

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 17, 2020

CLAIM NO. 201765078

REBECCA O'TOOLE

PETITIONER

VS.

APPEAL FROM HON. JEFF V. LAYSON, III,
ADMINISTRATIVE LAW JUDGE

JEFFERSON COUNTY PUBLIC SCHOOLS and
HON. JEFF V. LAYSON, III,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS and RECHTER¹, Members.

ALVEY, Chairman. Rebecca O'Toole ("O'Toole") appeals from the Opinion, Award, and Order rendered August 19, 2019 by Hon. Jeff V. Layson III, Administrative Law Judge ("ALJ"). The ALJ found O'Toole only established she sustained a temporary injury for which he awarded temporary total disability

¹ Although Board Member Rechter's term expired on January 4, 2020, she is permitted to serve until January 22, 2020 pursuant to KRS 342.213(7)(b), and will participate in decisions rendered by this Board through that date.

("TTD") and temporary medical benefits. The ALJ dismissed O'Toole's claim for permanent income and medical benefits for a head injury she sustained on August 31, 2017, while working for Jefferson County Public Schools ("JCPS"). O'Toole also appeals from the September 11, 2019 order denying her petition for reconsideration.

O'Toole argues the ALJ erred by finding she sustained only a temporary injury while working for JCPS on August 31, 2017. She argues Dr. Jeffrey Frank's opinions compel a finding that she is entitled to future medical benefits. We disagree. The ALJ performed the appropriate analysis and because substantial evidence supports his decision, and a contrary result is not compelled, we affirm.

O'Toole filed a Form 101 on June 4, 2018 alleging she sustained a head injury while working for JCPS when her foot stuck to the floor as she was stepping backward, causing her to lose her balance, fall, and strike her head on a table base. O'Toole missed a brief time from work due to the injuries she sustained in the accident, but she has not worked since she underwent unrelated knee surgeries in March 2018. The Form 104 filed in support of the claim indicates O'Toole's employment history consists of working as an EMT, and as a school instructor.

O'Toole testified by deposition on September 5, 2018, and at the final hearing held June 19, 2019. O'Toole was born August 30, 1963, and is a resident of Louisville, Kentucky. She is a high school graduate, and has two bachelor's degrees. She also has EMT and cosmetology certifications. O'Toole began working for JCPS in 1996. She has additionally performed some work for Yellow Ambulance. At the

time of the accident, she only worked at special events for the ambulance service. In addition to the jobs reflected in the Form 101, O'Toole has worked as a clerk in a cosmetics store, and as a hairdresser.

When O'Toole was hired by JCPS, she worked with physically and mentally disabled students in order to allow them to function more independently. She worked in that capacity until 2015 when she became a middle school computer lab instructor. She had to obtain additional training to perform that job. At the time of her deposition, O'Toole was still employed by JCPS, but she did not know what job she would return to. She was receiving long-term disability benefits at the time of her deposition. By the time of the hearing, she had not returned to work, and had applied for disability retirement.

O'Toole testified she had sustained at least nine head injuries beginning at age ten. She also stated she sustained upper and lower back injuries while working as an EMT for Yellow Cab in 2013 or 2014. She continues to take Oxycodone and Tizanidine for her low back problems. She also noted that in 1997, she was attacked by a reindeer at a training event for her students. She was attacked when she was instructing on care and feeding of animals. She sustained injuries to her chest, shoulder, the backs of her legs, and struck her head in the attack. She has undergone forty-seven surgeries due to that attack, most of which were for removal of infection. She was eventually released to return to work. She also reported that she was involved in a motor vehicle accident in 2017, when she was struck from behind.

O'Toole additionally reported she was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD") as a teenager, and began treating with Dr. Frank for headaches in 2016 after she was struck in the head by a board in her basement. She experienced daily headaches for a while after that incident, and still had them three to four times per week by August 31, 2017. O'Toole also reported she was diagnosed with learning disabilities as a child, and has memory issues associated with her ADHD. O'Toole was treating for depression, anxiety, and post-traumatic stress disorder ("PTSD") stemming from the reindeer attack prior to her work injury.

