Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 30, 2019

CLAIM NO. 201801444

DIANE ANDERSON PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY, ADMINISTRATIVE LAW JUDGE**

MOUNTAIN COMPREHENSIVE HEALTH CORP.
and HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Diane Anderson ("Anderson") appeals from the April 24, 2019, Opinion and Order of Hon. Jonathan R. Weatherby, Administrative Law Judge ("ALJ"). The ALJ dismissed Anderson's claim for failure to provide due and timely notice of her alleged cumulative trauma injuries.

On appeal, Anderson asserts the fact Dr. James Owen's medical note, filed in the record by Mountain Comprehensive Health Corp. ("Mountain Comp"),

was incorrectly date-stamped January 23, 2017, instead of January 23, 2018, "caused her claim to be dismissed" for failure to give notice as soon as practicable. Anderson contends that due to newly discovered evidence and mistake, her claim should be reopened pursuant to KRS 342.125 or the decision set aside by the ALJ pursuant to CR 60.02 to consider the typographical error on the medical note and the correctly-dated full report of Dr. Owen attached to her appeal brief.

The Form 101, filed October 3, 2018, alleges Anderson sustained cumulative trauma injuries to her neck, back, and hands on November 17, 2017, while in the employ of Mountain Comp. The Form 101 claims Anderson gave notice of her cumulative trauma injuries in writing on September 26, 2018.

On October 30, 2018, Mountain Comp filed a Special Answer asserting Anderson's claim is barred by the statute of limitations.

Anderson was deposed on November 19, 2018. Relevant to the issue on appeal is the following testimony:

> Q: Have any of these doctors ever told you that you [sic] neck or back pain is work related that was due to your work duties at Mountain Comp?
>
> A: The first one that told me that was Dr. James Owen.
>
> Q: Were you sent to Dr. Owen for treatment for an examine [sic] for your legal case?
>
> A: I was sent to him due to Social Security.
>
> Q: Now you are talking about Dr. James Owen in Lexington?
>
> A: Yes.
>
> Q: The emergency medicine specialist?

A: I am not sure of his specialty.

Q: The social security administration sent you there?

A: No.

Q: Who sent you there?

A: April Hall recommended that I see him.

Q: Okay. When was this examination with Dr. Owen?

A: January of this year.

Q: Dr. Owen told you that your neck and back pain were conditions that are related to your employment as a RN?

A: And that I should not continue.

Q: Now had anyone ever told you that you have a work related problem before Dr. Owen did so?

A: No.

Anderson also testified at the February 26, 2019, hearing. Regarding when she was first informed her injuries were work-related, Anderson testified:

Q: Okay. All right. Now, when were you first advised by any physician that you were suffering from cumulative trauma injuries to your neck or your low back as a result of your work at Mountain Comp?

A: Not until I saw the chiropractor in London.

Q: Was that Dr. Morgan that we sent you to?

A: Yes.

Q: And then did you instruct us to send notice to the…to your company that you were going to pursue a workers' compensation claim?

A: Yes.

Later at the hearing, Anderson testified as follows:

> Q: Okay. Now, wasn't Dr. James Owen the first physician who informed you that these medical conditions were work related?
>
> A: He just said that, you know – I can't recall exactly the…the sentence he actually used in the…in the paperwork.

On February 7, 2019, Mountain Comp filed Dr. Owen's hand-written and mostly illegible note dated January 23, 2017. Filed with Dr. Owen's note is the December 20, 2018, letter to him from counsel for Mountain Comp requesting copies of Anderson's medical records; a medical waiver and consent form signed by Anderson on October 3, 2018; and a Fax Transmission cover sheet dated December 28, 2018, from Dr. Owen to Mountain Comp's counsel date-stamped "received" on January 2, 2018. The cover sheet, under "remarks," states: "This is the only OU note."

The February 12, 2019, Benefit Review Conference Order lists the following contested issues: benefits per KRS 342.730; work-relatedness/causation; notice; average weekly wage; unpaid or contested medical expenses; injury as defined by the ACT; exclusion for pre-existing disability/impairment; and retroactivity of KRS 342.730(4).

