

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 1, 2022

CLAIM NO. 201981843

IHG HOTELS & RESORTS

PETITIONER

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

ANA ALEXANDER and
HON. TONYA M. CLEMONS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

ALVEY, Chairman. IHG Hotels & Resorts (“IHG”) appeals from the March 18, 2022 Opinion, Order, and Award rendered by Hon. Tonya M. Clemons, Administrative Law Judge (“ALJ”). The ALJ awarded Ana Alexander (“Alexander”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits enhanced by the multipliers contained in KRS 342.730(1)(c)1, and medical benefits for work-related injuries she sustained on May

5, 2019 while working for IHG. IHG also appeals from the April 11, 2022 Order denying its Petition for Reconsideration.

IHG argues the ALJ's decision is not supported by substantial evidence. It specifically argues Dr. Jeffrey Fadel's language regarding when Alexander reached maximum medical improvement ("MMI") is ambiguous, and it is unclear whether he determined the date of the evaluation is the exact date she reached that level of improvement, or if it was prior to that date. It also argues, in the alternative, if the language Dr. Fadel used is interpreted as indicating he believed Alexander reached MMI on the date of the evaluation, such determination is arbitrary, and is based on when she could be scheduled for the evaluation rather than a proper consideration of the evidence. Finally, IHG argues some of the body parts Dr. Fadel found compensable and took into consideration when he determined Alexander had reached MMI were ultimately dismissed by the ALJ, thereby rendering his opinion invalid. We find the ALJ properly exercised her discretion, and her decision is supported by substantial evidence. Therefore, we affirm.

Alexander filed a Form 101 on May 10, 2021, alleging she fell and injured her neck, low back, left upper extremity, and both lower extremities when her foot became tangled in an electrical cord while vacuuming in the course of her work for IHG on May 5, 2019. Alexander worked as a hotel housekeeper at Ft. Knox, Kentucky for IHG from April 2019 until the accident date. She later amended her claim to include a psychological component. Her previous employment included working as a nursing home food service/server, a childcare provider, a retail sales associate, and a teacher's aide.

Alexander testified by deposition on July 1 2021, and at the hearing held January 19, 2022. Alexander was born on May 23, 1963, and she resides in Vine Grove, Kentucky. Alexander is a high school graduate and has some training in cosmetology. She was born in Panama and moved to the United States in 1983. She began working for IHG at the Holiday Inn located at Ft. Knox in April 2019. Her job required her to clean, vacuum, dust, move desks, move chairs, and clean bathrooms.

On May 5, 2019 she was vacuuming a guest room at the Holiday Inn when the cord tangled around her foot causing her to lose her balance and fall onto her left knee. She fell to her side with her back against the bed, striking her left hand on the door. She laid on the floor for a long period, yelling for assistance. When none was forthcoming, she pulled herself onto the bed. She eventually got up and reported the accident to her supervisor who advised her to continue working. Her daughter took her to the emergency room at Hardin Memorial Hospital after work that day. Alexander attempted to return to work the next day, but she was unable to do her job due to pain in the neck, back, legs, and wrist. She has not returned to work since.

Alexander subsequently underwent treatment including physical therapy and knee injections. She adversely reacted to the injections by developing tachycardia. Her treatment from May to August 2019 was primarily for her left knee, neck, and left wrist, not her low back. She underwent nerve burning for her lumbar complaints, and she takes Gabapentin. She denied any previous problems with her neck, low back, left wrist, or left knee. She also denied having any

psychological problems prior to her work accident. She testified her treatment, including medications, does not fully relieve her pain which is always present. She also indicated she has difficulty sleeping, using stairs, and cleaning her house due to pain. Alexander never attempted to return to work for IHG, nor has she applied for work anywhere else since the accident.

Alexander filed treatment records from Hardin Memorial Hospital for four treatment dates between May 5, 2019 and June 5, 2019 in support of her claim. Those records reflect Alexander tripped over a cord and fell at work on May 5, 2019 while vacuuming a floor. She complained of left wrist, right-sided neck, and left knee pain.

