

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 14, 2018

CLAIM NO. 201699779

DEBRA LOWE

PETITIONER

VS.

APPEAL FROM HON. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

PIKE COUNTY BOARD OF EDUCATION
and HON. GREG HARVEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Debra Lowe (“Lowe”) appeals from the April 20, 2018, Opinion and Order and the May 15, 2018, Order overruling her Petition for Reconsideration of Hon. Greg Harvey, Administrative Law Judge (“ALJ”). The ALJ awarded temporary total disability (“TTD”) benefits already paid, permanent partial disability (“PPD”) benefits, and medical benefits for Lowe’s work-related right shoulder injury.

On appeal, Lowe argues the ALJ erred in dismissing her claim for work-related lumbar and cervical spine injuries. Lowe also asserts she suffered work-related injuries to both of her shoulders and not just her right shoulder. Further, Lowe asserts she is entitled to benefits for her work-related psychological injury. Finally, Lowe argues her permanent restrictions preclude her from all work or, “at a minimum,” from returning to her pre-injury job.

Lowe’s Form 101 alleges she sustained work-related injuries to “multiple body parts” on May 15, 2015, while in the employ of the Pike County Board of Education (“Pike County”) in the following manner: “While removing something from the walk-in freezer, slipped on something on the floor, fell and was unconscious for a few minutes injuring head, back, neck, shoulders, arms, and right elbow.”

Lowe testified by deposition on June 27, 2017, and at the February 20, 2018, hearing. On the date of the injury, Lowe was working as manager of the cafeteria at North Point Academy. During her deposition, she described her job duties: “I opened up the school, turned all the equipment on. I basically done [sic] the ordering. We made food, cooked food. I carried food. We cleaned and I managed my one person I had on staff. I made the schedule.”

Lowe filed the August 16, 2017, Form 107-I medical report of Dr. Anbu Nadar. After performing a physical examination and medical records review, Dr. Nadar set forth the following diagnoses:

1. Chronic cervical and lumbosacral strain.
2. Rotator cuff tendinitis, left shoulder.
3. Rotator cuff tendinitis, with rotator cuff tear, right shoulder, status post-rotator cuff repair x2.

4. Lateral epicondylitis, right elbow.

Dr. Nadar opined the work incident caused Lowe's current complaints. He believed she had reached maximum medical improvement ("MMI") but "continues to have residual symptoms for which she needs periodic symptomatic care." He assessed a 20% whole person impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Restrictions include "limitation in work activity that requires heavy lifting, pushing, pulling, overhead activity, prolonged sitting/standing and activities of such nature," Dr. Nadar believed Lowe was unable to return to her pre-injury job.

Lowe filed the September 8, 2017, Independent Psychiatric Evaluation ("IPE") of Dr. Timothy Allen. After performing a psychiatric examination of Lowe and a medical records review, Dr. Allen diagnosed "Somatic Symptom Disorder" and "Adjustment Disorder with Depressed Mood, in remission" and set forth the following conclusions:

- Ms. Lowe developed an Adjustment Disorder and Somatic Symptom Disorder due to the work accident and subsequent physical problems.
- She sought treatment and the Adjustment Disorder resolved. The treatment she received was related to the work injury.
- She continues to suffer significant symptoms of Somatic Symptoms Disorder, which is a mental illness in which an individual experiences physical symptoms in response to emotional distress. At this point, after reasonable treatment, her condition is permanent.
- While there is some indication that Ms. Lowe suffered from Depression, Anxiety, and/or Fibromyalgia prior to the work injury, she was not actively treated for any of those conditions

and had no impairment from any such diagnoses prior to the work injury.

- She is at MMI.
- She has no psychiatric work restrictions.

Dr. Allen assessed a 5% whole person impairment rating “due to psychiatric causes related to the injury on May 13, 2015.

Pike County filed the March 7, 2017, Independent Medical Examination (“IME”) of Dr. David Jenkinson. After performing a physical examination and a medical records review, Dr. Jenkinson set forth the following opinions:

There is no evidence that Ms. Lowe suffered any injury to her cervical, thoracic, or lumbar spine. The MRI scans demonstrate minor degenerative changes of no clinical significance and there were no clinical signs for either cervical or lumbar radiculopathy. Her presentation was characterized by non-physiological signs and inappropriate pain behaviors. It is my opinion that Ms. Lowe has no significant abnormality in any level of her spine and there is no evidence that she had a work related injury.

