

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: September 28, 2018

CLAIM NO. 201564228 & 201563513

DENISE ZOELLER

PETITIONER

VS.

APPEAL FROM HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE

AMAZON and
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. Denise Zoeller (“Zoeller”) appeals from the June 17, 2018 Opinion and Award and the July 17, 2018 Order on petition for reconsideration rendered by Hon. Tanya Pullin, Administrative Law Judge (“ALJ”). The ALJ found Zoeller suffered a temporary injury due to a July 18, 2015 work incident while employed by Amazon. The ALJ awarded medical benefits Amazon had already paid, but found Zoeller is not entitled to future medical treatment.

On appeal, Zoeller essentially argues Dr. Ellen Ballard's opinion does not constitute substantial evidence supporting the ALJ's decision in light of her own testimony and other medical evidence in the record. Zoeller argues the ALJ erred in finding she sustained only a temporary, resolved strain injury. Because substantial evidence supports the ALJ's determination and a contrary result is not compelled, we affirm.

Zoeller filed two claims on October 5, 2017. Zoeller alleged she injured her shoulder on July 18, 2015, while working for Amazon in the following manner: "Plaintiff was doing a job different from her usual job. She had been lifting and bending picking up boxes. She lifted up her arm toward the computer mouse and felt pain in her shoulder." Zoeller also alleged a cervical injury occurring on October 1, 2015, when she was placing merchandise on a conveyor belt and felt pain in her neck. The ALJ consolidated the claims.

Zoeller testified by deposition on February 1, 2018, and at the hearing held April 18, 2018. Zoeller began working at Amazon through a temporary employment agency in December 2012, and was subsequently hired by Amazon as a full-time employee in July 2013 as a fulfillment associate. Zoeller's normal job entailed receiving boxes of returns from a conveyor belt and inspecting them for damage. However, on July 18, 2015, Amazon assigned her to a different job she had never previously performed. Zoeller testified she inspected returned shoes delivered on pallets, re-boxed them, and forwarded them to the appropriate department. According to Zoeller, this job was more difficult than her normal job.

At her deposition, Zoeller testified that on July 18, 2015, she experienced pain in the right side of her neck and shoulder as she picked up boxes from a pallet and placed them on her station table. Zoeller continued working, but at a slower pace. She then reached her right arm and hand above shoulder level to use a computer mouse and felt increased pain in the right side of her neck and shoulder. At the hearing, Zoeller testified she felt pain in the right side of her neck, right shoulder, and down her right arm performing the following tasks: “I picked up boxes, then I turned around and I put my arm up and I started to notice that I was having pain that was not normal . . .”

Zoeller was sent to Amcare and then to Hardin Memorial Hospital. Zoeller also treated with Dr. Stacie Grossfeld. Zoeller returned to light duty work for Amazon following the July 18, 2015 incident. According to Zoeller, despite her continuing right arm complaints, Dr. Grossfeld released her to regular duty sometime before October 1, 2015. While working at her normal position at Amazon without restriction on October 1, 2015, Zoeller experienced terrible neck pain and returned to Amcare. Zoeller testified no specific event occurred on October 1, 2015. She testified, “I was just experiencing pain from constantly moving my arm on the right side bringing it up to where the conveyor is. . . .” Zoeller treated with Drs. Rodney Chou, Craig Roberts and David Changaris.

Zoeller continued to work for Amazon on light duty from October 1, 2015 through November 21, 2015. Zoeller subsequently worked for several companies through temporary employment agencies. Zoeller continues to experience neck and right shoulder pain, as well as numbness and tingling in her

right arm extending down into her hand and thumb, index and middle fingers. Zoeller is not currently receiving treatment, and takes over-the-counter Tylenol for her pain. Zoeller wishes to undergo cervical surgery recommended by Dr. Changaris. She does not believe she is capable of returning to her former position with Amazon.

