

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 21, 2020

CLAIM NO. 201892747

NEW VISTA COMMUNITIES

PETITIONER

VS. **APPEAL FROM HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE**

PATRICIA MITCHELL
and HON. MONICA RICE-SMITH
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
VACATING IN PART AND REMANDING**

* * * * *

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

STIVERS, Member. New Vista Communities (“New Vista”) appeals from the August 8, 2020, Opinion, Award, and Order and the September 11, 2020, Order overruling its Petition for Reconsideration of Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ awarded Patricia Mitchell (“Mitchell”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”)

benefits based upon a 5% combined impairment rating, and medical benefits for a work-related right knee injury.

On appeal, New Vista asserts the ALJ erred when she included the impairment rating of Dr. Gregory Snider assessed for Mitchell's loss of right leg muscle mass and atrophy. New Vista argues that Dr. Snider could not opine, within a reasonable degree of medical probability, the atrophy is causally related to the work-related injury.

BACKGROUND

The Form 101, filed in the record on August 28, 2019, alleges Mitchell sustained work-related injuries to her right knee on February 20, 2018, "when she was shoved by an unruly patient."

The May 28, 2020, Benefit Review Conference Order and Memorandum lists the following contested issues: benefits per KRS 342.730, average weekly wage, unpaid or contested medical expenses, ability to return to work, TTD, and proper use of the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment. Under "Other" is the following: "Entitlement to medical benefits."

Mitchell was deposed on November 15, 2019, and she testified at the June 9, 2020, hearing. Her testimony is not pertinent to the issue on appeal.

Mitchell introduced the December 12, 2019, Form 107 Medical Report of Dr. Bruce Guberman. After performing a physical examination and a medical records review, Dr. Guberman diagnosed the following:

1. History of sprain of the right knee with medial meniscus tear and chondromalacia.

a. status post right knee arthroscopy, partial medial meniscectomy and chondroplasty of the medial femoral condyle of 5/3/2018.

Dr. Guberman attributed Mitchell's diagnosis to the February 20, 2018, work-related injury. He opined Mitchell obtained maximum medical improvement ("MMI") as of the date of his report, December 12, 2019. His calculation of the impairment rating is as follows:

From Table 17-10 on page 537 of the Guides to the Evaluation of Permanent Impairment, Fifth Edition, by the American Medical Association, the claimant receives a 4 (four) percent impairment of the whole person for range of motion abnormalities of the right knee. Since an impairment rating is recommended based on range of motion abnormalities, in accordance with Table 17-2 on page 526 of the Guides, no additional impairment rating is recommended for the partial medial meniscectomy from Table 17-33 beginning on page 526 of the Guides, no additional impairment rating is recommended for the partial medial meniscectomy from Table 17-33 beginning on page 546 of the Guides. Therefore, the entire impairment rating recommended for this injury is 4 (four) percent impairment of the whole person. Any impairment she has already received for this injury would have to be subtracted from this amount.

New Vista introduced Dr. Snider's February 20, 2020, Independent Medical Evaluation ("IME") report. After performing a physical examination and a medical records review, Dr. Snider diagnosed post partial medial meniscectomy and medial femoral condyle chondroplasty. Dr. Snider opined Mitchell reached MMI on July 10, 2018, and her right leg condition is a permanent change to her baseline anatomy. Regarding an impairment rating, Dr. Snider opined, in full, as follows:

5. According to the AMA Guides, 5th Edition, I cannot confirm any impairment for loss of ROM. According to Table 17-33, there is 1% WPI for partial meniscectomy.

However, Ms. Mitchell appears to exhibit loss of muscle mass in her right leg that appears to be attributed to her postoperative state. This was not a finding noted by either Dr. Cunningham or Dr. Guberman and could be a new finding or could be related to her previous intermittent back complaints. I cannot state within a reasonable degree of medical probability that it is related to her knee injury, but as she presented today, according to Table 17-6, there is 4% WPI for loss of thigh muscle and 1% WPI for loss of calf muscle, for 5% WPI. In summary, for the work-related injury, 1% WPI status post partial medial meniscectomy.