On August 31, 2017, O'Toole had arrived at work, and went downstairs to sign in. She noticed an item on the floor between tables. She bent over to pick it up, and when she attempted to step back, her foot stuck, causing her to lose her balance and fall backward, striking her head on the base of a table. At her deposition, she testified she was dizzy and nauseous after the incident, and her head bled a little. At the hearing, she testified she was "knocked out". She was taken to an immediate care center by a co-worker. She did not require stitches. She missed a brief time from work, then returned to her regular job, missing a few days after she returned. By January, she continued to have headaches three to four times per week.

At the time of her deposition, O'Toole still had headaches in the back of her head, but she stated Botox injections and pain blocking injections have helped. She stated her headaches are different than the ones she experienced in 2016. At the hearing, O'Toole testified she now has memory problems, nausea, vertigo, and balance problems. She testified that she does not believe that she has the ability to

return to the job at JCPS due to the effects of the injuries she sustained on August 31, 2017. She admitted she took medication for memory problems prior to her work injury.

In support of her claim, O'Toole filed multiple records from Dr. Frank, a neurologist with whom she began treating in February 2017, prior to the work incident. On February 8, 2017, Dr. Frank noted O'Toole had experienced multiple episodes of head trauma during her life. He noted that at age ten, she fell and struck her head on concrete, causing her to lose consciousness. At age thirteen, she was kicked in the head by a donkey and lost consciousness. At age sixteen, she was roughhousing with her brothers, and struck her head, again losing consciousness. He also noted the 1997 incident when she was attacked by the reindeer, when she fell backward, striking her head on a rock. Four years prior to the date of treatment, she was hit in the head by the trunk lid of her car, again causing a brief loss of consciousness. She had two additional episodes in November 2016. She was first hit in the head by a wooden slat while working in her basement. A few days later she was struck in the head by a beer mug. She reported she was dazed after both of those episodes. O'Toole stated she is clumsy, and bumps into walls for no reason. She complained of having headaches three times per week. Dr. Frank diagnosed her with ADHD, anxiety, seasonal asthma, and bronchitis. He also noted she may have chronic traumatic encephalopathy ("CTE").

On June 2, 2017, Dr. Frank noted he saw O'Toole for a follow up of her multiple head traumas. He noted her memory was worsening, suggestive of CTE. On June 11, 2017, Dr. Frank repeated the history of at least nine episodes of

head trauma, as well as PTSD from the reindeer attack. On that date, he diagnosed O'Toole with ADHD and generalized anxiety disorders.

On August 25, 2017, O'Toole saw Dr. Kristopher Fannin at Norton Healthcare on August 25, 2017. She had twisted her foot at home the night before, and was complaining of pain and swelling. She was given a walking boot. He noted she had been involved in an MVA in June 2017.

On September 1, 2017, O'Toole saw Kathryn Dunlap, APRN, at Norton Healthcare for treatment of a concussion she sustained after falling at work. O'Toole reported she had bent over to pick up an item. She stepped in something sticky, and this caused her to lose her balance and fall backward onto her buttocks, striking her head. On September 8, 2017, Dr. Frank noted O'Toole had a history of multiple episodes of head trauma over the years. He noted that neuropsychological testing performed earlier in the year was suggestive of her having problems with ADHD. Dr. Frank took her off work until September 15, 2017.

O'Toole saw Dr. Frank on January 7, 2018. He again noted the history of multiple head trauma, and the work event of August 31, 2017. After that fall, she reported an increase in frequency of her headaches. He noted she returned to work approximately two weeks after that incident. He noted she missed work from the date of the accident until September 15, 2017; October 4, 2017; December 1, 2017; December 13, 2017; and February 1, 2018 all due to the work accident.

O'Toole saw Dr. Frank on February 1, 2018. He placed her off work for one day. She reported increasing headaches since the August 2017 injury. She also complained of cognitive problems, not supported by testing. On April 25, 2018,

Dr. Frank followed up, and noted she had normal concentration. He recommended treatment with Botox. On May 4, 2018, O'Toole complained of leg and feet swelling since the Botox treatment. On August 27, 2018, he ordered additional Botox treatment.

