

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 14, 2020

CLAIM NO. 201900051

DELLA DOBSON

PETITIONER

VS. **APPEAL FROM HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE**

HAZARD ARH and
HON. JOHN H. McCracken,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Della Dobson (“Dobson”) appeals from the Opinion and Order rendered August 6, 2019, and the August 30, 2019 order denying her petition for reconsideration issued by Hon. John H. McCracken, Administrative Law Judge (“ALJ”). The ALJ dismissed Dobson’s claims for bilateral knee injuries, and a low back injury allegedly caused by cumulative trauma while working for Hazard ARH.

On appeal, Dobson argues the ALJ erred in dismissing her claim. She argues Dr. Kriss' report does not constitute substantial evidence supporting the ALJ's decision and a contrary result is compelled. She argues Dr. Kriss' report is substantially inaccurate, and therefore cannot be relied upon based upon the holding in Cepero v. Fabricated Metals Corp., 132 S.W.3d 839 (Ky. 2004). We find the ALJ's decision is supported by substantial evidence and a contrary result is not compelled; therefore, we affirm.

Dobson filed a Form 101 on January 7, 2019, alleging injuries to multiple body parts due to cumulative trauma she sustained while working for Hazard ARH for twenty-three years.

Dobson testified by deposition on February 18, 2019, and at the hearing held June 25, 2019. Dobson was born on December 11, 1964, and is a resident of Combs, Kentucky. She has a GED and an associate's degree in nursing from Hazard Community College. Dobson worked as a registered nurse for Hazard ARH for 23 years. She last worked in the Hazard ARH psychiatric unit for ten years. In addition to working as a registered nurse, Dobson has worked as a cashier at a grocery, and at the customer service desk of a department store.

During her employment at Hazard ARH, Dobson sustained a low back injury in 2005 or 2007 when she slipped down some stairs while working. She missed a brief period of work and returned to light duty, and her restrictions were subsequently lifted. She testified she continued to have some problems with her back afterward. She also sustained a low back strain in 1990 or 1991 while lifting her infant son. She began having knee problems in 2017, left worse than right. She last

worked on November 8, 2017, just prior to undergoing left total knee replacement surgery. Dr. Makut Sharma, her treating surgeon, has also recommended right total knee replacement surgery when her left knee stabilizes.

Dobson believes her knee and back conditions were caused by cumulative trauma from her work. She attributed her conditions to daily wear and tear due to walking, bending, and lifting. She testified that during her last ten years of employment with Hazard ARH, she walked approximately eight hours during a twelve-hour shift. She also testified she engaged in physically bending, moving, and lifting patients. The first medical provider to advise her the conditions are work-related was Dr. Chad Morgan, D.C., who she saw after consulting her attorney. She testified that her back hurts most of the time. She takes Naproxen and Flexeril. She also testified she has knee swelling when she walks a lot. Dobson testified she does not believe she is able to return to work due to the walking and lifting involved. She currently receives Social Security disability benefits, and long-term disability benefits.

Attached to Dobson's deposition is her 2017 application for short-term disability benefits. In the application, Dobson indicated that the request for benefits was not due to an accident or injury at work. She also indicated she was not receiving or eligible to receive workers' compensation benefits. Dr. Sharma indicated on the application her knee condition was not due to an injury or sickness arising from her employment.

In support of her claim, Dobson filed Dr. Morgan's January 8, 2019 medical questionnaire and report. Dr. Morgan checked boxes on the questionnaire

indicating Dobson's issues with her back and knees were caused in whole, or in part, by her job activities. He also indicated she would experience adverse consequences if she continues to perform her job duties. He also indicated her job aroused her cumulative trauma into disabling reality. Dr. Morgan diagnosed Dobson with radiculopathy in the lumbar region, segmental and somatic lumbar spine dysfunction, and pain in both knees. He stated her conditions were caused by job-related micro trauma from repetitive lifting, twisting, and standing on her feet all day.

Dobson also filed Dr. John Gilbert's February 13, 2019 Form 107-I report. Dr. Gilbert evaluated Dobson at her request. Dr. Gilbert noted Dobson had worked for Hazard ARH for 23 years, and she lifted many patients. He noted she worked in the psychiatric unit for ten years where she was frequently involved in restraining combative patients. Dobson contended she sustained cumulative trauma during her employment, mostly to her knees. She underwent left knee replacement surgery. She reported she has problems with pain, limited range of motion, and weakness in both knees. She also reported low back pain radiating more in the left leg than her right. She takes medication, and she has tried chiropractic treatment.

