

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 5, 2021

CLAIM NO. 201979578

CROTHALL

PETITIONER

VS.

APPEAL FROM HON. PAUL L. WHALEN,
ADMINISTRATIVE LAW JUDGE

CAROLYN ESTEPP AND
HON. PAUL L. WHALEN,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Crothall, an entity providing cleaning services for the University of Kentucky (“UK”) Hospital, appeals from the Opinion, Award, and Order rendered on September 28, 2020, and the amended Opinion, Award, and Order issued October 1, 2020 by Hon. Paul L. Whalen, Administrative Law Judge (“ALJ”). The ALJ determined Carolyn Estep (“Estep”) is permanently totally disabled from injuries she sustained when she fell in the hallway at the UK Hospital

while working for Crothall. Crothall also appeals from the Orders the ALJ issued regarding its Petition for Reconsideration on October 26 and 27, 2020.

On appeal, Crothall argues the impairment rating issued by Dr. Frank Burke, Jr., relied upon by the ALJ, is inconsistent with the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Crothall also argues the ALJ’s determination that Estep is permanently totally disabled is not supported by substantial evidence. We find the ALJ made the appropriate analysis in determining Estep is permanently totally disabled, and substantial evidence supports his decision. We also find the ALJ properly exercised his discretion in relying upon the impairment rating assessed by Dr. Burke, and therefore we affirm.

Estep filed a Form 101 on June 7, 2019, alleging injuries to multiple body parts when she fell in the hallway at the UK Hospital while working for Crothall on May 1, 2019. In the Form 104, Estep noted she worked in housekeeping for UK from 1989 to 2014. She next worked for Crothall at the UK Hospital from 2017 until 2019.

Estep testified by deposition on August 19, 2019, and at the hearing held July 29, 2020. Estep was born on February 18, 1949, and she resides in Lexington, Kentucky. Prior to working in housekeeping, Estep operated a screen-printing machine for approximately two years. Estep completed the eleventh grade, and does not have a GED, nor does she have any specialized vocational training.

Estep began working at the UK Hospital for Crothall in 2017. She cleaned rooms in the labor and delivery area. She testified her job required changing

bed linens, cleaning offices, cleaning patient rooms, mopping, dusting, cleaning windows (which required climbing on a step stool), bending, working on her hands and knees, as well as stooping (to clean baseboards and under beds). She testified that since her injury she has difficulty climbing the two steps to enter her home. She also testified she would be unable to perform her job duties from a seated position. She has not returned to work since the date of her injury due to continuing right leg problems, and she has developed a limp. She has not returned to work despite being released on September 30, 2019. When she contacted Crothall about returning to work, she was advised she was required to re-apply for the position.

On May 1, 2019, Estep went to the basement of the UK Hospital where the time clock is located to sign out for lunch. She fell in the hallway prior to reaching the clock. She testified at her deposition that she does not know if she slipped, stumbled, or tripped. She was unsure why she fell. She testified she has no history of fainting, dizziness, or right leg problems. She experienced immediate right leg pain after she fell. She stated she has continued to experience pain from her right hip to her ankle since the accident. After she fell, several co-workers gathered around her, her supervisor helped her into a chair, and she was wheeled into the office. Her supervisor reported the incident to the workers' compensation insurer.

Estep first sought treatment at UK Hospital Emergency Room. She was next treated at Concentra and followed up at the UK Clinic. The insurer initially denied the claim. Estep was notified of the denial in a letter from the insurer dated June 14, 2019. Crothall filed a Form 111 on July 3, 2019, noting the claim was denied, in part, due to lack of notice (despite the supervisor helping her

up), and the injury did not occur in the course and scope of Estep's employment. The Form 111 additionally indicated no temporary total disability ("TTD") or medical benefits had been paid. We note some benefits were eventually paid.

Estep filed Dr. Uzma S. Aslam's May 7, 2019 record in support of her claim. Dr. Aslam treated Estep at Concentra. Dr. Aslam diagnosed a fracture of the lower end of the right femur, and restricted Estep to sitting 90% of the time. She was also advised to wear a splint.

Dr. Mitchell Wattles, at the UK Hospital Emergency Room, treated Estep on May 1 and 2, 2019. He noted Estep was a seventy-year-old patient who complained of right knee pain after falling at work. A CT-scan revealed a non-displaced right femur fracture extending to the intercondylar notch.

Estep treated with Jennifer Raisley, P.A., at UK Healthcare, on July 29, 2019. Ms. Raisley noted Estep should remain off work for two more weeks, and recommended physical therapy two to three times per week for six weeks.

