

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: July 12, 2019

CLAIM NO. 201792808

KIMBERLY JOHNSON

PETITIONER

VS.

APPEAL FROM HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE

DYNO NOBEL
and HON. BRENT E. DYE,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION & ORDER
DISMISSING

* * * * *

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

STIVERS, Member. Kimberly Johnson (“Johnson”), *pro se*, seeks review of the January 18, 2019, Opinion & Order of Hon. Brent E. Dye, Administrative Law Judge (“ALJ”) dismissing her claim against Dyno Nobel for an occupational disease and a related psychological injury. Johnson also appeals from the February 21, 2019, Order

denying her petition for reconsideration and ordering various documents attached to her petition for reconsideration stricken from the record.¹

On appeal, Johnson expresses her dissatisfaction with the ALJ's decision asserting the decision is wrong and the record contains false testimony. In support of her assertion, in her brief and subsequent miscellaneous document filed on July 5, 2019, Johnson generally cites to facts which she contends cause the ALJ's decision to be erroneous. Because Johnson failed to timely appeal from the ALJ's decision, we *sua sponte* dismiss her appeal. However, we will attempt to address her concerns raised on appeal.

FACTUAL BACKGROUND

Johnson filed a Form 102 alleging she developed Rocky Mountain spotted fever ("RMSF") as a result of a tick bite on July 21, 2016, while working for Dyno Nobel. Johnson subsequently amended her claim to assert the occupational disease she contracted as a result of the tick bite caused a psychological injury. By order dated August 17, 2018, the ALJ granted Johnson's motion to amend.

Johnson testified at a July 30, 2018, deposition and at the September 26, 2018, deposition which the parties agreed would be conducted with the ALJ present in lieu of a hearing.² Johnson testified she had been an employee of Dyno Nobel since January 24, 2001. On the date she was bitten by the tick, she had been assigned to another building "running extruder #3." She testified that because she felt something

¹ Although the ALJ struck from the record the documents attached to Johnson's petition for reconsideration, he directed they remain in the record for review in the event of an appeal.

² In an order dated December 17, 2018, the ALJ noted the formal hearing was waived and the case would be submitted within sixty days. The order also reflects the deposition in lieu of a hearing transcript addressed the stipulations and contested issues.

in her head she reached into her hair and pulled out a tick. Johnson burned the tick and reported the incident to her supervisor. She also reported it to another employee who told her ticks were everywhere in the building. After the co-worker said this, she turned and saw several ticks on the door behind her. Johnson continued to work after she was bitten. Sometime after experiencing the tick bite, her legs turned purple from the waist down. She also developed sinus problems, body aches, general fatigue, and her “kidneys quit putting out.” She testified the RMSF reoccurs every three months. As a result of her physical symptoms, Johnson maintained she developed anxiety and Attention Deficit Disorder (“ADD”). She also “swelled forty pounds.” The test for RMSF was positive, but the test for Lyme disease was negative.

Donna Wellborn (“Wellborn”), a nurse practitioner initially treated Johnson with Doxycycline, which caused her to throw up. Johnson was treated by several doctors including Dr. Jeffrey Reeves, an infectious disease physician. She takes Valium for panic attacks and Adderall for ADD. Because of the recurring RMSF, her fingers are weak and function poorly, her toes are purple, and she has developed vasculitis. Johnson is unable to lift or engage in any type of physical activity. She believes the vasculitis “kicked in” due to the RMSF. The vasculitis manifests in the form of blisters on her arm, face, ear, hands, and feet. The blisters eventually pop. Although Wellborn’s medical records reveal Johnson experienced subsequent tick bites, she denied the accuracy of the record as she insisted she has only experienced one tick bite in her life. She also denied ticks were near her house as the house, the areas around the house, and her body have all been sprayed.

Johnson submitted numerous reports from Dr. David Changaris. Dyno Nobel submitted the records of Dr. Reeves, Baptist Health Medical Group Family Medicine, and the medical reports and the deposition of Dr. Ellen Ballard.

In the January 18, 2019, Opinion & Order, the ALJ provided the following findings of fact and legal conclusions:

Johnson is asserting a work-related tick bite caused her to contract RMSF. The ALJ must determine whether the alleged acute exposure/trauma (the tick bite) is work-related, and, if so, whether it caused a permanent harmful change. After reviewing the medical evidence, as well as the testimony, the ALJ finds Johnson did not meet her burden. Johnson did not prove the acute exposure/trauma (the tick bite) was work-related and occurred in her employment's course and scope.

