

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 28, 2022

CLAIM NO. 202086005

GEORGETOWN COMMUNITY HOSPITAL

PETITIONER

VS. **APPEAL FROM HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE**

ERICA LOWERY
and HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING IN PART AND REMANDING**

* * * * *

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

STIVERS, Member. Georgetown Community Hospital (“Georgetown”) appeals from the September 3, 2021, Opinion, Award, and Order and the October 4, 2021, Order of Hon. Tonya M. Clemons, Administrative Law Judge (“ALJ”). The ALJ awarded Erica Lowery (“Lowery”) temporary total disability benefits, permanent partial disability benefits, and medical benefits for an April 18, 2020, work-related head injury resulting in physical and psychological injuries.

On appeal, Georgetown asserts the ALJ erred in awarding benefits based upon Dr. Christopher Allen's impairment rating assessed four months before the date of maximum medical improvement ("MMI") as found by the ALJ. In determining the date of MMI, the ALJ relied upon Dr. Timothy Allen's opinion.

BACKGROUND

The Form 101 alleges Lowery sustained work-related injuries to her head on April 18, 2020, in the following manner: "When walking through doorway, a metal box fell from above onto my head."

Relevant to the narrow issue on appeal is the January 14, 2021, Form 107 medical report of Dr. Christopher Allen introduced by Lowery. After performing a psychological examination and medical records review, Dr. Christopher Allen set forth the following diagnosis in the attached Neuropsychological Report: "331.83 Mild Neurocognitive Disorder Due to Multiple Etiologies (mTBI; & possible AVM vs. demyelinating disease); 311 Unspecified Depressive Disorder." Under the heading "Causation," Dr. Christopher Allen answered the following statement: "Within reasonable medical/psychological probability, patient's psychological complaints x are are not caused by his/her work-related injury." In the attached report, he expounded on causation as follows:

As noted, Ms. Lowery's occupational injuries cannot fully account for her neurocognitive deficits, but likely have etiological significance. Her emotional and pain-related symptoms, on the other hand, are almost certainly directly related to her occupational incident. Symptom progression is possible, but significant improvement is very unlikely. Thus, her impairment is very likely permanent.

Dr. Christopher Allen assessed a 20% whole person impairment rating pursuant to the 2nd Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides, 2nd Ed.”), apportioning 7% to a pre-existing active condition.

Dr. Christopher Allen was deposed on May 24, 2021. At the time of this deposition, Lowery had returned to part-time work at the hospital. He opined that, based upon his testing, Lowery would have difficulty returning to full-time employment. There is no testimony directly relevant to the issue on appeal.

Georgetown filed Dr. Timothy Allen’s June 7, 2021, Independent Psychiatric Evaluation report. After performing a psychiatric examination and medical records review, Dr. Timothy Allen diagnosed “Unspecified Depressive Disorder” and “Unspecified Anxiety Disorder.” He opined Lowery’s cognitive symptoms are “incompatible” with the type of injury she sustained on April 18, 2020, but further opined as follows: “Ms. Lowery had a pre-existing Anxiety disorder which was exacerbated by a Depressive Disorder caused by the work injury.” He assessed a 5% whole person impairment rating, apportioning half to pre-existing anxiety and half to “exacerbation from the work injury.” The impairment rating was assessed pursuant to Chapter 12, table 1, p.220 of the AMA Guides, 2nd Ed. Regarding the date of MMI, Dr. Timothy Allen opined as follows: “She has not sought mental health treatment and therefore is at MMI.”

Lowery testified by deposition on November 23, 2020, and at the July 7, 2021, hearing. Due to the issue raised on appeal, a summary of Lowery’s testimony is unnecessary.

On February 19, 2021, Lowery filed a Motion to Amend the Form 101 in order to clarify that she suffered *psychological injuries* along with her multiple head injuries as a result of the work injury. By Order dated February 25, 2021, the ALJ sustained the motion.

The June 10, 2021, Benefit Review Conference Order and Memorandum listed the following contested issues: “Permanent income benefits per KRS 342.730; TTD Benefits; Wages upon return to work; Current wages; Ability to return to work; Exclusion for pre-existing, active disability/impairment; Unpaid or contested medical expenses; KRS 342.165; and Proper use of the AMA Guides as to Dr. Christopher Allen.” Under “Other contested issue” is the following: “1) Injury, as defined by the Act as to a neurologic condition.”