Dr. Gilbert diagnosed Dobson with left knee replacement with persistent pain, decreased range of motion, and weakness. He also stated she has right knee degenerative joint disease with limited range of motion, pain, and weakness. He additionally diagnosed her as having a lumbar disc rupture with radiculopathy, and "muscle spasms and numbness and weakness in dermatomal and myotomal type distribution. Gait and station abnormality. Thoracic pain with

muscle spasms and intermittent radiculopathy.” Dr. Gilbert determined Dobson reached maximum medical improvement (“MMI”) on February 13, 2019. He assessed a 40% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). Of this rating, he attributed 19% to the left knee replacement and right knee degenerative joint disease, 12% to the lumbar radiculopathy, 9% to gait and station disorder, and 8% to thoracic pain and intermittent radiculopathy. Dr. Gilbert opined Dobson is disabled from any occupation. He specifically stated she does not retain the physical capacity to return to the type of work performed at the time of her injury.

Hazard filed Dr. Sharma’s treatment records from August 10, 2017 to September 24, 2018. On August 10, 2017, Dr. Sharma noted Dobson was working full time. He indicated her job did not require heavy labor. He diagnosed left knee osteoarthritis, lumbar degenerative disk disease, low back pain, and left knee swelling. Dobson provided a history of knee joint pain, and reported her knee gives way. She also reported her pain increased with bending, twisting, kneeling, stair climbing, squatting, when it is raining, and in cold weather. Dr. Sharma continued to follow up with Dobson, and scheduled her left knee replacement surgery on November 15, 2017. He noted she had failed conservative treatment, and she had advanced bone-on-bone osteoarthritis. On March 8, 2018, he noted the left knee was doing better, but she still had swelling and weakness. Dobson also reported she had pain in the right knee, low back, and bilateral leg. He diagnosed her with lumbar disc degeneration and right knee osteoarthritis. He performed right knee injections.

Dr. Sharma's last record was dated September 24, 2018, and outlined her continued complaints.

Hazard ARH filed x-ray reports from its facility for Dobson's imaging studies taken on eight occasions between August 8, 2005 and September 24, 2018. X-rays taken on August 11, 2005 and October 23, 2006 note mild lumbar degenerative changes, and narrowing at L5-S1. The remaining x-ray reports beginning November 15, 2017 are follow-up studies from her left knee replacement surgery. The reports consistently note she has satisfactory alignment.

Hazard ARH also filed voluminous records for various treatment Dobson received for multiple health conditions on 20 occasions between November 13, 2012 and January 11, 2019. During that period, Dobson treated for right knee pain beginning in 2012, and pain and numbness in her left foot beginning in 2013. The September 9, 2013 record also notes her history of low back pain and a bulging disk at L4-L5-S1. The January 9, 2015 record notes she was still taking Naprosyn. She also treated for neck pain and enlargement of her lymph nodes. On February 18, 2016, she reported she had experienced left knee pain for two weeks. During that period, she also treated for hypertension.

Dr. Timothy Kriss evaluated Dobson at Hazard ARH's request on April 10, 2019. Dr. Kriss noted he had reviewed multiple medical records and reports, including those of Drs. Morgan and Gilbert, and Dobson's job description. He noted she last worked at Hazard ARH, with the last ten years in the psychiatric unit. Dobson complained of low back and bilateral knee pain. He stated that, "other than the generalized lifting, bending, and twisting of nursing, Ms. Dobson could not

identify any specific causal or aggravating work activities.” She stated her symptoms onset gradually. Dr. Kriss noted she is still recovering from her left knee surgery. Dobson attributed all of her symptoms to her repetitive work activities. She noted she has had persistent low back pain since 2007.

Dr. Kriss diagnosed Dobson with osteoarthritis in both knees significant enough to pursue total knee replacement surgery. He also noted she has chronic axial back pain due to osteoarthritis, spondylosis, and degenerative disc disease. He specifically stated: “I find no evidence whatsoever to indicate that any of the above conditions were caused or permanently aggravated by cumulative/repetitive work activity.” Dr. Kriss stated no medical professional has documented any cumulative/repetitive work activity which aggravated or caused her back or knee pain. Dr. Kriss outlined Dobson’s treatment with Dr. Sharma and Quantum Healthcare. He additionally stated as follows:

Ms. Dobson told me today that she believes all of her low back and bilateral knee pain is caused by cumulative/repetitive work activity

However, the first time any physician confirms any potential work injury to anybody [sic] part is the independent evaluation by chiropractor Chad Morgan on January 8, 2019 – more than a year after Ms. Dobson stopped all work activity. (Somehow Dr. Morgan makes this determination without ever learning or discussing what Ms. Dobson actually does for a living).

