

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 23, 2019

CLAIM NO. 201595827

MARY HARRIS AND
JOHNNIE TURNER

PETITIONER

VS. **APPEAL FROM HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE**

HARLAN CITY SCHOOL ASSOC. AND
HON. JONATHAN R. WEATHERBY,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

RECHTER, Member. Mary Harris (“Harris”) appeals from the April 11, 2019, Opinion on Remand rendered by Hon. Jonathan R. Weatherby, Administrative Law Judge (“ALJ”). The ALJ dismissed Harris’ claim for temporary injuries to her legs, ankles, and feet. For the reasons set forth herein, we affirm.

Harris worked as a school secretary for Harlan County School Association. She filed a Form 101 on June 7, 2016 alleging she was pushed in the back after attending a school assembly on January 15, 2015. This caused her to fall down bleachers, injuring her back, SI joint, legs, ankles and feet. She acknowledged she had previously undergone a back surgery by Dr. William Brooks on May 7, 2014, and she was still taking Lortab on the date she fell.

We have previously considered two appeals in this claim. In our opinion dated May 18, 2018, we affirmed the ALJ's conclusion Harris suffered no permanent injuries as a result of the work accident, but remanded for a determination as to whether she suffered any temporary injuries. In a remand opinion dated September 4, 2018, the ALJ determined Harris suffered no temporary injury to her low back. In our January 25, 2019 Opinion, we affirmed the determination Harris suffered no temporary injury to her low back. However, we again remanded the claim to the ALJ for a determination as to whether she suffered a temporary injury for conditions other than her lumbar spine as a result of the work accident.

In an April 11, 2019 Opinion on Remand, the ALJ determined Harris suffered no temporary injuries due to the work accident. He concluded Harris "failed to put forth any evidence supporting any permanent or temporary injury to the body parts listed other than the back and SI joint that would be sufficient to justify any award of either income or medical benefits pursuant to the Act." He dismissed the claim for temporary injuries. Harris did not file a petition for

reconsideration. On appeal, she argues the evidence compels a finding she suffered temporary injuries to her legs, ankles, and feet.

Because this appeal concerns only alleged injuries to Harris' lower extremities, our analysis of the medical evidence focuses solely on these body parts. Harris testified she landed on her right shoulder when she fell on January 15, 2015, and rolled onto her right hip. She was taken to the nurse's office because she had scraped her left shin, and her feet were swelling.

On January 22, 2015, she visited the Clover Fork Clinic. Eric Roberts, PA-C, noted Harris had x-rays of the lower left leg and right hip and knee on the day of the work accident. The x-rays were negative although her left leg showed some soft tissue swelling. Mr. Roberts ordered an x-ray of her left foot, which was negative. Harris reported continued pain in her legs, and Mr. Roberts noted a "poor healing lesion on her left leg." At a follow-up visit on January 29, 2015, Mr. Roberts expressed concern about the swelling in Harris' left leg. He diagnosed a sprained left ankle and right hip pain, and referred her to Dr. William Brooks, a neurosurgeon who had previously performed low back surgery on Harris. At a May 20, 2015 follow-up, Harris reported her ankle pain had improved.

Harris submitted multiple office notes from Dr. Brooks outlining treatment he provided from May 2014 through June 2015. In his operative note dated May 7, 2014, Dr. Brooks stated he performed a discectomy at L4-5 on the right, a foraminotomy at L4-5, and an exploration of the axilla on the right at L4-5. In his note dated February 24, 2015, Dr. Brooks noted Harris complained of radiating pain after she fell down some stairs. He also noted she had continued to

complain of intermittent pain since her May 2014 surgery, with right hip pain on rotation. He diagnosed a musculoligamentous injury to the lumbar spine and left ankle. He reviewed an MRI and noted surgery was not indicated. He ordered physical therapy. On April 23, 2015, he released Harris to return to work six hours per day with no lifting greater than ten pounds.

Dr. David Muffly, an orthopedic surgeon, evaluated Harris at her attorney's request on July 27, 2016. He noted the history of Harris falling down the bleachers on January 15, 2015, injuring her low back, SI joint and sustaining left leg contusions. He assigned impairment ratings for Harris' low back and SI joint, but assigned no impairment rating for any other body part.

Dr. Henry Tutt evaluated Harris on February 5, 2016. He noted she complained of low back, right hip and right leg pain. She also complained of tingling and numbness in her right foot. Dr. Tutt assigned no impairment rating for any lower extremity condition.

Harlan filed a supplement to Dr. Tutt's report. He noted Harris had reached maximum medical improvement ("MMI") from any lower extremity contusions four to six weeks after the work event. He found she needs no additional treatment for that condition, and there is no evidence she sustained a permanent injury due to the January 15, 2015 fall. He additionally stated he would impose no restrictions due to her lower extremity contusions.

In the April 11, 2019 Opinion on Remand, the ALJ first noted that Dr. Muffly did not assess an impairment rating for any lower extremity injury. The ALJ continued, "The ALJ therefore finds that the Plaintiff has failed to put forth any

evidence supporting any permanent or temporary injury to the body parts listed other than the back and SI joint that would be sufficient to justify any award of either income or medical benefits pursuant to the Act.” The ALJ also acknowledged Dr. Tutt stated Harris had reached MMI from her lower extremity contusions four to six weeks after the work accident. The ALJ then concluded:

There is no evidence upon which the ALJ could rely indicating that the Plaintiff could not have performed her job duties as a result of the lower extremity contusions during that time. As such, the ALJ is unable to find that the Plaintiff suffered any temporary injury to the ankles, legs or feet. The Plaintiff’s claims for benefits as a result of the alleged injuries to those body parts are therefore hereby DISMISSED.