The ALJ finds Johnson did not experience an occupational disease injury, including a temporary one, and prejudicially dismisses her claim. The evidence's totality supports this finding. Dyno Nobel does not have any liability.

The initial inquiry is not whether the tick bite occurred on Dyno Nobel's premises, or while Johnson performed her job duties, but, rather, whether the tick that bit Johnson came from her Dyno Nobel employment. It is moot whether the actual bite occurred on Dyno Nobel's premises, or at Johnson's personal residence, as long as Johnson's job caused tick exposure and this exposure produced the bite. Therefore, Johnson's RMSF is compensable, even if the actual tick bite occurred off Dyno Nobel's premises, as long as the tick came from Dyno Nobel.

As a preliminary matter, the ALJ, pursuant to KRE 201, is taking judicial notice that ticks are prevalent outdoors throughout Kentucky. This is an adjudicative fact that, pursuant to KRE 201(b)(1)-(2), is: "(1) [g]enerally known within...the county in which the venue of the action is fixed; or (2) [c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonable be questions." The ALJ is not relying on his

personal knowledge or experience. *See Commonwealth v. Howlett*, 328 S.W.3d 191, 193 (Ky. 2010); KRE 201.

The ALJ is also inferring this fact, because Johnson lives in Kentucky, testified she had not recently traveled outside the state immediately before July 21, 2016, and Dr. Ballard opined Johnson's tick bite and exposure did not occur from her Dyno Nobel employment. Dr. Ballard also documented that Johnson even found other local citizens who had allegedly developed similar problems. Significantly, these other citizens did not work at Dyno Nobel. Johnson told Dr. Ballard that Chastity Jarvis, who worked inside the local courthouse, experienced similar problems and symptoms. This information supports the ALJ's inference and judicial notice.

The ALJ is not persuaded the tick bite came from a tick that Johnson acquired/encountered at Dyno Nobel. The evidence shows Johnson encountered ticks in her everyday life, and away from Dyno Nobel. On June 13, 2017, Baptist Heath Medical Group Family Medicine documented, "[s]he had 2 tick bites to the upper arm on May 21st [2017] and has had increased general swelling, aches and fatigue since then." Johnson last worked on November 12, 2016. Therefore, these two tick bites occurred more than six months after Johnson had last stepped foot inside Dyno Nobel. This note proves Johnson encountered ticks away from her employment.

Johnson testified this office note is inaccurate, and contains typographical errors. The ALJ finds the office record more credible than Johnson's testimony. The reason is the medical record documents a time when Johnson only wanted treatment, symptom relief, and was not yet pursuing a workers' compensation claim. The ALJ adopts the rationale behind KRE 803(4)'s "statement for purposes of medical treatment or diagnosis" hearsay exception. This evidentiary rule admits "[s]tatements made for purposes of medical treatment or diagnosis and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to treatment or diagnosis" into evidence.

The Kentucky Supreme Court, in explaining KRE 803(4)'s rationale and why the records are typically

credible, has stated that an “...injured person seeking to be healed...is ordinarily highly motivated to give truthful information to the...medical provider treating that illness or injury. The essential element that lends credence to the statement is that the patient...believes that the doctor must have that information to render effective treatment.” Colvard v. Commonwealth, 309 S.W.3d 239, 245 (Ky. 2010).

Other legal sources have explained that the patient “has a selfish motive to be truthful [.]” because “the effectiveness of medical treatment depends upon the accuracy of the information provided.” Jack B. Weinstein & Margaret A. Berger, Weinstein’s Federal Evidence § 803.06[1] (Joseph M. McLaughlin, ed., 2d ed. 2004). There is not any credible evidence Baptist Heath Medical Group Family Medicine made a typographical error, or incorrectly documented the history Johnson provided.

The June 13, 2017 office note establishes Johnson encountered ticks in her everyday life. Johnson’s testimony also indicates she encountered ticks away from Dyno Nobel. First, Johnson admitted her sister-in-law’s dog had ticks. Johnson testified she has seen ticks crawling on her body, after encountering this dog.

Secondly, Johnson testified that, before July 21, 2016, she spent time outdoors - playing softball and mowing her yard. Johnson also admitted that she lives in a rural area. However, despite: (1) living in a rural area; (2) spending time outside, including mowing her yard and playing softball; (3) encountering a tick-ridden animal {a family member’s dog}, and (4) having two tick bites more than six months after she last stepped foot inside Dyno Nobel, Johnson adamantly testified the tick that bit her came from Dyno Nobel. Her reasoning is “[b]ecause there was no other ticks anywhere else. If I went anywhere else, okay, I sprayed OFF.”

