

Commonwealth of Kentucky  
Workers' Compensation Board

OPINION ENTERED: December 21, 2018

CLAIM NO. 201301127

FORD MOTOR COMPANY (KTP)

PETITIONER

VS.                   **APPEAL FROM HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE**

REGINA TENO and  
HON. MONICA RICE-SMITH,  
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION  
AFFIRMING**

\* \* \* \* \*

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

**ALVEY, Chairman.** Ford Motor Company (KTP) (“Ford”) appeals from the Opinion and Order on Remand rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”) on July 16, 2018. The ALJ found Regina Teno (“Teno”) sustained work-related injuries including a cervical sprain, bilateral upper extremity strains, myofascial pain, right carpal tunnel syndrome, cubital tunnel syndrome, and thoracic outlet compression on February 8, 2013 in the course of her

job at Ford. The ALJ awarded permanent partial disability (“PPD”) benefits, and medical benefits for Teno’s work-related injuries. Ford also appeals from the August 21, 2018 order denying its petition for reconsideration.

On appeal, Ford argues the ALJ erred in vacating the previous ALJ’s decision, thereby exceeding the directions of the Kentucky Supreme Court on remand. Ford also argues the ALJ erred by addressing issues not preserved on appeal. Ford additionally argues the ALJ erred by failing to recite the procedural history of the claim, and by failing to reference the decision previously rendered by Hon. Jeanie Owen-Miller, Administrative Law Judge (“ALJ Miller”) on June 11, 2015. Because we determine the ALJ appropriately followed the direction of both the Kentucky Court of Appeals and the Kentucky Supreme Court, and properly exercised the discretion afforded to her, we affirm.

In the Form 101 filed on July 29, 2013, Teno alleged she sustained work-related injuries to her right arm, right wrist, neck and left wrist on February 8, 2013. She specifically alleged she slowly developed symptoms in the right arm that became disabling while performing repetitive job duties in February 2013. ALJ Miller dismissed Teno’s claim in a decision rendered November 13, 2015. ALJ Miller discounted the evidence filed by Teno, including the findings of Dr. Warren Bilkey, and dismissed the claim based upon the opinions of Dr. Thomas Loeb.

Teno appealed to this Board, arguing ALJ Miller erred in concluding her cumulative trauma injury is not work-related, and dismissing her claim. This Board entered an opinion affirming ALJ Miller’s decision on November 13, 2015, specifically finding as follows:

In this instance, there were differing medical opinions in the record addressing the cause of Teno's conditions. Although Teno contends Dr. Dave's opinion, as the treating physician, is persuasive, nothing in Chapter 342 mandates greater weight be given to a treating physician's testimony. Wells v. Morris, 698 S.W.2d 321 (Ky. App. 1985); Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829 (Ky. 2008).

Dr. Loeb's opinions constitute substantial evidence supporting the ALJ's determination Teno's conditions are not casually related to her work activities at Ford, and no contrary result is compelled. Dr. Loeb reviewed all pertinent medical records, and disagreed with the diagnosis of thoracic outlet syndrome. Rather, he suspected she had chronic pain from a pre-existing non-work-related brachial plexitis. He also opined her activities with Ford were not consistent with carpal tunnel syndrome or cubital tunnel syndrome. According to Dr. Loeb, any alleged cervical strain or carpal tunnel syndrome is not related to her work.

The ALJ accurately summarized Dr. Dave's June 16, 2013 report. The report provides no explanation of any connection between the work and the various conditions he diagnosed. We conclude the ALJ correctly understood the evidence before her regarding causation, weighed that evidence, and, as was her prerogative, determined Teno's evidence was not persuasive. The ALJ cited Dr. Bilkey's apparent lack of knowledge of Teno's past medical treatment and her work activities in concluding his opinion was not persuasive. While Dr. Waters diagnosed thoracic outlet syndrome, Dr. Loeb stated Teno did not have that condition. Dr. Waters' opinion is merely conflicting evidence. The evidence falls far short of compelling a finding Teno's conditions are causally related to her employment with Ford. Because Teno failed to meet her burden of proof on this threshold issue, the ALJ properly dismissed the claim.