Dr. Fadel evaluated Alexander on June 17, 2021. He noted the history of Alexander's trip and fall while working for IHG, causing her injuries, including complaints of left knee, left wrist, cervical, and lumbar pain. He noted the June 5, 2019 MRI revealed a strained posterior cruciate ligament ("PCL"). He also reviewed the EMG/NCV studies performed by Dr. Noel Reloj who opined she had foot drop. Dr. Fadel diagnosed Alexander with degenerative left knee osteoarthritis aroused by the May 5, 2019 work-related fall, right knee osteoarthritis caused by over-compensating for her left knee injury, and low back pain aroused by her altered gait. Dr. Fadel assessed a 19% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") due to Alexander's knee problems. He apportioned 12% to the left knee and 8% to the right knee to reach the combined impairment rating. Dr. Fadel indicated Alexander can stand or walk less than 15 minutes at a time and she should

avoid lifting greater than 15 pounds occasionally. He also recommended she avoid pushing greater than 30 pounds occasionally. Dr. Fadel also stated, “Ms. Alexander has reached maximum medical improvement as of this examination, if no further treatment is anticipated.”

Dr. Eric Lydon, a psychiatrist, evaluated Alexander on August 30, 2021. Dr. Lydon diagnosed Alexander with depression, major, recurrent, severe. He determined she has a Class III impairment pursuant to the AMA Guides. He assessed a 25% impairment rating pursuant to the AMA Guides, 2nd Edition. He determined Alexander had reached MMI. He did not restrict her activities from a psychiatric standpoint.

Alexander also filed multiple records from Lin Patterson, LPCC, at Elizabethtown Partners in Counseling. Those records reflect seven mental counseling sessions between July 14, 2020 and July 6, 2021.

Dr. Stacie Grossfeld evaluated Alexander at IHG’s request on August 14, 2019. She noted the history of the May 5, 2019 work accident. Alexander complained of left knee, left upper extremity, left wrist, right shoulder, and neck pain stemming from the work accident. Dr. Grossfeld stated there is no medical basis to explain the extent of Alexander’s pain. She stated Alexander’s complaints were inconsistent with her normal range of motion. She disagreed with Dr. Reloj and found no evidence of foot drop. Dr. Grossfeld diagnosed a left knee contusion, partial interstitial tearing of the PCL, left wrist contusion, cervical strain, and a lumbar strain, all of which had resolved. She opined Alexander had reached MMI as of August 8, 2019, except for the cervical strain that she stated resolved as of May

15, 2019. Dr. Grossfeld assessed a 0% impairment rating based upon the AMA Guides. She also found Alexander can return to work without any limitations. She found Alexander has no harmful change in the human organism due to the work accident.

Dr. Rafid Kakel evaluated Alexander at IHG's request on August 19, 2021. He diagnosed her with cervical, left knee, and left wrist pain due to the May 5, 2019 work accident. He stated there is insufficient evidence supporting the alleged low back and right knee injuries. He opined she reached MMI eight weeks after the accident. He found she has no impairment based upon the AMA Guides. He stated she can return to work without any restrictions related to the work accident. In an addendum dated November 29, 2021, Dr. Kakel stated the 18% impairment rating Dr. Fadel assessed is not "supported as work-related".

Dr. Timothy Allen evaluated Alexander on November 1, 2021 at IHG's request. He diagnosed her with somatic symptom disorder, and an unspecified depressive disorder due to the work injury. He determined she had reached MMI. Dr. Allen assessed a 10% impairment rating based upon the AMA Guides, 2nd Edition. He stated she should continue taking Duloxetine for her depression and pain. Dr. Allen further stated he would not recommend any psychiatric restrictions.

A Benefit Review Conference was held on December 16, 2011. At that time, the parties stipulated Alexander sustained work-related injuries on May 5, 2019. The issues preserved for determination included whether Alexander retains the physical capacity to return to the type of work performed at the time of injury,

entitlement to medical benefits, injury as defined by the Act to the right knee only, temporary vs. permanent injury to all other physical and psychological injuries alleged, permanent income benefits per KRS 342.730, TTD benefits, unpaid or contested medical expenses, and proper use of the AMA Guides.

In the Opinion, Award, and Order rendered March 18, 2022, the ALJ determined Alexander sustained cervical, left wrist, psychological, and left knee injuries when she fell on May 5, 2019. She also found Alexander sustained a temporary low back injury strain for which she reached MMI by August 9, 2019. The ALJ dismissed the claim for a right knee injury. The ALJ awarded TTD benefits from May 5, 2019 to June 17, 2021, when she saw Dr. Fadel who determined Alexander had reached MMI. She also awarded PPD benefits based upon a 21% impairment rating, of which 12% was attributable to the left knee injury and 10% for the psychological injury. The ALJ determined Alexander does not retain the physical capacity to return to her pre-injury job and she therefore enhanced the award of PPD benefits pursuant to KRS 342.730(1)(c)1.

