Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: February 8, 2019

CLAIM NO. 201601040

RHONDA BLANDFORD PETITIONER

VS. **APPEAL FROM HON. TANYA PULLIN, ADMINISTRATIVE LAW JUDGE**

DOLLAR AISLE
UNINSURED EMPLOYERS' FUND
and HON. TANYA PULLIN,
ADMINISTRATIVE LAW JUDGE RESPONDENTS

OPINION
AFFIRMING
* * * * * *

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

STIVERS, Member. Rhonda Blandford ("Blandford")[1] seeks review of the October 8, 2018, Opinion and Order of Hon. Tanya Pullin, Administrative Law Judge ("ALJ") dismissing her claim for a head injury alleged to have been sustained due to an August

[1] The claim was initially filed by Blandford under the name Rhonda Gillman. However, prior to the August 27, 2018, hearing, Blandford married and "Blandford" became her last name. Accordingly, the ALJ changed the style of the action to reflect Blandford's married name.

15, 2015, motor vehicle accident ("MVA"). Blandford also appeals from the November 2, 2018, Order overruling her petition for reconsideration.

On appeal, Blandford argues the ALJ's determination she had not met her burden of proving a work-related injury is erroneous, as substantial evidence established a work-related injury. Blandford contends the ALJ did not take into consideration the medical records indicating she sustained a work-related injury. Blandford maintains that, "to some extent a complex medical issue should be run through a medical professional, but the most basic finding of a work-related injury can be shown by medical treatment records and opinions expressed by the treating doctors." Blandford insists the medical records generated on the date of the accident by Jewish Hospital Medical Center Southwest ("Jewish Hospital") show a MVA occurred with corresponding symptoms of head trauma. She further contends the medical records reflect she sustained a concussion based upon the objective medical evidence.

Blandford notes that, the day after the MVA, she presented to Norton Audubon Hospital ("Norton Hospital") and once again received a diagnosis of a concussion along with additional symptoms including facial drooping. A medical history was obtained with a notation that Blandford had been involved in a MVA with a subsequent CT of the head performed.

Blandford points out that she was later seen by her treating physician, Dr. William E. Aufox, who noted a history of a MVA and diagnosed a closed head injury and cervical strain. Blandford also treated with Dr. Blaine Lisner who discussed her past medical history and prior problems with headaches, including her problems

arising from a 2012 MVA. Blandford argues these medical providers had direct knowledge of her prior treatment and referenced this treatment in their medical records.

Blandford acknowledges the ALJ placed great emphasis on the inaccurate history she provided concerning her prior medical treatment. Notably, she concedes the history was not entirely accurate. However, Blandford argues Dr. C. Andrew Gilliland's opinions, which the ALJ rejected, were formulated after considering her previous medical history. Blandford insists this prior treatment history was set forth in the records of Jewish Hospital, Norton Hospital, Dr. Aufox, and Dr. Lisner which Dr. Gilliland reviewed. Blandford contends the ALJ imposed upon her the burden of establishing she did not have a pre-existing active condition, and in doing so, failed to consider the medical records which show a work-related accident occurred. Blandford acknowledges whether her symptoms were temporary or permanent is another issue. Thus, the ALJ should have to at least consider one of these two possibilities.

In a related argument, Blandford maintains the ALJ erred in rejecting Dr. Gilliland's report, as his was the only report based upon a review of her medical records and a physical examination. Blandford argues the ALJ erroneously dismissed the contents of Dr. Gilliland's report because she found Blandford was not credible and Dr. Gilliland had an incorrect medical history.

Blandford asserts Dr. Joseph Zerga's medical reports were generated after a medical records review, and his first report is void of any conclusions as it only contains a summary of the records reviewed. Blandford notes Dr. Zerga's second

report merely critiqued Dr. Gilliland's report, stating there was essentially no basis for assigning an impairment rating. Thus, the ALJ should have decided which portions of Dr. Gilliland's opinion were to be accepted or rejected.