Zoeller filed the treatment records from WorkWell Occupational Health and Hardin Memorial Hospital from July 21, 2015. Zoeller reported on July 18, 2015, “she was simply reaching with her arm above her shoulder level to use the mouse and then started experiencing sharp pain in her shoulder,” followed by numbness and tingling in the right side of her face, neck, right shoulder and right arm. Zoeller completed a history form and reported she was re-boxing and, “I reached up to use the mouse and I felt a sharp pain in my shoulder.” Dr. Robert Berlin diagnosed a right shoulder strain and right arm paraesthesias. He recommended over-the-counter Tylenol and home exercises. He also assigned right upper extremity restrictions.

Zoeller went to the emergency department at MCS Medical Center South on July 24, 2015, reporting she sustained a work injury on July 18, 2015. She complained of right shoulder and neck pain radiating to her right upper extremity, as well as tingling in the right arm. X-rays of the right shoulder were within normal limits. Zoeller was diagnosed with a shoulder sprain and restricted to one-handed duty.

Zoeller next treated with Dr. Grossfeld on July 25, 2015, August 3, 2015 and September 14, 2015. In the July 2015 treatment note, Dr. Grossfeld noted

the July 18, 2015 work injury in which Zoeller reported she was working in re-boxing which required a lot of repetitive activity. Dr. Grossfeld noted a cervical x-ray taken the same day revealed advanced degenerative joint disease at C5-C6 and a right shoulder x-ray demonstrated some narrowing of the AC joint. Dr. Grossfeld noted Zoeller had “advanced DJD of the cervical spine at C5-C6, preexisting and active with a new work-related right biceps tendonitis and right AC joint pain.” Dr. Grossfeld administered an injection to the right AC joint, ordered physical therapy, prescribed Ultram, and assigned restrictions.

On August 3, 2015, Zoeller reported her right shoulder pain significantly worsened after she returned to work making boxes. A physician’s assistant ordered a right shoulder MRI to rule out a labral tear. The September 2, 2015 right shoulder MRI demonstrated no evidence of a labral or rotator cuff tear, but evidenced anterior labrocapsular thickening, small shoulder joint effusion and mild hypertrophic arthropathy of the AC joint. Zoeller returned on September 14, 2015 reporting continuing right shoulder pain. Dr. Grossfeld stated Zoeller had “AC joint arthropathy, mild, possible flare up secondary to work-related injury.” Dr. Grossfeld administered an AC joint injection, which provided no relief after ten minutes in the office. Dr. Grossfeld then noted, “right shoulder pain, unknown etiology.” Dr. Grossfeld recommended Zoeller obtain a second opinion.

Zoeller next treated with Dr. Rodney Chou from October 1, 2015 through December 1, 2015. On October 1, 2015, Zoeller reported neck and bilateral arm pain, but no new work incident. Dr. Chou noted Zoeller initially injured her right shoulder on July 18, 2015 at work. Dr. Chou performed an examination, and

diagnosed Zoeller with a cervical sprain and pain in the limb. He ordered physical therapy and restricted Zoeller from overhead activity. In the last treatment note dated December 1, 2015, Dr. Chou noted Zoeller reported her neck pain is improved with physical therapy. His examination of the cervical spine and bilateral upper extremities was essentially normal. He diagnosed a cervical sprain and pain in the limb, and found Zoeller had attained maximum medical improvement (“MMI”) for the neck.

