

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: April 23, 2021

CLAIM NO. 201996501

JAMIE TELLMAN

PETITIONER

VS.

APPEAL FROM HON. TONYA CLEMONS,
ADMINISTRATIVE LAW JUDGE

KENTUCKY LOTTERY CORPORATION
and HON. TONYA CLEMONS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

STIVERS, Member. Jamie Tellman (“Tellman”) appeals from the December 17, 2020, Opinion and Order and the January 15, 2021, Order on Petition for Reconsideration of Hon. Tonya Clemons, Administrative Law Judge (“ALJ”). The ALJ dismissed Tellman’s claim for income and medical benefits for alleged work-related injuries to her low back and lumbo-sacral area.

On appeal, Tellman sets forth three arguments. First, Tellman asserts the ALJ erred by dismissing her low back injury claim. Next, Tellman argues there is “no evidence in the record to support any apportioning of the Petitioner’s current impairment to a pre-existing active disability.” Finally, Tellman argues the ALJ erred by failing to find she sustained a temporary injury.

BACKGROUND

The Form 101, filed July 23, 2019, alleges Tellman sustained work-related injuries to her lower back (including lumbar and lumbo-sacral) on January 22, 2019, while in the employ of the Kentucky Lottery Corporation (“Kentucky Lottery”) in the following manner: “While loading/unloading boxes and materials and pulling a cart up some stairs and pushing to a warehouse, felt pain in lower back.”

Tellman testified by deposition on May 21, 2020. She began working for the Kentucky Lottery as a sales representative in March 1989. Her job as a sales representative involved developing and managing a territory route of approximately one hundred accounts. She loaded tickets into machines, repaired machines, tracked tickets, loaded and unloaded boxes to and from a vehicle, climbed ladders, and got in and out of her vehicle approximately twenty to thirty times per day. She also worked on a computer at home and talked on the phone. On January 22, 2019, Tellman was unloading boxes from her vehicle when she felt pain in her lower back. She completed her regular route the next day; however, she was still experiencing pain in her lower back. She returned to the corporate office to unload boxes on January 24, 2019. That afternoon, at her last stop for the day, she was almost unable to arise after

bending over. She called her supervisor who advised her to contact Human Resources. She called Human Resources and reported that she was having severe back pain. She was unable to work the next day. Tellman saw Dr. Venu Vemuri on January 31, 2019.

Tellman testified she previously injured her lower back at work in January 2007 when she was placing some equipment into her vehicle. Tellman also experienced some lower back pain due to lifting at work in February 2018. There was no specific event that triggered her pain and she never reported it to Kentucky Lottery. Tellman stated she did not receive any other treatment of her back after that date until the alleged injury of January 22, 2019.

Tellman also testified at the October 20, 2020, hearing. She testified her job required twisting and turning, kneeling, squatting, and lifting above shoulder level. She is still treating with Dr. Vemuri due to problems with her left foot and numbness in a portion of her left leg. She testified she received periods of temporary total disability benefits, but they were terminated due to a medical report from Dr. Timothy Kriss. She has not, however, been released to return to work. Tellman did not miss any work following the 2007 injury. She received epidural injections and fully recovered. Tellman testified she did not have problems until January 22, 2019. Tellman does not believe she can return to her pre-injury job for Kentucky Lottery or other past employment. Her restrictions include lifting no more than ten pounds and bending carefully. She performs physical therapy exercises at home. Walking causes cramps from her foot up to her calf. Standing also causes cramps. She has fallen when she experienced cramping. Tellman acknowledged she had a problem with

back pain in February 2018 because of inflammation in her hip. However, in the months leading up to January 2019, she was not experiencing lower back complaints.

Dr. Kriss performed an independent medical evaluation (“IME”) on March 11, 2020, which generated a report. After performing a physical examination and a medical records review, he opined Tellman did not sustain a work-related injury on January 22, 2019. He opined, in relevant part, as follows:

Lifting boxes on January 22, 2014 does not even qualify for a lumbar strain because Ms. Tellman had no symptoms whatsoever for two days.

Medically, lifting the boxes on January 22, 2014 is a non-event.

There is no lumbar strain. There is no injury. There is no permanent harmful change.

Absolute worst-case scenario would be a mild, temporary lumbar strain. But this is not credible with no symptoms at all for two days.