In the September 3, 2021, Opinion, Award, and Order, the ALJ provided, in relevant part, the following findings of fact and conclusions of law *verbatim*:

Having reviewed the evidence, the ALJ finds Plaintiff suffered a neurological injury as a result of the April 18, 2020 in the form of a mild TBI. In reaching this finding, the ALJ relies on the opinions of Dr. Christopher Allen. Dr. Christopher Allen’s findings are consistent with Plaintiff’s contemporaneous medical records from her treating physicians following the April 18, 2020 work incident.

Plaintiff has been found to have suffered a neurological injury. Further, as stated, the parties do not appear to dispute the work-related physical trauma of a blow to her head and psychological injury stemming from the April 18, 2020 incident. Thus, the ALJ must determine what, if any, impairment stems from the work-related injuries. There is conflicting medical evidence on this issue.

Dr. Christopher Allen assessed a combined 20% impairment rating for Plaintiff's mental status/neurological condition and her psychological condition of depressive disorder, which he related to the work incident. He apportioned 7% of that of that impairment to a pre-existing, active mental status condition. Dr. Timothy Allen assessed a 5% psychological impairment rating with half of the impairment attributable to a pre-existing, active psychological condition.

Dr. Zerga felt there was no reason to place any impairment attributable to the work event as Plaintiff did not suffer a permanent neurological injury. Dr. Ruth assessed 6% psychiatric impairment although he did not feel Plaintiff was at MMI.

In this matter, Dr. Christopher Allen performed testing and recorded his findings. He appropriately applied the AMA Guides to arrive at the combined assessed 20% whole person impairment rating for Plaintiff's mental status/neurological conditions and psychological conditions. While Dr. Zerga, Dr. Timothy Allen, and Dr. Ruth also 11 performed testing, the ALJ finds Dr. Christopher Allen offers the more accurate assessment of Plaintiff's injuries due to the work incident.

Defendant preserved the issue of pre-existing, active disability or impairment. Plaintiff argues Defendant has not met its burden on this issue under Finley v. DBM Technologies, 217 S.W.3d 261, 265 (Ky. App. 2007).

With respect to this issue, the April 3, 2020 record from Dr. Reinhart states Plaintiff had sleep issues that she believed could affect her job as well as a history of anxiety. She was diagnosed with insomnia and prescribed medication. Further, the August 24, 2020 record of Dr. Smith diagnosed Plaintiff with concussion without a loss of consciousness, sequela. She went on to state that "[t]he incident 2mm area on her MRI is an incidental finding and not related to her current headaches."

These records are consistent with the findings of Dr. Christopher Allen that Plaintiff had a pre-existing, active condition as noted on his original report. Dr. Allen testified that he reviewed the MRI report in rendering his decision. He was also questioned about Plaintiff's

April 3, 2020 pre-injury treatment with Dr. Reinhart and its relevance. He ultimately explained the pre-existing impairment was due to neurological/mental status condition reflected in the findings of the MRI report.

Having reviewed the evidence, the ALJ finds Dr. Christopher Allen offered the most credible assessment of Plaintiff's impairment due to the April 2020 work incident. Additionally, the ALJ finds Defendant met its burden to prove a pre-existing, active impairment. In reaching this finding, the ALJ relies on the pre-injury medical records as well as opinions of Dr. Christopher Allen who assessed 7% pre-existing, active impairment. Accordingly, the ALJ finds that Plaintiff retains a 13% whole person impairment rating due to the April 18, 2020 work incident.

...

Based upon the foregoing, the ALJ finds Plaintiff retains the physical capacity to return to her pre-injury work. In reaching this finding, the ALJ relies on the opinions of Dr. Smith. Thus, Plaintiff's PPD benefits are calculated as follows:

$\$1,016.97 \times 66 \frac{2}{3}\% \times 13\% \times 1.0 \times 1.0 = \88.14 per week.

Plaintiff sustained injuries in the form of a blow to her head on April 18, 2020 with neurological and psychological injuries. As such, Plaintiff is entitled to reasonable and necessary treatment, both past and future, for the cure and relief of her injuries due to April 18, 2020 work event. See KRS §342.020(1); see also National Pizza Co. v. Curry, 802 S.W.2d 949 (Ky. 1991); FEI Installation, Inc. v. Williams, 214 S. W.3d 313, 318 (Ky. 2007).

