Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: June 6, 2014

CLAIM NO. 201300312

WHITLOW, ROBERTS, HOUSTON & STRAUB, PLLC PETITIONER

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

BRENDA MOSS JONES
and HON. R. SCOTT BORDERS,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING

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

RECHTER, Member. Whitlow, Roberts, Houston & Straub, PLLC ("Whitlow") appeals from the January 13, 2014 Opinion, Order and Award rendered by Hon. R. Scott Borders, Administrative Law Judge ("ALJ"), awarding Brenda Moss Jones temporary total disability and medical benefits for a right shoulder injury. On appeal, Whitlow argues the ALJ

did not fully consider the evidence in finding a causal connection between the alleged work accident and Jones' shoulder condition. Because the ALJ's determination is supported by substantial evidence, we affirm.

Jones testified she was injured on August 1, 2011 when she pulled on the doors of a cabinet to assist her in rising from a squatted position. The cabinet fell, striking her right shoulder and forcing her to the floor. She pushed the cabinet back up and within minutes felt a pulling sensation in her right shoulder and pain in her right middle finger. She immediately reported the incident but was able to continue working.

A week later, she visited Dr. Joseph Bassi, her family physician, and then saw Dr. Ted H. Jefferson the following day. She was able to continue working until Dr. Jefferson performed surgery on October 25, 2011. She returned to work in late November 2011. Her symptoms worsened in March 2012, but improved with physical therapy. Her symptoms worsened again in May 2012 and she was referred to Dr. John Kuhn, who administered injections.

Jones testified she had seen Dr. Thane Deweese in April and May 2011 for shoulder problems beginning in February or March 2011. She stated her problems completely resolved after Dr. Deweese administered two injections.

She received no further treatment and was asymptomatic immediately prior to the work injury. Since the work accident, Jones feels her right shoulder condition has continued to worsen. She remains under the care of Dr. Kuhn who recommended additional therapy once her shoulder "calmed down."

Jones submitted the report of Dr. Daniel Primm who performed a medical records review at the request of Whitlow. Dr. Primm noted Jones had been diagnosed and treated for right shoulder pain with underlying AC joint arthritis prior to the work injury. He opined Jones had a pre-existing active condition and found no objective evidence of a permanent work-related change in the human organism as a result of the work incident. Dr. Primm agreed with Dr. Kuhn that the incident probably produced a soft tissue strain or condition which may have resulted in scapular dyskinesis. He felt the tight posterior capsule and scapular dyskinesis were most likely residuals from the shoulder surgery, particularly since she had not had post-surgical physical therapy.

Jones submitted Dr. Jefferson's medical records. He diagnosed rotator cuff arthropathy and AC joint degenerative changes of the right shoulder. On September 21, 2011, Jones denied any improvement in her symptoms with

previously attempted conservative therapies. Dr. Jefferson performed an arthroscopic synovectomy and subacromial decompression on October 25, 2011. On November 21, 2011, Dr. Jefferson indicated Jones could increase her activities as tolerated and could follow up on an as-needed basis.

Dr. Kuhn's records indicate he received a history of the work injury and prior treatment with Dr. Deweese, performed an examination, and reviewed an MRI. Dr. Kuhn felt Jones had impingement related to her right shoulder capsule and scapular dyskinesis. He opined her symptoms were work-related. Dr. Kuhn administered injections and recommended physical therapy once her pain at rest resolved.

In asserting Jones had a pre-existing active condition prior to the work injury, Whitlow relied on the records of her prior treatment with Dr. Deweese. He first saw Jones on April 25, 2011 for complaints of pain over the top of the right shoulder for the past two months. Jones indicated she moved to another residence a month and a half prior to the visit, which had aggravated her symptoms. Dr. Deweese diagnosed AC arthritis and administered a cortisone injection. Jones returned on May 11, 2011, indicating the injection helped for a few days, but her pain returned after she did a lot of ironing. Dr. Deweese opined she was

bothered by rotator cuff tendinitis and AC arthritis. He administered a lidocaine and betamethasone injection in her subacromial space. He did not treat her again before the August 1, 2011 work accident.

Whitlow submitted the September 9, 2011 report of Dr. Robert Jacob who performed a medical necessity and causation review. Relying on an MRI report, he opined Jones had pre-existing active pathology in her right shoulder including rotator cuff tendonitis with impingement and AC joint arthritis. He stated these changes were active, long standing and disease related. He further believed the changes are age-related and she had been symptomatic since February 2011. To support this conclusion, he points to multiple precipitating events necessitating multiple physician visits. Dr. Jacob opined treatment or evaluation for her shoulder complaints could not be attributed to the work incident, and the incident did not cause any permanent aggravation of the pre-existing active disease. He concluded Jones did not sustain a harmful change to the human organism as a result of the work incident.