Dr. Kriss considers the surgery of September 16, 2019 “to be neither medically necessary nor medically reasonable” nor causally related to the alleged January 22, 2019, work incident. He diagnosed “fairly severe left L5 lumbar radiculopathy” as a consequence of this surgery. He opined, in relevant part, as follows:

Sadly, Dr. Vemuri has now done Ms. Tellman significant disservice by exposing her to the risk of the big fusion surgery in September 16, 2019. Ms. Tellman required a second surgery as a complication from the first surgery, and the second surgery caused even more severe complications than the first surgery. Ms. Tellman now has a fairly impressive chronic left L5 radiculopathy and partial foot drop as a direct consequence and complication of both operations.

He also diagnosed chronic low back pain of a multifactorial nature and opined as follows: “Contrary to the narrative I obtained today from Ms. Tellman, her pre-existing active history of chronic back pain leading up to January 22, 2019 is very impressive, and this back pain was spontaneously escalating in the year immediately prior to January 22, 2019.” Pertaining to maximum medical improvement (“MMI”) after the alleged January 22, 2019, work incident, since he believed Tellman did not sustain a work-related injury, Dr. Kriss opined there is no date of MMI. However, Dr. Kriss also believed Tellman had yet to reach MMI with respect to the surgeries of September and December 2019. He concluded she will attain MMI following the surgeries on December 16, 2020. Dr. Kriss assessed an 11% impairment rating, pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, (“AMA Guides”), attributable to Tellman’s “explicitly documented, actively symptomatic pre-existing active lumbar radiculopathy.” He explained, in part, as follows:

An intermediate percentage (11%) is appropriate, given on the one hand that Ms. Tellman did not have any neurologic deficit and had a normal physical examination, but on the other hand, was chronically symptomatic, had recent escalation of symptoms, required chronic nonsteroidal anti-inflammatories (Advil), and had a very long history of radicular pain and radiculopathy recalcitrant to treatment going all the way back to 2007.

Dr. Kriss assessed a 0% whole person impairment rating stemming from the alleged work incident on January 22, 2019, since “[t]here is simply no objective indication of permanent harmful change specifically from lifting boxes on January 22, 2019.”

Kentucky Lottery filed Dr. Kriss' June 23, 2020, supplemental report. After reviewing additional medical records and reports, including those of Dr. Jules Barefoot, Dr. Kriss opined Dr. Barefoot's evaluation of Tellman is "egregiously incomplete and inaccurate" and not in accordance with the AMA Guides.

Tellman introduced Dr. Barefoot's April 28, 2020, IME report. After performing a physical examination and a medical records review, Dr. Barefoot provided the following diagnoses:

1. January 22, 2019: Workplace injury to the lumbar spine.
2. March 4, 2019 MRI of the lumbar spine demonstrated a right L4/5 paracentral disc herniation with a right L5 nerve root contact.
3. September 16, 2019: Bilateral L5/S1 laminectomy, facetectomy, posterior lumbar fusion with cage and pedicel screw.
4. December 16, 2019: Micro laminectomy and partial facetectomy and foraminotomy with decompression of the left L5 nerve root.
5. Ongoing left L5 radiculopathy.
6. November 27, 2017: MRI of the lumbar spine demonstrated at L5/S1 a disc herniation.

Dr. Barefoot opined Tellman had reached MMI, assessed a 35% impairment rating, 7% of which is apportioned to a pre-existing active lumbar condition. He opined, in relevant part, as follows: "By her history and the available medical records, it is apparent that she had a preexisting condition in her lumbar spine." He further opined as follows: "Subtracting 7% from her current 35%

impairment equals a 28% Whole Person Impairment that is **solely** apportionable to her workplace accident that occurred on January 22, 2019.” (emphasis in original.)

Dr. Barefoot was deposed on June 24, 2020, and opined as follows concerning causation:

Q: I'm jumping ahead. Your diagnostic impression for Ms. Tellman was, number one, let me know when you're there. Are you there?

A: Yes, sir.

Q: January 22, 2019, workplace injury to the lumbar spine. Did I get that correct?

A: Yes, sir.

Q: Let's discuss that. What level of the lumbar spine do you believe she sustained an injury to on January 22?

A: Well, then, if we jump ahead to where she saw Dr. Bonnarens and then was sent for her MRIs of the lumbar spine. The MRI she had on March 4, 2019, which was, what, five weeks later, six weeks later at the most? She had a right L4-5 disc herniation with right L5 nerve root contact.

Q: So you believe she sustained an injury at L4-5?

A: I believe she did at that time, yes, sir.

Q: Is it your opinion that she also sustained an injury at L5-S1?

