

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: March 25, 2019

CLAIM NO. 201662623

CHRISTINA LYNN

PETITIONER

VS.

**APPEAL FROM HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE**

HEALTHSOUTH d/b/a
CARDINAL HILL REHABILITATION HOSPITAL
And HON. W. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. Christina Lynn appeals from the September 23, 2019 Opinion and Order and the October 17, 2018 Order on Reconsideration rendered by Hon. W. Greg Harvey, Administrative Law Judge ("ALJ"). The ALJ concluded Lynn suffered a temporary injury to her low back. On appeal, Lynn challenges this

conclusion and argues she is entitled to an award of permanent income benefits. For the following reasons, we affirm.

Lynn worked as an occupational therapist for Cardinal Hill. On October 29, 2016, she strained her lower back while assisting a patient into a wheelchair. About a week prior to this incident, on October 24, 2016, Lynn had visited Dr. Rob Hutchinson with complaints of right leg numbness for one week. Dr. Hutchinson diagnosed peripheral neuropathy and lumbar radiculopathy. He ordered an MRI and prescribed prednisone. Lynn returned to work without restrictions.

On the date of the injury, Lynn treated at Concentra Medical Center and reported back pain radiating into her legs. She was given steroids and an MRI was ordered. At a November 6, 2016 follow-up, Lynn's left leg symptoms had resolved and her back pain was improving. The MRI revealed mild degenerative disc disease but no evidence of herniation or stenosis. Lynn was referred to physical therapy. She returned to full duty work.

On November 20, 2016, Lynn returned to Dr. Hutchinson and reported the work accident. He diagnosed lumbar neuritis, though he noted the current treatment plan was improving Lynn's condition. He continued physical therapy for three weeks.

Lynn testified that, by January 2017, her pain had worsened and she took medical leave from work. On February 1, 2017, when she was visited Dr. Patrick Leung with complaints of pain when sitting, and numbness into the right foot. An EMG study revealed no evidence of nerve entrapment. Dr. Leung referred Lynn to Dr. Matthew Tutt, who prescribed Gabapentin for her lower extremity

numbness. The medication was ceased, however, due to an allergic reaction. Dr. Tutt suspected Lynn's extremity numbness was not coming from her spine, and ordered a second EMG. It was also negative for nerve entrapment.

Lynn next returned to Dr. Leung. He prescribed Cymbalta for pain, and took her off work for four weeks. When Lynn returned to Dr. Leung on June 20, 2017, she complained of continued low back pain and radiculopathy. Dr. Leung noted conservative treatment had failed and referred her to Dr. Chris Swayze for pain management. He ordered her to remain off work until she visited Dr. Swayze. On December 13, 2017, Dr. Swayze evaluated Lynn and suspected intermittent compression of lumbar roots. He recommended daily vitamin C and an epidural steroid injection.

Dr. Philip Corbett conducted an independent medical evaluation ("IME") on August 2, 2017. In addition to a review of the medical records documenting treatment following the work accident, Dr. Corbett reviewed records from Dr. Robert Taylor. Dr. Taylor treated Lynn from April 4, 2000 through July 5, 2007 for lumbar spine pain and sciatica. Upon physical examination, Dr. Corbett diagnosed myofascial strain of the lumbar spine. While acknowledging Lynn's radiating pain, he found no indication of "true" radiculopathy. Referencing the American Medical Association Guides to the Evaluation of Permanent Impairment, 5th Edition ("AMA Guides"), Dr. Corbett assessed a 0% impairment rating. He suggested an epidural injection of saline to determine therapeutic effect.

In an October 23, 2017 supplement, Dr. Corbett placed Lynn at maximum medical improvement ("MMI") because she had refused the

recommended saline injection. His impairment rating remained unchanged. He continued to diagnose a stretch strain to the myofascial structures of the low back.

Dr. Frank Burke conducted an IME on November 16, 2017. Dr. Burke diagnosed acute lumbosacral strain with radicular complaints. He reviewed Lynn's prior treatment with Dr. Hutchison but did not believe her current symptoms were pre-existing. Referencing the AMA Guides, he placed Lynn in the DRE Lumbar Category II and assessed a 7% whole person impairment, entirely attributable to the work accident.

Dr. Corbett reviewed Dr. Burke's report, and in an April 10, 2018 letter, stated his opinion remained unchanged. Dr. Corbett disagreed that Lynn suffered an injury as defined by KRS 342.0011, or that her condition qualified for placement in the DRE Lumbar Category II. He concluded Lynn could return to work without restrictions, again emphasizing the lack of evidence of physical change in the lumbar spine.

The ALJ concluded Lynn failed to establish an injury as defined by KRS 342.0011(1), because there was no evidence of a "harmful change in the human organism evidenced by objective medical findings." He noted the lumbar MRI and two EMG studies revealed no evidence of pathology. The ALJ also referenced Lynn's prior treatment history with Drs. Taylor and Hutchinson. While lending credence to Lynn's testimony regarding her symptoms after the work incident, the ALJ likewise highlighted that no physician had offered clear and objective evidence regarding causation.