Harris did not petition for reconsideration. On appeal, she states the ALJ erred in failing to award her temporary total disability (“TTD”) and permanent partial disability benefits for her ankles, legs or feet. She argues the ALJ failed to consider the Clover Fork Clinic records, which document treatment for her legs, knees, hips and ankles. She was diagnosed with bilateral edema, and a left ankle sprain. Additionally, Harris emphasizes that she received TTD benefits from January 15-19, 2015, January 22-April 26, 2015, and May 6, 2015 to February 22, 2016. She claims the payment of TTD benefits is evidence she was at least temporarily injured.

Harris cites Arnold v. Toyota Motor Mfg., 375 S.W.3d 56 (Ky. 2012), but does not specifically argue the ALJ’s opinion fails to meet the standard set forth in that case. Similarly, Harris discusses the holdings in Shields v. Pittsburgh & Midway Coal Mining Co., 634 S.W.2d 440 (Ky. App. 1982) and Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973), but does not

argue the ALJ failed to set forth sufficient findings of fact to support the conclusions he reached so as to reasonably apprise the parties of the basis for his decision.

Additionally, to the extent Harris argues the evidence compels a finding of permanent injury to her lower extremities, this issue was decided in our prior consideration of this claim. In our May 18, 2018 opinion, we affirmed the ALJ's dismissal of Harris' claim for permanent injuries stemming from the January 15, 2015 incident. The May 18, 2018 opinion of the Board was not appealed. Thus, it is the law of the case. *See Inman v. Inman*, 648 S.W.2d 847 (Ky. 1982) and *McGuire v. Coal Ventures Holding Company, Inc.*, 2009-SC-000114-WC, rendered October 29, 2009, Designated Not To Be Published.

Therefore, we consider only whether the ALJ erred in dismissing Harris' claims for temporary injuries to her legs, ankles and feet. As the claimant in a workers' compensation proceeding, Harris bore 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). Because she 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).

Harris did not request additional findings of fact or a more explicit ruling in a petition for reconsideration, as required by KRS 342.281 and KRS 342.285. As such, the issue of inadequate or incomplete findings of fact by the ALJ is not properly preserved for review by this Board. *See Bullock v. Goodwill Coal Co.*,

214 S.W.3d 890, 893 (Ky. 2007)(failure to make statutorily-required findings of fact is a patent error which must be requested in a petition for reconsideration in order to preserve further judicial review). An ALJ must be afforded the opportunity to make any corrections, via a petition for reconsideration, concerning any perceived misunderstanding of the evidence. An award or order of the ALJ shall be conclusive and binding as to all questions of fact if a petition for reconsideration is not filed. KRS 342.285. Absent a petition for reconsideration, questions of fact, including the adequacy of the ALJ's findings of fact, are not preserved for appellate review. Brasch-Barry General Contractors v. Jones, 175 S.W.3d 81, 83 (Ky. 2005). *See also* Hornback v. Hardin Memorial Hospital, 411 S.W.3d 220, 223 (Ky. 2013). Stated otherwise, inadequate, incomplete, or even inaccurate fact-finding on the part of an ALJ will not justify reversal or remand if there is substantial evidence in the record supporting the ultimate conclusion. Eaton Axle Corp. v. Nally, 688 S.W.2d 334 (Ky. 1985).

Therefore, the only question preserved for review by this Board is whether a finding Harris suffered temporary injuries to her legs, ankles or feet is compelled. Harris submitted the records of the Clover Fork Clinic which document Mr. Roberts' diagnosis of a left ankle sprain, and treatment for leg contusions. Dr. Muffly noted Harris was treated for left ankle pain but made no specific diagnosis and did not assign an impairment rating. Dr. Tutt diagnosed contusion of the legs. Dr. Brooks diagnosed a musculoligamentous injury to the left ankle, though his treatment concerned only Harris' lumbar spine.

Upon careful consideration, we concluded the ALJ did not abuse his discretion in dismissing Harris' claim for temporary injuries to her legs, ankles and feet. Though Mr. Roberts diagnosed a left ankle sprain and bilateral swelling in the legs, there is no record Harris was treated for these conditions or that the diagnosis was confirmed by a physician. Additionally, x-rays of the left leg were normal. Dr. Muffly, who examined Harris at her request, did not make any diagnosis for any condition in the lower extremity. Dr. Tutt's diagnosis of leg contusions is based on Harris' treatment for bruising and abrasions after the fall.

There was no evidence set forth that Harris suffered anything other than contusions to her legs, which spontaneously healed with no specific treatment. Arguably, the evidence in this case could support a finding Harris suffered a temporary injury to her left ankle, though the proof does not compel such a result. A physician's assistant diagnosed a sprained ankle, and Harris did not receive any specific treatment for this condition. Dr. Muffly did not diagnose any temporary injury to Harris' ankle. Under the circumstances of this case, we do not believe the proof compels a finding Harris suffered a temporary injury to her legs, ankles or feet.

Accordingly, the April 11, 2019 Opinion on Remand is **AFFIRMED**.

STIVERS, MEMBER, CONCURS.

ALVEY, CHAIRMAN, DISSENTS AND FURNISHES A SEPARATE OPINION.

ALVEY, Chairman. I respectfully dissent from the majority decision in this case. I believe the evidence compels the finding of a temporary injury to Ms. Harris' extremities including bruising, scratches, swelling, etc. This is supported by the

information contained in Dr. Muffly's report, as well as from both the treating physician and from Dr. Tutt. There is no evidence in the record establishing she did not sustain these temporary injuries.

I therefore would reverse the ALJ's decision and remand for a finding that Harris sustained a temporary injury, which has healed, necessitating the payment of temporary medical benefits for those conditions. Most likely those have already been paid.

DISTRIBUTION:

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