

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: August 16, 2019

CLAIM NO. 201701985

MARY NOBLE

PETITIONER

VS. **APPEAL FROM HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE**

MENDING HEARTS, INC. and
HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

ALVEY, Chairman. Mary Noble (“Noble”) appeals from the April 12, 2019 Opinion and Order, and the May 10, 2019 Order overruling her petition for reconsideration rendered by Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). The ALJ dismissed Noble’s claim for income benefits, but awarded permanent medical benefits for her right shoulder injury and temporary medical benefits for her right leg, back, and neck conditions through April 23, 2018.

On appeal, Noble argues the ALJ's determinations are contrary to the evidence; the ALJ's decision is not in conformity with the Act; her decision is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion; and the credible evidence is so overwhelming in her favor that no reasonable person could reach the same conclusion as the ALJ. We disagree and affirm.

Noble filed a Form 101 alleging she sustained injuries to multiple body parts on August 27, 2016 when a patient assaulted her. Noble alleged she was hit in the head and right side of her neck, and she was kicked on the leg. The Form 101 was later amended to include a right shoulder injury. Noble attached the August 27, 2016 Appalachian Regional Healthcare Emergency Physician record. Noble reported she was assaulted, sustaining a hit in the head and right side of her neck, and a kick on the leg. Noble complained of right neck pain and a headache. The examination demonstrated a right paracervical spasm. A cervical x-ray showed moderate degenerative changes. Noble was diagnosed with a right neck pain/paracervical spasm and headaches due to the assault. She was prescribed Motrin and Flexeril, and advised to follow up with her primary care physician.

Noble testified by deposition on January 22, 2018, and at a hearing held June 11, 2018. Noble began working for Mending Hearts, Inc. ("Mending Hearts") in September 2015 as a direct support professional assisting patients with daily living skills and administering medication. Noble testified that on August 27, 2016, she took three patients to a marina. One of the patients became upset and struck her right shoulder. While she was driving, the patient repeatedly struck Noble

with his wing-tipped shoe on her right leg and right shoulder. Noble subsequently experienced pain in her head and neck, and later in her right shoulder and back. Noble alleged injuries to her neck, right shoulder, back and right leg.

Noble treated at the emergency room on the day of the assault, and was advised to follow up with her primary care physician. Noble alleged she was unable to do so because her primary care physician required a Workers' Compensation number which Mending Hearts refused to provide. Her health insurance also refused to pay for her medical expenses related to the assault. Noble was unable to receive any other treatment outside of the initial emergency room visit. Noble acknowledged she continued to work at her normal job without restrictions until she was terminated on January 9, 2018 for reasons unrelated to the assault.

Noble filed Dr. Jared Madden's March 14, 2018 report from his February 28, 2018 evaluation. Dr. Madden noted the August 27, 2016 assault and the reported neck, right shoulder, and right leg/hip pain. He also noted Noble reported problems with varicose veins in her right thigh after the assault. Dr. Madden diagnosed Noble with neck pain, right shoulder pain, and varicosities in her right lower extremity/venous stasis disease. Dr. Madden opined Noble's complaints of neck and shoulder pain are related to the assault, but referred her to a vascular specialist to determine the etiology of the varicosities/venous stasis. Dr. Madden did not discuss any symptoms or problems with Noble's back.

Dr. Madden found Noble is not at maximum medical improvement ("MMI") since she had neither been evaluated nor completed a treatment process. He recommended an additional evaluation for Noble's neck and right shoulder pain,

as well as physical therapy or chiropractic/osteopathic manipulation. Dr. Madden assessed a current 11% impairment rating, consisting of 5% for Noble's neck pain and a 6% for her right shoulder condition, pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment ("AMA Guides"). Dr. Madden noted Noble's impairment could increase absent appropriate intervention. Dr. Madden assigned various restrictions and found Noble does not retain the physical capacity to return to work.