A: Well, she had surgery there, so that apparently was the treating physician's opinion, yes, sir.

Q: Is it your opinion that she sustained an injury at L5-S1?

A: Well, she had ongoing evidence, when I examined her, of an L5-S1 radiculopathy. She also had some evidence of an L5 radiculopathy to go along with that, too, although, I just rated the L5 radiculopathy. But her treating surgeon apparently felt that her symptoms were significant enough where she had that initial surgery,

and then because of ongoing complaints of pain with radicular symptoms, she had the second surgery in December.

The October 8, 2020, Benefit Review Conference Order and Memorandum lists the following under “Other contested issues”: “Bifurcated for an initial determination as to 1) ‘Injury’ as defined by the Act; 2) reasonableness, necessity, and work-relatedness of the medical treatment provided by Dr. Venu Vemuri and subsequent physical therapy, and; 3) past and future medical expenses.”

The ALJ set forth the following findings of fact and conclusions of law:

...

The medical records reflect that Ms. Tellman had complaints of low back pain and radicular symptoms prior to January 22, 2019. Plaintiff had a prior work-related low back injury in 2007 that resulted in treatment with Dr. Guarnaschelli, a 5% AMA impairment rating, and a settlement.

The medical records from Plaintiff’s primary care physician, Dr. Leis, indicate that in February 2018, Ms. Tellman had complaints of low back pain and leg pain for the past six months that caused problems sleeping with a diagnosis that included low back pain, other intervertebral disc degeneration in the lumbar region, and lumbar radiculopathy. A lumbar spine x-ray showed moderately severe degenerative disc disease at L5-S1 with mild facet arthropathy bilaterally and mild upper lumbar degenerative disc disease—the same level surgically fused by Dr. Vemuri in September 2019.

The lumbar MRI taken five days later in February 2018 noted increasing low back pain that had been going on for four to five months and showed degenerative changes in the lumbar spine particularly at L5-S1 followed by L4-5 with mild inferior bilateral neural foraminal narrowing and borderline size canal at L2-3. Less than three months prior to the alleged January 2019 incident, in October 2018, Plaintiff was

again seen by Dr. Leis with an active problems list that included intervertebral disc degeneration of the lumbar region, lumbar radiculopathy, low back pain, and left hip pain among others.

Despite Ms. Tellman's deposition testimony that she did not treat for any pain or numbness in her back or leg for approximately ten years prior to the alleged January 22, 2019 incident, she admitted at the formal hearing to symptoms and treatment in 2018 for her low back and legs that was not only with her primary care physician for general complaints, but treatment upon referral to two other specialists for her complaints. She also admitted the 2018 treatment required additional diagnostic studies on her low back and/or lower extremities beyond the February 2018 MRI and treatment records. The contradictory testimony leads the ALJ to find that Plaintiff is not an accurate historian of her symptoms or medical treatment.

Further, the records and testimony reflect that Plaintiff did not report the alleged January 2019 incident until approximately two days later after working her normal duties the day after the alleged incident, which included driving approximately eighty miles and performing all other normal duties such as lifting additional boxes of tickets and moving them into Defendant's headquarters. The two-day lapse in alleged complaints of low back pain and radicular symptoms is significant as it is insufficient to infer the alleged January 22, 2019 work incident caused her present low back and radicular complaints. Dr. Kriss, in his original IME report, found that not even a lumbar strain could have occurred because Plaintiff's report of no symptoms for two days is essentially a non-event and not an injury.

Dr. Kriss stated that Plaintiff's current low back complaints are not related to any alleged lifting incident as she did not have immediate symptoms after the alleged incident. Moreover, Dr. Kriss noted in his reports that there were no significant changes in the lumbar spine symptoms, exam, mobility, or diagnostic studies before or after January 2019. He concluded that Ms. Tellman's complaints

“. . . are the result of natural aging processes, and natural progression of osteoarthritis, degenerative disc disease,

and spondylosis-degenerative processes confirmed on all of Ms. Tellman's imaging studies, including her x-rays and MRI scans from 2007, 2008, and 2009, and the same degenerative processes present in all humans to varying degrees over the age of 40, and the same degenerative processes quite significant in all humans in Ms. Tellman's age group (early 60s)."

See March 11, 2020 Kriss Report, at p. 17.