B. TTD Benefits

Defendant argues that it is entitled to a credit for overpayment of TTD benefits as to duration. It maintains Plaintiff reached MMI by July 1, 2020 as assessed by Dr. Zerga. Alternatively, Defendant argues Plaintiff was at a level of improvement to permit a return to work by October 19, 2020 based upon Dr.

Smith's records. Plaintiff argues she is entitled to TTD benefits until she returned to work in February 2021.

"Temporary total disability" is the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment. See KRS §342.00011(11)(a). When a claimant has not reached MMI, TTD benefits are payable until such time as the claimant's 14 level of improvement permits a return to the type of work he was customarily performing at the time of the traumatic event. Livingood v. Transfreight, LLC, 467 S.W.3d 249 (Ky. 2015); Trane Commercial Systems v. Tipton, 481 S.W.3d 800 (Ky. 2016).

The Tipton Court explained that "an award of TTD benefits is inappropriate if an injured employee has been released to return to customary employment, i.e. work within her physical restrictions and for which she has the experience, training, and education; and the employee has actually returned to employment." Tipton, 481 S.W.3d at 807(emphasis in original).

In this matter, Plaintiff was released to return to work by Dr. Smith on multiple occasions for her neurological condition beginning on July 22, 2020. The last documented release to return to work without restrictions issued by Dr. Smith was November 16, 2020. Dr. Zerga opined Plaintiff reached MMI by July 1, 2020 for the head blow due to the work incident.

Dr. Ruth did not believe Plaintiff had reached MMI for her psychiatric complaints as of his November 10, 2020 evaluation. Dr. Christopher Allen does not provide a specific date of MMI for Plaintiff's neurological and psychological injuries. Dr. Timothy Allen found Plaintiff had reached MMI for her psychological complaints in his June 7, 2021 report although he did not state a specific date MMI was attained.

Plaintiff testified she did not return to work until February 2021. This testimony is consistent with the post-injury wage records submitted by Defendant reflecting an initial post-injury pay period beginning on February 14, 2021. Further, it is consistent with the

stipulation of the parties of Plaintiff's return to work on February 22, 2021.

Based upon the foregoing, the ALJ finds Plaintiff met the statutory definition of temporary total disability benefits from April 18, 2020 through February 22, 2021 consistent with her testimony as to her return to work, the stipulations, and the post-injury wage records. Plaintiff is entitled to TTD benefits for this period at a weekly rate of \$677.98.

Georgetown's Petition for Reconsideration alleged several patent errors. Relevant to the issue on appeal is the following request for an additional finding: "iii. When did the Plaintiff reach Maximum Medical Improvement?"

In the October 4, 2021, Order, regarding MMI, the ALJ furnished, in relevant part, the following findings *verbatim*:

Specifically, with respect to her work-related psychological injury, the evidence reflects Lowry was not at MMI until her evaluation on May 10, 2021 as found by Dr. Timothy Allen in his June 7, 2021 report. Dr. Christopher Allen stated in his narrative that Lowry's ability to discharge the duties which are common to her chosen profession was severely compromised due to her neurocognitive, emotional, and pain-related difficulties. He went on to recommend Lowry undergo psychotherapy following his December 2020 evaluation.

Dr. Timothy Allen noted Lowry had not sought mental health treatment at the time of his evaluation. Therefore, he found she was at MMI. He went on to state Lowry had no psychiatric work restrictions and could return to her previous position as a RN. Thus, as a point of clarification, the ALJ finds Dr. Timothy Allen provides the most credible assessment of MMI as of May 10, 2021. Lowry reached a level of improvement in her physical and psychological injuries, however, that allowed a return to customary work as of February 21, 2021. Thus, the ALJ declines to otherwise disturb the finding of the TTD period. (emphasis added).

On appeal, Georgetown maintains the ALJ erred by awarding income benefits based upon Dr. Christopher Allen's impairment rating after adopting Dr. Timothy Allen's May 10, 2021, MMI date. As an initial matter, we note Georgetown unequivocally states "this appeal is not about the method employed by Dr. Christopher Allen to derive impairment." Georgetown's objections center on the ALJ's reliance upon Dr. Timothy Allen's opinion Lowery reached MMI on the date of his May 10, 2021, examination while simultaneously relying upon the impairment rating assessed by Dr. Christopher Allen *four months prior* on January 14, 2021. We agree and vacate the ALJ's award of benefits and remand for additional findings.