In regard to the right shoulder, she was found to have a degenerative rotator cuff tear but there is no evidence she had acute trauma. She presented to a physician in July 2016 with a history that her symptoms were ‘chronic non traumatic’. Ms. Lowe is fifty-five years old and the abnormalities reported on MRI scan of the right and left shoulder are consistent with age related degeneration which is found commonly in this age group. There is no evidence that she had an injury to the right elbow. She was assigned a clinical diagnosis of lateral epicondylitis but the MRI demonstrated no abnormality in the common extensor origin. It is my opinion that there was no significant injury to the right elbow and there is no evidence that she has any significant abnormality.

Ms. Lowe did not report symptoms in her left knee.

She complained of pain in the left shoulder and an MRI reported degenerative changes consistent with age.

Dr. Jenkinson concluded Lowe required no further treatment and is capable of returning to her pre-injury job “or any comparable employment with no restrictions.” Dr. Jenkinson opined Lowe is at MMI and assessed no impairment rating.

Pike County also filed the October 4, 2017, IME report of Dr. Ronald Burgess. After performing a physical examination and a medical records review, Dr. Burgess diagnosed bilateral degenerative rotator cuff disease not causally related to the subject work incident. He assessed a 3% whole person impairment rating for “her significant complaints of pain.” Regarding Lowe’s restrictions, Dr. Burgess stated, “[h]er restrictions are based on her self-limiting activities and there is no objective evidence of any abnormality that would prevent her from returning to work as a food service assistant and cafeteria manager.”

Pike County filed the October 31, 2017, IPE report of Dr. David Shraberg. After performing a psychiatric examination and a medical records review, Dr. Shraberg set forth the following diagnoses:

AXIS I Adjustment Disorder of Adult Life associated with the injury of May 3 [sic], 2015, resolved. Elements of symptom magnification enveloped into somatic symptom disorder.

AXIS II Deferred.

AXIS III Status post slip and fall and with initial right shoulder arthroscopy and right rotator cuff repair November 19, 2015 with subsequent second arthroscopy August 16, 2016 with subacromial decompression and again repair of a rotator cuff.

Apparently cervical lumbar sprain, resolved, with slip and fall.

Headaches, tension in nature.

Hypertension, Pre-existent.

Opiate-induced hyperalgesia and dependency, reversible.

Dr. Shraberg opined Lowe reached MMI, assessed a 0% whole person impairment rating, and imposed no psychiatric restrictions. He opined as follows:

Ms. Lowe is a 55-year-old woman who essentially has disabled herself following what appeared to be a simple sprain/strain to her shoulder. She has had some degenerative changes as one would expect in a woman her age, but essentially after a slip and fall rather than returning to work has undergone several surgeries and now has spreading pain, which is, in my opinion (and my interpretation of Dr. Allen's as well) psychogenic or psychosomatic in nature complaining of chronic pain now in both shoulders, right elbow, back, and head. On the other hand, her neurodiagnostic tests are normal. In addition, she is on opiates for this pain which not only can cause opiate-induced hyperalgesia or rebound pain but certainly confounds any efficacy of **Zoloft**.

Her primary stressor was an adjustment of adult life following her second surgery from which her 'subjective' complaints were not relieved, but objectively from a psychiatric vantage point she has no psychiatric restrictions for returning to her usual and customary job. Her symptoms appear to be, at this junction, subjective, exaggerated, and she essentially has a functional disorder of a somatic symptom disorder or psychophysiological which, at this junction, I believe has to do with disabling herself, maximizing her benefits including disability and retirement. Sadly, she is only 55, a robust and friendly lady who would be better served discontinuing narcotics and returning to gainful employment if she were so motivated and no psychiatric restrictions for her doing so.

Pike County also filed the October 24, 2017, Form 107-P medical report of Dr. Shraberg which is handwritten and mostly illegible. Of significance, however, is the section regarding causation in which Dr. Shraberg stated Lowe's psychological complaints are not caused by her work-related injury.

The February 20, 2018, Benefit Review Conference ("BRC") Order and Memorandum lists the following contested issues: work-relatedness/causation, benefits per KRS 342.730, "injury" as defined by the Act, and average weekly wage. Under "other" is the following: "1) Form 101 is amended to allege psychological claim as the claim contains proof and no prejudice on that issue. 2) Future medical treatment per Dr. Jenkinson and Dr. Shraberg." The BRC Order, under "Stipulations," notes TTD benefits were paid from November 19, 2015, through April 13, 2017, for a total of \$17,374.00 as well as medical expenses in the amount of \$110,148.37.

In an Order dated February 21, 2018, the ALJ granted Lowe's oral motion, made at the BRC, to amend her Form 101 to include a psychological injury claim.