Teno appealed to the Kentucky Court of Appeals who, in a split decision, reversed the Board's opinion, and remanded the claim because it determined the ALJ misconstrued the evidence of one of the physicians. Teno v.

Ford Motor Company, Claim No. 2015-CA-001903-WC (Kentucky Court of Appeals, April 28, 2017)(Designated to be Published). The Court of Appeals stated as follows:

Here, Teno claims the evidence compels a finding in her favor because four doctors diagnosed her with work-related thoracic outlet syndrome. Teno's argument, at first blush, appears convincing. Dr. Waters and Dr. Clair both diagnosed Teno with thoracic outlet syndrome, but neither linked that diagnosis to Teno's work activities. We note that Dr. Waters examined Teno as part of her Ford Disability plan. Dr. Dave provided a similar diagnosis with language establishing a causal linkage; he checked the work-related box on a disability form and described the injury as "repetitive moments."

Dr. Bilkey provided the most detailed explanation connecting Teno's diagnoses to her work activities. But the ALJ discounted Dr. Bilkey's testimony, citing the physician's misunderstanding of Teno's prior medical history that led him to conclude that she had no prior pain or issues related to her right arm, right elbow, or neck. The ALJ found Teno had been actively treated for right arm, elbow, and neck pain since 2003 and stated that Dr. Bilkey failed to explain how or why Teno's work activities caused her pain.

However, our review of Dr. Bilkey's report establishes that he indeed explained how Teno's work activities caused her to experience pain. He stated, "Ms. Teno had the onset of neck pain, pain extending to both upper limbs much worse on the right in relate to a new job duty that had her doing repetitive lifting of heavier items than usual, unhooking and beating loose this chain." And based upon his review of her past medical records, including 2008 records from Kleinert and Kutz, Dr. Bilkey determined that Teno had not been experiencing an active impairment at the time of her February 2013 work injury. That Teno had in the past sought treatment for her upper extremities does not mean that she was experiencing any active impairment at the time she claimed to have sustained her injury at Ford.

...

While the ALJ was certainly at liberty to pick and choose what evidence she found persuasive, we hold that she flagrantly erred in her discounted assessment of Dr. Bilkey's evaluation in reaching the decision to dismiss Teno's claim and that this caused a gross injustice to Teno. **Because the ALJ is the fact-finder, we cannot hold that the evidence compels a finding that Teno's injury was related to her work for Ford. Rather, we must remand this matter to permit the ALJ to properly re-examine Dr. Bilkey's report along with the rest of the medical proof and make an appropriate decision as to whether Teno met her burden to establish that her condition was related to her work.**

(Emphasis added).

Ford appealed to the Kentucky Supreme Court who rendered a decision in Ford Motor Company v. Teno, 2017-SC-000229-WC (Ky. March 22, 2018) (designated not to be published). The Court, in a split decision, affirmed the Court of Appeals. The Court stated that, "[b]ecause the ALJ misconstrued the evidence and caused an error of flagrant misjustice, we affirm the Court of Appeals." The Court acknowledged that determining causation in a workers' compensation claim requires a factual determination, and an ALJ is vested with a broad authority in making such determination. The Court specifically stated as follows:

However, that is not what the ALJ did here. Instead of finding some experts more reliable than other, the ALJ's decision was based on erroneous conclusions and on the discounting of Dr. Bilkey's report. As stated above, Teno presented evidence from Dr. Bilkey and Dr. Dave supporting her contention that her injury was due to her current occupation. Further, ample circumstantial evidence was entered supporting Teno's contention and an ALJ has the authority "to infer causation from properly admitted evidence." Dravo Lime Co., Inc. v. Eakins, 156 S.W.3d 283, 289 (Ky. 2005). The ALJ's opinion states that "the causal relationship testimony

comes from only one medical witness, Dr. Bilkey.” This is not correct.

