Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 25, 2014

CLAIM NO. 201166969

REBECCA MAHAN PETITIONER

VS. **APPEAL FROM HON. R. SCOTT BORDERS, ADMINISTRATIVE LAW JUDGE**

PROFESSIONAL HOME HEALTHCARE
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Rebecca Mahan appeals from the October 16, 2013 Opinion and Order and the November 26, 2013 Order rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ") dismissing her claim for permanent partial disability and future medical benefits. On appeal, Mahan

argues the evidence compels a finding she suffered from a pre-existing dormant condition prior to a November 28, 2011 work-related motor vehicle accident. She similarly claims the ALJ did not rely on substantial evidence in denying her benefits related to the accident. We affirm.

Mahan worked as a nurse for Professional Home Healthcare, Inc. ("PHH"), which required her to visit patients' homes. On November 28, 2011, she was en route to a patient's home when she was rear-ended by another vehicle. While the parties did not dispute the accident occurred, the extent of Mahan's injuries was contested and substantial medical proof was submitted. Additionally, Mahan's physical condition prior to the accident was litigated. Mahan acknowledged she pulled a muscle in her lower back in May of 2011. She stated this happened while she was getting into her vehicle following a patient visit, though she reported no injury to her employer and, at the final hearing, PHH contested this incident was work-related. Regardless of its origin, PHH argued Mahan was actively suffering from back and hip pain prior to and until the November 28, 2011 car accident. Mahan testified she fully recovered and returned to work following the May 2011 incident, but has suffered continual pain since the November 2011 car accident.

The medical proof submitted in this case was substantial, and for that reason we detail only the evidence necessary to the issues on appeal. Following the May 2011 incident, Mahan was treated at Baptist Health Care and x-rays were taken. There were no acute compression fractures, but osteoarthritis was present in the right hip. She was referred to Dr. Ronald Durbin, an orthopedic surgeon, for back and left hip pain. He treated her with an intramuscular injection in June, 2011. In September of 2011, she also visited a rheumatologist for bilateral hip and back pain, and was diagnosed with fibromyalgia. In 2011, she was prescribed hydrocodone, Celebrex, and Lyrica.

After the car accident, Mahan treated with Dr. Akif Ahmed, who initially prescribed medication, injections and physical therapy. Eventually he ordered an MRI, which revealed small herniations in the lumbar spine. She was referred to a neurosurgeon, Dr. Magdy El-Kalliny, who recommended epidural steroid injections notwithstanding his normal physical and neurological examinations. Dr. David Weber performed five injections and continues to treat Mahan.

The ALJ ultimately concluded Mahan suffered a temporary exacerbation of a pre-existing, active lumbar spine condition and reached maximum medical improvement by

February of 2012. In reaching this conclusion, the ALJ stated his reliance on the independent medical evaluation report of Dr. Christopher Stephens.

Dr. Stephens, an orthopedic surgeon, evaluated Mahan on June 3, 2013. He also reviewed records documenting her treatment following both the May 2011 and November 2011 incidents. Dr. Stephens found no objective abnormalities following his examination. Further, he reviewed a January 24, 2012 lumbar MRI scan, and believed it revealed degenerative disc disease in the low back. While conceding the MRI scan was abnormal for a forty-year-old woman, Dr. Stephens found no sign of trauma. Instead, considering the MRI scan along with her treatment records, he opined she suffered previous issues with her low back due to degenerative disease. He concluded the car accident was not the beginning of her low back symptoms, but merely an exacerbation of an already existing medical condition. Dr. Stephens stated she would be entitled to a 5% functional impairment rating according to the American Medical Association, Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), but this would be entirely due to her pre-existing active condition and not the car accident. Further, he opined she would have achieved maximum medical improvement five months after the

car accident and any further medical treatment after that time would be due to the pre-existing condition.

