

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 21, 2020

CLAIM NO. 201889838

LISA GABBARD

PETITIONER

VS. **APPEAL FROM HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE**

TOYOTA MOTOR MANUFACTURING KENTUCKY and
HON. STEPHANIE L. KINNEY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Lisa Gabbard (“Gabbard”) appeals from the Opinion and Order rendered October 16, 2019, and the November 14, 2019 order denying her petition for reconsideration issued by Hon. Stephanie L. Kinney, Administrative Law Judge (“ALJ”). The ALJ dismissed Gabbard’s claim for a left shoulder injury allegedly caused by cumulative trauma she sustained while working for Toyota Motor Manufacturing of Kentucky (“Toyota”).

On appeal, Gabbard argues the record does not support the ALJ's determination that her condition resulted from diabetes and hypothyroidism, not her repetitive work at Toyota. We find the ALJ's decision is supported by substantial evidence and a contrary result is not compelled. Therefore, we affirm.

Gabbard filed a Form 101 on November 2, 2018, alleging a left shoulder injury caused by the cumulative trauma she sustained while working for Toyota. She listed the date of injury as December 18, 2017. Gabbard did not file a work history in support of her claim.

Gabbard testified by deposition on December 13, 2018, and at the hearing held September 6, 2019. Gabbard was born on March 1, 1967, and is a resident of Berea, Kentucky. She is a high school graduate, and has no additional education or vocational training. She is right hand dominant. She last worked for Toyota in March 2018, and has not returned to work since.

Gabbard worked as a team member at Toyota until December 18, 2017. Her job on the assembly line required her to remove welding lines around windows by using an electric sander, or in some instances a file. She stated she worked on up to five-hundred cars per shift. Gabbard testified she was performing that activity when her left arm gave out, and she could no longer perform her job. She admitted she actually began having shoulder problems in November 2017.

Gabbard went to the Toyota clinic for her problem. She was then restricted to light duty, advised to rest, and told to use ice on her shoulder. While on light duty, Gabbard performed odd jobs and cleaned the break room. She continued

on light duty until March 18, 2018. She now draws long-term disability benefits. She testified she is physically unable to perform her previous job duties at Toyota.

After the treatment with the Toyota clinic provided no relief, Gabbard was referred to Dr. Ryan Donegan with Bluegrass Orthopedics. Dr. Donegan eventually performed a shoulder manipulation on August 28, 2018, and ordered physical therapy. She reported the procedure provided no relief, and she still cannot lift her left arm to shoulder level. Gabbard testified she was diagnosed with diabetes and thyroid problems in 2018.

Gabbard filed Dr. Donegan's February 26, 2018 and February 28, 2018 office notes in support of her claim. Dr. Donegan reported Gabbard complained of throbbing and dull aching left shoulder and left scapular pain, with an onset date of December 18, 2018. He noted she had a history of thyroid disease, depression, and heart surgery. Dr. Donegan noted an MRI showed biceps tendinopathy and subacromial bursitis. It also showed some tendinopathy of the supraspinatus and infraspinatus, as well as some thickening in the rotator interval. His diagnosis was radiographic evidence of adhesive capsulitis in a fifty-year old female with thyroid disease. He administered a left shoulder injection. Gabbard also filed Dr. Donegan's April 10, 2019 note reflecting she continued to have left shoulder pain.

Gabbard filed records from Bluegrass Orthopedics which included Dr. Donegan's notes, as well as those of Dr. Harry Lockstadt. Those records reflect treatment Gabbard received from February 26, 2018 to August 28, 2018. Included in those records was a "special letter" written by Dr. Donegan on March 25, 2018. The

records reflect ongoing left shoulder treatment, and Gabbard's failure to have any relief with injections. The May 25, 2018 "special letter" notes Gabbard, "has some risk factors for frozen shoulder including her age and her female sex, in addition to hypothyroid issues." On August 28, 2018, she underwent left shoulder arthroscopic debridement with capsular release and manipulation, and subacromial decompression with acromioplasty.

