

**Commonwealth of Kentucky
Workers' Compensation Board**

OPINION ENTERED: March 27, 2020

CLAIM NO. 201898085

AMAZON.COM

PETITIONER

VS.

**APPEAL FROM HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE**

VICKIE HENRY and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

AND

VICKIE HENRY

PETITIONER

VS.

AMAZON and
HON. R. ROLAND CASE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING IN PART,
VACATING IN PART & REMANDING**

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

BORDERS, Member. Amazon appeals from the September 20, 2019 Opinion and Award rendered by Hon. Roland Case, Administrative Law Judge (“ALJ”). The ALJ awarded Vickie Henry (“Henry”) temporary total disability (“TTD”) benefits and permanent partial disability (“PPD”) benefits based on a 30% impairment rating assessed by Dr. James Bilbo pursuant to the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition (“AMA Guides”) enhanced by a multiplier of 3.4. The ALJ determined Henry did not meet her burden of proving she suffered a compensable neck injury nor did she prove challenged medical expenses for Olanzapine and blood work were causally related to her work injuries. Amazon also appeals the order on reconsideration. Henry cross-appeals from the November 18, 2019 order on reconsideration, arguing the ALJ erred in failing to find a cervical injury and permanent total disability. For the reasons set forth herein, we affirm in part, vacate in part, and remand.

Henry testified by deposition on April 2, 2019, and at the final hearing held July 23, 2019. Henry was born on November 20, 1961, is 57 years old, and resides in Hebron, Kentucky. She is a high school graduate and has no specialized or vocational training. Her employment history indicates employment at Perfetti Van Melle, a candy manufacturer, where she worked for approximately a year, performing repetitive heavy lifting. She worked at Ancra Container for approximately a year as a material handler also performing heavy lifting, and she worked at Amazon from July 2016 to December 2017. She also worked for a local

Elks club as a cook after leaving Amazon, but subsequently quit as it became too difficult to perform.

Henry testified the picker job at Amazon required her to repetitively lift heavy items such as cat litter, big bags of cat food, dog food, and cases of pop, all weighing in excess of 45 pounds. On July 28, 2017, she was performing her typical job duties when she began to develop pain in her right shoulder and elbow. She was seen at Amcare, was given an aspirin and ice and returned to work. She continued working, periodically presenting to Amcare for treatment. On December 16, 2017, she was working, lifting cases of water at work and developed severe pain in her left shoulder, and aggravated pain in her right shoulder, impacting her production. She presented to Amcare at that time and once again was given aspirin and ice and returned to work. She underwent physical therapy and continued working. She eventually was seen at Concentra and by Dr. Sam Koo, an orthopedic surgeon, who recommended shoulder surgery. She thereafter came under the care of Dr. Bilbo, an orthopedic surgeon. He treated her conservatively, had her undergo diagnostic testing, and recommended surgery. She has also seen Dr. Klickovich for pain management.

At the hearing, Henry testified she has worked primarily as a laborer at Amazon as a material handler, line worker, order filler and picker. All of these jobs required her to work above the shoulder level, and to carry heavy items. Henry did not feel physically capable, due to her bilateral shoulder conditions, to return to any of the prior work she performed. She worked at the Elks Club twenty to twenty-five hours per week as a cook but quit due to her constant bilateral shoulder pain. Henry

also filed for Social Security disability as part of the application process for long-term disability. Henry testified she has weakness in her arms and suffers from constant debilitating pain that affects her ability to sleep and perform activities of daily living. Henry feels she is permanently and totally disabled.

The records from Amcare indicate Henry received treatment from July 28, 2017 through December 18, 2018. On July 28, 2017, Henry was seen for a right shoulder and elbow injury caused by lifting at work. She complained of right shoulder, elbow and low back pain and increased arm pain after tripping over a table at work on July 27, 2017. The records from December 17, 2017 also indicate treatment for left shoulder pain with a diagnosis of sprain/strain of the left shoulder, caused by lifting a pack of water at work.

The records from Concentra reflect treatment for the right and left shoulder conditions with diagnosis of sprain/strain of both shoulders. The records indicate Henry was released to return to work on January 5, 2018, with restrictions.

