

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 3, 2020

CLAIM NO. 201572461

AVI FOOD SYSTEMS

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

DELORSE BREEDEN AND
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. AVI Food Systems (“AVI”) appeals from the September 11, 2019 Opinion, Award and Order rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ found Delorse Breeden (“Breedden”) sustained a work-related lumbar injury on May 12, 2015, for which he awarded permanent total disability (“PTD”) benefits and medical benefits. AVI also appeals from the October 2, 2019 Order, which in part, overruled its petition for reconsideration.

On appeal, AVI argues the award of PTD benefits is not supported by substantial evidence, and should be reversed. Because we determine the ALJ performed the correct analysis set forth in City of Ashland v. Stumbo, 461 S.W.3d 392 (Ky. 2015), and his decision is supported by substantial evidence, we affirm.

Breden filed a Form 101 on October 16, 2017, alleging she injured her low back from pushing and pulling at work on May 12, 2015 in Florence, Kentucky. She reported the injury to her supervisor, eventually underwent two surgeries, and returned to work. Breden later amended the Form 101 to include the allegation of a work-related psychological condition. In the Form 104 filed in support of the claim, Breden noted her work history included working as a food service/vending route driver, as a machine operator in a factory, as a fast food restaurant manager, and in food service at a youth corrections facility. Breden eventually waived her claim for a work-related psychological condition, so the evidence pertaining to that condition will not be discussed.

AVI filed a Form 111 on December 22, 2017, disputing the amount owed to Breden. It also stated Breden's injury did not arise from her employment, although it later stipulated she indeed sustained a work injury. In the Notice of Disclosure filed on the same date, AVI admitted it had paid temporary total disability ("TTD") benefits from October 20, 2015 to December 18, 2015, and again from February 24, 2016 to March 13, 2016. It also stated it had paid \$44,501.60 medical benefits on Breden's behalf.

Breden testified by deposition on September 26, 2018, and at the hearing held July 17, 2019. Breden was born on October 28, 1962, and is a resident

of Independence, Kentucky. She completed the tenth grade, and has not obtained a GED. She has no specialized vocational training, but has held a CDL in the past. Breeden testified that in addition to her work-related low back injury, she has had multiple unrelated health problems. She underwent a right carpal tunnel release surgery in 2005. She has treated for mitral valve prolapse. She had a right shoulder surgery in 2013. In 2003, she developed problems in her upper back, for which she had injections. She testified she continues to have some pain between her shoulder blades. Breeden has also had knee pain and osteoarthritis. She was also actively treating for depression and anxiety at the time of her work injury with Xanax and Prozac.

Breeden began working for AVI, a vending company, in September 2014. She drove a box truck, and stocked vending machines on a route. This included stocking candy, soft drinks, food, etc. The heaviest items she lifted were cases of soft drinks. She worked approximately eight to ten hours per day, beginning at 4:00 a.m. A couple of days before her injury, she was assigned a larger Ryder box truck to drive. She had to climb into the back of the truck to obtain the items to be stocked. The rear door of the truck was hard to pull down. Her back began hurting from pulling down the door. She completed her shift on May 12, 2015, and went home to take a warm bath to relieve her pain. The next morning she had difficulty getting out of bed. She called her supervisor, and later went to the emergency room. After a period of treatment, she eventually underwent two low back surgeries. The initial surgery was on October 20, 2016. She developed a hematoma, and had additional surgery a few days later. She testified the surgeries did not relieve her

conditions, and her low back condition has worsened. Breeden underwent an unrelated knee replacement surgery on April 11, 2018.

After the accident, Breeden drove a car, and loaded machines in specific factories. She testified this job was much lighter, and the items to be stocked were dropped off by other drivers. She took a ten-minute break every forty-five minutes. Breeden testified she does not believe she is physically able to return to work, even the lighter duty job, because of her ongoing back problems. She additionally testified she does not believe she can physically perform any of her previous jobs due to her back problems. She testified she has neuropathy and pain down her left leg due to her injury. She underwent a trial for a spinal cord stimulator, but this did not relieve all of her pain. She also underwent injections, which did not help. Breeden last worked for AVI on April 10, 2018.