The ALJ, relying on Dr. Kuhn’s opinion, found Jones suffered an injury to her right shoulder causally related to the work incident. The ALJ noted he did not

find Dr. Jacob or Dr. Primm to be particularly persuasive, as neither had the opportunity to personally examine Jones, and each based their opinion solely on a review of medical reports. The ALJ awarded temporary total disability benefits from October 25, 2011, the date Dr. Jefferson took her off work for surgery, through November 21, 2011. Additionally, the ALJ found contested medical expenses were compensable and Jones is entitled to future medical treatment for the work injury.

Whitlow did not file a petition for reconsideration. On appeal, it argues the ALJ failed to fully consider the evidence in finding a causal connection between the work accident and Jones' shoulder condition. It challenges the ALJ's interpretation of several pieces of evidence.

First, Whitlow contends the medical records establish Jones had complications with her right shoulder prior to the alleged August 1, 2011 work incident. Records from Dr. Deweese indicate Jones complained of right shoulder pain on April 25, 2011 over the last two months and physical examination at that time suggested rotator cuff tendonitis and AC joint arthritis. Additionally, Whitlow challenges the ALJ's reliance on Jones as a "credible" witness, in light of the fact she initially

denied prior treatment for shoulder problems in her deposition testimony. Finally, Whitlow contends the ALJ improperly discounted Dr. Jacob's opinion because it is "in direct contradiction of the medical proof and [Jones'] credible testimony." Dr. Jacob believed Jones experienced shoulder pain between May and August 2011. According to Whitlow, no proof other than Jones' self-serving statements contradicts this statement.

Because Jones successfully bore the burden of proof in establishing the elements of her cause of action, the sole question on appeal is whether the decision is supported by substantial evidence. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979); Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). Additionally, Whitlow did not file a petition for reconsideration. Therefore, concerning questions of fact, the Board is limited to a determination of whether there is any evidence of substance to support the ALJ's conclusion. Inadequate, incomplete, and even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence supporting the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

We are convinced the ALJ correctly understood the evidence presented and fully considered the evidence.

While Dr. Jacob believed Jones' shoulder problem continued from February 2011 to beyond the date of the work-injury, we note there is no medical record establishing she received treatment after the second injection by Dr. Deweese until she sustained the work injury. Her uncontradicted testimony is that the shoulder symptoms resolved prior to the work injury. Additionally, the ALJ's rejection of Dr. Jacob's opinion was not based solely on the doctor's belief Jones had ongoing symptoms since February 2011. The ALJ specifically stated he discounted Dr. Jacob's opinion because he only performed a medical records review and had not examined Jones. The ALJ acted within his discretion as fact-finder in so finding. Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

Dr. Kuhn opined Jones had impingement related to her posterior capsule and scapular dyskenisis that is work-related. Dr. Primm agreed the work incident probably produced a soft tissue strain or condition that may have resulted in scapular dyskenisis. He stated the dyskenesis and tight capsule were most likely residuals related to the surgery. The record contains no evidence Jones received medical treatment for her shoulder following the May 2011 visit with Dr. Deweese, when she received the second

injection. Jones testified the second injection relieved her symptoms and she was asymptomatic until the work incident. Whitlow points to no evidence suggesting any physician considered surgery for the shoulder condition prior to the work injury. This proof constitutes substantial evidence upon which to conclude the work injury necessitated the surgery. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971) ("substantial evidence" is evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons). Therefore, the award of income and medical benefits may not be reversed. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999)(the Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals of the evidence or by noting other conclusions or reasonable inferences that could have been drawn).

The ALJ did not abuse his discretion in finding Jones to be a credible witness. Certainly, Jones provided somewhat inconsistent statements at her deposition regarding her prior treatment for shoulder problems. However, her treatment with Dr. Deweese was listed in the Form 105 medical history and was discussed in detail in Dr. Kuhn's report, which was attached to the Form 101. When considered as a whole, the record reasonably supports the

conclusion Jones was not attempting to conceal the prior treatment. The ALJ properly exercised his discretion in relying on Jones as a credible witness. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15, 16 (Ky. 1977); Pruitt v. Bugg Bros., 547 S.W.2d 123 (Ky. 1977).

Accordingly, the January 13, 2014 Opinion and Order rendered by Hon. R. Scott Borders, Administrative Law Judge is hereby **AFFIRMED**.

ALL CONCUR.

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