Ultimately, the ALJ was most persuaded by Dr. Swayze who “diagnosed the condition as intermittent compression of the nerve roots.” Though Dr. Swayze stated it “it not inconceivable that the condition was caused by the work incident,” he declined to state within reasonable medical certainty that the work accident caused her symptoms. The ALJ noted Dr. Burke concluded the work accident caused an injury, though Dr. Corbett believed no permanent impairment resulted. The ALJ determined the work accident caused a temporary injury, and dismissed the claim.

Lynn petitioned for reconsideration, raising the same arguments as she does in the appeal. Additionally, she asserted her entitlement to temporary total disability (“TTD”) benefits. The ALJ granted the petition insofar as Lynn’s entitlement to TTD benefits, but denied the remainder of the petition. He reiterated his reliance on Dr. Swayze and Dr. Burke to conclude that a temporary injury had occurred.

On appeal, Lynn first argues the ALJ erred by dismissing her claim for permanent disability benefits. She claims the ALJ based this conclusion entirely on the fact that the MRI and EMG tests were negative for pathological change, which is not a legal requisite for a compensable permanent injury claim. She also asserts the ALJ ignored the possibility that the work accident aroused a dormant condition for which she had treated in 2007. Finally, Lynn challenges the ALJ’s reliance on Dr. Corbett’s opinion, which she claims was based on only a cursory physical examination.

As the claimant in a workers' compensation proceeding, Lynn bore 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). 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 they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

We find no error in the ALJ's determination Lynn sustained only a temporary injury. Lynn is incorrect that KRS Chapter 342 does not recognize temporary injuries. Robertson v. UPS, 64 S.W.3d 284 (Ky. 2001) very clearly states that a claimant may sustain a temporary injury for which TTD benefits may be awarded, even though no permanent injury or impairment has been established. Further, there is ample evidence to support the ALJ's conclusion Lynn sustained a temporary injury. He found Lynn's testimony regarding the incident and her subsequent symptoms credible. The Concentra Medical Center and Dr. Leung's medical records establish her care after the incident. The ALJ is entitled to believe the opinions of Drs. Swayze and Burke that Lynn suffered an injury, but also rely on Dr. Corbett's opinion that the accident caused no permanent impairment. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000) (The ALJ 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.). As substantial evidence supports the ALJ's conclusion Lynn suffered only a temporary injury, it cannot be said that the proof compels a different result.

Lynn next claims the ALJ's opinion applies an incorrect standard that would require objective diagnostic evidence to establish a permanent injury. She emphasizes the ALJ's use of the phrase "anatomic change", which she argues was improperly substituted for the statutory requirement of "harmful change" found at KRS 342.0011(1). Lynn is correct that a harmful change may be established through observation or testing. Gibbs v. Premier Scale Co., 50 S.W.3d 754 (Ky. 2001). However, the ALJ is likewise entitled to take into consideration the fact that more sophisticated diagnostic tools rule out pathology. We find no error in the ALJ's consideration of the results of the MRI and EMG, and no indication he based his decision solely on the negative imaging studies.

Next, Lynn challenges the ALJ's reliance on Dr. Corbett. She asserts he misunderstood the nature of her job duties, and conducted only a cursory physical examination. She also claims Dr. Corbett's opinion was biased by the fact she refused the saline injection, which she found inappropriate. Dr. Corbett described the injection as a diagnostic, not therapeutic, tool which he considered due to the lack of findings on other objective tests. He also was able to provide a diagnosis without the injection. Lynn's arguments concerning the quality of Dr. Corbett's examination or the basis of his diagnosis go to the weight of the evidence, not its

admissibility. We find nothing in Dr. Corbett's opinion that would render it unreliable or otherwise insufficient.

Finally, Lynn states there is no proof to support the ALJ's determination she suffered a pre-existing active condition. The ALJ made no such finding. He referenced Lynn's treatment for radicular symptoms the week prior to the work accident, and also her prior lumbar pain. However, the ALJ merely stated this medical history "further complicate[s] the claim" in addition to the fact that no objective testing had confirmed her diagnosis either before or after the work accident. The ALJ did not conclude Lynn suffered a pre-existing active condition, and entered no such findings in either the Opinion or the Order on Reconsideration.

The ALJ's ultimate conclusion that Lynn suffered a temporary injury is supported by the medical proof. Though Lynn believes it is inconsistent to simultaneously believe her testimony regarding her symptoms, but decline to award permanent injury benefits, we find no such inconsistency. The ALJ weighed the entirety of the proof and reached a conclusion supported by substantial evidence.

Accordingly, the September 23, 2019 Opinion and Order and the October 17, 2018 Order on Reconsideration rendered by Hon. W. Greg Harvey are hereby **AFFIRMED**.

ALL CONCUR.

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