Zoeller began treating with Dr. Craig Roberts on October 27, 2015 for right shoulder pain radiating into her hand, secondary to the July 18, 2015 work injury. Dr. Roberts noted Zoeller was also treating with Dr. Chou for her neck. Dr. Roberts examined her right shoulder and obtained x-rays, which demonstrated mild degenerative changes involving the right AC joint. Dr. Roberts diagnosed acute right shoulder pain, arthrosis of the right AC joint, and right shoulder impingement syndrome. He ordered physical therapy and assigned restrictions. On December 1, 2015, Dr. Roberts ordered electrodiagnostic studies of both upper extremities for possible right-sided radiculopathy, which were not approved. Zoeller reported improved right shoulder pain and arm numbness on December 29, 2015. X-rays from that date demonstrated mild degenerative changes involving the right AC joint. In his last treatment note dated March 8, 2016, Dr. Roberts noted Zoeller’s right shoulder is better, and she had started treating with Dr. Changaris. Dr. Roberts reviewed cervical and right shoulder MRI reports obtained by Dr. Changaris. Right shoulder x-rays demonstrated tiny degenerative osteophytes arising from the distal right clavicle at the AC joint. He diagnosed Zoeller with acute right shoulder pain,

arthrosis of the right AC joint, right shoulder impingement syndrome, and tingling of the right upper extremity. He noted Zoeller was to follow-up with Dr. Changaris and a cervical spine surgeon.

The records from Dr. Changaris, which are partially handwritten and illegible, demonstrate Zoeller treated with him on eight occasions spanning January 2016 through July 2016. On January 14, 2016, Zoeller reported she was working with lifting restrictions and was moving boxes when she experienced “hammering” cervical pain on October 1, 2015. She also reported right shoulder and arm pain, as well as numbness and tingling. Dr. Changaris ordered MRIs of the cervical spine and right shoulder, as well as an EMG/NCS of the right upper extremity. Dr. Changaris consistently diagnosed Zoeller with a restrictive painful lumbar spine with sprain/stain and contusion; restrictive painful neck with sprain/strain and contusion with painful right shoulder and contusion; and painful right upper extremity. The February 25, 2016 right shoulder MRI demonstrated productive changes at the AC joint with a small joint effusion. The February 25, 2016 cervical MRI demonstrated straightening of normal cervical lordosis possibly due to spasm; multilevel spondylosis from C3-4 through C6-7 with central canal measurements and some neural foraminal narrowing, bilaterally left greater than right at C3-4 and bilaterally mild at C4-5 and C5-6, and C6-7 cord flattening. Dr. Changaris ordered physical therapy and a cervical x-ray. He referred Zoeller to a neurosurgeon for a cervical surgery consultation.

Amazon filed the March 22, 2016 report and the April 18, 2016 addendum by Dr. Ellen Ballard. In the March 2016 report, Dr. Ballard noted Zoeller

reported she was re-boxing three pallets of boxes on July 18, 2015, and felt a pop and pain in her right shoulder when she reached her arm up to maneuver the computer mouse. After reviewing the records and performing an examination, Dr. Ballard diagnosed complaints of neck and shoulder pain. She provided the following opinions:

Q: Is any further treatment required to cure the injuries/conditions caused by the work-related injury? If so, please provide a recommended treatment outline.

A: **It is difficult to correlate her complaint that she developed pain when moving a mouse to her present symptomatology. Her tests show evidence of some possible cervical stenosis, although the quality of the MRI is so poor as to be non-diagnostic. She would require a repeat MRI to determine if there was actually any type of surgical lesion**

Q: Has the employee reached [MMI] from this injury? If so, what, if any, permanent impairment would you assess?

A: **In terms of an injury that would occur because of using a mouse, if indeed that could be an injury, she would appear to have recovered.**

Q: If the employee has not reached [MMI], how long would you estimate the period of temporary disability will continue?

A: **If she has a cervical condition, this would require treatment and require temporary disability. However, the mechanism of injury would not appear to have caused a cervical problem in terms of how she reported this occurred. She did report that using her arm again caused the problem, but the presence of cervical spondylotic disease that would cause cord compression would not appear to be consistent with her reported injury.**

Dr. Ballard opined some of the treatment rendered to Zoeller appeared to be reasonable, but she declined to address possible cervical arthritis or work restrictions without a new cervical MRI. Dr. Ballard emphasized when Zoeller was initially seen on July 21, 2015, Dr. Berlin assessed shoulder pain and arm paraesthesia, but her neck was documented as being non-tender with range of motion or palpation. Dr. Ballard found this would not correlate with her cervical spine as causing her problems.