The records of Dr. Koo/Beacon Orthopaedics & Sport Medicine reflect Henry was seen initially on May 7, 2018, and was diagnosed with bilateral shoulder pain with no significant improvement with physical therapy. Henry was treated from May 14, 2018 through January 30, 2019, with a diagnosis of bilateral shoulder rotator cuff tendinitis and AC degenerative joint disease. Dr. Koo recommended surgery that Henry declined.

The records of OrthoCincy include the results of a January 25, 2018 MRI of the right shoulder, indicating focal 50% bursal surface tearing of the mid supraspinatus tendon with retraction superimposed on moderate tendinosis; global

rotator cuff tendinosis and moderate proximal biceps tendinosis; edema and inflammation in the axillary recess compatible with imaging findings of adhesive capsulitis; and moderate acromioclavicular degenerative joint changes with thickening of the coracoacromial arch and mild subacromial/subdeltoid bursitis.

Dr. Steven Shockey performed an Independent Medical Evaluation on March 29, 2019. Dr. Shockey received a history of Henry's alleged work related injuries to both shoulders at Amazon. Dr. Shockey also received a history of Henry's medical treatment to date, and reviewed all medical records and diagnostic studies regarding her treatment for her work injuries, including the records from Dr. Bilbo. Dr. Shockey performed a thorough physical examination and diagnosed shoulder pain with evidence of rotator cuff tendinopathy that appears to be accurate based on physical examination. He felt Henry was at maximum medical improvement as surgery has been recommended and declined by Henry. Dr. Shockey opined Henry retains an impairment rating of 4% for the right shoulder and 3% for the left shoulder per the AMA Guides. Dr. Shockey did not address the findings set forth by Dr. Bilbo in his report. Dr. Shockey otherwise did not address whether he agrees with the 30% assessed by Dr. Bilbo. His report is devoid of any mention of Dr. Bilbo's assessment of impairment and whether he agrees or disagrees with it.

Dr. Bilbo initially saw Henry on June 5, 2018 with a history of right shoulder pain starting around mid-2017 without any specific history of injury other than repetitive heavy lifting at work. Later in the year, around December 16, 2017, she was lifting heavy objects at work, causing left shoulder and neck pain with aggravation of her right shoulder. Dr. Bilbo recited her treatment to date and noted

his findings on physical examination. Dr. Bilbo reviewed MRI scans of both shoulders and opined Henry suffered from right shoulder partial rotator cuff tear, bilateral shoulder tendinosis, adhesive capsulitis, bursitis, impingement syndrome, and acromioclavicular degenerative joint disease. Dr. Bilbo opined the conditions are causally related to her work incidents and she retained a functional impairment rating of 30% based on Table 16-35 of the AMA Guides. He noted Henry has a 50% upper extremity impairment which translates to a 30% whole body impairment based on Table 16-3. Dr. Bilbo further opined Henry does not retain the physical capacity to return to the type of work she was performing.

In the September 20, 2019 Opinion, Award and Order, the ALJ awarded TTD benefits at the rate of \$362.25 per week from January 5, 2018 to January 15, 2018 and from February 3, 2018 to February 26, 2018. The ALJ also awarded PPD benefits based on the 30% impairment rating assessed by Dr. Bilbo for Henry's bilateral shoulder conditions, enhanced by the 3.4 multiplier. The ALJ determined Henry was not permanently and totally disabled.

Amazon filed a petition for reconsideration, arguing Dr. Bilbo's assessment of a 30% impairment rating was not in conformity with the AMA Guides, and therefore was not substantial evidence upon which the ALJ could rely. Therefore, Amazon asked the ALJ to amend his decision and award PPD benefits based on the 7% impairment rating assessed by Dr. Shockey.