Mending Hearts filed Dr. Gregory Snider's April 23, 2018 report. He noted the August 27, 2016 assault, and reported symptoms in her right shoulder, neck, and right leg. Dr. Snider noted his cervical examination demonstrated no obvious abnormality other than superficial tenderness and general diminished range of motion, an essentially normal examination of her shoulders, and varicosities bilaterally of the thighs, right greater than left. Dr. Snider diagnosed Noble with contusions of the neck, right shoulder, and right thigh.

Dr. Snider opined Noble had attained MMI, and he saw no objective abnormality warranting an impairment rating for Noble's head, neck, shoulder, or thigh pursuant to the AMA Guides. He also noted the initial workup at the emergency room was relatively benign, and Noble received no additional treatment for over a year and a half. Dr. Snider opined Noble could return to work without restrictions. However, he recommended a course of anti-inflammatory medication and physical therapy. Dr. Snider opined the varicosities are unrelated to the assault and Noble requires no specific treatment.

The ALJ entered an Interlocutory Opinion on July 31, 2018, finding in relevant part as follows:

This ALJ finds that Noble sustained a work-related injury on August 27, 2017, when she was assaulted by a patient at Mending Hearts. The records contemporaneous with the alleged injury show that she was treated for assault at ARH for complaints to her right leg, headaches and right neck pain.

While this ALJ finds that Noble sustained a temporary injury to her right leg, the ALJ is not convinced that Noble sustained a permanent injury to her right leg or backa[sic]. It is Noble's burden to prove that she sustained an injury. Dr. Madden stated that she should have a specialist evaluate her varicosities to determine causation. Further, Dr. Madden did not address any alleged back complaints. This ALJ finds Dr. Madden's opinion insufficient to prove causation for either her back or right leg. This ALJ finds Dr. Snider more convincing that her varicosities are not related to the injury. He noted bilateral varicosities, and thus, this ALJ finds it unlikely that they are related to a right thigh injury. Thus, her claims for any permanent injury to her right leg or her back are dismissed.

The ALJ next determined Noble is not entitled to temporary total disability benefits since she did not miss any work due to the work injury, and she returned to work without restrictions or limitations. The ALJ also found credible Dr. Snider's opinion concerning Noble's physical abilities to perform her job.

The ALJ found Noble had not yet reached MMI, relying in part upon Noble's testimony regarding her current symptoms and that she had unsuccessfully tried to seek treatment. The ALJ noted Dr. Snider observed generalized soft tissue tenderness in the shoulders and neck, for which he recommended physical therapy. The ALJ believed Noble should have the opportunity to seek treatment for her continuing complaints related to the assault. Since Noble had yet to attain MMI, the

ALJ found it premature to determine whether she was entitled to a permanent disability rating. The ALJ found Noble, “entitled to medical treatment for her injuries until she reaches [MMI]. Whether she sustained permanent or temporary injuries is reserved for determination.”

The ALJ awarded medical expenses for the effects of the work-related neck and shoulder injuries, including continuing medical expenses and expenses associated with the initial emergency room visit. Other than the treatment received at the emergency room, the ALJ dismissed Noble’s claim for benefits to her right leg and back conditions. The ALJ placed the claim in abeyance pending the attainment of MMI.

Subsequent to the interlocutory order, Mending Hearts filed the October 1, 2018 note of Rita Fletcher, APRN (“Ms. Fletcher”), and Dr. Snider’s February 7, 2019 supplemental report. Ms. Fletcher noted the 2016 assault and complaints of worsening of right-sided neck, right shoulder, and upper back pain. Ms. Fletcher noted Noble refused muscle relaxers and requested Neurontin 400 mg. Noble’s neck examination was essentially normal, but she noted Noble was unable to lift her right shoulder above the elbow area. Ms. Fletcher ordered x-rays of Noble’s cervical and thoracic spine, right shoulder, and right clavicle. She diagnosed Noble with an injury to the neck, right shoulder, and upper back. She prescribed Ibuprofen 800 mg and Cyclobenzaprine, and advised Noble to follow up in one week. There is no record indicating Noble received any additional treatment.