ANALYSIS

Dispositive of this issue is Copar, Inc. v. Rogers, 127 S.W.3d 554, 561 (Ky. 2003) in which the Kentucky Supreme Court held that an ALJ may rely upon one physician's impairment rating while simultaneously relying upon another physician's assessment of the date of MMI. The Supreme Court provided the following:

The employer asserts that the finding of total disability in this case was invalid because the ALJ failed to select a particular impairment rating and also because the impairments that were in evidence were invalid. In October, 1999, after the employer's experts determined that the claimant reached MMI, Dr. Taylor was asked to assign an impairment rating and indicated that it was 15%. When deposed on November 21, 2000, he indicated that the present impairment rating also was 15% and that it might take as long as ten years for the claimant to reach MMI. Dr. Gleis examined the claimant in January, 2001. He was convinced that she had reached MMI as of June, 1999, and assigned a 5% impairment due to a non-work-related incident.

Before the Board, the employer maintained that because Dr. Taylor's rating was assigned before he thought the claimant had reached MMI and because Dr. Gleis attributed his rating to a 1997 incident, neither was valid with respect to the 1999 injury. We note, however, that an ALJ may pick and choose among conflicting medical opinions and has the sole authority to determine whom to believe. *Pruitt v. Bugg Brothers, Ky., 547 S.W.2d 123 (1977)*. Thus, the ALJ was free to rely upon Dr. Gleis in order to conclude that the claimant reached MMI before November, 2000, but to rely on Dr. Taylor with respect to the cause and extent of her impairment. Likewise, the ALJ was free to rely upon Dr. Taylor with respect to causation but Dr. Gleis with respect to the extent of permanent impairment at MMI. In either event, there was sufficient evidence in the record to support a finding of total disability. (emphasis added.)

In other words, the ALJ is free to rely upon two different physicians in arriving at the date of MMI and an impairment rating as long as the date of MMI pre-dates the date upon which the impairment rating is assessed. More recently, the Kentucky Court of Appeals, in Floyd County Board of Education v. Slone, 2018-CA-000385-WC, rendered May 24, 2019, Designated Not To Be Published, upheld an ALJ's ability to pick and choose amongst the medical testimony.

The ALJ relied upon Dr. Timothy Allen's MMI date of May 10, 2021, while also relying upon the impairment rating assessed by Dr. Christopher Allen four months prior to May 10, 2021. However, this is in direct contravention of both the 2nd and 5th Edition of the AMA Guides which require the claimant to be at MMI before a permanent impairment rating is assigned. Because the ALJ adopted Dr. Timothy Allen's May 10, 2021, date of MMI, she was prohibited from relying upon Dr. Christopher Allen's impairment rating assessed four months earlier.

On remand, the ALJ must rely upon a date of MMI and an impairment rating consistent with the mandates of the AMA Guides. Stated another way, if on remand the ALJ chooses to once again rely upon Dr. Timothy Allen's May 10, 2021, date of MMI, she cannot accept Dr. Christopher Allen's impairment rating, as it was assessed before the date of MMI. Alternatively, should the ALJ on remand once again rely upon Dr. Christopher Allen's impairment rating, she cannot adopt a later date of MMI.

We acknowledge Dr. Christopher Allen did not opine Lowery achieved MMI on a specific date. However, we note again that the basis of Georgetown's appeal is not that Dr. Christopher Allen failed to provide a specific date Lowery achieved MMI. In fact, as previously cited herein, Georgetown insists the appeal is not about the methodology employed by Dr. Christopher Allen to derive an impairment rating. Its sole argument is the ALJ erroneously relied upon Dr. Christopher Allen's impairment rating which was assessed four months before she found Lowery achieved MMI. On remand, the ALJ is free to infer that Dr. Christopher Allen believed Lowery was at MMI at the time of his January 14, 2021, report and may rely upon his impairment rating once again. However, we express no opinion as to the outcome on remand.

Accordingly, the ALJ's award of income benefits as set forth in the September 3, 2021, Opinion, Award, and Order and confirmed in the October 4, 2021, Order is **VACATED**. This claim is **REMANDED** to the ALJ for additional findings and entry of an amended order and award consistent with the views expressed herein.

ALL CONCUR.

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