No treating physician, nurse, therapist or chiropractor has documented any cumulative trauma work injury anywhere in the body, or even the suggestion of such a possibility.

While working, or even after stopping work, NOT ONCE does Ms. Dobson complaint[sic] to ANY treating doctor of cumulative/repetitive work activity

causing or aggravating any back or knee pain. This is the very essence of causation in this case.

Dr. Kriss noted that when Dobson completed the application for short-term disability benefits, she indicated she had no work injury, and her condition was not caused by work. He found that she has 0% impairment for the lumbar and thoracic spines pursuant to the AMA Guides. He stated it is premature to assess impairment ratings for the left and right knees because she had not reached MMI for those conditions. In any event, he indicated that he finds “no evidence of any work-related lumbar or knee impairment.” He specifically found that Dobson has no work-related injuries.

A Benefit Review Conference was held on June 25, 2019. The issues preserved for determination included whether Dobson sustained work-related injuries, causation, notice, statute of limitations, permanent income benefits per KRS 342.730, TTD benefits, ability to return to work, exclusion for pre-existing impairment, unpaid or contested medical expenses, MMI, and proper use of the AMA Guides.

The ALJ rendered his decision dismissing Dobson’s claim on August 6, 2019. He initially noted that pursuant to the holding in Haycraft v. Corhart Refractories, 544 S.W.2d 222 (Ky. 1976), “a cumulative trauma injury could be proven by showing the nature and duration of the work probably aggravated a degenerative disc condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous ...”. The ALJ did not believe that Dobson met her burden of proof establishing she sustained work-related cumulative trauma injuries to her knees or low back. The

ALJ did not believe the “cursory statements” provided by Drs. Morgan and Gilbert sufficiently established causation. The ALJ specifically found as follows:

Neither Dr. Gilbert nor Dr. Morgan state that Dobson’s condition, given her age, weight (morbid obesity) and job made her lumbar spine, or knees, worse than what would have been expected of any other person similarly situated to Dobson, regardless of the job type. Haycraft, supra. While Dobson may testify herself regarding her condition, claims for cumulative trauma typically depend on medical testimony for purposes of causation. When the causal relationship between an injury and a medical condition is not apparent to a lay person, the issue of causation is solely within the province of a medical expert. Elizabethtown Sportswear v. Stice, 720 S.W. 2d 732, 733 (Ky. App. 1986); Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W. 2d 184 (Ky. 1981). Dobson’s claims for work-related repetitive injury to her back, and bilateral knees, are not conditions apparent to a layperson and therefore, require a medical expert.

The ALJ relies on Dr. Kriss to find that Dobson did not sustain work-related cumulative trauma to either her left or right knee, or lumbar spine.

Dobson filed a petition for reconsideration on August 14, 2019, arguing the ALJ misstated Dr. Sharma’s statements. She noted the ALJ found Dr. Sharma stated her condition was not caused by her job. Dobson argued, “Dr. Sharma specifically noted that there was no specific injury, and he clearly did not have an accurate description of the job that the Plaintiff performed on a daily basis because he stated that her job required no heavy manual labor.” Dobson argued the ALJ erred in relying upon Dr. Kriss’ opinions, implicitly alleging bias. She also essentially re-argued the merits of the ALJ’s decision regarding causation. Dobson argued, as she does on appeal, that Dr. Kriss’ opinion was substantially inaccurate

and could not be relied upon based upon the holding in Cepero v. Fabricated Metals Corp., supra.

On August 30, 2019, the ALJ issued his decision denying the petition for reconsideration. The ALJ found specifically found as follows:

Plaintiff filed a Petition for Reconsideration asserting patent error in the August 6, 2019 Opinion dismissing her claims for cumulative trauma. Plaintiff asserts that the ALJ failed to provide essential findings of fact concerning Plaintiff's claim.