The ALJ continued by saying Dr. Bilkey does not explain how or why the work activity caused the pain. Again, this is not correct. Dr. Bilkey’s July 21 2014 IME states that Teno’s pain is in relation to a new job duty that had her doing repetitive lifting of heavier items than usual, unhooking and beating loose this chain. **This is consistent with the Court of Appeals’ holding. Although an ALJ has broad authority to find an expert lacking credibility or unbelievable, the ALJ’s statements here lead to the inevitable conclusion that she misconstrued and misunderstood the evidence before her. With such an erred conclusion, we have no choice but to reverse her decision as the Court of Appeals has done.**

(Emphasis added).

The Court found the ALJ did not make findings appropriately addressing Teno’s theory of the case. The Court determined, “[t]he only remedy this Court can bestow is to allow Teno to receive a comprehensive and proper review of the evidence upon remand.” The Court also stated, “[T]his opinion does not order the ALJ to enter a finding for Teno. However the ALJ is required to provide a thorough consideration of all of the evidence, including causation, and delineate a sufficient basis for the ALJ’s opinion.”

The ALJ issued her decision on remand on July 16, 2018. We will not recite the evidence since we, and the courts, have previously done so. The ALJ revisited the evidence, as directed by the courts, which she specifically outlined in her decision. After reviewing the evidence, the ALJ determined Teno did in fact sustain work-related injuries on February 8, 2013. She specifically found as follows:

In light of the credible testimony of Teno, the ALJ is persuaded by the opinion of Dr. Bilkey. Dr. Bilkey

diagnosed a cervical sprain, bilateral upper extremity strain, and myofascial pain caused by the February 8, 2013 injury. He also noted Teno had right carpal tunnel syndrome and cubital tunnel syndrome for which she had undergone surgical release for nerve compression. He also reported a diagnosis of thoracic outlet syndrome. Dr. Bilkey advised all the diagnoses are causally related to Teno's February 8, 2013 work injury. Dr. Bilkey explained Teno has an onset of neck pain extending to both upper limbs much worse on the right in relation to a new job that had her doing repetitive lifting of heavy items. He advised the onset of the symptoms was gradual over several weeks perhaps three months.

The ALJ also determined Ford is entitled to credit for disability retirement benefits pursuant to KRS 342.730(6). The ALJ specifically found as follows:

The ALJ finds the [sic] Ford is entitled to an offset credit for the disability retirement benefits. It is undisputed that the Ford disability benefits Teno is receiving are for the condition she alleges are work-related. Teno acknowledged such in her testimony. Keith Murray, Ford Motor Company pension analyst, testified the disability retirement benefit program was solely funded by Ford Motor Company. He explained that there were certain provision [sic] under which dealt with the disability benefits and potential offset for workers' compensation benefits. Murray testified there were three subsections of the plan where no deduction for workers' compensation shall be taken. He explained Teno was in the third subsection because her seniority had not been broken. Therefore, the retirement benefit does not get an offset for the workers' compensation benefits. So accordingly, Ford gets an offset against the workers' compensation benefits for payments made under the disability retirement plan that overlap past-due or future income benefits.

Ford filed a Petition for Reconsideration, arguing, as it does on appeal, that the ALJ failed to review the procedural history of the claim, and in effect

rendered a decision as if there was no existing decision from ALJ Miller. It argued the order on remand was not a direction to review and reapply all evidence at issue in the claim. The ALJ denied the petition in an order issued on August 21, 2018.

On appeal, Ford argues the ALJ erred in vacating the previous ALJ's decision, and exceeding the direction of the Kentucky Supreme Court on remand in deciding issues not specifically preserved. Ford additionally argues the ALJ erred by ignoring the procedural history of the case, specifically Judge Miller's previous decision. As noted above, we believe the ALJ appropriately conducted a review of the case, and properly exercised her discretion in accordance with the direction provided by the courts.