In support of her claim, Breeden filed four separate set of notes from Dr. Brian Braithwaite, a pain management physician, reflecting multiple treatment dates. On January 5, 2018, Dr. Braithwaite noted Breeden has post-laminectomy syndrome, lumbar radiculopathy, a prolapsed lumbar disc, spondylosis without myelopathy, and inflammation of the sacroiliac joint. He prescribed Hydrocodone, Meloxicam, Tizanidine, Gabapentin, Diclofenac Sodium, Alprazolam, Sertraline, and Bupropion. He also referred her to a psychiatrist. He stated her problems had worsened. He noted she complained of left leg pain with a mixed dermatomal pattern. She described her pain as aching, shooting, sharp, and stabbing.

The second set of notes document treatment Breeden received on January 5, 2018, February 26, 2018, and March 1, 2018. Dr. Braithwaite noted

Breeden had failed conservative treatment options. He noted she continued to take medications and still complained of radiculopathy. Included was a letter from Dr. Charles Buhrman, Jr., a psychologist, who stated Breeden is an appropriate candidate for a neuromodulator implant, or other invasive procedures, from a psychological standpoint. Dr. Braithwaite requested a spinal cord stimulator trial.

The third set of records include notes from seven treatment dates from August 4, 2017 through March 8, 2018. Dr. Braithwaite again indicated Breeden's low back condition continued to worsen from the date of onset of May 12, 2015, with reported radiation into the left leg. During her course of treatment, Breeden underwent multiple injections, and he changed her medication from Neurontin to Lyrica. Breeden additionally filed Dr. Braithwaite's May 29, 2018 note. Dr. Braithwaite noted Breeden had pain equally on both sides, and her problems were worsening. He refilled her medications, and indicated she was interested in having a permanent spinal cord stimulator implanted.

Breeden additionally filed Dr. Braithwaite's September 26, 2018 note. Dr. Braithwaite stated objective data supports the use of opiates. He also indicated he did not plan to wean Breed from opiate medication.

Breeden also filed Dr. Jeffrey Fadel's report dated November 29, 2018. Dr. Fadel evaluated Breeden at her attorney's request. Dr. Fadel diagnosed Breeden with failed back syndrome stemming from her work-related low back injury and surgeries, lumbar facet arthritis aroused by the work injury, exploration and eventual surgical removal of a lumbar facet cyst at L4-L5, and radiculopathy of the L5 nerve root into the left lower extremity. Dr. Fadel assessed a 13% impairment rating

pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). He stated Breeden had reached maximum medical improvement (“MMI”), and should avoid lifting or carrying greater than twenty pounds. He also advised her to avoid pushing or pulling more than forty pounds. He additionally stated that since the trial dorsal stimulator did not effectively relieve her chronic pain, he would not recommend implanting a permanent one. He also suggested Breeden engage in Yoga or aquatic aerobics. He believed further surgery was unnecessary.

Breeden filed the December 13, 2018 functional capacity evaluation (“FCE”) report from Novo Care. The report indicates Breeden does not have the physical capacity to work as a route salesperson. The report indicates Breeden can perform light duty work.

AVI filed records from St. Elizabeth’s of Covington for Breeden’s emergency room treatment on May 13, 2015. Breeden reported the onset of pain from using a different truck at work. Breeden advised she had a previous medical history of left hip arthritis. She was diagnosed with likely chronic minimal anterolisthesis of L4 relative to L3 and L5. X-rays showed she had no acute subluxation or fracture.

AVI also filed office notes from Dr. Jonathan Spanyer, who performed Breeden’s knee surgery. On August 16, 2018, Dr. Spanyer noted Breeden was status post left knee arthroplasty. He noted her incision had nicely healed, and she appeared to be functioning well, although she complained of ongoing pain of unclear etiology. He stated her range of motion was acceptable with some stiffness. He

allowed her to return to work with no knee restrictions. On December 4, 2018, Dr. Spanyer noted Breeden reported her left knee pain was worse than it was prior to her surgery. She reported she did not believe she could return to work due to her knee condition. He recommended conservative treatment only with no additional surgery.

