duty work without restriction and has a 0% WPI according to the AMA *Guides to the Evaluation of Permanent Impairment, 5th Edition.* According to Dr. Burgess, her complaints of residual pain and weakness are not supported by objective medical evidence.
>
> As to any separate claim for the alleged left shoulder injury, I find that the Plaintiff failed to give proper and timely notice of the claimed injury to the employer, which has resulted in such claim being barred by operation of law. KRS 342.185; KRS 342.270 (1); T.W. Samuels Distillery Co. v. Houck, 296 Ky. 323, 176 S.W.2d 890 (Ky., 1943). Here, if Plaintiff had a claim to an injury to her left shoulder (which I have found not to be supported by the physical evidence), she knew about it on or about 9/25/2013, when Dr. Hughes rendered his IME report. Yet one month later at her deposition, she was specifically denying a left shoulder injury. It was not until her benefit review conference on December 4, 2013, that the issue was raised before the ALJ. Further, the Form 101 was not amended to include a left shoulder injury. 803 KAR 25:010,

Section 5. Thus, the claim is barred and should be dismissed, both on a factual and legal basis.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Facts as stipulated by the parties herein and as set out herein above.

2. Facts as set out in my analysis herein above.

3. I find that the Claimant, **NANNIE BOWLING** suffered a work-related injury to her left arm and elbow on January 25, 2013, while in the employ of the Defendant/Employer, **LAUREL CREEK HEALTH CARE CENTER.** In making this finding, I have relied upon the evidence in the record as a whole, including Plaintiff's sworn testimony which, concerning the work causation of Plaintiff's injury, I find to be the most credible and convincing evidence in the record, and the medical opinion of Dr. Ronald C. Burgess, M.D, which I find to be the most credible and persuasive medical evidence as to the Plaintiff's whole person impairment.

4. I find that the Claimant, **NANNIE BOWLING** has failed to prove that she suffered a work-related injury to her left shoulder on January 25, 2013, while in the employ of the Defendant/Employer, **LAUREL CREEK HEALTH CARE CENTER,** and in addition such claim is barred because she failed to comply with the notice requirement of KRS 342.185. In making this finding, I have relied upon the evidence in the record as a whole, including Plaintiff's sworn testimony which, concerning the work causation of Plaintiff's injury, I find to be the most credible and convincing evidence in the record, and the medical opinion of

> Dr. Ronald C. Burgess, M.D., which I find to be the most credible and persuasive medical evidence as to whether the Plaintiff suffered from an impairment to her left shoulder.

No petition for reconsideration was filed.

On appeal, Bowling argues the ALJ's decision was not in conformity with the Act. She also argues the evidence is so overwhelming in her favor no reasonable person could reach the same conclusion as that reached by the ALJ.

As the claimant in a workers' compensation proceeding, Bowling not only had the burden of proving each of the essential elements of her cause of action, she had the burden of appropriately listing each injury claimed. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since she was unsuccessful in that burden, the question on appeal is whether the evidence compels a different result. 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).

It is undisputed Bowling fell at work on January 25, 2013, and sustained injuries to her left wrist and elbow. She received TTD benefits, voluntarily paid by Laurel Creek, and medical treatment for both conditions. She returned to work, albeit at light duty for a period of time, then resumed her regular job. Bowling's treating orthopedic surgeon released her to return to work with no restrictions, and a 0% impairment rating. Several months later, Dr. Hughes assessed an impairment rating for her left shoulder, a condition for which she had never provided notice to Laurel Creek, and never reported to any of her medical providers. As noted by the ALJ, at her deposition Bowling denied multiple times she had injured her left shoulder. At no time was the Form 101 amended to include an injury to the left shoulder.

It is within the ALJ's discretion as fact-finder to determine the quality, character and substance of the evidence. Square D Company v. Tipton, 862 S.W.2d 308 (Ky. 1993); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985). The ALJ has the sole authority to judge the weight of the evidence and inferences to be drawn from that evidence. Miller v. East Kentucky Beverage/Pepsico, Inc.,

951 S.W.2d 329 (Ky. 1997). The fact-finder 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). Halls Hardwood Floor Co. v. Stapleton, 16 S.W.3d 327 (Ky. App. 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). 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).

Based upon Bowling's allegations in the Form 101, her history provided to the treating physicians, and her deposition testimony, the ALJ did not err, and could reasonably conclude Bowling sustained no permanent impairment as a result of her fall at work.

Until evaluated by Dr. Hughes, Bowling repeatedly stated she had injured her left wrist and elbow. No mention was made of a left shoulder injury until Dr. Hughes so stated in his report. Even afterward, Bowling testified

multiple times in her deposition she had not injured her shoulder. It was not until the final hearing that Bowling asserted her difficulties with her left shoulder stemming from the accident; however she further stated she did not inform Laurel Creek or her treating physicians of this allegation. Likewise, at no time did Bowling seek to amend her Form 101 to include a claim for a left shoulder injury. Therefore, Bowling is estopped from asserting such claim, and the ALJ did not err in his determination denying her allegation of a left shoulder injury. After reviewing the entirety of the evidence, we affirm the ALJ's decisions regarding income benefits, and whether she sustained a left shoulder injury.

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). The ALJ failed to perform an analysis pursuant to FEI Installation Inc. v. Williams, supra.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to

the human organism for which permanent benefits are authorized. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

> Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident.

Here, it is clear the ALJ determined Bowling at a minimum sustained a temporary injury to which she was entitled to the payment of TTD benefits and medical benefits which had been paid. Therefore, the ALJ is required to determine whether she is entitled to future medical benefits pursuant to KRS 342.020 based upon the holding in FEI Installation Inc. v. Williams, supra. Clearly, the ALJ may

award medical benefits despite the lack of a permanent injury after providing sufficient reasons for the award.

Accordingly, the opinion and order is **AFFIRMED IN PART**, and **REMANDED** to the ALJ for entry of an amended decision addressing Bowling's entitlement to future medical benefits as set forth above.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON MCKINNLEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

COUNSEL FOR RESPONDENT:

HON CHAD M JACKSON
2000 RICHARD JONES RD, STE 260
NASHVILLE, TN 37215

ADMINISTRATIVE LAW JUDGE:

HON STEVEN G BOLTON
PREVENTION PARK
657 CHAMBERLIN AVE
FRANKFORT, KY 40601