In the February 7, 2019 supplement report, Dr. Snider stated he had reviewed Ms. Fletcher’s October 1, 2018 treatment note. He opined as follows:

Ms. Noble's diagnoses remain strain and contusion to her neck and right shoulder. Based on the mechanism of injury, I would not anticipate long-term problems. Her initial inability to receive treatment and her subsequent disinclination to seek treatment is puzzling. Based on the records available to me and my one-time examination of Ms. Noble, I am unable to identify a permanent anatomic change that would qualify her for impairment under the *AMA Guides*, 5th Edition. I see no reason that Ms. Noble could not have returned to her regular job duties; I do not see an objective reason for restrictions. I recommend OTC NSAIDS on a PRN basis with a home exercise and stretching program. In my opinion, Ms. Noble's condition reached MMI on 04/23/18.

A final hearing was held on March 1, 2019. Noble testified that since the June 11, 2018 hearing, she had only received treatment on one occasion with Ms. Fletcher. Noble testified she has constant pain in her neck, right shoulder, and upper back, and is unable to wash her hair. When asked if she had tried to see another doctor, Noble replied no "[b]ecause Workers' Comp wouldn't allow the claim number to go through to another doctor." When asked if she returned to Ms. Fletcher after October 1, 2018, Noble stated she did not "because I called to set up a new appointment and they couldn't get it authorized." Noble testified she did not have a written denial. Noble returned to work for different employers in crisis intervention in November 2018 and April 2019 without restrictions.

The ALJ rendered a final opinion on April 12, 2019. She stated as follows:

As explained in the previous Interlocutory Opinion & Order, this ALJ again finds that Noble sustained a work-related injury on August 27, 2017, when she was assaulted by a patient at Mending Hearts. This ALJ finds that she sustained a permanent injury to her right

shoulder, but a temporary injury only to her right leg, back and neck.

This ALJ previously found that Noble was entitled to seek continuing complaints for her assault until she reached maximum medical improvement. In particular, Dr. Snider recommended physical therapy for her soft tissue tenderness in the shoulders and neck. Since that time, she has sought treatment only once, with APRN Fletcher. She has not returned to Fletcher, and she never underwent physical therapy.

Noble relies on Dr. Madden's February 28, 2018 examination for her claim of permanent impairment. Dr. Madden determined that Noble had a permanent impairment rating based upon her decreased flexion, extension, side bending, and rotation in segments from C3-7. However, he assessed that she was not at maximum medical improvement, and he never examined her again following his evaluation. Since that time, she was evaluated on October 1, 2018, when Fletcher observed normal active range of motion of the cervical spine. Although Noble complained of shoulder pain, there was no objective evidence noted of any permanent injury to Noble's neck. This ALJ is not convinced by Dr. Madden that Noble sustained a permanent injury to her spine given Fletcher's observation that she had normal range of motion. This ALJ is also convinced by Dr. Snider that he was unable to identify a permanent anatomic change that would qualify her for impairment under the *AMA Guides*, Fifth Edition. For these reasons, this ALJ finds that Noble sustained no permanent neck injury.

Temporary Total Disability

This ALJ also again finds that Noble returned to work after her injury and she was and remains capable of returning to work, and she is not entitled to TTD benefits.

Maximum Medical Improvement

This ALJ finds that Noble attained maximum medical improvement at the time of her examination with Dr. Snider. Although this ALJ previously

determined that Noble had not yet reached maximum medical improvement, this ALJ did so to allow Noble to seek treatment. Noble went to APRN Fletcher once, and claimed that she attempted to seek treatment with Fletcher a second time, but it was denied. However, she produced no evidence of a denial, and made no attempt to enforce this ALJ's interlocutory award of medical benefits. Thus, this ALJ finds that Dr. Snider's assessment of maximum medical improvement is credible, as her condition has not changed since his examination.