The ALJ ultimately dismissed Mahan's claim for permanent partial disability and future medical benefits. Noting PHH had paid temporary total disability benefits from December 5, 2011 through April 16, 2012, in addition to medical expenses, the ALJ determined she was not entitled to additional benefits. Mahan's subsequent petition for reconsideration was denied.

On appeal, Mahan asserts the ALJ erred in concluding her back condition was pre-existing and active at the time of the car accident. Citing to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), she argues the evidence compelled a finding her back condition had reverted back to its pre-injury dormant state prior to the November 28, 2011 car accident. Finley states:

> [A] pre-existing condition that is both asymptomatic and produces no impairment prior to the work-related injury constitutes a pre-existing dormant condition. When a pre-existing dormant condition is aroused into disabling reality by a work-related injury, any impairment or medical expense related solely to the pre-existing condition is compensable. A pre-existing condition may be either temporarily or permanently aroused. If the pre-existing condition completely reverts to its pre-injury dormant state, the arousal is considered temporary. If the

> pre-existing condition does not completely revert to its pre-injury dormant state, the arousal is considered permanent, rather than temporary.

Id. at 265.

Mahan testified her back pain following the May 2011 incident had completely resolved, and she had returned to work. She also presented an independent medical evaluation report from Dr. Frank Burke, who acknowledged her history of back pain and thoracic spine pain. However, he noted Mahan developed radicular symptoms following the November 2011 car accident which were not previously present, which he attributed to the accident.

The ALJ chose instead to rely upon Dr. Stephens' report, who opined Mahan's back condition was active and impairment ratable at the time of the November 2011 car accident. He also noted Mahan had been treated after the May 2011 incident for back pain, and as recently as September 2011 for fibromyalgia and complaints of back and hip pain. Additionally, he noted Dr. El-Kalliny's normal physical and neurological examinations and an IME conducted by Dr. Michael Best. Dr. Best found no evidence of disc herniation or other objective signs of abnormality.

As the claimant in a workers' compensation proceeding, Mahan 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). Because 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). While Mahan has identified evidence supporting a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

In a related argument, Mahan next argues the ALJ's conclusions are not based on substantial evidence. As part of this claim of error, she asserts the ALJ did not properly address the work-relatedness of the May 2011 incident, and improperly characterized the November 2011 car accident as "minor".

As to the evidentiary support for the ALJ's conclusions, we believe Dr. Stephens' medical report

constitutes the requisite substantial evidence to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986). Furthermore, we find Mahan's citation to the Court of Appeals' unpublished opinion in Scott v. Fruit of the Loom, 2002 WL 253814 (Ky. App. 2002), unavailing. In that case, the claimant was awarded permanent partial disability benefits based, in part, on the effects of a prior, work-related injury. In this case, the ALJ relied on Dr. Stephens' report to determine Mahan suffered no permanent effects from the November 2011 car accident. Moreover, contrary to Mahan's assertions on appeal, the evidence was less than compelling that the May 2011 was work-related. While Mahan testified her back pain began as she entered her car after a patient visit, her own statements to physicians following the incident belied this assertion. The ALJ did not abuse his discretion in this regard.

Similarly, the ALJ acted well within his discretion to characterize the November 2011 car accident as minor. This is a reasonable conclusion based on the photographs, police report, and testimony presented concerning the collision. 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).

Accordingly, the October 16, 2013 Opinion and Order and the November 26, 2013 Order rendered by Hon. R. Scott Borders are hereby **AFFIRMED**.

ALL CONCUR.

COUNSEL FOR PETITIONER:

HON FRANK K NEWMAN
108 KNOX STREET
P.O. BOX 250
BARBOURVILLE, KY 40906

COUNSEL FOR RESPONDENT:

HON LEE JONES
POB 1167
PIKEVILLE, KY 41502

ADMINISTRATIVE LAW JUDGE:

HON R. SCOTT BORDERS
PREVENTION PARK
657 CHAMBERLIN AVENUE
FRANKFORT, KY 40601