Dr. Burke evaluated Estep on August 26, 2019. He noted Estep's May 1, 2019 fall at work. She reported experiencing immediate right hip and knee pain. Dr. Burke diagnosed a right distal femoral fracture extending intraarticularly into the right knee. He determined she had not reached maximum medical improvement ("MMI"); therefore, he could not assess an impairment rating pursuant to the AMA Guides. He noted additional diagnostic studies were indicated. Dr. Burke again evaluated Estep on December 2, 2019. He found she had reached MMI. He stated she has chronic right knee pain and has a mild limp. Based upon loss of motion in her right hip and right knee, along with pain and her limp, he

assessed a 13% impairment rating pursuant to the AMA Guides. Dr. Burke noted Estepp should undergo work hardening. He also recommended she avoid repeated squatting or ladder/stepstool climbing.

Dr. Ellen Ballard evaluated Estepp at Crothall's request on January 28, 2020. She noted Estepp has not worked since her May 1, 2019 injury. Dr. Ballard stated Estepp could fully squat, and had normal right hip, knee, and ankle range of motion. She diagnosed a history of a non-displaced femur fracture. She also noted Estepp's history of a 2019 cholecystectomy with a cancer diagnosis. Dr. Ballard assessed a 2% impairment rating pursuant to the AMA Guides for Estepp's ongoing pain stemming from her injury. Dr. Ballard disagreed with Dr. Burke's impairment assessment, and stated Estepp could return to work with no restrictions.

The ALJ rendered an Opinion, Award, and Order on September 28, 2020 finding Estepp is permanently totally disabled due to her May 1, 2019 work injury. He reiterated this determination in the amended Opinion, Award, and Order issued October 1, 2020. The ALJ specifically found *verbatim*, as follows:

KRS 342.0011(11) (c) defines permanent total disability 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 due to an injury. KRS 342.0011(34) defines work as providing service to another in return for remuneration on a regular and sustained basis in a competitive economy. In determining whether a worker is totally disabled, an ALJ must consider several factors, including the worker's age, education level, vocational skills, medical restrictions, and the likelihood that he can resume some type of "work" under normal employment conditions. Ira A. Watson Department Store v. Hamilton, Ky., 34 SW3d 48 (2000).

The ALJ is required to undertake a 5-step analysis to determine whether a claimant is permanently and totally disabled. The ALJ must determine whether there has been a work-related injury, the Plaintiff's impairment rating, and permanent disability rating. Finally, the ALJ must determine whether the Plaintiff can perform any type of work and that total disability is due to the work injury. Ashland v. Stumbo, 461 SW 3d 392 (Ky. 2015).

In this case, the medical report of Dr. Burke, combined with the reports from UK Healthcare, as well the deposition and hearing testimony are substantially more convincing than the medical report of Dr. Ballard. Dr. Burke saw the Plaintiff twice. He initially saw her on August 26, 2019 and three months later on December 2, 2019. After the second visit, Dr. Burke diagnosed that Plaintiff had suffered a minimally displaced fracture of the right femur from the junction of the middle and distal third with intraarticular extension into the right knee. (Burke, 12/02/2019 report p. 2 of 3) Plaintiff's testimony at the hearing concerning that she walks with a limp, has to stop after a few steps and is unable to stand for long periods of time are supportive of Dr. Burke's assessment of 13%.

In her position as housekeeper for the Defendant at the University of Kentucky Hospital, Plaintiff had to use stepstools and ladders, as well as, stand on her feet for many hours at a time. Additionally, she would have to squat in order to wash walls and clean areas of the bathroom. Proof provided by the report of Dr. Burke, the Plaintiff's own testimony, and deposition, indicate it that she will ever be able to perform a job where she is on her feet for many hours at a time, as well as performing multiple tasks squatting and climbing on stepstools. The evidence provided in this case indicates that the Plaintiff will never be able to return to work for the Defendant providing housekeeping services at the UK Hospital or elsewhere. There is an inference that the Defendant does not want Plaintiff to return to work due to asking her to re-apply. Additionally, the Plaintiff is 71 years old with less than a high school diploma. Most of her working life has been as a housekeeper at the University of Kentucky. After incurring the injury of May 1, 2019, she is unable to return to her position with

Crothall or find a similar position. As a result, Plaintiff is occupationally disabled.

In the instance before us, Plaintiff Carolyn Estep is unable to return to any gainful employment at the time of award as was the case in McNutt Construction v. Scott 40 S.W. 3d 854 (2001). As seen above the analysis above considering the impact of the May 1, 2019 injury, the Plaintiff's permanent disability rating of 13%, her educational level and age as well as her work history determine that Plaintiff is totally occupational disabled.