In the April 20, 2018, Opinion and Order, the ALJ set forth the following findings and conclusions:

A. Burden of Proof

The claimant in a workers' compensation proceeding has 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); Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002). KRS 342.285 grants the ALJ, as fact-finder the sole discretion to determine the quality, character, and substance of evidence. AK Steel Corp. v. Adkins, 253 S.W.3d 59

(Ky. 2008). The 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).

B. "Injury" as Defined by the Act (physical and psychological)

Plaintiff alleges she suffered physical injuries to her lumbar and cervical spine and bilateral shoulders as a result of her May 13, 2015 fall. She also alleges development of a psychological injury.

"Injury", for purposes of a worker's compensation claim, is any work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which is the proximate cause producing a harmful change in the human organism evidenced by objective medical findings. KRS 342.0011(1). The Act includes a psychological injury as one for which benefits may be awarded provided the psychological injury is the direct result of a physical injury.

1. Lumbar and Cervical Spine Injuries

Plaintiff has submitted the report of Dr. Nadar who opined Plaintiff suffered a lumbar and cervical strain as a result of her fall. He assigned 5% whole person impairment to each of those conditions and concluded that the fall caused changes in Plaintiff's soft tissues.

The February 10, 2016 MRI studies of the lumbar and cervical spines revealed only minor degenerative changes and evidenced no compression of the nerve roots. Dr. Jenkinson opined there is no evidence of an injury to the spine either in the MRI reports or on examination. He noted Plaintiff had non-physiological signs and inappropriate pain behaviors.

A claimant's self-reporting of symptoms is not objective medical findings. Durham v. Peabody Coal Co., 272 S.W.3d 192, 197 (Ky. 2008). In other words,

because not all work-related harmful changes are compensable, a claimant must do more than present her subjective complaints to demonstrate an injury as defined by KRS 342.0011. Gray v. Trimmer, 173 S.W.3d 236, 240 (Ky. 2005).

Regarding the quality of proof required to satisfy the claimant's burden, it has long been established that the mere possibility of a work connection is insufficient to support a finding of a work-related injury, the standard being one of probability. Old Republic Insurance v. McCarty, 599 S.W.2d 163 (Ky. 1980); Marcum v. General Electric Company, 479 S.W.2d 640 (Ky. 1972). Further, where the question is one that properly falls within the province of medical experts, the fact-finder may not disregard the uncontradicted conclusion of a medical expert and reach a different conclusion. Mengel v Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184 (Ky. 1981).

Here, the undersigned finds the objective medical evidence and the opinions of Dr. Jenkinson are most persuasive on the question of whether or not she suffered a work-related back injury as a result of the fall. The MRI scans showed no nerve root compression and no evidence of an acute injury. In addition, both psychological opinions offered in this case indicate Plaintiff has somatic symptom disorder and this further complicates reliance upon her subjective complaints of pain. Based on the lack of reliable, objective medical evidence of a harmful change to the lumbar or cervical spine and along with Dr. Jenkinson's opinion, the undersigned finds Lowe did not sustain a work-related back injury.

2. Left and Right Shoulder and Elbow

Plaintiff also alleges injuries to her left and right shoulder. She testified she fell to the floor and landed on her elbows and back. Post-injury she completed the school year and in the summer sought treatment for bilateral shoulder symptoms. The July 3, 2015 note from Dr. Varney at Pikeville Medical Center characterized those symptoms as "chronic" and "non-traumatic." An MRI of the right shoulder taken in August that showed high-grade tendinosis with a small, focal, articular-sided partial tear and degenerative changes in the AC joint.

Dr. Varney diagnosed Plaintiff with rotator cuff tendonitis and bursitis and lateral epicondylitis in the elbow. Plaintiff underwent a right shoulder rotator cuff repair on November 19, 2015. Approximately three months later, Plaintiff complained of left shoulder pain and had an MRI on February 17, 2016. That study revealed a small intrasubstance partial supraspinatus tear.

Another right shoulder MRI was taken on May 12, 2016 and showed a high-grade partial tear of the supraspinatus. Dr. Hall diagnosed Lowe with a right rotator cuff tear and a partial tear of the left rotator cuff. He referred her to Dr. Ryan Donegen who performed a second surgery on the right shoulder on August 16, 2016.