In a November 8, 2019 Order the ALJ ruled as follows:

The Defendant/employer initially argues the ALJ could not rely on Dr. Bilbo's impairment rating since it was not in conformity with the AMA Guides. However, there simply is no medical evidence whatsoever

indicating that assertion to be accurate. The extent of a worker's impairment and the proper interpretation of the AMA Guides are medical questions solely within the province of medical experts. See Kentucky River Enterprises, Inc. vs. Elkins, 107 SW3d 206 (KY 2003). It has consistently been held that the proper method for impeaching a physician's proper use of the AMA Guides is through either cross-examination or through another medical expert. See Brasch-Barry General Contractors vs. Jones, 175 SW3d 81 (KY 2005). Additionally, in Plumley vs. Kroger, Inc., 557 SW3d 905 (KY 2018), the Court held the opinion did not require strict adherence to the AMA Guides but required only the opinion "to be grounded in the Guides is not to require strict adherence to the Guides but rather a general conformity with them." Quite simply, the Defendant/employer's argument is not medical evidence and the objections raised in the Petition for Reconsideration would have been proper matters for either cross-examination or the submission of [sic] medical opinion. After consideration, the petition concerning the proper use of the AMA Guides is rejected.

Next, the Defendant/employer requests the ALJ to make more specific findings to support his reliance on Dr. Bilbo. However, again these are questions which could have been asked on cross-examination. The answer to the questions raised by the employer may or may not be in the records of Dr. Bilbo, but it is not within the province of the ALJ to question the methodology of Dr. Bilbo absent any medical evidence to indicate he did not properly use the Guides.

For the above reasons, the Defendant/employer's Petition for Reconsideration is overruled.

Henry also filed a petition for reconsideration, arguing the ALJ improperly analyzed the evidence in determining whether Henry was partially or totally disabled. She asserted the ALJ determined, in four short sentences, without any analysis at all, that she is capable of work. Henry argues this bare-bones analysis from the ALJ is insufficient to provide the basis of his decision and for meaningful

review. Henry argues the ALJ did not follow the five-step requirements pursuant to City of Ashland v Stumbo, 461 S.W.3d 392 (Ky. 2015), nor any of the factors required by current case law.

In a November 8, 2019 Order, the ALJ ruled as follows:

The Plaintiff initially argues the evidence compelled a finding of total disability. However, the Plaintiff points to no medical evidence of record which indicates she is totally disabled nor points to any evidence of record indicating medical restrictions that would establish total disability. Essentially, Dr. Bilbo deferred to the FCE and this did not indicate total disability. Quite simply in this case, there was no medical evidence to establish total disability. The ALJ remains persuaded the Plaintiff is not totally disabled and could perform a wide range of occupations not requiring significant lifting. Concerning the cervical neck condition, there simply is no evidence of record establishing an impairment to that body part. There simply was no evidence of record to establish a causal relationship between the injury and the cervical area. Concerning the medical expenses, again there was simply no evidence to establish a causal relationship between the injury and the drug Olanzapine and blood work. Although these may be related to the injury, the evidence of record simply provided no connection.

For the above reasons, the Plaintiff's Petition for Reconsideration is overruled.

On appeal, Amazon argues the ALJ erred by finding the 30% functional impairment assessed by Dr. Bilbo, constitutes substantial evidence. Amazon contends the ALJ did not properly analyze the assigned impairment ratings pursuant to the AMA Guides. Amazon contends the opinions of Dr. Shockey are more specific, appropriate, consistent, and supported by the entirety of the medical evidence. Amazon argues the ALJ erred in relying on the 30% functional impairment assessed by Dr. Bilbo because the rating was not in conformity with the

AMA Guides, and cannot be relied upon as substantial evidence in this case. Amazon argues the 30% impairment rating assessed by Dr. Bilbo is flawed and therefore does not constitute substantial evidence as there is a single impairment rating for two body parts with separate dates of injury making it impossible to determine how the rating was assigned. Amazon argues the decision should be reversed and remanded to the ALJ to enter an award of PPD benefits relying on the 3% impairment rating for the left shoulder and the 4% impairment rating for the right shoulder assessed by Dr. Shockey.

We disagree. Amazon submitted no expert medical testimony to show that the assessment of the impairment rating by Dr. Bilbo was not in conformity with the AMA Guides, and relies on the arguments of Counsel instead. Amazon's counsel goes to great lengths in its brief, setting forth the reasons it believes Dr. Bilbo opinions are incorrect, not in compliance with the AMA Guides, and do not constitute substantial evidence that the ALJ could rely on in determining the appropriate level of impairment.