In the April 24, 2019, Opinion and Order, the ALJ set forth the following findings of fact and conclusions of law:

> 13. No proceeding for compensation for an injury or death shall be maintained unless a notice of the accident shall have been given to the employer as soon as practicable after the happening thereof…KRS 342.185
>
> 14. The Plaintiff testified in her deposition that she was informed by Dr. Owen in Lexington that her symptoms were causally work-related. She testified that she was told by Dr. Owen in January of 2018, but it appears that she

was mistaken because the records indicate that the Plaintiff was seen by Dr. Owen in January of 2017.

15. The ALJ finds based upon the testimony and medical records, that the Plaintiff's injury became manifest on January 23, 2017. The Plaintiff filed the instant claim on October 3, 2018, and no other form of notice was apparently provided to the Defendant Employer.

16. In situations where the claimant has failed to prove the giving of reasonable notice, the Plaintiff must show that the delay in giving notice was reasonable under the circumstances. *Special Fund v. Francis, Ky.*, 708 S.W.2d 641, 643 (1986).

17. The Plaintiff in this matter, while a sympathetic and likable figure, has provided no evidence to excuse this delay of almost two years. The ALJ is therefore compelled to find that notice was not given as soon as practicable per KRS 342.185.

Importantly, no petition for reconsideration was filed.

On appeal, Anderson argues:

> While Anderson does not submit the attached exhibits for proof of her physical condition or to sway either the Board or the ALJ in any particular direction as it pertains to the final outcome of her claim, she humbly submits these documents in order to prove that a typographical error caused her claim to be dismissed. Neither the ALJ or [sic] the Employer knew that the handwritten note was incorrectly dated, and unfortunately, neither did the undersigned until Anderson pointed it out to him after she received the Opinion of the ALJ and reviewed the copy of the disability report from Dr. Owen that was sent to the Social Security Administration after the exam. Once the undersigned had been informed of this error, he contacted Dr. Owen's office only to find he was out of the state on vacation and could not be reached to correct this error; therefore, a Petition for Reconsideration was not made for this reason. As soon as Dr. Owen was back in his office and available, a statement was prepared and signed attesting to the error that had been made.

> The one and only occasion Anderson saw Dr. Owen was for a disability examination scheduled by DDS and the Social Security Administration. Unfortunately, the only document sent to the Employer in response to their request for medical records was the attached handwritten note dated January 23, 2017. (See attached Exhibit "A"). The actual report generated and sent to the SSA and DDS (attached hereto as Exhibit "B") is clearly dated January 23, 2018, which was the date that Anderson saw Dr. Owen, and the date in which he told her that her physical problems were indeed work-related. Once the undersigned realized that the error had been made, he reached out to Dr. Owen for a declaration proving that error. In a statement made by Dr. Owen signed on June 13, 2019, he states the notes filed by the Employer were incorrectly dated as January 23, 2017, and that the correct date of the examination was January 22, 2018. (attached hereto as Exhibit "C").
>
> *Wheatley v. Bryant Auto Service*, 860 S.W.2d 767 (Ky. 1993) states that (1) upon its own motion or upon the application of any party and a showing of change of occupational disability, mistake or fraud or newly discovered evidence, the Administrative Law Judge may at any time reopen and review any award or order, except as provided in subsection (2) of this section, ending, diminishing or increasing the compensation previously awarded, within the maximum and minimum provided in this chapter, or change or revoke its previous order, sending immediately to the parties a copy of its subsequent order or award …
>
> Had this typographical error not happened, Anderson believes that this claim would have had a very different outcome. It is her position that she gave ample notice based on the correct date of the appointment with Dr. Owen in 2018 and not 2017.