The ALJ does not find this credible. First, ticks are prevalent throughout Kentucky, and are found in yards and especially rural areas. Secondly, Johnson encountered ticks in her everyday life, and outside her work environment. Again, two ticks bit Johnson more than six months after she last stepped foot inside Dyno Nobel. Nonetheless, despite the above factors, Johnson adamantly asserts her indoor employment is where she

acquired/encountered the tick that bit her. The ALJ declines to make this finding.

Johnson did not have an outdoor job, or even work outdoors. She worked inside a building (not even a warehouse). Although the building obviously had doors, there is not any credible evidence these doors were constantly open. Johnson only explained the doors were unlocked. There is not any credible evidence, explaining how the ticks allegedly entered the building in the mass quantities Johnson claimed – Johnson stated the building was infested.

The ALJ finds the building was not tick-infested. If it were, Johnson should and would have seen the ticks sometime before she allegedly found the one burrowing into her scalp. Despite operating the extruder for approximately six hours earlier that day, Johnson allegedly did not see any ticks until after she found the one burrowing into her scalp. According to Johnson, after finding this tick, she immediately noticed that a closed-door, which was only two feet away, had “quite a few” ticks on it. The ALJ does not find it credible that Johnson worked two feet away from a tick filled door, but did not notice them until she found the tick in her scalp.

The ALJ does not find it credible that Johnson allegedly worked in a tick-infested environment, but did not notice any until after she pulled the tick off her scalp. If Johnson had seen ticks on prior occasions, Johnson would have showered herself in OFF (as she allegedly frequently did), as well as declined to work in the environment. The reason is Johnson’s grandmother allegedly had warned Johnson, when she was a child, never to get tick bitten. This is why she allegedly took extra precautions, including showering OFF on herself and bushes.

Johnson had only recently begun working in this area. The exact date is unknown, because the parties did not question Johnson about it. However, before Dyno promoted her, Johnson, several years earlier, work in this same area. She also worked at Dyno Nobel for approximately 15.5 years. Despite this lengthy employment, there is not any evidence Johnson had previously encountered ticks at Dyno Nobel, or that Dyno Nobel had a tick problem. Yet, this all allegedly

changed in July, 2016. The ALJ does not find this credible.

The ALJ notes Johnson also continued performing the extruder job even after July 21, 2016. She performed the job, and worked in the same area, until approximately November 12, 2016. There is not any credible evidence Johnson encountered any subsequent ticks. If the area was truly infested, given Johnson's pre-existing fears and the fact she had already allegedly experienced a tick bite there, the ALJ highly doubts Johnson would continue to work in the same area for almost four more months.

There is not any credible evidence Johnson ever encountered any ticks before or after July 21, 2016. This is despite the alleged tick infestation. The ALJ simply does not find this or Johnson credible.

The ALJ does not doubt Johnson found a tick in her scalp, inside Dyno Nobel, on July 21, 2016. The ALJ, however, finds Johnson did not meet her burden, and prove her indoor employment exposed her to ticks, and this alleged exposure produced the bite. The credible evidence shows Johnson worked indoors, and encountered ticks in her everyday life, and outside her work environment.

Johnson had the proof burden, and non-persuasion risk. After carefully weighing the evidence, the ALJ finds Johnson did not meet her proof burden. The ALJ explained his rationale. Based on the credible evidence's totality, the ALJ finds Johnson did not even sustain a temporary injury and prejudicially dismisses her claim.

On February 4, 2019, Johnson filed a document which the ALJ treated as a petition for reconsideration. The first two pages consisted of factual recitations and complaints about the decision. The rest of the document contained medical records and other documents not introduced prior to the ALJ's decision. In its response, Dyno Nobel asserted the petition for reconsideration was merely a re-argument of the merits and moved to strike the documents attached to the petition for reconsideration, as they had not previously been filed in evidence. By order dated

February 21, 2019, the ALJ agreed and denied the petition for reconsideration as a re-argument of the merits and struck the attached documents.

ANALYSIS

Because Johnson's petition for reconsideration was not filed within fourteen days of the January 18, 2019, final and appealable Opinion & Order causing her notice of appeal to be untimely, we *sua sponte* dismiss her appeal.