IHG filed a Petition for Reconsideration arguing Dr. Fadel's assessment of MMI was completely arbitrary. It argued there is no substantial evidence establishing Alexander's condition changed after August 27, 2019, the date her TTD benefits were terminated. It argued the ALJ erred in relying upon Dr. Fadel's examination date for determining the end date to the TTD period. In an Order issued on April 11, 2022 denying the Petition for Reconsideration, the ALJ reiterated her finding regarding the period of TTD benefits. She found IHG pointed to no patent errors and its Petition for Reconsideration was no more than an

impermissible re-argument of the merits of the claim. She stated she found Dr. Fadel's opinion the most credible regarding when Alexander reached MMI. She further stated she found the opinions expressed by Drs. Kakel and Grossfeld were not as persuasive as Dr. Fadel's.

IHG only argues on appeal that the ALJ erred in relying upon Dr. Fadel's examination date in determining when Alexander reached MMI. It argues Dr. Fadel did not opine Alexander reached MMI on the date of the examination. It argues that if Dr. Fadel determined Alexander reached MMI on the date of the examination, such finding is arbitrary and based solely upon when the examination could be scheduled, not when she actually reached that level of improvement. It also argues that some of Alexander's maladies Dr. Fadel considered in his determination the ALJ found as non-compensable.

As the claimant in a workers' compensation proceeding, Alexander had the burden of proving each of the essential elements of her cause of action. *See* KRS 342.0011(1); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). 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). 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 ALJ's decision, 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 that otherwise could have been drawn from the record. Whittaker v. Rowland, supra.

In reaching a determination, the ALJ must also provide findings sufficient to inform the parties of the basis for the decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

IHG does not challenge the ALJ's determination Alexander sustained compensable left knee and psychiatric injuries. The only issue for consideration is the compensable TTD period based upon the ALJ's determination of when Alexander reached MMI. IHG specifically challenges the ALJ's reliance upon Dr. Fadel's evaluation date in determining when Alexander reached MMI.

KRS 342.0011(a) defines TTD as follows:

Temporary total disability" means 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;

The AMA Guides define MMI as follows:

A condition or state that is well stabilized and unlikely to change substantially in the next year, with or without medical treatment. Over time, there may be some change; however further recovery or deterioration is not anticipated. p. 601

The AMA Guides additionally states at p. 19, as follows:

An impairment should not be considered permanent until the clinical findings indicate that the medical condition is static and well stabilized, often termed the date of the **maximal medical improvement (MMI)**. It is understood that an individual's condition is dynamic. Maximal medical improvement refers to a date from which further recovery or deterioration is not anticipated, although over time there may be some expected change.

The ALJ was confronted with opinions by Drs. Kakel, Grossfeld, and Fadel in determining when Alexander reached MMI. The ALJ provided a sufficient and accurate review of the evidence and noted the differing dates each physician assessed Alexander reached MMI. The ALJ has the discretion to choose which medical opinion upon which to rely. Jones v. Brasch-Berry General Contractors, 189 S.W.3d (Ky. App. 2006). We find the ALJ did not err in relying upon Dr. Fadel's determination of when Alexander reached MMI. We note IHG's argument that Dr. Fadel merely acknowledged Alexander had reached MMI, but he did not specifically state it was on the date of the evaluation. We find Dr. Fadel's assessment is no more arbitrary than those expressed by Drs. Kakel and Grossfeld. The ALJ was free to rely upon Dr. Fadel's determination in finding Alexander reached MMI as of the date of his examination. The ALJ could reasonably conclude Alexander reached MMI as of the date of Dr. Fadel's evaluation, especially based

upon his determination her condition would not change “if no additional treatment is anticipated.” We find Dr. Fadel’s assessment of MMI constitutes substantial evidence supporting the ALJ’s decision; therefore, we affirm her determination regarding when Alexander reached MMI, and the period of TTD benefits awarded.

Accordingly, the March 18, 2022 Opinion, Award, and Order, and the April 11, 2022 Order on Petition for Reconsideration rendered by Hon. Tonya M. Clemons, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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