In the April 2016 addendum, Dr. Ballard noted an April 11, 2016 cervical MRI demonstrated a broad based disc protrusion with an associated ridge of osteophytes resulting in mild spinal and intervertebral foraminal stenosis with slight effacement of the venical aspect at C6-7. Dr. Ballard opined the MRI showed age-related changes unrelated to any event that occurred at her job. Dr. Ballard could not opine with certainty the need for surgical intervention of the cervical spine. Regardless, Dr. Ballard opined the MRI finding “is an age-related problem and not work related, she should follow up for evaluation of her cervical spine with her regular physician. There does not appear to be any need for her to follow up in terms of a work injury.”

Dr. Ballard re-examined Zoeller, reviewed additional medical records, and prepared a second report on February 7, 2018. Dr. Ballard opined, “the patient’s original injury may have been a strain. In addition, she has cervical degenerative disc disease. This is not due to her job. Her right shoulder does not show any significant abnormalities.” Dr. Ballard stated the strain may have initially been related to the work events, but not presently. Dr. Ballard stated her findings on

examination are inconsistent with Zoeller's subjective complaints. Dr. Ballard opined Zoeller reached MMI from her strain injury due to the July 18, 2015 work incident by August 18, 2015. Dr. Ballard declined to assess an impairment rating or assign permanent restrictions for the strain injury. She also stated further treatment is unnecessary, and Zoeller is not totally or partially disabled. Dr. Ballard assessed a 6% impairment rating for Zoeller's non-work-related cervical condition. Dr. Ballard opined Zoeller is capable of returning to her former work with Amazon.

Zoeller filed Dr. Anthony McEldowney's November 13, 2017 report. Zoeller reported she experienced pain in her neck, right shoulder and right arm while performing frequent lifting at Amazon. Dr. McEldowney diagnosed a right paracentral disc protrusion at C6-7 causing cervical stenosis. Dr. McEldowney opined Zoeller's injury caused her complaints, "as this patient arrived to work on July 18, 2015 without restrictions and performing full work activities, with no previous significant injuries or conditions to her cervical spine." He also opined the July 18, 2015 work injury resulted in a harmful change to the human organism. He opined Zoeller suffers neck and proximal right upper extremity pain and weakness in her right arm, with MRI revealing significant central canal narrowing at C6-7. Dr. McEldowney assessed a 16% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Dr. McEldowney opined Zoeller does not retain the physical capacity to return to her previous work activities and will require further treatment. He stated Zoeller had attained MMI if no additional treatment is rendered. Dr. McEldowney assigned permanent restrictions.

In a rebuttal report dated March 30, 2018, Dr. McEldowney reviewed the April 11, 2016 cervical MRI which demonstrated a C6-7 disc herniation and indentation on the spinal cord. He recommended a CT/myelogram to consider decompression and probable fusion. He did not alter the 16% impairment rating he had previously assessed.

A benefit review conference (“BRC”) was held on February 15, 2018. The BRC order reflects the parties stipulated Amazon paid \$7,947.06 in medical expenses for the July 2015 injury and \$10,136.40 in medical expenses for the October 2015 injury. The parties identified the following contested issues: benefits per KRS 342.730, work-relatedness/causation, unpaid or contested medical expenses, injury as defined by the Act, temporary total disability (“TTD”), and whether Zoeller retains the physical capacity to return to work.

The ALJ made the following findings in the June 17, 2018 Opinion:

Work-relatedness/Causation and Injury as defined by the Act

The first issue for determination is whether Plaintiff sustained a work-related injury. KRS 342.0011(1) defines “injury” as “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.”