Attached to Anderson's appeal brief are three documents. The first document is a copy of the medical note in question. The second document is the full Disability Examination report of Dr. Owen dated January 23, 2018. After performing a physical examination of Anderson, Dr. Owen set forth the following diagnosis and conclusion regarding Anderson's disability:

> Persistent radiculopathy at C5-6 although it is non-verifiable at present time per physical exam. The recommendation for EMG-NCV is made. The lumbar spine again non-verifiable with history of radiculopathy with clearly positive MRIs at both levels. Undoubtedly this lady is in pain. She is having significant difficulty although I do not perceive that the problem is severe enough presently to warrant surgery. I have recommended that to her today. The EMG-NCV certainly needs to be done in both upper and lower extremities to verify the necessity for the surgery and at a minimum if contemplating surgery on the lumbar spine fusion, all of those levels an extension of flexion films for instability should be accomplished. That apparently has not been done to this point.

The third document is a note from Dr. Owen which reads as follows: "I, Dr. James Owen, state that the notes filed into evidence by the Defendant/Employer were incorrected [sic] dated 1/23/17. The correct date of the examination was 1/23/18. I apologize for any confusion this may have caused."

Anderson's assertion that her claim could be reopened or set aside under the theory of newly discovered evidence fails. The Supreme Court in Russellville Warehousing v. Bassham, 237 S.W.3d 197, 201 (Ky. 2007) explained what comprises newly discovered evidence:

> As the ALJ noted, *Black's Law Dictionary* 579 (7th ed.1999) explains that "newly discovered evidence" is a legal term of art. It refers to evidence that existed but that had not been discovered ***and with the exercise of due diligence could not have been discovered at the time a matter was decided.*** *Stephens v. Kentucky Utilities Company,* 569 S.W.2d 155 (Ky.1978), explains further that when the term is used in a statute, *it may not be construed to include evidence that came into being after a matter was decided.* The decisive effect of evidence does not arise unless it is properly viewed as being "newly discovered." See *Walker v. Farmer,* 428 S.W.2d 26 (Ky.1968).

(emphasis added.)

The incorrect date placed on Dr. Owen's medical note could have been discovered and corrected and Dr. Owen's correctly-dated full report obtained through the exercise of due diligence by Anderson before the ALJ decided this case. Anderson's deposition took place on November 19, 2018. During that deposition her unequivocal testimony reveals in "January of this year [2018]," Dr. Owen informed her that her injuries were work-related. As revealed by her deposition testimony, Anderson should have realized a copy of Dr. Owen's medical report was critical to obtain. The documents filed in the record by Mountain Comp indicate that on December 20, 2018, it requested Dr. Owen's medical records. It received the one-page handwritten medical note dated January 23, 2017, which it filed in the record on February 7, 2019, without objection by Anderson. Thereafter, from February 7, 2019, until rendition of the April 24, 2019, Opinion and Order, Anderson had an opportunity to contact Dr. Owen and not only have the typographical error on the medical note corrected but also obtain Dr. Owen's correctly-dated full report. She failed to do so.

Significantly, Anderson's Form 105 contains no reference to her examination by Dr. Owen. Further, the record reveals Mountain Comp served a Request for Production of Documents on October 30, 2018, and received no response.[1] On November 16, 2018, a reminder letter was sent to Anderson regarding the request for production. On November 28, 2018, Mountain Comp filed a motion to compel discovery, attaching a copy of both the original request for production and the

[1] The Request for Production of Documents requests "production of any medical or vocational report or records."

November 16, 2018, reminder letter. Finally, on December 14, 2018, the ALJ ordered as follows:

> This matter comes before the undersigned Administrative Law Judge upon Defendant's Motion to compel the Defendant to submit all medical records from the past 15 years. The ALJ being otherwise sufficiently advised;
>
> IT IS HEREBY ORDERED AND ADJUDGED that Plaintiff shall submit all medical records from the past 15 years within 10 days of the date of this Order.

On December 26, 2018, Anderson filed a Notice of Compliance stating Mountain Comp was served with Anderson's response to the Request for Production of Documents. It is not clear from the record what was provided to Mountain Comp on December 26, 2018; however, according to its brief to this Board, what was provided "still did not contain any report of Dr. Owen whatever."