KRS 342.281 reads, in relevant part, as follows:

Within fourteen (14) days from the date of the award, order, or decision any party may file a petition for reconsideration of the award, order, or decision of the administrative law judge. The petition for reconsideration shall clearly set out the errors relied upon with the reasons and argument for reconsideration of the pending award, order, or decision. All other parties shall have ten (10) days thereafter to file a response to the petition. The administrative law judge shall be limited in the review to the correction of errors patently appearing upon the face of the award, order, or decision and shall overrule the petition for reconsideration or make any correction within ten (10) days after submission.

The Opinion & Order was final on January 18, 2019. Pursuant to KRS 342.281, Johnson had fourteen days from that date to file a petition for reconsideration. Since Johnson's *pro se* petition for reconsideration was not filed within the fourteen-day statutorily prescribed period, the petition for reconsideration was a nullity and the running of the time for filing an appeal was not stayed.

Pursuant to KRS 342.285, an award or order of the ALJ as provided in KRS 342.275 shall be conclusive and binding as to all questions of fact if a petition for reconsideration is not filed as provided for in KRS 342.281. The statute provides for the filing of a petition for reconsideration "[w]ithin fourteen (14) days from the date of

the award, order, or decision" of the ALJ. Because Johnson did not file a petition for reconsideration "as provided for" in KRS 342.281, the ALJ's decision is conclusive and binding as to all questions of fact.

KRS 342.285 further provides that "either party may in accordance with administrative regulations promulgated by the commissioner appeal to the Workers' Compensation Board for the review of the order or award." The Kentucky Administrative Regulation, 803 KAR 25:010 § 22 (2)(a), provides any party aggrieved by a decision of an ALJ may file a notice of appeal to the Board within thirty days of the date a final decision is rendered. The statute and regulation are mandatory and jurisdictional.

As Johnson did not timely file a petition for reconsideration and her notice of appeal was not filed within thirty days from the date the ALJ's Opinion & Order was rendered, this Board does not have jurisdiction to consider the appeal. The last day upon which Johnson could timely file a petition for reconsideration was Friday, February 1, 2018. Johnson's petition for reconsideration was filed on Monday, February 4, 2018, the seventeenth day, following the January 18, 2019, Opinion & Order. Consequently, the petition for reconsideration was invalid. In Rice v. McCoy, 590 S.W.2d 340, 341, 342 (Ky. App. 1979), the Court of Appeals held as follows:

KRS 342.281 is mandatory; a showing of good cause offers no relief from its provisions. In *Johnson v. Eastern Coal Corporation*, Ky., 401 S.W.2d 230, 231 (1966), the court held that "strict compliance with this section is mandatory to obtain a full Board review."

Appellee's petition for reconsideration was untimely filed and the Board properly overruled it. We note that a dismissal would have been the more

appropriate ruling by the Board; however, overruling the petition accomplished the same result.

Since the petition for reconsideration was untimely taken, any right of appeal to the circuit court was lost. KRS 342.285 is jurisdictional. “The language of the statute is plain as to the time in which to appeal. The time within which a petition for review must be filed is mandatory, and if it is not complied with the circuit court acquires no jurisdiction.” [citation omitted]

The ALJ had no choice but to overrule the untimely petition for reconsideration. In Tube Turns Division of Chemetron v. Quiggins, 574 S.W.2d 901, 903 (Ky. App. 1978), the Court of Appeals held as follows:

We hold K.R.S. 342.281 to mean that any party may file a petition for reconsideration within 14 days from the date of the award which, in this case, was June 21, 1976.

...

Neither the statute nor the Board’s regulation extend the time or provide for the filing of a petition for reconsideration more than 14 days after the date of the award, which means the original order, award or decision and the date of its entry. We do not construe the statute as permitting a party to file a petition for reconsideration or, in effect, a second petition for reconsideration more than 14 days from the date of the original award, except where the subsequent order contained an error not present in the original award and, therefore, could not have been raised by the first petition for reconsideration. [citation omitted]

Johnson’s appeal was untimely as the notice of appeal was not filed within thirty days of January 18, 2019, the date of the rendition of the ALJ’s Opinion & Order. Johnson’s appeal had to be filed no later than February 17, 2019. The notice of appeal was filed on March 18, 2019. Consequently, the issues raised by Johnson are not properly before the Board. Since this Board does not have jurisdiction to consider

the appeal, it must be dismissed. *See also Stewart v. Kentucky Lottery Corp.*, 986 S.W.2d 918 (Ky. App. 1998).