AVI filed the September 17, 2018 record of Dr. Benjamin Wilson from U.K. Healthcare regarding an evaluation of Breeden's left knee. Dr. Wilson noted Breeden complained her left knee is worse now than it was prior to her surgery. He advised additional knee surgery was not recommended.

Dr. Ellen Ballard evaluated Breeden at AVI's request on October 10, 2017. Breeden reported she developed low back pain while working, when she was required to use a larger truck with a back door that was difficult to close. Dr. Ballard noted Breeden had undergone two lumbar surgeries in October 2016. At the time of the evaluation, Breeden was taking Gabapentin, Hydrocodone, Tizanidine, and Meloxicam for her work-related injury. Dr. Ballard diagnosed Breeden with low back pain with left leg radicular symptoms, status post-surgery. Dr. Ballard also noted Breeden has non-work-related upper back pain. Dr. Ballard found Breeden had reached MMI, and assessed an 11% impairment rating pursuant to the AMA Guides. She advised Breeden to avoid lifting over twenty pounds. She stated the use of Meloxicam could be discontinued.

Dr. Ballard again evaluated Breeden on November 13, 2018. She noted Breeden had undergone two unrelated knee surgeries since the last evaluation. She reiterated Breeden had reached MMI by October 10, 2017, and has an 11%

impairment pursuant to the AMA Guides due to her low back injury. Dr. Ballard stated Breeden should follow up with her treating physician every six months, and continue to take Gabapentin and Tizanidine. Dr. Ballard advised Breeden should be weaned from taking narcotic medications over two to three months with proper tapering.

Dr. Ralph Crystal performed a vocational evaluation on April 5, 2019. He noted Breeden was not working, nor was she looking for work. He stated Breeden reported she does not believe she can perform any of her past work, nor can she concentrate sufficiently to obtain a GED. He noted there is no indication Breeden cannot complete a normal workday, or work week, and there are numerous jobs she can perform with her restrictions, either through direct entry, or on-the-job training. Dr. Crystal's testing indicates Breeden functions at a fourth to fifth grade level regarding her reading, spelling, and mathematical skills.

Steven Michael Crisp ("Crisp"), a branch manager for AVI, testified by deposition on April 2, 2019. He testified AVI supplies food and beverages to factories, schools, etc. There are 80 employees in his branch. Breeden began working for AVI on September 15, 2014, as a vending route driver. He noted Breeden's May 12, 2015 injury, and that she provided proper notice of the accident. He testified she returned to work in a different position after the accident. He also noted she underwent a left knee surgery in December 2017, and eventually returned to work. She last worked on April 10, 2018, when she left to undergo total knee replacement surgery. He testified Breeden could not return to her usual job as a

route driver after her accident based upon her restrictions. He testified Breeden was a good employee.

AVI also filed two medical disputes. The first dispute challenged the installation of a spinal cord stimulator. In support of the challenge, AVI filed the utilization review report of Dr. Jamie Lewis, who opined Breeden does not meet the medical necessity requirements for such a procedure. It was noted there is no documentation Breeden received greater than fifty percent relief from the trial stimulator.

AVI also filed a dispute challenging treatment with Hydrocodone/Norco prescribed by Dr. Kendall Hansen. Dr. Phong T. Nguyen recommended weaning and cessation of treatment with that medication.

At the Benefit Review Conference held July 17, 2019, the parties stipulated the issues preserved for determination included benefits per KRS 342.730, average weekly wage, unpaid/contested medical bills, TTD, whether Breeden is permanently totally disabled, and treatment with Norco. Breeden waived her claim for a psychological injury.

The ALJ issued his decision on September 11, 2019. The ALJ specifically found as follows:

The Plaintiff is permanently, totally disabled solely as a result of her work injury. The Norco is non-compensable as not reasonable and necessary.

II. Benefits per KRS 342.730

Ms. Breeden has either an 11% or 13% impairment rating, assigned by Drs. Ballard and Fadel, respectively. Both are from DRE Category III. While the restrictions and ability to be employed again are

paramount in this claim, it is necessary to select an impairment rating. Because I believe the Plaintiff's claims of residual symptoms and pain, I select the higher rating, the 13%, assigned by Dr. Fadel.