Dr. Bruce Guberman evaluated Gabbard at her attorney's request on January 17, 2019. In his Form 107-I report, Dr. Guberman noted Gabbard's problems began without specific trauma in November 2017. Gabbard complained that her left shoulder and upper arm pain worsened after her surgery. He diagnosed Gabbard with left shoulder adhesive capsulitis, subacromial bursitis with impingement, and degenerative changes of the AC and glen humeral joints. He stated those conditions were caused by cumulative trauma Gabbard sustained at Toyota. He attributed her condition to sanding the right-sided windows of Toyota cars on an assembly line for two years, on an average of six hours per day. He stated, "[A]lthough she does have predisposing factors for adhesive capsulitis, such as thyroid disease and diabetes, in my opinion, she would not have developed the adhesive capsulitis, subacromial bursitis or degenerative changes at this time if it weren't for the cumulative trauma of the work described above."

Dr. Guberman assessed a 7% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). He anticipated she would reach maximum medical improvement ("MMI") in one week, after Dr. Donegan had the

opportunity to review an MRI. He stated she does not have the physical capacity to return to the type of work performed on the date of injury. He restricted Gabbard to lifting less than ten pounds on a maximum basis, or five pounds frequently. He advised her to avoid using her left arm overhead or repeatedly. He also advised her to avoid any pressure on the left arm from pulling, lifting, or carrying.

On March 11, 2019, Dr. Guberman issued an addendum. He stated he disagreed with Dr. Ronald C. Burgess, and reiterated his previous assessments.

Gabbard also filed Toyota medical records from December 19, 2017 and January 4, 2018. The December 2017 note reflects Gabbard complained of left shoulder, neck, and upper back pain, which began a month earlier. Gabbard reported she believed her problems stemmed from repetitive sanding. The January 2018 note reflects continued complaints of left shoulder, neck, and upper back pain. She was diagnosed with shoulder pain and a supraspinatus strain.

Dr. Burgess evaluated Gabbard at Toyota's request on July 26, 2018. He noted she was a fifty-one year old, right-handed female who began working for Toyota on March 17, 2015. He noted her left shoulder complaints. He stated an MR Arthrogram showed mild tendinopathy and moderate AC joint disease. He also noted neither injections nor physical therapy improved her symptoms. Gabbard reported her symptoms began without the occurrence of a traumatic event. Dr. Burgess diagnosed Gabbard with left shoulder adhesive capsulitis. He stated the most common cause of this condition is diabetes, and Gabbard was recently diagnosed as diabetic. He opined the condition was most likely caused by a combination of Gabbard's diabetes and hypothyroidism. He disagreed with the

surgery recommended by Dr. Donegan. Dr. Burgess stated it could take up to eighteen months to reach MMI from this type of condition.

Toyota filed Dr. Donegan's March 25, 2018 "special letter". Dr. Donegan stated it is impossible to know whether Gabbard's adhesive capsulitis is related to her work activities. He specifically stated, "Individuals can develop adhesive capsulitis without provocations and without work-related issues or on there [sic] could be a mechanical insult due to her work-related activities which caused this condition." He noted it is impossible to state whether her conditions is work-related.

Dr. Michael Best evaluated Gabbard at Toyota's request on February 26, 2019. He stated Gabbard had reached MMI within two to four weeks after her surgery. Gabbard complained of neck, left shoulder, and left arm pain to the elbow. He agreed with Dr. Donegan to the extent he diagnosed Gabbard with adhesive capsulitis, status post left shoulder arthroscopic debridement, and subacromial decompression with manipulation under anesthesia. He stated within reasonable medical probability her condition was due to her diabetes, and not work-related. He assessed a 5% impairment rating pursuant to the AMA Guides, but again noted her condition was due to her diabetes, and not work-related. He did not recommend any restrictions, and stated the more active she is the better. In a supplemental report dated March 25, 2019, Dr. Best noted he had reviewed an MRI, and Gabbard has no rotator cuff tear, no biceps tendon tear, and no glenoid labrum tear.

Toyota also filed the January 18, 2019 MRI report from American Imaging Consultants, PLLC. The report from Dr. Jon Kostelic notes Gabbard has hypertrophic changes of the AC joint, and a possible supraspinatus strain.

A Benefit Review Conference was held on May 30, 2019. The issues preserved for determination included whether Gabbard retains the capacity to return to the type of work performed at the time of the injury, injury as defined by the Act, causation/work-relatedness, income benefits per KRS 342.730, wages upon return to work, and unpaid or contested medical expenses.