The record contains conflicting medical opinions as to Henry's impairment rating. Dr. Bilbo assigned his impairment rating based on Table 16-35 of the AMA Guides. Dr. Shockey assigned his impairment rating based on Figures 16-40, 16-43, and 16-46 of the AMA Guides. There is no allegation in the testimony of any medical expert that either rating was assessed in contravention to the AMA Guides. Instead, the arguments regarding the appropriateness of Dr. Bilbo's rating are made by Amazon's counsel in its briefs, and the record is devoid of evidence substantiating those arguments.

In Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206 (Ky. 2003), the Kentucky Supreme Court held the proper interpretation of the AMA Guides is a medical question solely within the province of the medical experts. Where opinions from medical experts conflict regarding the appropriate percentage, it is the ALJ's function, as fact-finder, to weigh the evidence and select the rating upon which permanent disability benefits, if any, will be awarded. Knott County Nursing Home v. Wallen, 74 S.W.3d 706 (Ky. 2002).

In George Humfleet Mobile Homes v. Christman, 125 S.W.3d 288 (Ky. 2004), the Court further held that, while an ALJ is not authorized to independently interpret the AMA Guides, as fact-finder he may consult them in the process of assigning weight and credibility to evidence. Although assigning a permanent impairment rating is a matter for medical experts, determining the weight and character of medical testimony and drawing reasonable inferences therefrom are matters for the ALJ. Wallen, Id. The ALJ is not required to engage in a detailed analysis under the AMA Guides, nor is he required to engage in a detailed explanation of the minutia of his reasoning in reaching a particular result. Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973).

The ALJ provided a sufficient explanation of his reasons for accepting the ratings of Dr. Bilbo. As articulated by the ALJ, Dr. Bilbo is Henry's treating physician and treated him on several occasions. The ALJ could reasonably conclude Dr. Bilbo's opinion was the most comprehensive and persuasive concerning the bilateral shoulder condition. Dr. Bilbo clearly explained the methodology he used in

his assessment and directives of the AMA Guides applicable to Henry's bilateral shoulder conditions. The opinions of Dr. Bilbo are substantial evidence supporting the ALJ's determination of Henry's impairment ratings.

Amazon argues Dr. Bilbo incorrectly assigned a single impairment rating to the bilateral shoulders, for two different injury dates, which is not permitted under the AMA Guides. However, the record is devoid of any expert medical testimony substantiating Amazon's arguments regarding the inappropriateness of Dr. Bilbo's assignment of impairment and the arguments of Amazon's counsel do not constitute evidence. Therefore, we find the ALJ properly exercised his discretion in selecting the impairment ratings upon which to rely, and it is not the function of this Board to disturb his conclusions. Accordingly, the ALJ's determination that Henry suffered a 30% functional impairment rating is affirmed.

On cross-appeal, Henry argues the ALJ failed to properly consider uncontroverted evidence that she is totally disabled. Henry argues the ALJ's simplistic statement that she may be able to do some sedentary work is deficient to apprise her of the meaning of that finding. Henry argues the ALJ must properly analyze the proof and translate the lay and medical evidence into a finding of occupational disability. Henry contends the ALJ's analysis fails to properly consider the factors set forth in KRS 342.0011(11) (b) and the mandates in Ira A. Watson Department Store v Hamilton, 34 S.W.3d 48 (Ky. 2000) in determining whether she is permanently and totally disabled.

The record supports the ALJ's determination that Henry's cervical spine condition was not work related. While the evidence submitted by Henry

indicated she complained of neck pain, no medical expert who testified in this case made a causal connection between the neck condition and the work incidents or assessed a functional impairment rating for a neck condition. The ALJ therefore determined Henry did not meet her burden of proving she suffered the alleged neck injury and was within his discretion as the fact finder to so find. Snawder v Stice, 576 S.W.2d 276 (Ky. App. 1979). Therefore, we affirm the ALJ in this respect.