As to the surgical procedures performed by Dr. Vemuri in September 2019 and December 2019, Dr. Kriss opined that "the back and leg symptoms that Dr. Vemuri attempted to treat with the September 2019 surgery were not caused or aggravated by an January 2019 incident," but rather "continuations of Ms. Tellman's well-documented, extremely chronic, extremely active, pre-existing active low back pain, bilateral leg pain, and lumbar radiculopathy." Id. at p. 16. The December 2019 surgery was performed due to complications from September 2019. Ultimately, Dr. Kriss concluded that the September 16, 2019 fusion surgery was neither reasonable, necessary, nor related to the alleged January 2019 incident after having reviewed the extensive medical evidence. Id. at p. 19.

Even Dr. Barefoot stated that Ms. Tellman had pre-existing conditions. His assessments as to causal connection to the alleged January 2019 incident, however, were based primarily on Plaintiff's report of her medical history as he admitted in his deposition that he did not have access to several diagnostic films or medical records at the time of his evaluation. Of note, he admitted that he did not review the actual diagnostic films, only radiologists' reports of the studies. Moreover, he stated that he had not been aware of some of Plaintiff's pre-injury medical treatment in 2018 at the time of his evaluation and the fact that the February 2018 record indicating that Ms. Tellman was having back pain while active and at rest would have been relevant as a clinician.

Having reviewed all the evidence in light of the facts in this matter, the ALJ finds the opinions of Dr. Kriss to be the most credible and persuasive on the issue

of causal relationship between Plaintiff's complaints and the alleged January 22, 2019 work incident. Consequently, the ALJ relies upon Dr. Kriss' opinions to conclude that Ms. Tellman did not sustain an "injury," as defined by the Act to her low back with radicular symptoms proximately caused by the alleged January 22, 2019 incident at work. Accordingly, the ALJ dismisses Ms. Tellman's claim for income and medical benefits.

The Petition for Reconsideration asserted the same arguments Tellman makes on appeal. In the January 15, 2021, Order, the ALJ furnished the following additional findings:

...

First, Plaintiff asserts error in the finding that the occurrence of the incident and notice were not at issue in this matter and voluntary benefits were paid. Thus, she is entitled to benefits under the Workers' Compensation Act (the Act). Additionally, she maintains patent error in the analysis of whether Plaintiff had a pre-existing condition. Finally, Plaintiff argues patent error in not finding that she suffered, at least, a temporary injury.

Defendant has responded to Plaintiff's Petition indicating that the Petition does not point to patent errors on the face of the Opinion, but merely reargues the merits of the case. Thus, it maintains Plaintiff's Petition should be overruled.

The ALJ does not believe that Plaintiff points to patent errors in the Opinion and Order. The parties in a workers' compensation claim are entitled to a sufficient explanation by the ALJ of the basis for a decision. Whittaker v. Roland, 998 S.W.2d 479, 481 (Ky. 1999)(internal citations omitted).

Plaintiff argues that the occurrence of the incident and notice were not in question and that Defendant's payment of voluntary benefits proves that she suffered a compensable injury. This claim was bifurcated by the parties, however, for an initial determination as to several issues including "injury," as defined by the Act. Further, the payment of voluntary

benefits does not preclude findings as to injury, as defined by the Act.

Contrary to Plaintiff's contentions that the findings are against the substantial weight of the evidence, the Opinion identified the statutory definition of injury as well as applicable case law with respect to medical causation and pre-existing conditions under the Act. The Opinion indicates that all of the evidence was fully considered in determining that Plaintiff had not met her burden to prove a work-related traumatic event proximately caused a harmful change based upon the opinions of Dr. Timothy Kriss.

Consistent with applicable case law, the Opinion cites the evidence relied upon that demonstrated Plaintiff did not prove that she had a dormant degenerative condition that was brought into disabling reality by the work incident. Of note, in addition to Dr. Kriss' opinions, Plaintiff's pre-injury medical records less than three months prior to the incident reveal that she had an active problem list that included lumbar disc degeneration, lumbar radiculopathy, low back pain, and left hip pain. Further, Plaintiff's contradictory testimony as to her treatment in 2018 led the ALJ to find that she was not an accurate medical history.

Plaintiff asserts that the findings of the Opinion are against the substantial weight of the evidence of record. The Opinion, however, sets out all evidence relied upon in reaching the conclusion that Plaintiff failed to meet her burden to prove she suffered an "injury," as defined by the act and the reasoning behind such findings. Plaintiff's Petition on these issues is a re-argument of the merits of the claim. Accordingly, Plaintiff's Petition is OVERRULED.