On November 1, 2018, Dr. Frank stated O'Toole had undergone two courses of Botox. She still complained of daily headaches, but they were less severe. Dr. Frank saw her again on November 21, 2018. He diagnosed her with chronic post-traumatic headaches due to the head trauma she sustained at work. He recommended she limit the time she spends in front of a computer screen. He urged her to take breaks, or go home if she begins feeling ill. He stated all of the treatment he has provided since August 31, 2017, including Botox, has been work-related

On April 2, 2019, Dr. Frank indicated he is not qualified to provide impairment ratings. He also stated he is not qualified to comment upon impairment ratings issued by other physicians. He agreed to provide O'Toole with continued treatment. On November 22, 2019, Dr. Frank noted O'Toole's last episode of head trauma occurred on August 31, 2017. He noted her previous history of multiple head traumas, but that she had sustained a marked increase in headaches after the August 2017 incident. He stated her condition is permanent.

On May 21, 2019, Dr. Frank noted O'Toole continued to complain of frequent headaches. He admitted she experienced headaches prior to the work incident, but they were not as frequent or severe. He recommended continued Botox injections every three months, and occipital nerve blocks and office visits every six months.

O'Toole filed the report of Dr. Gregory Nazar, a neurologist, who evaluated her on August 7, 2018. Dr. Nazar noted O'Toole's longstanding history of multiple episodes of head trauma and concussion, with associated loss of consciousness, beginning around age ten. She reported she experienced headaches three to four times per week prior to August 31, 2017. He noted she had a pre-morbid history of ADHD and PTSD subsequent to being attacked by a reindeer. He noted that on May 10, 2017, prior to the work incident, she had no indication of post-concussive symptomatology. She did not lose consciousness when she fell on August 31, 2017. She reported being dazed after that incident. He stated that if she did sustain a concussion in that incident, it was mild. She reported increased frequency of headaches, with no increase or change in cognition or concentration abilities. Dr. Nazar noted O'Toole's pattern of "bad" headaches had not changed from her pre-injury status. His neurological examination was normal. He also noted she was off work due to unrelated knee problems since March 2018.

Dr. Nazar diagnosed O'Toole with a mild concussion, and a subjective increase in migraines. She reported worsening of photophobia and nausea with headaches subsequent to the August 31, 2017 incident. He noted her pre-injury history of repetitive concussions, headaches, dizziness, and difficulty with concentration. He also noted she had a pre-morbid anxiety disorder and PTSD. Dr. Nazar found she reached maximum medical improvement ("MMI") in February 2018, six months post injury. He stated she does not have a new impairment rating attributable to the August 31, 2017 incident. He noted her neurological examination is entirely normal. He noted she was released to return to work in September 2017.

JCPS filed the August 31, 2017 records from Kentucky One Urgent Care – Dupont. She was seen by Frank Buchanan, PA-C. Those records reflect O’Toole had injured her head on that date, and had a probable concussion note. O’Toole was reported to be alert, cooperative, and in no apparent distress. She was assessed with a head injury. A CT-scan revealed no intracranial hemorrhage or mass. The findings were normal.

JCPS filed additional records from Dr. Fannin. On September 9, 2016, O’Toole reported she had persistent headaches of several months’ duration with multiple symptoms. On November 21, 2016, he noted O’Toole presented with a possible concussion after hitting her head twice of the past three days. On December 19, 2016, O’Toole reported a history of headaches and recurrent dizziness beginning the month before. She also reported a history of experiencing a transient ischemic attack.

A Benefit Review Conference was held on June 6, 2019. The issues preserved for determination included whether O’Toole retains the capacity to return to the type of work performed on the date of the injury, work-relatedness/causation, permanent income benefits pursuant to KRS 342.730, TTD benefits, and injury as defined by the ACT (i.e. temporary v. permanent injury).