Medical Expenses

This ALJ finds that Noble is entitled to reasonable and necessary medical expenses for her injuries, including for her initial emergency room treatment for her neck, back and right leg, treatment for her neck through the date of maximum medical improvement, and for past and future medical treatment for permanent injuries to her right shoulder.

The ALJ dismissed Noble's claim for either temporary or permanent income benefits. She awarded permanent medical benefits for the right shoulder only, and awarded only temporary medical benefits for her right leg, back, and neck injuries through April 23, 2018.

Noble filed a petition for reconsideration requesting, as she does on appeal, the ALJ to make additional findings of fact addressing whether she suffered from a prior, active condition. The ALJ overruled Noble's petition stating:

Further, this ALJ notes that the shoulder claim was not dismissed, as the ALJ found that she does have a permanent[sic] injury, but no permanent[sic] impairment rating. Thus, she retains her right to seek treatment for her shoulder injury, and/or to seek increased benefits due to a worsening of condition[sic] in the future. However, this ALJ did not believe that Plaintiff met her burden to prove that she had a permanent impairment rating given Dr. Snider's inability to reproduce instability in her shoulder upon

examination, which was what Dr. Madden's impairment rating was based upon. Plaintiff further asks that the ALJ rely on Plaintiff's testimony concerning her continuing complaints. However, this ALJ did not find Plaintiff to be a very convincing witness in light of her allegations that she was unable to receive treatment, despite the ALJ's order to the contrary, and the fact that she did not attempt to return to Fletcher for treatment, or attempt to enforce the ALJ's order permitting continued treatment. Finally, when she did seek treatment from Fletcher, she was offered muscle relaxers, but she requested Neurontin, and when the medication was denied, she did not return for further treatment.

This ALJ did not find that Plaintiff had a pre-existing and active condition. Rather, this ALJ found that Plaintiff sustained a permanent work injury, albeit not ratable at this time.

On appeal, Noble argues:

The ALJ's determination that her issues are not work-related is contrary to the evidence, that the ALJ's decision is not in conformity with the Act, that her decision is arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion and that the credible evidence is so overwhelming in her favor that no reasonable person could reach the same conclusion as ALJ.

Noble asserts the ALJ "essentially dismissed this claim based on [her] inability to treat." She also points to the October 1, 2018 visit with Ms. Fletcher and the fact she continued to suffer since the August 27, 2016 work injury. Noble argues the ALJ failed to sufficiently summarize and properly weigh the evidence in accordance with Arnold v. Toyota Motor Manufacturing, 375 S.W.3d 56, 61-62 (Ky. 2012). Noble asserts the evidence clearly supports a finding of a permanent injury.

We find these issues raised by Noble on appeal are nothing more than a re-argument of her case before the ALJ. Noble impermissibly requests this Board to engage in fact-finding and substitute its judgment, as to the weight and credibility of the evidence, for that of the ALJ. This is not the Board's function. *See* KRS 342.285(2); Paramount Foods, Inc. v. Burkhardt, 695 S.W.2d 418 (Ky. 1985).

As the claimant in a workers' compensation proceeding, Noble had the burden of proving each of the essential elements of her claim, including entitlement to income benefits. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Noble 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 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 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.

We begin by finding the ALJ summarized and properly weighed the evidence before her, and had a clear understanding of the record. We also find substantial evidence supports her determination, and a contrary result is not compelled.

The ALJ found Noble sustained a permanent right shoulder injury due to the work-related assault, but this did not warrant an impairment rating. The ALJ awarded Noble medical benefits for the right shoulder condition pursuant to FEI Installation v. Williams, 214 S.W.3d 313 (Ky. 2007). The record contains only one impairment rating for Noble's right shoulder condition. In his March 14, 2018 report, Dr. Madden diagnosed right shoulder pain and assessed a 6% current

impairment rating. However, the ALJ found Noble did not attain MMI until April 23, 2018, a finding which has not been challenged on appeal and is supported by substantial evidence. Indeed, Dr. Madden emphasized Noble had not attained MMI at the time of his examination.