We initially note the Kentucky Court of Appeals reversed the decision of this Board, essentially vacating the ALJ's decision. When a decision is vacated it is as if the initial determination never existed. This was addressed in Hampton v. Flav-O-Rich, 489 S.W.3d 230 (Ky. 2016), and in Commonwealth of Kentucky v. Werner, 2014-CA-001154-WC, 2015 WL 2226274 (Ky. Ct. App., April 10, 2015)(designated Not to be Published). The holding in both cases clearly establishes that when an ALJ's decision is vacated, it is effectively canceled, annulled, or revoked. Thereafter, the judgement or opinion is no longer binding or conclusive.

As noted in Hampton, at 234, the Kentucky Supreme Court stated as follows:

In the process of writing that new opinion, there is nothing to prevent the ALJ from entering a different award. By vacating the ALJ's opinion and requiring him to make additional findings, the Board has implicitly authorized him to enter a different award . . .

Similarly, in Werner, the Kentucky Court of Appeals stated as follows:

This argument misses the mark, however, because the ALJ did not reverse himself. Rather, the Board vacated the ALJ's decision and directed the ALJ to reconsider this matter pursuant to its authority under KRS 342.285(3). When any court or tribunal orders that a judgment, opinion, or order be set aside or vacated, that decision effectively cancels, annuls, or revokes the judgment, order, or opinion. See BLACK'S LAW DICTIONARY 1546 (7<sup>th</sup> ed. 1999) (defining "vacate" as "to nullify or cancel; make void; invalidate"). Thereafter, the judgment, order or opinion is no longer binding or conclusive. *First State Bank v. Asher*, 273 Ky. 54, 117 S.W.2d 581, 583 (1938). This means the vacated judgment no longer binds any litigant and, by logical extension, no longer binds the ALJ who rendered the vacated judgment. Thus, upon remand, the ALJ was free to consider the evidence, and in doing so, reevaluate the merits of Werner's claims. See, e.g., *ABS Global, Inc. v. Draper*, No. 2013-SC-000051-WC, 2014 WL1514991 (Ky. April 17, 2014) (holding, in a situation where the Board's order vacated the ALJ's original opinion and order, "It is clear that the Board wanted the ALJ to fully review the evidence and either make findings to support his original opinion or reach a different conclusion on remand.")

We find this reasoning is directly applicable to the case before us. We additionally note that BLACK'S LAW DICTIONARY (10<sup>th</sup> ed. 2014), defines a reversal as, "An annulling or setting aside: esp., an appellate court's overturning of lower court's decision."

This Board's opinion affirming ALJ Miller's determinations was reversed by the Kentucky Court of Appeals, thereby "annulling or setting aside" her decision. The decision rendered by the Court of Appeals was affirmed by the Kentucky Supreme Court. While no particular result was directed by the courts, the ALJ was required to render a decision based upon a correct interpretation of all of

the evidence, including Dr. Bilkey's report. Since ALJ Miller's decision was vacated, the ALJ was not bound by her determinations. The ALJ was required to render a decision based upon a proper review of the evidence.

That said, we note that, 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 discretion to determine 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). 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). Although a party may note evidence supporting a different outcome than that reached by an ALJ, such proof is not an adequate basis to reverse on appeal. McCloud v. Beth-Elkhorn Corp., 514 S.W.2d 46 (Ky. 1974). 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 that otherwise could have been drawn from the record. Whittaker v. Rowland, 998 S.W.2d 479, 481 (Ky. 1999). 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, 708 S.W.2d 641, 643 (Ky. 1986).

On remand, the ALJ acted within the discretion afforded to her, and issued a new decision. As noted above, the ALJ was not required to rely upon the

decision issued by ALJ Miller, which had been vacated. The ALJ performed the appropriate analysis, and rendered a decision based upon the evidence. The ALJ did not act, as asserted by Ford, outside the discretion afforded to her. We find no error in her exercise of discretion, and the ALJ's decision is affirmed.

For the foregoing reasons, the July 16, 2018 Opinion on Remand, and the August 21, 2018 Order on Petition for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

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