Henry also argues the ALJ failed to properly assess the evidence and conduct the appropriate analysis per statute and case law in determining she was not permanently and totally disabled. For reasons to be set forth herein we vacate the ALJ's determination Henry was not permanently and totally disabled, and remand for the proper analysis of permanent total disability as mandated by KRS 342.0011(11) (b); Ira A. Watson Department Stores v Hamilton, *supra*; and City of Ashland v Stumbo, *supra*.

Henry argues the ALJ erred by not performing the proper analysis in determining whether she was permanently and totally disabled. Permanent total disability is 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 the injury. KRS 342.0011(11) (c). While consideration of a total disability award depends on many factors, it remains within the ALJ's discretion to translate an impairment rating into either partial or total disability. Colwell v. Dresser Instrument Div., 217 S.W.3d 213 (Ky. 2006); Ira A. Watson Department Store v. Hamilton, *supra*; City of Ashland v Stumbo, *supra*. In City of Ashland, *supra*, the Kentucky Supreme Court set forth as follows:

Thus an ALJ is required to undertake a five-step analysis to determine whether a claimant is totally disabled. Initially, the ALJ must determine if the claimant suffered a work related injury....Next the ALJ must determine what, if any, impairment rating the claimant has...Next the ALJ must determine what permanent disability claimant has...Next the ALJ is required to determine that the claimant is unable to perform any type work ... Finally, an ALJ must determine that the total disability is the result of the work injury.

The Court additionally stated:

An ALJ cannot simply state that he has reviewed the evidence and concluded that a claimant lacks the capacity to perform any type of work. The ALJ must set forth, with some specificity, what factors he considered and how those factors led to the conclusion that the claimant is totally and permanently disabled.

In this instance, the ALJ failed to perform the requisite analysis. He merely stated as follows:

The issue of benefits under KRS 342.730 involves the determination of whether the Plaintiff has a permanent disability and if so whether it is total or partial in nature. In this case, the ALJ finds the Plaintiff is not totally disabled.

Although the ALJ believes the Plaintiff to be a credible witness, he is not persuaded she is totally disabled. No physician specifically indicated she was totally disabled. Although she has significant restrictions in the use of her shoulders, she still has the ability to perform at least sedentary work or essentially any job not requiring significant lifting. The ALJ in view of the Plaintiff's education, work experience and restrictions, believes the Plaintiff could perform a wide range of occupations not requiring significant lifting.

The Plaintiff's disability must be considered partial in nature. This begins with the determination of the appropriate impairment rating under the AMA Guides. Jones vs. Brash-Barry General Contractors, 189 SW3d 149 (Ky. App. 2006).

We do not believe this is a sufficient analysis as mandated by City of Ashland v Stumbo, supra. The ALJ's opinion does not sufficiently set forth a detailed analysis, properly weighing the evidence of record in determining whether Henry will be able to earn income by providing services on a regular and sustained basis in a competitive economy. On remand, the ALJ is directed to perform the correct analysis in accordance with City of Ashland v Stumbo, supra, and Ira A. Watson Department Store v Hamilton, supra. We make no determination regarding whether Henry is permanently disabled, and the ALJ is free to make any determination based upon the evidence.

The record also supports the ALJ's determination that the medication Olanzapine and medical expenses for blood work performed are non-compensable. The ALJ determined Henry failed to prove the medical expenses were compensable. The record is devoid of proof indicating a causal connection to the challenged medical expenses to support the claim for payment of the expenses. Snawder v Stice, supra. Therefore, we affirm the ALJ in this respect.

Accordingly, the September 20, 2019 Opinion, Order and Award, and the November 8, 2019 Orders on petitions for reconsideration rendered by Hon. R. Roland Case, Administrative Law Judge are hereby **AFFIRMED IN PART AND VACATED IN PART**. This claim is **REMANDED** for additional analysis as set forth above.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON LORI V DANIEL
1510 NEWTOWN PIKE, STE 108
LEXINGTON, KY 40511

COUNSEL FOR RESPONDENT:

LMS

HON GREGORY N SCHABELL
401 MADISON AVE
COVINGTON, KY 41011

ADMINISTRATIVE LAW JUDGE:

LMS

HON R ROLAND CASE
MAYO-UNDERWOOD BLDG
500 MERO ST, 3rd FLOOR
FRANKFORT, KY 40601