Permanent partial disability is defined as, “the condition of an employee who, due to an injury, has a permanent disability rating” KRS 342.11(11)(b). Pursuant to Chapter 1.2 of the AMA Guides, “an impairment is considered permanent when it has reached **maximum medical improvement (MMI)**, meaning it is well stabilized and unlikely to change substantially in the next year with or without medical treatment.” (original emphasis). Likewise in Chapter 2.4, the AMA Guides states, “An impairment should not be considered permanent until the clinical findings indicate the medical condition is static and well stabilized, often termed the date of **maximal medical improvement (MMI)**.” (original emphasis). Therefore, the ALJ could not rely upon the only impairment rating in the record since it pre-dated Noble’s attainment of MMI. However, as noted by the ALJ, the absence of an permanent impairment rating does not preclude a finding of entitlement to medical benefits. In FEI Installation v. Williams, *supra*, the Court stated as follows in finding a claimant’s eligibility for medical benefits does not require a permanent impairment rating:

Unlike KRS 342.0011(11) and KRS 342.730(1), KRS 342.020(1) does not state that eligibility for medical benefits requires proof of a permanent impairment rating, of a permanent disability rating, or of eligibility for permanent income benefits. Moreover, it states clearly that liability for medical benefits exists “for so long as the employee is disabled regardless of the duration of the employee's income benefits.” Mindful of

the relationship between impairment and disability under the 1996 Act, we conclude that disability exists for the purposes of KRS 342.020(1) for so long as a work-related injury causes impairment, regardless of whether the impairment rises to a level that it warrants a permanent impairment rating, permanent disability rating, or permanent income benefits. Id. at 319-320.

Therefore, we find the ALJ did not err in finding Noble sustained a permanent right shoulder injury which does not warrant a permanent impairment rating. We likewise affirm the ALJ's award of Noble's entitlement to past and future medical expenses.

Dr. Snider's opinion constitutes substantial evidence supporting the ALJ's determination that Noble did not sustain a permanent injury to her cervical spine due to the work-related assault. Prior to the interlocutory opinion, Dr. Snider noted his cervical examination demonstrated no obvious abnormality other than superficial tenderness and general diminishment of range of motion. Dr. Snider diagnosed Noble with contusions of the neck, right shoulder and right thigh, but saw no objective abnormality that would warrant an impairment rating for any of Noble's conditions. Subsequent to the interlocutory opinion, Dr. Snider reviewed the additional treatment received by Noble, and diagnosed strain and contusion to her neck and right shoulder. He again noted he was unable to identify a permanent anatomic change qualifying her for an impairment pursuant to the AMA Guides, and assigned no restrictions.

The ALJ also relied upon Noble's most recent treatment record with Ms. Fletcher on October 1, 2018, who observed normal active range of motion of the cervical spine. Based upon the above, and in line with Robertson v. United Parcel

Service, 64 S.W.3d 284 (Ky. 2001), we believe the ALJ could reasonably conclude based on the evidence, the work-related assault produced only a transient, temporary cervical injury resulting in no need for future medical treatment beyond April 23, 2018. Similarly, based upon the opinions of Dr. Snider, the ALJ could reasonably conclude the assault produced only transient back and leg injuries, resulting in no need for future medical treatment beyond April 23, 2018.

Noble relies upon her own testimony in support of her arguments on appeal. However, the ALJ clearly found her testimony unconvincing and was neither mandated nor compelled to determine otherwise. Square D Co. v. Tipton, supra.

Accordingly, the April 12, 2019 Opinion and Order, and the May 10, 2019 Order on petition for reconsideration rendered by Hon. Christina D. Hajjar, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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