I reject the opinions of Dr. Crystal that the Plaintiff has no loss in earning capacity. Frankly, I do not find those opinions credible. The Plaintiff clearly cannot return to her prior work-lifting product, stocking machines, using dollies and driving a box truck with her restrictions from either Dr. Ballard or Dr. Fadel. Both doctors state the Plaintiff cannot lift over 20 pounds. She testified she cannot work as a route driver with that limitation. Mr. Crisp also testified she must be able to lift up to 32 pounds.

This mandates a finding she cannot return to work as a route driver and suggests Dr. Crystal's conclusions are not credible.

Since she cannot return to work as a route driver, I must analyze if she can return to any of her prior work. She testified that she cannot. I accept that. I have already discounted the opinions of Dr. Crystal. Ms. Breeden's testimony on this subject is admissible, probative and sufficient to find that she cannot return to any of her prior work. I note that her prior work consists of fast food worker, corrections officer and factory worker. She currently has a rather severe lifting limitation of 20 pounds. She has a restriction on bending and stooping from Dr. Ballard and restrictions on standing and twisting from Dr. Fadel, all of which I find credible. She has an FCE, which states that her results are credible and she can work in a light duty category but no higher. Based on all of the foregoing I determine that she cannot return to any work she has done in the past.

The Plaintiff cannot return to the type of work done on the date of injury. She cannot return to any of her prior work. She can lift no more than 20 pounds and has restrictions on bending, stooping, twisting, sitting and standing. She can only work in sedentary or light duty demand level work, work for which she has no experience or training.

Furthermore, the Plaintiff only has an 11th grade education and no GED. She is clearly of limited education. I also have no evidence and no reason to find that any of her prior work resulted in any transferrable skills or really any ability to learn skills or jobs that indicate she is adaptable or able to learn different or more complex jobs. In short, not only can the Plaintiff not return to any type of prior work the evidence strongly shows that she would need more than rudimentary or remedial training to be able to do any job.

I also see little chance that at currently 57 years of age, with an 11th grade education and the restrictions that she has that any job retraining would realistically result in any real job opportunities.

In short, Ms. Breeden cannot do any prior work and there is no realistic level of retraining that she could complete even if she tried to allow her to work again. She is permanently and totally disabled solely as a result of the work injury.

I recognize the fact that the Plaintiff had a total knee replacement after the work injury. She continued to complain about it to her doctors. She did not apply for social security disability until after the knee surgery. However, she is under no doctor's restrictions for her knee. There is no evidence, only implication, that the knee has caused any real occupational disability. The implication maybe sound and reasonable but it is not supported by evidence. Given the weight of the evidence for the low back, I will not carve out any portion of the total disability award for the knee.

III. Unpaid or Contested Medical Expenses

I recognize the fact that Ms. Breeden continues to have low back pain and I find her credible in this matter. Certainly, this type of pain, low back pain with radiculopathy, should not be dismissed as having an impact on a person's quality of life.

Dr. Braithwaite, her treating pain management physician, endorses the continued use of the Norco. His opinion does carry weight. Conversely, I have Dr.

Ballard who feels that the Norco should be weaned. Dr. Ballard does recommend continued use of the Gabapentin and Tizanidine.

To that point the Defendant, to this point [sic], has continued to pay for the surgery, injections, a trial spinal cord stimulator as well as the Gabapentin and Tizanidine. Of course, nothing prevents them in the future from denying these medicines but nothing prevents Ms. Breeden's doctors from attempting to re-introduce the Norco.

I do not believe it is in Ms. Breeden's best interest to continue to take opioids without even attempting to stop.

In reliance on Dr. Ballard and the above analysis, the Norco is non-compensable. Nothing in this Order prevents the Defendant from agreeing to a reasonable weaning period, and nothing compels them to agree to one either.

IV. Award

The Plaintiff's permanent total disability award shall be \$421.41 a week, from May 13, 2015, until she reaches 70 years of age, and excluding any periods, she actually worked. She is also entitled to all reasonable and necessary and work-related medical expenses for the low back, excluding the Norco.