Lowe continues to complain of shoulder pain that she attributes to her fall. Dr. Nadar opined both shoulders were injured in the fall and he assessed impairment to both as a result of the work-incident. Dr. Burgess opined Plaintiff had bilateral degenerative rotator cuff disease which had no causal relationship with the May 12, 2015 fall. Dr. Jenkinson concurred with Dr. Burgess's opinion that there was no evidence of an acute injury to the bilateral shoulders.

Plaintiff reports no improvement to her symptoms following the surgical procedures. The Plaintiff's reported mechanism of injury and the development of symptoms in her right shoulder is consistent. The MRI films of the right shoulder do indicate a presence of pathology the only question being whether they resulted from the fall or are degenerative in nature.

The right shoulder symptoms emerged after the fall and in proximity to it. Dr. Nadar opined the fall caused the right shoulder injury and there is diagnostic evidence that Lowe had rotator cuff pathology. The undersigned is persuaded Plaintiff suffered a work-related right shoulder injury as the result of her fall. That finding is consistent with the event, the onset of symptoms and the opinion from Dr. Nadar.

The undersigned is not, however, persuaded that the left shoulder was injured during the fall. Imaging on

the left shoulder revealed a small issue with the supraspinatus tendon and the manifestation of symptoms with that shoulder did not come with any significance until well after the alleged injury date. The ALJ finds Dr. Burgess's opinion persuasive that the left shoulder had degenerative changes and no evidence of an acute injury.

3. Psychological Injury

Plaintiff alleges a psychological injury following her fall at work. She offers Dr. Allen's opinion that she suffers from somatic symptom disorder and suffers 5% whole person impairment as a result. The Defendant countered with Dr. Shraberg's opinion that, although Plaintiff does have somatic symptoms disorder, it is not work-related and she has no permanent impairment as a result.

The undersigned finds Dr. Shraberg's opinion most persuasive on the issue of impairment. Although Lowe may suffer from somatic symptom disorder, the ALJ is not convinced it has resulted in permanent impairment. For that reason, the ALJ dismisses Plaintiff's claim for benefits associated with her alleged psychological condition.

C. AWW; Extent and Duration of Benefits

The parties were unable to agree on Plaintiff's pre-injury average weekly wage. Plaintiff testified she earned \$12.90 an hour and worked 8 hours per day for a 40 hour work week. There is no contrary evidence. The undersigned finds the Plaintiff's average weekly wage prior to the injury was \$516.00.

The undersigned has found Plaintiff suffered a work-related right shoulder injury. In terms of the extent and duration of benefits, the ALJ relies upon Dr. Nadar's 7% whole person impairment rating. Plaintiff has undergone two surgeries on the right shoulder and has expressed continued discomfort therein. The undersigned is not persuaded that the Plaintiff is totally disabled or unable to return to the type of work she was performing on the date of the injury. The examination

by Dr. Burgess revealed good range of motion and strength and he assessed no permanent restrictions on Lowe as a result of her right shoulder surgeries. The ALJ finds Dr. Burgess's assessment of Lowe's current functional abilities most reliable due, in part, to his qualifications.

Plaintiff's award is calculated as follows:

$[2/3 \times \$516.00] \times .07 \times .85 \times 1 = \20.47 a week
for 425 weeks

Both parties filed petitions for reconsideration. Lowe asserted the same errors raised on appeal. In the May 15, 2018, Order, the ALJ overruled Lowe's petition for reconsideration and granted in part and overruled in part Pike County's petition for reconsideration.¹

Lowe first asserts she sustained work-related injuries to her lumbar and cervical spine, the "overwhelming evidence" is in favor of her regarding these injuries, and the ALJ erred by stating Lowe needed to present more than "subjective complaints."

As the claimant in a workers' compensation proceeding, Lowe had the burden of proving each of the essential elements of his cause of action, including "injury" as defined by the Act. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Lowe was unsuccessful in that burden regarding her alleged work-related lumbar and cervical spine injuries, 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

¹ In the May 15, 2018, Order, the ALJ corrected Lowe's average weekly wage and, consequently, PPD award.

ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence that they must be reversed as a matter of law. Ira A. Watson Department Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000).

The ALJ relied upon the medical opinions of Dr. Jenkinson to dismiss Lowe's alleged work-related lumbar and cervical spine injuries. Dr. Jenkinson opined Lowe has no significant abnormalities in her cervical or lumbar spine, and there is no evidence that she had a work-related injury to either portion of her spine. While Dr. Nadar's opinions, as set forth herein, support a finding of a work-related cervical and lumbosacral strain, the ALJ, as fact-finder, has the discretion to choose which physician's opinion to believe. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). So long as the ALJ's ruling with regard to an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, 708 S.W.2d 641, 643 (Ky. 1986). As Dr. Jenkinson's medical opinions constitute substantial evidence in support of the ALJ's dismissal of Lowe's claim for work-related lumbar and cervical spine injuries, and the record does not compel a different result, we must affirm on this issue.

