

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 11, 2022

CLAIM NO. 201801680

PATRICIA ARVIN

PETITIONER

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

THE OUTDOOR GROUP, and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

MILLER, Member. Patricia Arvin (“Arvin”) appeals from the September 15, 2021, Opinion, Award, and Order and the October 11, 2021, Order denying her Petition for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ found Arvin is not entitled to additional temporary total disability (“TTD”) benefits. For the reasons set forth below, we affirm.

BACKGROUND

Arvin started working for The Outdoor Group in April 2017. Her job entailed wrapping wire around a machine with two sprockets to make strings for cross bows and compound bows. Her position required repetitive use of her hands.

Arvin filed a Form 101 alleging an injury on June 22, 2018, when she was twisting wire on the machine and felt a pop in her left wrist with pain shooting to the elbow. She also alleged a right hand/wrist injury from repetitive use of her right hand. Arvin worked light duty until the plant in Stanton, Kentucky shut down on December 11, 2018. During this timeframe, she treated with Dr. Greg Grau who administered injections into her left wrist and elbow.

Arvin's care was transferred to Dr. Anub Chattha with an initial visit on November 27, 2018. Dr. Chattha performed a left carpal tunnel release on January 10, 2019, and a right carpal tunnel release on April 25, 2019. Medical benefits were paid, and TTD benefits were paid from January 10, 2019, until December 25, 2019.

Arvin began treatment of her left elbow condition with Dr. Chattha in June 2019. The diagnosis was left common extensor tendonitis. An MRI of October 10, 2019 confirmed tendinitis of the common extensor tendon. Dr. Chattha recommended surgery.

Dr. Robert Burgess evaluated Arvin on December 12, 2019, on behalf of The Outdoor Group. Dr. Burgess did not believe the proposed surgery for the left elbow condition was reasonable or necessary. He believed Arvin was at maximum

medical improvement (“MMI”) and needed no additional medical care. He did not assign any physical restrictions.

The claim was bifurcated on the issue of compensability of the left elbow surgery. The surgery occurred on February 27, 2020. The operative report states the procedure performed was a left elbow open fasciotomy and repair of the common extensor origin. Subsequently, the ALJ issued an Interlocutory Order on September 25, 2020, finding the surgery compensable. TTD benefits were not mentioned in the Order. The claim resumed for purposes of indemnity benefits.

Prior to the February 2020 surgery, Dr. Chattha never placed Arvin off work. He simply stated she was fit for work with restrictions. Post-surgery, Dr. Chattha again did not place Arvin off work, but assigned physical restrictions of no heavy lifting, pushing, or pulling with palm down. Dr. Chattha released Arvin to regular work on June 16, 2020. Dr. Chattha stated Arvin would attain MMI on August 27, 2020

In a supplemental report, Dr. Burgess stated MMI was reached on June 16, 2020, the date Dr. Chattha released Arvin to work with no restrictions. He stated Arvin did not qualify for an impairment rating for tendinitis according to the 5th Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, (“AMA Guides”) and believed she could work without restrictions.

Arvin never returned to work of any type after the plant shut down in December 2018. She testified in her deposition of June 16, 2020, that she was caring for her two-year-old grandson who has special needs. She reiterated at the final

hearing on July 21, 2021 that she continued to take of her grandson who was in her custody.

Dr. Bruce Guberman completed a Form 107 after an evaluation on March 23, 2021. He assessed a 2% impairment rating for the left elbow condition according to the AMA Guides, did not recommend any impairment rating for the carpal tunnel surgeries, and opined Arvin had attained MMI as of that date. He stated she is unable to lift, carry, push, or pull objects weighing more than ten pounds occasionally or more than 2-3 pounds frequently. He also stated she was unable to use her left hand and arm for repeated activities.

In the final Opinion, Award, and Order, the ALJ explained her reasoning for finding the left elbow surgery compensable but not awarding TTD benefits. Of particular importance, there was no evidence that the treating surgeon ever placed Arvin off work, but instead gave physical restrictions that would not prohibit Arvin from performing her prior work at The Outdoor Group. Arvin testified she did not have to do any lifting on the job and there was a lack of testimony regarding any heavy pushing or pulling with palm down.

The ALJ found the most persuasive MMI date to be that determined by Dr. Burgess on December 12, 2019, and she acknowledged TTD benefits had been paid from January 10, 2019 through December 26, 2019.

Arvin appeals, requesting TTD benefits from December 27, 2019 through March 23, 2021.

ANALYSIS

TTD is statutorily defined in KRS 342.0011(11)(a) as “the condition of an employee who has not reached maximum medical improvement from an injury and has not reached a level of improvement that would permit a return to employment[.]” In Magellan Behavioral Health v. Helms, 140 S.W.3d 579 (Ky. App. 2004), the Court of Appeals instructed that until MMI is achieved, an employee is entitled to TTD benefits as long as he remains disabled from his customary work or the work he was performing at the time of the injury. In Central Kentucky Steel v. Wise, 19 S.W.3d 657, 659 (Ky. 2000), the Kentucky Supreme Court explained, “It would not be reasonable to terminate the benefits of an employee when he is released to perform minimal work but not the type that is customary or that he was performing at the time of his injury.” Thus, a release “to perform minimal work” does not constitute a “return to work” for purposes of KRS 342.0011(11)(a).

In Livingood v. Transfreight, LLC, et, al., 467 S.W.3d 249 (Ky. 2015), the Supreme Court declined to hold a claimant is entitled to TTD benefits so long as he or she is unable to perform the work performed at the time of the injury. The Court stated, “... we reiterate today, Wise does not ‘stand for the principle that workers who are unable to perform their customary work after an injury are always entitled to TTD.’” Id. at 254. *Also see*, Trane Commercial Systems v. Tipton 481 S. W. 3d 800 (Ky. 2016) further clarifying when TTD benefits are appropriate if the injured worker has not reached MMI and has not reached a level of improvement sufficient to permit a return to employment.

The ALJ chose the MMI date first offered by Dr. Burgess. This is within the ALJ's prerogative to pick and choose among the various medical opinions. This finding alone prohibits an award of additional TTD benefits. However, the ALJ further determined there was evidence Arvin could perform her job even with the restrictions assigned by Dr. Chattha. Arvin testified there was no lifting or over-head work in her job. In her Opinion, Award, and Order, the ALJ specifically detailed her reasoning for denying additional TTD benefits, foremost the lack of any restrictions imposed by the treating surgeon that would prohibit Arvin from performing her job. The ALJ acknowledged Arvin does not feel she can perform her job, but again stated she was taking care of her grandson virtually full time. Arvin said in her June 2020 deposition she had legal custody of her grandson and, "I've got the grand baby and there is no time for nothing." She did not have any physical therapy after the left elbow surgery, in contrast to therapy after the carpal tunnel releases.

As the claimant in a workers' compensation proceeding, Arvin had the burden of proving each of the essential elements of her claim. Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Because Arvin 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 the 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). Although a party may note evidence that would have supported a different outcome than that reached by the 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 (Ky. 1999).

In terms of weighing the differing medical opinions based on sound medical reasoning, it is for the ALJ to choose which opinion to believe. Jones v. Brasch-Barry General Contractors, 189 S.W.3d 149, 153 (Ky. App. 2006). While there was evidence that would have supported an award of additional TTD benefits, there was evidence as found by the ALJ to deny additional TTD benefits. That determination is best left to the trier of fact.

Accordingly, the September 15, 2021, Opinion, Award, and Order and the October 11, 2021, Order on Petition for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge are hereby **AFFIRMED**.

ALL CONCUR.

DISTRIBUTION:

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