In his decision issued August 19, 2019, the ALJ acknowledged it is undisputed that O’Toole fell and struck her head on August 31, 2017, sustaining a mild concussion. He determined the evidence does not establish that she sustained a permanent “change in the human organism evidenced by objective medical findings” in that accident. He specifically noted that Dr. Nazar opined that O’Toole’s

condition is not significantly different from her pre-morbid state. The ALJ specifically found as follows:

“Injury” is defined by KRS 342.0011(1) as a “work-related traumatic event or series of traumatic events, including cumulative trauma, arising out of and in the course of employment which proximately causes a harmful change in the human organism evidenced by objective medical findings.” The term “objective medical findings” means “information gained through direct observation and testing of the patient applying objective or standardized methods.” When the causal relationship between an injury and a medical condition is not apparent to a lay person, the issue of causation is solely within the province of a medical expert. *Mengel v. Hawaiian-Tropic Northwest and Central Distributors, Inc.*, 618 S.W.2d 184 (Ky. 1981). An injury may be temporary, requiring the payment of TTD benefits and temporary medical benefits, while not resulting in a permanent change to the human organism that qualifies for permanent disability benefits or medical benefits. *Robertson v. UPS*, 64 S.W.3d 284 (Ky. 2001).

There is no dispute in this case that Ms. O’Toole was involved in a work-related traumatic event when she fell and struck her head on August 31, 2017. The medical evidence indicates that she sustained a mild concussion as a result of that incident. However, the medical evidence does not support a finding that Ms. O’Toole has suffered a permanent “change in the human organism evidenced by objective medical findings.” In arriving at this conclusion, the Administrative Law Judge relies upon the testimony of the Plaintiff’s IME physician, Dr. Nazar, who found that the Plaintiff’s current condition is not “significantly different from her premorbid situation.” Moreover, Dr. Nazar stated that Ms. O’Toole’s condition is not ratable under the AMA Guides and that “[t]here is no other treatment currently available to her specifically for her injury.”

The medical testimony from Dr. Nazar is essentially un rebutted. Based on that testimony, the Administrative Law Judge finds that Ms. O’Toole sustained a temporary work-related injury on August 31, 2017 for which she reached MMI no later than February 28,

2018. She has not met her burden of proving that she has any residual impairment or disability related to the work injury.

“Temporary total disability” is defined by statute as the condition of an employee who has not reached MMI and is not able to return to work. In this case, Ms. O’Toole was off from work beginning on September 1, 2017 and continuing until September 13, 2017, when she was released to return to work by Dr. Frank on September 14, 2017. Subsequent notes from Dr. Frank indicate that Ms. O’Toole missed work because of flare-ups in her condition on September 15, 2017; October 14, 2017; December 1, 2017, and; December 13, 2017. This amounts to a total of 17 days missed from work. Ms. O’Toole also missed work on February 1, 2018, but this appears to be related to a doctor’s appointment and not disability. Based on the foregoing, the Administrative Law Judge finds that Ms. O’Toole met the statutory definition of temporary total disability on the dates listed above, for a total of 17 days.

Finally, Dr. Nazar’s statement that there is no additional medical treatment specifically for the work injury is reasonable and credible in light of the fact that Ms. O’Toole was already actively treating for the same symptoms prior to the injury.

Based on the foregoing, the Plaintiff is entitled to an award of TTD benefits from September 1, 2017 through September 13, 2017 and for individual days on September 15, 2017; October 14, 2017; December 1, 2017, and; December 13, 2017. Additionally, the Defendant/Employer is liable for payment of work-related medical expenses incurred from August 31, 2017 through the date of MMI on February 28, 2018.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

1. The facts as stipulated.
2. The Plaintiff sustained a temporary work-related injury on August 31, 2017.

3. The Plaintiff reached MMI following the work-related injury on February 28, 2017.

4. The Plaintiff met the statutory definition of temporary total disability following the work-related injury from September 1, 2017 through September 13, 2017, and, again, on September 15, 2017; October 14, 2017; December 1, 2017, and; December 13, 2017.

5. The Plaintiff has failed to prove that she suffered any permanent impairment and/or disability as a result of the work-related injury.