Plaintiff first states that the ALJ relied heavily on Dr. Kriss and Dr. Sharma in support of his decision. She states that Dr. Sharma did not have an accurate understanding of her daily job duties, as a nurse. The ALJ notes that Dr. Sharma was Plaintiff's treating doctor. Plaintiff did not argue in her original brief that Dr. Sharma did not have accurate facts regarding Plaintiff's daily job duties. Plaintiff states that she testified that her job required her, for more than 23 years, to engage in a lot of walking, lifting and hands-on patient care. However, Dr. Gilbert seems to contradict some of this when he stated in the restrictions portion of his report that at the time of injury Plaintiff was a "registered nurse at Hazard ARH, occasionally doing heavy lifting and occasionally restraining combative patients. [sic] (emphasis added by ALJ). Cumulative trauma is the result of micro-injuries, over time, from strenuous repetitive work. Dr. Gilbert does not describe heavy lifting or restraining combative patients as a frequent, repetitive work condition. Further, Dr. Morgan's report does not have a history of any of Plaintiff's job duties other than the initial statement that "he[sic] has detailed the job that he[sic] performs to you which involves constant repetitive movements and impacts to his[sic] body". This appears to be form language that provides no substantive information on the opinions of Dr. Morgan and how he relates her specific job duties, and physical condition, to cumulative trauma.

The Kentucky Supreme Court stated in Haycraft v. Corhart Refractories Co, 544 S.W.2d 222, 225 (Ky. 1977):

Nonetheless, just as constant exposure to the dust and dampness of underground coal mining is certain to increase the risk of emphysema and chronic bronchitis, so are the rigors of strenuous manual labor bound to hasten toward its breaking point the debilitating process of a degenerative spinal disc. We are therefore of the opinion that if it be found, or should be found, that the nature and duration of the work probably aggravated a degenerative disc condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous, to the extent the pre-existing condition is itself an injury as now defined in KRS 342.620(1)..

Id. at 225.

The ALJ stated in the Opinion and Order that he did not believe that Dr. Gilbert provided any substantive explanation as to how each of his assessed impairments were caused by cumulative trauma. The ALJ stated in the original opinion that he did not believe that Plaintiff met her burden of proof. Neither Dr. Morgan or[sic] Dr. Gilbert compared Plaintiff's knee and back condition to a job requiring less strenuous work, in this case walking and standing on her feet. Neither stated that the x-ray and MRI findings were worse than if Plaintiff had worked less strenuous work as a nurse. The ALJ notes that Dr. Sharma's records state that on September 24, 2018, Plaintiff was 5 feet 1 inch and weighed 390 pounds. The ALJ was not convinced that her testimony of having to lift patients and deal with combative patients was repetitive enough to constitute the type of repetitive work contemplated by cumulative trauma. Even Dr. Gilbert stated Plaintiff's lifting and dealing with combative patients was "occasional". This leaves her walking as an issue.

Plaintiff stated at the hearing that she walked eight hours a day, out of a 12-hour shift. The other four hours she

completed paperwork. However, she stated that her job in the psychiatric unit required her to check on patients every 15 minutes. There were 24 patients in that ward. She stated some patients were similar to nursing home patients and she would have to turn, transfer and clean them. There was no testimony regarding how many patients this involved, nor how frequently this occurred. Some patients required restraint to administer injections. Plaintiff described one patient weighing 500 pounds that she received help with turning and cleaning that patient. Plaintiff did not state the frequency with which she dealt with combative patients. While Plaintiff stated that she walked eight hours a day, she qualified this by stating that she checked on patients every 15 minutes. Although she stated there were 24 patients on this ward, she did not state how many she was required to check on every 15 minutes.

Plaintiff needed to prove that her walking, as a nurse, was more strenuous on her than if she had a job requiring less walking. Plaintiff's age and weight play a role in this equation. Stated another way, the ALJ questions what the likelihood is that a 53 year old, 5 foot 1 inch woman, weighing 390 pounds, is going to have low back and knee problems, including a knee replacement, regardless of her job? The ALJ did not believe that she proved work-related cumulative trauma occurred to any body part.

Additionally, Dr. Kriss stated in his opinions that Plaintiff's medical records were clear that no cumulative or repetitive trauma was caused by her work. He concluded this after reviewing Plaintiff's medical records, imaging studies and receiving a history from Plaintiff.

Plaintiff asserts that Dr. Kriss' report is corrupt and not substantial evidence because he failed to assign an impairment, failed to place Plaintiff at MMI or assign an MMI date. The ALJ disagrees. This overlooks the fact that the ALJ stated that he did not believe Plaintiff met her burden of proof that she sustained work-related cumulative trauma. The ALJ still believes and finds this to be the case. This is irrespective of Dr. Kriss' opinions. However, in this particular case, the ALJ believes that

Dr. Kriss is correct in his opinions. Dr. Kriss stated that Plaintiff did not sustain work-related cumulative trauma. The issues raised by Plaintiff concerning Dr. Kriss' failure to provide an impairment rating or information regarding MMI are not relevant to the conclusion reached by the ALJ. The ALJ notes that McCoy Elkhorn Coal Co Insolvent Employer v Glade Taylor, (not to be published), 2019 WL 2463032 (Ky. June 13, 2019) was reversed by the Supreme Court of Kentucky.