ANALYSIS

Tellman first asserts the ALJ committed reversible error by dismissing her claim for benefits for the alleged January 22, 2019, low back injury. She maintains Dr. Barefoot's opinions establish she sustained a work-related injury to her low back. On this issue, we affirm.

As the claimant in a workers' compensation proceeding, Tellman had the burden of proving each of the essential elements of her cause of action, including causation/work-relatedness. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Tellman was unsuccessful in that burden, 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 that is 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).

In rendering a decision, 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). Although a party may note evidence supporting a different outcome than 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). Rather, it must be shown there is no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing the ALJ's decision is limited to a determination of whether the findings made by the ALJ are so unreasonable under the evidence they must be reversed as a matter of law. Ira A. Watson Department

Store v. Hamilton, 34 S.W.3d 48 (Ky. 2000). The Board 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, 998 S.W.2d 479 (Ky. 1999). As long as the ALJ's ruling regarding an issue is supported by substantial evidence, it may not be disturbed on appeal. Special Fund v. Francis, *supra*.

The ALJ relied upon Dr. Kriss' medical opinions as support for the conclusion Tellman did not sustain a January 22, 2019, work injury. In his March 11, 2020, IME report, Dr. Kriss opined Tellman did not sustain a work-related injury on January 22, 2019, stating "[m]edically, lifting the boxes on January 22, 2014 [sic] is a non-event." He further opined "[t]here is no lumbar strain. There is no injury. There is no permanent harmful change." Dr. Kriss assessed a 0% impairment rating for the work events of January 22, 2019. This medical testimony comprises substantial evidence supporting the ALJ's determination Tellman did not sustain a January 22, 2019, work injury. Consequently, a different result is not compelled.

We are aware Dr. Barefoot proffered opinions contrary to those of Dr. Kriss regarding the events of January 22, 2019. After apportioning a 7% impairment for a pre-existing active lumbar condition, Dr. Barefoot opined Tellman has a 28% impairment rating attributable to the January 22, 2019, work incident. However, the ALJ, within her discretion, rejected his opinions, relying instead upon Dr. Kriss' medical opinions. When "the physicians in a case genuinely express medically sound, but differing opinions as to the severity of a claimant's injury, the ALJ has the

discretion to choose which physician's opinion to believe.” Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). This is precisely what transpired in the case *sub judice*, and we will not disturb the ALJ’s exercise of discretion.

Next, Tellman asserts “[t]here is no evidence in the record to support any apportioning of the Petitioner’s current impairment to a pre-existing active disability.” On this issue, we affirm.

The ALJ did not apportion any of Tellman’s “current impairment to a pre-existing active disability,” as she relied upon the 0% impairment rating assessed by Dr. Kriss for the alleged January 22, 2019, work incident. That said, Dr. Kriss assessed an 11% whole person impairment rating, pursuant to the AMA Guides, for Tellman’s “explicitly documented, actively symptomatic pre-existing active lumbar radiculopathy.” Further, Dr. Barefoot, Tellman’s expert, assigned a 7% whole person impairment rating for a pre-existing *active* lumbar condition. Therefore, despite Tellman’s erroneous claim there is no evidence supporting apportionment to a pre-existing active condition, pursuant to Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007), the ALJ could have chosen to offset against any impairment rating assessed for Tellman’s alleged work-related injury *if* she had chosen. She did not. Instead, she relied upon Dr. Kriss who assessed a 0% impairment rating for the events occurring on January 22, 2019; therefore, apportionment was unnecessary.

Finally, Tellman alternatively asserts the ALJ erroneously failed to find she sustained a temporary injury. We disagree and affirm on this issue.

As previously noted herein, the ALJ relied entirely upon Dr. Kriss' opinions in dismissing Tellman's claim for an alleged work-related injury. Regarding a temporary injury, Dr. Kriss was clear: "Absolute worst-case scenario would be a mild, temporary lumbar strain. But this is not credible with no symptoms at all for two days." This statement constitutes substantial evidence supporting the finding Tellman did not sustain a temporary injury on January 22, 2019.

The ALJ set forth her rationale for dismissing the claim in a cogent and thorough manner. She furnished sufficient findings of fact and conclusions of law fully apprising all parties, including this Board, of the basis of her dismissal. 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). Accordingly, since substantial evidence supports the ALJ's dismissal of Tellman's claim based upon Dr. Kriss' medical opinions, a different result is not compelled. Concerning all issues raised on appeal, the December 17, 2020, Opinion and Order and the January 15, 2021, Order on Petition for Reconsideration are **AFFIRMED**.

ALVEY, CHAIRMAN, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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