The ALJ rendered her decision dismissing Gabbard's claim on October 16, 2019. She noted that pursuant to the holding in Haycraft v. Corhart Refractories, 544 S.W.2d 222 (Ky. 1976), "the test is whether the nature and duration of the work probably aggravated a degenerative disc condition to the degree that it culminated in an active physical impairment sooner than would have been the case had the work been less strenuous." The ALJ relied upon the opinions of Drs. Donegan, Burgess, and Best in finding Gabbard's condition is not work-related. Regarding Dr. Guberman's opinion on causation, the ALJ stated:

Dr. Guberman is the only physician to attribute Plaintiff's left shoulder condition to her work duties, and his opinion stands alone. To accept Dr. Guberman's opinion, this ALJ would have to find cause to reject the causation opinion of three orthopedics, who all appear more qualified to address causation emanating from an orthopedic condition. After reviewing the treatment records, this ALJ concluded Plaintiff's diabetes was the primary causative factor in this claim. This is supported by Dr. Donegan's April 10, 2019 treatment record where he noted Plaintiff's sugars were poorly controlled and diagnosed refractory adhesive capsulitis. Thus, despite treatment, Plaintiff's diabetes impeded any further surgical intervention and Plaintiff's left shoulder symptomatology persisted in spite of surgery, performed on August 28, 2018. This indicates Plaintiff's diabetes was a causative factor, as opined by Drs. Best and Burgess.

Gabbard filed a petition for reconsideration on October 21, 2019, arguing the ALJ misconstrued the evidence in finding her condition was due to her diabetes and/or hypothyroidism. She requested additional findings regarding the ALJ's determination concerning causation. She argued that Dr. Best only attributed her adhesive capsulitis to diabetes and hypothyroidism. She requested the ALJ to provide additional findings supporting her conclusion that the entirety of her condition was caused by diabetes and/or hypothyroidism.

On November 14, 2019, the ALJ issued her decision denying the petition for reconsideration. The ALJ found specifically found as follows:

Previously, this ALJ reviewed the evidence and found Plaintiff's left shoulder condition was not work-related. This finding was based partially on Dr. Donegan's opinion that he could not definitively state Plaintiff's left shoulder condition was work-related. This ALJ concluded Dr. Burgess provided the most persuasive causation opinion. Dr. Burgess opined Plaintiff's left shoulder condition (i.e. frozen shoulder) was related to diabetes and hypothyroidism. After reviewing the evidence once again, this ALJ believes her findings/conclusions are supported by Drs. Burgess and Donegan's opinions.

On appeal, Gabbard argues the ALJ erred in finding her condition is not work-related, and dismissing the claim. She notes her evidence, specifically Dr. Guberman's report, establishes her left shoulder condition was caused by the cumulative trauma she sustained while working for Toyota. Essentially Gabbard argues the ALJ abused her discretion in dismissing her claim. Interestingly, Gabbard notes Dr. Best holds himself out as an orthopedic surgeon, but the Kentucky Board

of Medical Licensure records indicate that he is not certified in any specialty. However, there is no evidence in the record supporting this contention.

As the claimant in a workers' compensation proceeding, Gabbard had the burden of proving each of the essential elements of her claim, including work-relatedness/causation. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Gabbard was unsuccessful in her 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 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 sole authority to judge all reasonable inferences 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 decision of the ALJ, it must be shown there was no substantial evidence of probative value to support his 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 which otherwise could have been drawn from the record. Whittaker v. Rowland, supra. 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, supra.

Gabbard requests this Board to re-weigh the evidence and substitute its judgement for that of the ALJ. This we cannot do. The ALJ acted squarely within her discretion in relying upon the opinions of Drs. Donegan, Burgess, and Best in dismissing this claim. We cannot say that her assessment of those opinions is either incorrect, or amounts to an abuse of her discretion. The ALJ specifically outlined why she relied upon those opinions, and why she found Dr. Guberman's opinion lacking. We determine the evidence does not compel a contrary result.

Abuse of discretion by definition "implies arbitrary action or capricious disposition under the circumstances, at least an unreasonable and unfair decision." Kentucky National Park Commission v. Russell, 301 Ky. 187, 191 S.W.2d 214 (1945). Here, the ALJ simply found the opinions of Drs. Donegan, Burgess, and Best more credible than those of Dr. Guberman. As noted above, the ALJ clearly provided her reasoning for relying upon those opinions. We cannot say

that her reliance upon those opinions constitutes an abuse of discretion compelling a contrary result.

Accordingly, the Opinion and Order rendered October 16, 2019, and the November 14, 2019 order on the petition for reconsideration issued by Hon. Stephanie L. Kinney, Administrative Law Judge, are hereby **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

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