10. As above, I cannot confirm a 4% WPI for loss of ROM. Based on the procedure performed, Ms. Mitchell has 1% WPI. It appears that she may have a new finding of right leg atrophy that is not definitively related to the injury in question.

In the August 8, 2020, Opinion, Award, and Order, the ALJ provided the following findings of fact and conclusions of law which are set forth, in relevant part, *verbatim*:

1. The facts as stipulated by the parties.
2. Benefits pursuant to KRS 342.730 – Ability to return to work performed at the time of injury.

To qualify for an award of permanent partial benefits under KRS 342.730, the claimant is required to prove not only the existence of a harmful change as a result of the work-related traumatic event, he is also required to prove the harmful change resulted in a permanent disability as measured by an AMA impairment. KRS 342.0011(11), (35), and (36). Additionally, when work-related trauma arouses or exacerbates a preexisting condition, it has caused a harmful change in the human organism, i.e., an injury as defined by KRS 342.0011(1). Although the impairment that results is compensable, the type and duration of benefits depends on whether the impairment is permanent or temporary. To the extent that the condition is active immediately before the trauma occurs, it cannot have been aroused by the trauma and, thus, to that extent cannot be compensable. “[T]o be characterized as active, an underlying

preexisting condition must be symptomatic and impairment ratable 6 pursuant to the AMA Guidelines immediately prior to the occurrence of the workrelated injury.” Finley v. DBM Technologies, 217 S.W. 3d 261 (Ky. App. 2007). The employer bears the burden of proving the existence of a preexisting, active disability.

After careful consideration of the evidence, the ALJ finds Taylor has sustained a combined 5% whole person impairment because of her February 29, 2018 right knee injury. The ALJ finds Dr. Snider’s impairment ratings persuasive, but not his opinion regarding causation of the impairment. Based on Dr. Snider’s findings and the totality of the evidence, the ALJ believes Dr. Snider’s total impairment relates to the work injury of February 20, 2018.

Dr. Snider diagnosed a medial meniscus tear due to the work injury February 2, 2018. On physical exam, he noted loss of muscle mass in the right leg. Dr. Snider assigned a 5% impairment for the loss of muscle mass and a 1% impairment for Mitchell’s work injury. Although Dr. Snider stated it appeared the loss of muscle mass is attributable to Mitchell’s postoperative state, he stated he could not relate it to her work injury. Dr. Snider’s failure to relate the loss of muscle mass and its impairment to the injury are perplexing. Dr. Snider specifically opined the meniscus tear was due to the work injury and the treatment rendered was reasonable and necessary. Further, Dr. Snider advises the muscle loss could be related to her low back pain; however, the evidence does not support that conclusion. Mitchell made no complaints of low back pain to Dr. Snider. Mitchell acknowledged she has some intermittent low back pain, but has no right leg pain associated with her back pain. Mitchell has weakness in her right leg since the surgery. Mitchell has sustained no new injuries to her right leg or knee since her surgery. Dr. Snider specifically attributed the loss of muscle mass to her postoperative state, but failed to relate it to the work injury, which necessitated the surgery. I am simply not sure how he could not attribute it to her work injury, in light of his own opinions and the totality of the evidence.

Based on foregoing, the ALJ finds Mitchell has a 5% impairment for her muscle loss in her right leg and a 1%

impairment for her meniscal repair for a combined whole person impairment of 5%.

The ALJ finds Mitchell does retain the ability to perform her work as a residential assistant. Although Mitchell believes she cannot return to her job as a residential assistant, the evidence does not support such a finding. Both Dr. Cunningham, Mitchell's treating physician, and Dr. Snider released her to return to work without restrictions. In fact, Mitchell returned to her regular duty job, without restrictions. She continued in that job for 10 months, without any complaints regarding her job performance. When Mitchell resigned from her job at Oakwood, she made no mention of having any difficulty with her job; she simply advised she was resigning to take a different job. Although Mitchell continues to have some pain in her knee, particularly when she is on it a prolonged period, she is receiving no current treatment or taking any prescription medications.