6. The Defendant/Employer is liable for payment of work-related medical expenses incurred from August 31, 2017 through February 28, 2018.

O'Toole filed a petition for reconsideration arguing the ALJ erred in finding JCPS is not liable for payment of medical expenses after February 28, 2019. O'Toole requested additional findings regarding the duration of the medical benefits award. In his order on reconsideration issued September 11, 2019, the ALJ found as follows:

In her Petition, the Plaintiff states that it was error for the ALJ to find that the Defendant/Employer is not liable for payment of medical expenses incurred after February 28, 2019. This finding by the ALJ was based on medical testimony from Dr. Gregory Nazar. The Plaintiff argues that this finding was improper because Dr. Nazar's testimony did not take into consideration additional medical treatment which was proposed by Dr. Frank subsequent to Dr. Nazar's examination.

The Plaintiff in this case has a long pre-injury history of medical treatment for the same conditions and symptoms which are the basis of this claim. In his report, Dr. Nazar--who, by the way, was the Plaintiff's IME physician--stated that there "is no other treatment currently available to her specifically for her injury." The fact that Dr. Frank has proposed additional treatment for the same conditions and symptoms for which he has

been treating the Plaintiff long before the injury in this case in no way detracts from Dr. Nazar's opinion that there is no additional medical treatment necessary for that particular injury.

The Plaintiff's Petition for Reconsideration is overruled.

On appeal, O'Toole argues the ALJ erred in finding she only sustained a temporary head injury. She argues that while she has no permanent impairment stemming from the August 31, 2017 head injury, based upon Dr. Frank's opinions, she is entitled to future reasonable and necessary medical expenses pursuant to the Act. She argues the ALJ could only rely upon Dr. Nazar's opinion for finding that she has no impairment, not that she only sustained a temporary injury.

As the claimant in a workers' compensation proceeding, O'Toole 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 O'Toole was unsuccessful in her burden of establishing she sustained more than a temporary injury, 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). An ALJ is vested with broad authority to decide questions involving causation. Dravo Lime Co. v. Eakins, 156 S.W.3d 283 (Ky. 2003). 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 not adequate 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 an 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 could otherwise 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*.

In Robertson v. United Parcel Service, 64 S.W.3d 284, 286 (Ky. 2001), the Kentucky Supreme Court stated that where a claimant suffers a work-related injury with only transient effects, resulting in no permanent disability or change in

his pre-existing condition, he is not entitled to income benefits for permanent, partial disability, nor is he entitled to future medical expenses. The claimant in such a case is entitled to payment of the medical expenses incurred in treating the temporary flare-up of symptoms that resulted from the incident. An injured worker may establish a temporary injury for which only TTD benefits and temporary medical benefits are paid, but fail in the burden of proving a permanent harmful change to the human organism entitling him to permanent benefits.

After careful review, we find the ALJ accurately summarized the evidence. We determine Dr. Nazar's report constitutes substantial evidence supporting the ALJ's determination that O'Toole sustained only a temporary injury on August 31, 2017, for which she reached MMI by February 28, 2018. The ALJ clearly explained why he found Dr. Nazar's opinions the most probative in this claim. The ALJ also cited to the portions of Dr. Nazar's opinions he relied upon in reaching his decision.

We acknowledge O'Toole is able to point to conflicting evidence supporting her position on appeal. However, the ALJ as fact-finder determines the credibility of the evidence. The ALJ may also choose whom and what to believe when faced with conflicting evidence. The ALJ is not required to afford Dr. Frank's opinion more weight because he was a treating, rather than an evaluating, physician. Sweeney v. King's Daughters Medical Center, 260 S.W.3d 829 (Ky. 2008). It was the ALJ's prerogative to rely on the evidence outlined in his opinion. Because we find substantial evidence supports the ALJ's determination, and a contrary result is not compelled, we affirm.

Therefore, the August 19, 2019 Opinion, Award, and Order, and the September 11, 2019 Order on petition for reconsideration rendered by Hon. Jeff V. Layson, III, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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