Plaintiff's permanent total disability benefits are calculated as follows: AWW of \$498.82 x 2/3 = \$332.55 per week. Because she is already 71 years old, her benefits will continue for so long as she is totally disabled, or until four years after the date of injury. KRS 342.730(4).

Crothall filed a motion to reopen the record to allow the submission of additional evidence on October 6, 2020. Crothall also filed a Petition for Reconsideration on October 6, 2020, essentially rearguing the merits of the case. Crothall also noted the ALJ erred by awarding 12% interest on past-due benefits. The ALJ entered Orders on October 26, 2020 and October 27, 2020, denying the Petition for Reconsideration except for correcting the interest rate to 6%. The ALJ also denied Crothall's motion to reopen proof time to allow for the admission of additional evidence.

On appeal, Crothall argues Dr. Burke's impairment rating, relied upon by the ALJ, is erroneous, and it was not assessed in accordance with the AMA Guides. Crothall also argues the ALJ's determination Estep is permanently totally disabled is not supported by substantial evidence.

We initially note that as the claimant in a workers' compensation proceeding, Estep had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Estep was successful in her burden, we must determine whether the ALJ properly analyzed the claim, and whether substantial evidence of record supports the 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).

We initially note there is no dispute that Estep sustained a work-related injury while working for Crothall on May 1, 2019. Crothall clearly had notice of the injury since the supervisor actually helped her into a chair after the fall. We additionally note both Drs. Burke and Ballard assessed impairment ratings due to residual problems Estep continues to experience resulting from her fall. The only difference is the percentage of impairment assessed. We note Estep testified she has experienced right hip and knee pain, along with a limp, since the fall. The Form 101 indicates she sustained injuries to multiple body parts when she fell. The fact she sustained a non-displaced femur fracture is unquestioned.

When Dr. Burke evaluated Estep, he noted she had restricted range of motion in her hip and knee, which he determined resulted from the fall. He relied upon that restricted motion in assessing the 13% impairment rating. To the contrary, Dr. Ballard noted no restricted range of motion. She assessed a 2% impairment rating due to Estep's pain complaints. There is no evidence in the record that either impairment rating was incorrectly calculated pursuant to the AMA Guides, only that the evaluators based their ratings on different factors. The ALJ was free to choose which impairment rating upon which to rely. He chose to rely upon the rating Dr.

Burke assessed. Dr. Burke's impairment rating constitutes substantial evidence upon which the ALJ could rely. We find the ALJ properly exercised his discretion, and that determination will not be disturbed.

We next note 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 because 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 Estep is permanently totally disabled, the ALJ was required to perform an analysis pursuant to City of Ashland v. Taylor Stumbo, 461 S.W.3d 392 (Ky. 2015), and Ira A. Watson Department Store v. Hamilton, *supra*. We additionally note, as Estep cited, an injured worker's testimony may be considered and relied upon when assessing total disability. Walker v. Product Finishers, 505 S.W.2d 178 (Ky. 1974), Hush v. Abrams, 584 S.W.2d 48 (Ky. 1979)

We find the ALJ appropriately analyzed and applied the required factors set forth in City of Ashland v. Stumbo, *supra*, and Ira A. Watson Department Store v. Hamilton, *supra*, in finding Estep is permanently totally disabled. The ALJ explained the five-step process required to support a determination of permanent total disability. The ALJ found Estep sustained compensable work-related injuries. He next determined Estep has a 13% impairment rating based upon Dr. Burke's assessment. The ALJ could reasonably infer this as a basis for assessing whether Estep is disabled. The ALJ next determined Estep is unable to perform any of her past work. He specifically noted the limitations specified by Dr. Burke, and Estep's

own ability assessment. The ALJ also noted Estep's lack of education. The ALJ also observed Crothall required Estep to complete a job application before she could return to work, which he reasonably assumed indicated she may not be re-hired. We acknowledge Crothall's assertion of numerous jobs that Estep could perform. However, the record is bereft of any evidence supporting this assertion. Based upon the evidence, the ALJ determined Estep's inability to work is due to the residual limitations from her work injuries.

We determine the ALJ appropriately outlined the steps necessary, and the evidence he relied upon in reaching his determination Estep is permanently totally disabled. The ALJ properly analyzed the claim, and his decision falls squarely within his discretion. Therefore, his determination on this issue will also remain undisturbed.

Accordingly, we **AFFIRM** the September 28, 2020, Opinion, Award, and Order, and the amended Opinion, Award, and Order rendered on October 1, 2020 by Hon. Paul L. Whalen, Administrative Law Judge, as well as the October 26, 2020 and October 27, 2020 Orders regarding Crothall's Petition for Reconsideration.

ALL CONCUR.

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