The claimant in a Workers’ Compensation case bears the burden of proof and risk of non-persuasion for every element of his or her claim. Durham v. Peabody Coal Co., 272 S.W. 3d 192, 195 (Ky. 2008). Essential elements include the work-relatedness/causation of any injury. Burton v. Foster Wheeler Corp., 72 S.W. 3d 925 (Ky. 2002). The mere possibility of work-related

causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W. 2d 165 (Ky. App. 1980).

After careful review of the medical and lay testimony, the ALJ finds that Plaintiff has not borne her burden of proving that she suffered a work-related injury to her shoulder(s) as a result of a work incident of July 18, 2015. Dr. McEldowney opined that Plaintiff did suffer a work-related injury on July 18, 2015. Dr. Ballard opined, "It is difficult to correlate her complaints that she developed pain when moving a mouse to her current symptomatology." Dr. Ballard also opined that an "original injury may have been a strain," but she said, "If indeed that could be an injury, she would appear to have recovered." Dr. Ballard also opined that the cervical degenerative disease is not [sic] "not due to her job." Dr. Ballard assigned no permanent impairment rating due to a work injury. **Relying upon the opinion of Dr. Ballard, the ALJ finds the plaintiff sustained a temporary injury that "recovered" or resolved and has not borne her burden of proving that she sustained a permanent injury as a result of a July 18, 2015 work incident.**

Dr. Ballard's opinion is more persuasive to the ALJ because Dr. Ballard went into detail to explain how she arrived at her conclusion as to causation. Whereas, Dr. McEldowney said Plaintiff "arrived at work on July 18, 2015 without restrictions and performing full work activities." Dr. McEldowney said, "because of work-related injuries on July 18, 2015, there has been a harmful change to the human organism of Amy Gardiner [sic], who despite conservative treatment, suffers neck and proximal right upper extremity pain and notable weakness in her right arm, with MRI revealing rather significant central canal narrowing at C6-7 level." Dr. McEldowney's conclusory statements as an explanation of a causative relationship are not as persuasive to the ALJ as the causation opinion of Dr. Ballard. Furthermore, Dr. Ballard included in her explanation information from treatment records and reports, some inconsistent with one another, from Plaintiff. **Therefore, based on the opinion of Dr. Ballard, the ALJ finds on July 18, 2015 Plaintiff suffered a temporary injury/strain from which Plaintiff recovered.**

While a number of treatment records support Dr. Ballard's opinion, the ALJ specifically points to the July 21, 2015 Hardin Memorial Hospital record noting that Plaintiff presented with right shoulder, neck pain and right arm numbness and tingling that began on July 18, 2015. This record noted that Plaintiff "denied any specific event that precipitated these particular symptoms." Plaintiff reported reaching with her arm above her shoulder to use a mouse when she began experiencing pain. The doctor's impression was right shoulder strain and right arm paresthesia. The July 24, 2015 emergency department treatment record included a diagnosis of neck pain, shoulder pain and swelling with a report from Plaintiff that onset was one week earlier with a lifting injury at work. The diagnosis from the emergency department doctor was shoulder sprain after reviewing a three-view shoulder x-ray with impression of "normal shoulder." In the record of October 1, 2015, Dr. Chou assessed cervical sprain and pain in [sic] limb after Plaintiff presented with 6/10 pain in neck, right arm and left arm. Upon examination, Dr. Chou charted alignment midline, normal degree of lordosis, no paraspinous muscle tenderness, no masses or defects, no trigger points found, arc of motion full in all planes, no crepitus or pain with range of motion, Spurling's test negative as to Plaintiff's cervical spine/neck. His examination of right upper extremity showed full range of motion and 5/5 muscle strength, mild impingement pain and examination of left upper extremity showed full range of motion and 5/5 muscle strength. On October 6, 2015, Dr. Chou charted similar examination results but with paraspinous muscle tenderness and gave the same assessment. [sic] October 26, 2015, Dr. Chou charted the same examination result and assessment. On November 2, 2015, Dr. Chou noted an x-ray showed "DDD at C5-C6," with the same examination results and assessment. On December 1, 2015, Dr. Chou charted the same examination results but with no paraspinous muscle tenderness and same assessment, i.e. cervical strain and pain in limbs. While on August 3, 2015 Dr. Grossfeld assessed a labral tear of long head of right biceps tendon, in the September 14, 2015 treatment record after reviewing the September 2, 2015 MRI report from ProScan, Dr. Grossfeld assessed AC joint pain. Her impression was joint arthropathy, mild, possible