We acknowledge Lowe's argument regarding the ALJ's implication Lowe presented only "subjective complaints" in support of her alleged work-related lumbar and cervical spine injuries. In the two-paragraph discussion of cases in the section resolving this portion of Lowe's claim, the ALJ appears to imply Lowe presented only "subjective complaints" and Dr. Jenkinson's medical opinions are "uncontradicted." However, the ALJ was clearly aware of the medical opinions of Dr. Nadar, as he not only summarized Dr. Nadar's August 16, 2017, report in his

discussion of the evidence but referred to Dr. Nadar's opinions at the beginning of his analysis. The ALJ ultimately concluded Dr. Jenkinson's medical opinions were more persuasive. Consequently, since the ALJ demonstrated an understanding of the contrasting opinions of Dr. Nadar, we find the referenced summation of case law to be harmless error.

Second, Lowe asserts the ALJ erred in only awarding benefits for a work-related right shoulder injury, as the same reasoning supporting an award for her right shoulder injury applies to the alleged work-related left shoulder injury. We affirm on this issue.

The ALJ relied upon Dr. Burgess' opinions in dismissing Lowe's work-related left shoulder injury claim. Further, Dr. Jenkinson opined, "the abnormalities reported on MRI scan of the right and left shoulder are consistent with age related degeneration which is found commonly in this age group." Dr. Burgess agreed with Dr. Jenkinson, as he opined Lowe suffers from bilateral degenerative rotator cuff disease *unrelated to the work incident*. As the opinions of Drs. Burgess and Jenkinson constitute substantial evidence in support of the ALJ's dismissal of Lowe's left shoulder injury claim, and the record fails to compel a different result, we are unable to disturb the ALJ's decision.

Third, Lowe argues she is entitled to an award for a work-related psychological injury. As argued by Lowe, "Ms. Lowe either actually experiences disabling pain on a daily basis, or **she thinks she does**. Regardless, the effect is the same. Ms. Lowe's level of functionality is greatly diminished to the point where she cannot return to work." (emphasis in original.)

In dismissing Lowe's work-related psychological injury claim, the ALJ relied upon Dr. Shraberg's opinion. In Dr. Shraberg's October 31, 2017, IPE, he diagnosed somatic symptom disorder, opined Lowe was at MMI, and he assigned a 0% whole person impairment rating. In the October 24, 2017, Form 107-P, Dr. Shraberg indicated Lowe's psychological condition is not caused by her work injury. Dr. Shraberg's medical opinions constitute substantial evidence in support of the ALJ's dismissal of her alleged psychological injury claim. While the opinions of Dr. Allen support a finding of work-related somatic symptom disorder with a 5% whole person impairment rating, his opinions represent nothing more than conflicting evidence compelling no particular result. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). As previously stated, where the evidence with regard to an issue preserved for determination is conflicting, the ALJ, as fact-finder, is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). We must affirm on this issue.

Finally, Lowe asserts she is entitled to a finding she is permanently totally disabled or, at a minimum, unable to return to her pre-injury job and thus entitled to income benefits enhanced by the three multiplier.

The ALJ relied upon Dr. Burgess' medical opinions in concluding Lowe is neither permanently totally disabled nor unable to return to her pre-injury job. As the ALJ stated in the April 20, 2018, Opinion and Order, "the examination by Dr. Burgess revealed good range of motion and strength and he assessed no permanent restrictions on Lowe as a result of her right shoulder surgeries." Indeed, in his October 4, 2017, IME report, Dr. Burgess opined Lowe's restrictions are based

on “her self-limiting activities,” and she has the ability to return to her pre-injury work. Dr. Jenkinson’s opinions support Dr. Burgess’ opinions on this issue. Even though the ALJ’s analysis of permanent total disability and the applicability of the three multiplier is limited, Lowe did not seek additional findings in her petition for reconsideration but simply requested the ALJ to reconsider his conclusions. Since substantial evidence in the form of Drs. Burgess’ and Jenkinson’s opinions supports the ALJ’s determination Lowe is neither permanently totally disabled nor entitled to enhancement of her income benefits via the three multiplier, and the record does not compel a different result, we must affirm on this issue.

Accordingly, the April 20, 2018, Opinion and Order and the May 15, 2018, Order are **AFFIRMED**.

ALL CONCUR.

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