That said, had we considered the appeal, since the petition for reconsideration did not seek additional findings, our sole task on appeal would have been to determine whether the ALJ's decision was supported by substantial evidence within the record. We emphasize that Johnson, as the claimant in a workers' compensation proceeding, had the burden of proving each of the essential elements of her cause of action. *Snawder v. Stice*, 576 S.W.2d 276 (Ky. App. 1979). Since Johnson 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). 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 that they must be reversed as a matter of law. *Ira A. Watson Department Store v. Hamilton*, 34 S.W.3d 48 (Ky. 2000).

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 that would have supported 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). So 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).

The record contains the July 13, 2017, medical record of Dr. Reeves, the infectious diseases physician, to whom Johnson was referred. It reads, in relevant part, as follows:

H/o Rocky Mountain spotted fever

Based on positive RMSF IgG, it is likely that she has been exposed to either Rocky [sic] Mountain spotted fever or another rickettsial illness in the past. However, it is very unlikely that her recent symptoms are related to RMSF. Her symptoms are not suggestive of tick-borne illness, and RMSF nearly always has fever and a spotted rash (she had neither of these with her 2 most recent courses of doxycycline). Additionally, it is an acute illness and does not cause chronic or recurrent disease. However, the antibodies are not necessarily protective, and she would be at risk for RMSF infection if she were to have another tick bite. While I do not know why her titer was negative and then positive, the serology is not a very reliable test, especially in a setting of low pretest probability. Regardless, she has completed a more than sufficient course to treat any potential tick-borne illness (RMSF

treatment is only for 72h after a patient has become febrile, and is usually 7 days or less). Her recurrent swelling, fatigue, and body aches are not related to RMSF or other tick-borne diseases. She also appears to be having significant skin damage related to sun exposure while on doxycycline. No indication for continued or further doxycycline therapy at this time.

Similarly, the August 15, 2018, report of Dr. Ballard generated as a result of an independent medical examination and records review contains the following:

IMPRESSION:

1. History of diffuse complaints with reports of exposure to tick bite.
2. History of previous exposure to tick bite.
3. History of treatment for multiple aches and pains and arthritis prior to incident of July 2016.

...

1. What is your current diagnosis of the patient?

See above.

- a. Please address your qualifications to make a diagnosis in this particular claim.

My qualifications in regard to this individual are that I have had experience treating various musculoskeletal problems for many years. I have training in occupational medicine as well as physical medicine and rehabilitation, and I also have a Master degree in entomology and have studied ticks and tick-borne disease even prior to going to medical school.

2. Do you believe the above diagnosis is work-related? Please explain.

In my opinion, her diagnosis is not work-related.

...

5. When do you believe the patient reached maximum medical improvement?

It is my opinion this patient's present symptomatology is in no way related to any specific work event. There is no way to prove that this patient's tick bite that she reported occurred at work actually occurred at work. It is not at all uncommon for ticks to bite and be present for a period of time, hours or days, prior to being noted. Therefore, there is no actual evidence that the tick bite that she reported occurred at work would have resulted in the complaints that she stated were related to her July 2015 incident. A tick bite and reaction to it is more probably than not related to an exposure that occurred prior to her even being at work in July of 2016.

Dr. Ballard did not agree with Dr. Changaris' impairment rating, because there was no citation to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides") which would support the impairment rating. During her October 3, 2018, deposition, Dr. Ballard testified, "there is no such thing as relapsing Rocky Mountain spotted fever." She testified that vasculitis is not caused by RMSF and RMSF did not cause Johnson's ADD, PTSD, and anxiety. Dr. Ballard opined the physical symptoms Johnson reported were not caused by RMSF and Johnson's reported symptoms and current condition are not related to the tick bite. She again noted that in assessing a 40% impairment rating, Dr. Changaris did not cite to the AMA Guides in support of his permanent impairment rating.

Finally, we note that, although Johnson challenged the accuracy of Wellborn's records, Wellborn's June 13, 2017, record reveals Johnson had two tick bites to the right upper arm on April 4, 2017, and had increased general swelling,

aches, and fatigue since then. This document firmly supports the ALJ's finding Johnson received tick bites outside her work environment.

Since the above evidence constitutes substantial evidence in support of the ALJ's decision, this Board would have had no choice but to affirm the ALJ's decision in the event it had jurisdiction to consider Johnson's appeal. Accordingly;

IT IS HEREBY ORDERED AND ADJUDGED that Johnson's appeal from the January 18, 2019, Opinion & Order and the February 21, 2019, Order is **DISMISSED**.

ALVEY, CHAIRMAN, CONCURS.

RECHTER, MEMBER, CONCURS IN RESULT ONLY.

HON. FRANKLIN A. STIVERS, MEMBER
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