flare-up secondary to work-related injury. Finally, Dr. Changaris noted that “events of injury” were “working (with lift restrictions) moving boxes, started having a ‘hammering’ pain CX.” He diagnosed “restrictive painful lumbar spine with sprain/strain and contusion S/P WC; restrictive painful neck with sprain/strain and contusion with painful right shoulder and contusion S/P WC; painful right upper extremity S/P WC.” He continued to give the same diagnoses for multiple office visits through July 18, 2016. Dr. Changaris diagnosed an injury involving a contusion, but this is inconsistent with the testimony of Plaintiff and reports of Plaintiff to other medical providers concerning the work events of July 18, 2015. While these treatment records showed that numerous doctors have treated Plaintiff for her reported pain, they actually support the causation opinion of Dr. Ballard.

(Emphasis added.)

The ALJ determined Zoeller did not prove she sustained a permanent work-related injury to her neck on October 1, 2015, based primarily on Dr. Ballard’s opinions.

The ALJ found Dr. Ballard’s opinion regarding MMI more consistent with a temporary injury/strain that recovered or resolved, and found she reached MMI on August 18, 2015. Because Zoeller continued to work for Amazon following the July 18, 2015 work injury in a position for which she had sufficient training and experience and which was a part of Defendant Employer’s regular business activities, the ALJ found she is not entitled to TTD benefits for the temporary injury.

Regarding medical expenses, the ALJ found Zoeller failed to meet her burden of proof of a work-related injury on July 18, 2015, other than a temporary injury resulting in entitlement to the medical expenses as paid in the amount of \$7,947.06, but no ongoing liability for medical care. The ALJ noted Dr. Ballard opined further treatment was not necessary and said the temporary injury had

“recovered.” Therefore, based on the medical evidence in its entirety, but primarily the opinion of Dr. Ballard, the ALJ found Zoeller entitled only to those medical expenses already paid by Amazon and she is not entitled to future medical expenses. The ALJ found Zoeller did not have a continuing disability after the resolution of her temporary injury.

Zoeller filed a petition for reconsideration requesting additional findings of fact addressing why the ALJ found Dr. Ballard’s opinion credible; to define contusion and explain why Dr. Changaris’ use of this term is inconsistent with her testimony; to provide factual medical data supporting the finding of MMI on August 18, 2015; and to support her conclusion in finding an award of TTD was not appropriate. Zoeller also requested additional findings of fact addressing whether the temporary injury was to her shoulder or neck, what date the temporary injury occurred, and to identify the proof in support of her determinations. The ALJ summarily denied the petition in an order dated July 17, 2018.

On appeal, Zoeller essentially argues Dr. Ballard’s opinion regarding causation does not constitute substantial evidence supporting the ALJ’s decision in light of her testimony and other medical evidence in the record. Zoeller further argues Dr. Ballard’s opinion is unsubstantial since it is disingenuous, offers a myopic interpretation of the mechanism of injury, and does not identify which body part she strained due to the work injury. Zoeller argues the finding of a temporary, resolved strain injury is contrary to Kentucky law since she has not experienced a resolution of her symptoms. She further alleges she has not fully recovered and the arousal of her spinal condition has not reverted to her pre-injury state of health.

As the claimant in a workers' compensation proceeding, Zoeller had 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 proving she sustained more than a temporary injury due to the July 18, 2015 work injury, 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 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) *superseded by statute on other grounds as stated in* Haddock v. Hopkinsville Coating Corp., 62 S.W.3d 387 (Ky. 2001).