ORDER

1. The Plaintiff, Delorse Breeden, shall recover of the Defendant-Employer, AVI Food Systems, and/or its insurance carrier, whether as temporary total or permanent total disability benefits, the sum of \$421.41 a week, from May 13, 2015, and subject to termination upon reaching age 70 in accordance with KRS 342.730(4), with 6% interest on any past due portions arising on or after June 29, 2017 and 12% interest on any past due portions arising before June 29, 2017, and with the Defendant taking a credit for any benefits paid and excluding any periods actually worked.

AVI filed a petition for reconsideration on September 16, 2019, arguing the ALJ erred in finding there is no evidence Breeden's left knee replacement interferes with her ability to work. AVI pointed to Breeden's complaints to Dr. Spanyer of her ongoing knee problems and inability to work. AVI also requested a specific finding as to the onset date of Breeden's PTD. Finally, AVI requested additional findings regarding the medical dispute. It noted the ALJ found Norco is not compensable, but did not address Hydrocodone-Acetaminophen that was also disputed.

In his order issued October 2, 2019, the ALJ stated the award of PTD benefits is supported by substantial evidence, with no carve out for the knee condition, therefore he denied that portion of the petition. The ALJ noted the award of PTD benefits began April 11, 2018. He also acknowledged Norco and Hydrocodone-Acetaminophen are the same medications so he sustained that portion of AVI's petition.

On appeal, AVI argues the award of PTD benefits based solely upon Breeden's low back injury is not supported by substantial evidence. It argues that while Breeden sustained a work-related low back injury eventually requiring surgery, she returned to work, and continued working until April 10, 2018, when she left to undergo an unrelated total knee replacement.

As the claimant in a workers' compensation proceeding, Breeden had the burden of proving each of the essential elements of her cause of action. *See* KRS 342.0011(1); Snowder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Breeden was successful in her burden, we must determine whether substantial evidence of record

supports his decision. Wolf Creek Collieries v. Crum, 673 S.W.2d 735 (Ky. App. 1984). “Substantial evidence” is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971).

In rendering a decision, KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney’s Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). Rather, 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 function of the Board in reviewing an ALJ’s decision is limited to a determination of whether the findings made are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (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 weight and credibility or by noting other conclusions or reasonable inferences that otherwise

could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

Permanent total disability is defined as the condition of an employee who, due to an injury, has a permanent disability rating and has a complete and permanent inability to perform any type of work as a result of an injury. KRS 342.0011(11)(c). “Work” is defined as providing services to another in return for remuneration on a regular and sustained basis in a competitive economy. KRS 342.0011(34). In determining Breeden is permanently totally disabled, the ALJ was required to perform an analysis pursuant to the City of Ashland v. Taylor Stumbo, *supra*, and Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

Although the ALJ did not specifically cite to City of Ashland v. Taylor Stumbo, *supra*, we determine he performed the appropriate analysis and took into consideration the correct factors in finding Breeden is permanently totally disabled. The parties stipulated Breeden sustained a work-related low back injury on May 12, 2015. The ALJ accepted the 13% impairment rating assessed by Dr. Fadel. The ALJ next determined Breeden could not return to any of her past work based upon her own testimony, as well as considering the restrictions imposed by Drs. Fadel, Ballard, and the FCE. The ALJ also noted Breeden has only an eleventh grade education, is 57 years old, and in his summary of the evidence, noted Dr. Crystal’s testing revealed she has limited reading, spelling and mathematical aptitude. The ALJ took into account Breeden’s age, education, and past work experience, along with her post-injury/surgical physical status. The ALJ performed the appropriate

analysis in accordance with the direction of the Kentucky Supreme Court in City of Ashland v. Stumbo, supra, and Ira A. Watson Department Store v. Hamilton, supra.

The ALJ outlined the evidence he reviewed, and provided the basis for his determination that Breeden is permanently totally disabled due to the lumbar injury. The ALJ properly analyzed the claim, and his decision falls squarely within his discretion. The ALJ's determination is supported by Breeden's testimony, along with the medical evidence, and will remain undisturbed.

Accordingly, the September 11, 2019 Opinion, Award and Order, and the October 2, 2019 Order on petition for reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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