Through the exercise of due diligence, Anderson could have caused Dr. Owen to correct the typographical error on the medical note and also obtained Dr. Owen's full Disability Examination report before the ALJ's resolution of this claim. Had Anderson complied with Mountain Comp's original Request for Production of Documents, she would have obtained these records in late October/early November of 2018 – five months before the April 24, 2019, Opinion and Order. Anderson's claim on appeal regarding Dr. Owen being out of the country at the time she could have filed a petition for reconsideration is unpersuasive in light of the ample opportunity she had to contact Dr. Owen well before the ALJ's dismissal of her claim. We affirm on this issue.

Anderson's argument of mistake is also misplaced. The type of "mistake" intended as a condition for reopening pursuant to KRS 342.125(1)(c) must

be either a "mistake of law" or a "mutual mistake" of fact between the parties. Whittaker v. Hall, 132 S.W.3d 816 (Ky. 2004); Whittaker v. Reeder, 30 S.W.3d 138 (Ky. 2000); Wheatley v. Bryant Auto Service, 860 S.W.2d 767 (Ky. 1993). To rectify an alleged mistake of fact, a petition for reconsideration should have been filed. If that proved unsuccessful then an appeal to this Board was necessary. However, Anderson missed the first step by failing to file a petition for reconsideration. Since Anderson failed to file a petition for reconsideration raising the issue of the typographical error with the ALJ, she waived her right to raise the issue for the first time on appeal. In the absence of a petition for reconsideration, inadequate, incomplete, or even inaccurate fact-finding on the part of the ALJ will not serve as a basis for reversal as long as substantial evidence supports the ALJ's decision. "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).

Here, Anderson's deposition testimony reflects she was first informed her cumulative trauma injuries were work-related by Dr. Owen. Significantly, on appeal, Anderson does not dispute the ALJ's finding she was first informed her symptoms were work-related by Dr. Owen. The ALJ, within his discretion, chose to rely upon this testimony. 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). We are aware that Anderson also testified that she was seen by Dr. Owen in "January of this year," and her deposition took place in 2018. However, at the time of the ALJ's decision, the *only* medical evidence from Dr. Owen in the record was the hand-written January 23, 2017, medical note. The ALJ had the discretion to rely upon the evidence that was before him at the time of his decision. He ultimately concluded that, while "[Anderson] testified that she was told by Dr. Owen in January of 2018…it appears that she was mistaken because the records indicate that the Plaintiff was seen by Dr. Owen in January of 2017." Thus, "[her] injury became manifest on January 23, 2017."

Dr. Owen's status of being out of the country at the time Anderson could have filed a petition for reconsideration is irrelevant to the issue of mistake. Anderson should have addressed this error of fact with the ALJ in a timely-filed petition for reconsideration and obtained a statement by Dr. Owen regarding the correct date of her disability examination after-the-fact.

It is important to add that, even if the ALJ were to reopen this case in order to consider the correct date of Anderson's disability examination by Dr. Owen (January 23, 2018), Anderson would still have to establish reasonable cause for her delay in providing notice of her cumulative trauma injuries until September 26, 2018, eight months after the examination by Dr. Owen. Marc Blackburn Brick Co. v. Yates, 424 S.W.2d 814 (Ky. 1968).

Accordingly, the ALJ's dismissal of Anderson's claim for failure to provide notice as soon as practicable as set forth in the April 24, 2019, Opinion and Order is **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

COUNSEL FOR PETITIONER:

HON MCKINNLEY MORGAN **LMS**
921 S MAIN ST
LONDON KY 40741

COUNSEL FOR RESPONDENT:

HON W BARRY LEWIS **LMS**
P O BOX 800
HAZARD KY 41702-0800

ADMINISTRATIVE LAW JUDGE:

HON JONATHAN R WEATHERBY **LMS**
657 CHAMBERLIN AVE
FRANKFORT KY 40601