Based on the foregoing, Mitchell is able to return to her job at Oakwood as a residential assistant, and is not entitled to the three multiplier.

Based on the foregoing, the ALJ finds Mitchell has sustained a 5% impairment due to the February 20, 2018 work injury. Taylor's benefits shall be calculated as follows:

$$\$667.79 \times 66 \frac{2}{3} \times 5\% \times .65 = \$14.47$$

In its Petition for Reconsideration, New Vista asserted the same arguments it now asserts on appeal. By Order dated September 11, 2020, the ALJ overruled New Vista's Petition for Reconsideration.

On appeal, New Vista maintains the ALJ erred by assigning a 4% impairment rating to Mitchell's muscle atrophy, as Dr. Snider, the physician upon whom the ALJ relied, could not opine, within a reasonable degree of medical probability, that Mitchell's muscle atrophy was causally-related to the work injury.

We vacate the ALJ's award of PPD benefits based upon a 5% whole person impairment rating and remand for additional findings.

ANALYSIS

When the question of causation involves a medical relationship not apparent to a layperson, the issue is properly within the province of medical experts and an ALJ is not justified in disregarding the medical evidence. Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc., 618 S.W.2d 184, 186-187 (Ky. App. 1981). Medical causation must be proven by medical opinion within "reasonable medical probability." Lexington Cartage Company v. Williams, 407 S.W.2d 395 (Ky. 1966). The mere possibility of work-related causation is insufficient. Pierce v. Kentucky Galvanizing Co., Inc., 606 S.W.2d 165 (Ky. App. 1980).

Here, the cause of Mitchell's muscle atrophy is a medical issue that falls squarely within the province of medical experts. Thus, the ALJ erred by concluding "Dr. Snider specifically attributed the loss of muscle mass to her postoperative state." In actuality, Dr. Snider, in the February 20, 2020, IME, opined that the loss of muscle mass in Mitchell's right leg "**appears to be** attributed to her postoperative state." (Emphasis added). He further opined the loss of muscle mass could either be a new finding or even related to Mitchell's "intermittent back complaints." Consequently, Dr. Snider concluded that he "cannot state within a reasonable degree of medical probability that [the atrophy] is related to her knee injury." He also opined that Mitchell "may" have a new finding of muscle atrophy "that is not definitely related to the injury in question." This language does not meet

the necessary threshold as articulated by the Kentucky Supreme Court in Lexington Cartage Company, *supra*.

On remand, the ALJ must re-examine the medical evidence in the record and determine if substantial evidence supports a causal connection between Mitchell's right leg muscle atrophy, as diagnosed by Dr. Snider, and the work-related injury. "Substantial evidence" is defined as evidence of relevant consequence having the fitness to induce conviction in the minds of reasonable persons. Smyzer v. B. F. Goodrich Chemical Co., 474 S.W.2d 367 (Ky. 1971). We emphasize that the ALJ can rely upon Dr. Snider's 4% impairment rating for muscle atrophy if there is another medical opinion in the record addressing the causal connection between Mitchell's atrophy and the work-related injury. In such a case, the ALJ would have the discretion to rely upon both medical opinions simultaneously. However, if there is no medical evidence in the record establishing a causal connection between Mitchell's right leg muscle atrophy and the work-related injury, the ALJ cannot award PPD benefits based upon an impairment rating, including Dr. Snider's, assessed for the atrophy.

On remand, the ALJ must re-examine the entirety of the medical testimony and make the appropriate determination accordingly. The ALJ is free to once again rely upon Dr. Snider's assessment of a 1% impairment rating for Mitchell's partial meniscectomy or she may rely upon the impairment ratings assessed by other physicians in the record.

Accordingly, the finding that the work injury generated a 5% permanent impairment rating and the award of PPD benefits, as set forth in the

August 8, 2020, Opinion, Award, and Order and affirmed in the September 11, 2020, Order, are **VACATED**. The claim is **REMANDED** to the ALJ for additional findings and an amended award in accordance with the views set forth herein.

ALVEY, CHAIRMAN, CONCURS.

BORDERS, MEMBER, NOT SITTING.

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