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 to be 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). (Emphasis added). 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 the 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*.

Since the rendition of Robertson v. United Parcel Service, 64 S.W.3d 284 (Ky. 2001), this Board has consistently held it is possible for an injured worker to establish a temporary injury for which temporary benefits may be paid, but fail to prove a permanent harmful change to the human organism for which permanent benefits are payable. In Robertson, the ALJ determined the claimant failed to prove more than a temporary exacerbation and sustained no permanent disability as a result of his injury. Therefore, the ALJ found the worker was entitled to only medical expenses the employer had paid for the treatment of the temporary flare-up of symptoms. The Kentucky Supreme Court noted the ALJ concluded Robertson suffered a work-related injury, but its effect was only transient and resulted in no permanent disability or change in the claimant's pre-existing spondylolisthesis. The Court stated:

Thus, the claimant was not entitled to income benefits for permanent partial disability or entitled to future medical expenses, but he was entitled to be compensated for the medical expenses that were incurred in treating the temporary flare-up of symptoms that resulted from the incident. Id. at 286.

FEI Installation, Inc. v. Williams, 214 S.W.3d 284 (Ky. 2001), established a worker suffering an injury with no permanent impairment may

nonetheless qualify for future medical benefits. However, Williams does not require an award of future medical benefits. Instead, the ALJ enjoys the discretion to determine if an award of future medical benefits is appropriate.

Here, the ALJ clearly found Zoeller “sustained a temporary injury that ‘recovered’ or resolved and has not borne her burden of proving that she sustained a permanent injury as a result of a July 18, 2015 work incident” based upon Dr. Ballard’s opinion and portions of the treatment records. Dr. Ballard evaluated Zoeller on two occasions and reviewed all relevant treatment records. In her first report, Dr. Ballard diagnosed complaints of shoulder and neck pain, but noted the difficulty in correlating her complaints due to moving a mouse to her present symptomatology. Dr. Ballard requested a new cervical MRI. Dr. Ballard noted if Zoeller indeed has a cervical condition, it would not have been caused by the reported mechanism of injury. She also emphasized the July 21, 2015 treatment record in which Dr. Berlin assessed shoulder pain and arm paraesthesia, but documented her neck as being non-tender with range of motion or palpation. Dr. Ballard found this would not correlate with her cervical spine causing her problems.

In the April 2016 addendum, Dr. Ballard noted an April 11, 2016 cervical MRI demonstrated a broad based disc protrusion with an associated ridge of osteophytes resulting in mild spinal and intervertebral foraminal stenosis with slight effacement of the venical aspect at C6-7. Dr. Ballard opined the MRI showed age-related changes which are unrelated to any work event. After the second examination, Dr. Ballard opined, “the patient’s original injury may have been a strain. In addition, she has cervical degenerative disc disease. This is not due to her

job. Her right shoulder does not show any significant abnormalities.” Dr. Ballard opined the strain may have been related to the work events, but it had resolved. Dr. Ballard determined Zoeller reached MMI from her strain injury by August 18, 2015, and declined to assess an impairment rating or assign permanent restrictions. She also stated further treatment is not necessary; Zoeller is not totally or partially disabled; and she is capable of returning to her former work with Amazon.

The above opinions rendered by Dr. Ballard constitute substantial evidence supporting the ALJ’s determination the July 18, 2015 work event resulted in a temporary injury which has since resolved. The ALJ additionally relied upon portions of the medical records in reaching her determination. The ALJ provided a complete explanation and analysis for her decision in finding Dr. Ballard’s opinions more credible than Dr. McEldowney’s in determining Zoeller sustained only a temporary injury due to the July 18, 2015 work incident. Although Zoeller is able to point to evidence contrary, a different decision is not compelled.

Accordingly, the June 17, 2018 Opinion and Award and the July 17, 2018 Order on petition for reconsideration rendered by Hon. Tanya Pullin, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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