Plaintiff asserts that the positional risk doctrine applies. The ALJ does not find that the positional risk doctrine applies in this case.

On appeal, Dobson essentially argues the ALJ abused his discretion in relying upon Dr. Kriss' opinions in dismissing her claim. She also argues Dr. Kriss' opinions do not constitute substantial evidence, and a contrary result is compelled. She also argues Dr. Kriss' opinions are so unreliable they cannot be relied upon pursuant to Cepero v. Fabricated Metals Corp., supra. Dobson argues the overwhelming evidence establishes she sustained work-related injuries caused by cumulative trauma while working for Hazard ARH.

As the claimant in a workers' compensation proceeding, Dobson had the burden of proving each of the essential elements of her claim, including work-relatedness/causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Dobson was unsuccessful in her 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).

As fact-finder, the ALJ has the sole authority to determine the weight, credibility and substance of the evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). Similarly, the ALJ has the sole authority to judge all reasonable inferences drawn from the evidence. Miller v. East Kentucky Beverage/ Pepsico, Inc., 951 S.W.2d 329 (Ky. 1997); Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979). 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. Magic Coal Co. v. Fox, 19 S.W.3d 88 (Ky. 2000); Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999). Mere evidence contrary to the ALJ's decision is inadequate to require reversal on appeal. Id. In order to reverse the decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to the weight and credibility to be afforded the evidence or by noting reasonable inferences which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. As 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, supra.

Dobson requests this Board to re-weigh the evidence and substitute its judgement for that of the ALJ. This we cannot do. The ALJ acted squarely within his discretion in relying upon the opinions of Drs. Kriss and Sharma instead of those provided by Drs. Morgan and Gilbert in dismissing her claim. The ALJ specifically outlined why he relied upon Dr. Kriss' opinions. The ALJ noted Dr. Kriss provided an in-depth analysis of the medical records. He additionally noted the record does not contain specific references to repetitive work that would have caused Dobson's conditions. We also note the ALJ specifically found Dobson failed to prove her conditions were caused by repetitive work, irrespective of Dr. Kriss' determination. The ALJ was not compelled to find Dobson sustained work-related injuries to her low back or knees due to cumulative trauma at work.

We next conclude Dobson's reliance on Cepero v. Fabricated Metals Corp., supra, is misplaced. This case is distinguishable from Cepero, which was an unusual case involving not only a complete failure to disclose, but also affirmative efforts by the employee to cover up a significant injury to the left knee two and a half years prior to the alleged work-related injury to the same knee. The prior, non-work-related injury left Cepero confined to a wheelchair for more than a month. The physician upon whom the ALJ relied was not informed of this prior history by the employee and had no other apparent means of becoming so informed. Every physician who was adequately informed of this prior history opined Cepero's left knee impairment was not work-related but, instead, was attributable to the non-work-related injury two and a half years previous. In Cepero, the Supreme Court found a medical opinion erroneously premised on the claimant's egregious omission

of directly relevant past medical history was sufficient to mandate reversal based on an insufficient history received by the medical expert. The Court held a “medical opinion predicated upon such erroneous or deficient information that is completely unsupported by any other credible evidence can never, in our view, be reasonably probable.” Id. Here Dr. Kriss outlined the records he reviewed, including Dobson’s job description, and the reports from Drs. Morgan and Gilbert. There is no evidence that he did not have a complete and thorough understanding of Dobson’s job duties, work, or medical history invalidating his opinions.

Abuse of discretion by definition “implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision.” Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945). Here, the ALJ found the opinions of Dr. Kriss, and to a certain extent those of Dr. Sharma, more thorough and more credible than those of Drs. Morgan and Gilbert. He clearly provided his reasoning for relying upon those opinions. We cannot say that his reliance upon those reports constitutes an abuse of discretion compelling a contrary result.

Accordingly, the Opinion and Order rendered August 6, 2019, and the August 30, 2019 order on the petition for reconsideration issued by Hon. John H. McCracken, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

LMS

HON MCKINNLEY MORGAN
921 SOUTH MAIN STREET
LONDON, KY 40741

COUNSEL FOR RESPONDENT:

LMS

HON DENISE KIRK ASH
PO BOX 34125
LEXINGTON, KY 40588

ADMINISTRATIVE LAW JUDGE:

LMS

HON JOHN H McCRACKEN
MAYO-UNDERWOOD BLDG
500 MERO STREET, 3rd FLOOR
FRANKFORT, KY 40601