Blandford requests the ALJ's decision be vacated and the claim remanded for more findings of fact concerning the nature and permanency of her work-related injury.

BACKGROUND

Blandford's Form 101 alleges that, on August 15, 2015, in Jefferson County, Kentucky, she was operating her motor vehicle in the course of her employment with Dollar Aisle when another vehicle struck her rear bumper and injured her head.

Blandford testified at a September 15, 2018, deposition and at the August 27, 2018, hearing. Blandford is a Licensed Practical Nurse ("LPN") and has obtained a Bachelor of Science degree. At her deposition, Blandford testified she had previously been involved in a 2012 MVA when she was rear ended by a truck. All of her medical bills were paid and no lawsuit was filed. The 2012 MVA resulted in head and neck pain which she experienced for a couple of months. She also had difficulty turning her neck and was disoriented for the rest of the day. She saw Dr. Lisner as a result of this injury. She testified Dr. Aufox has been her family physician since 2012.

Blandford provided an in-depth description of the subject MVA which is recounted in the ALJ's opinion and will not be repeated herein. Blandford indicated that as a result of the subject work injury she has a slight palsy on the right side of her face which comes and goes. She also sustained short-term memory loss and a neck

injury. The injury has affected her speech and sense of smell and taste. The neck injury causes occasional weakness in portions of her hands and arms.

Blandford testified she was employed by Dollar Aisle as a sales representative working in Indiana and Kentucky. At the time of the injury, she was on her way to see a customer in Vevay, Indiana. The MVA occurred a little after 8:00 a.m. on Old Cane Road in Jefferson County, Kentucky. Blandford testified she did not know she was knocked out and was informed of that fact by emergency room personnel and her neurologist. However, she testified she believes she may have told someone at the hospital she was knocked out. Blandford explained this "made sense from the sequence of time because [she] was missing time." Blandford also testified:

> Q: I'm not talking about just that day. I am talking about that day and as far as you recall though, you don't recall telling anybody before you saw Doctor Lisner that you had blacked out or that you have been knocked out from the accident?
>
> A: Not prior to seeing Doctor Lisner, no, I don't think so.

After the injury, her immediate symptoms were headache and vomiting. She did not remember what occurred the rest of the day after the MVA. She did not remember how she got home. Blandford developed a slight droop on the right side of her face the "second day when I woke up." Her droop has improved and her sense of taste and smell comes and goes. She experiences migraine headaches daily and her speech has changed. She also experienced memory loss as she "cannot remember snippets of [her] second daughter." She testified the only symptoms she had prior to the MVA were headaches and neck pain. At the time of her deposition, Blandford was

employed with another company earning $12.00 an hour working between 40 and 60 hours a week.

At the hearing, Blandford testified that, although the MVA occurred in the morning, she did not go to the emergency room at Jewish Hospital until later that same night. The next day she went to Norton Hospital because the right side of her face and eye were drooping and she was afraid she was having a stroke. She later saw Dr. Aufox and Dr. Lisner. Due to the injury, she experiences a loss of balance necessitating the use of a cane. Her hands, legs, and feet have also been affected by the injury. She has pain on both sides of her legs. She has problems with facial nerves as her tongue rolls causing her to "choke on drinks and food." Blandford's sense of taste and smell comes and goes. Her "old memories are gone," and she is unable to remember directions. Because she gets lost in her own neighborhood, she uses a GPS whenever she is driving. She uses a notepad and multiple calendars to help her remember tasks she has to perform. Blandford also has problems remembering what her children tell her. Her cognitive problems caused her to discontinue the job she assumed after the accident because she misspelled and jumbled words, entered posts on the wrong pages, and could not keep companies separate.

Blandford testified Dr. Lisner told her he was treating her for post-concussion syndrome. Significantly, she did not remember a number of physical and mental symptoms which the medical records pre-dating her injury indicate she experienced. She did not remember experiencing multiple concussions in 2015 and three head traumas in 2016. She denied experiencing many of the same symptoms prior to the subject MVA of which she now complains.

After summarizing Blandford's testimony and the medical evidence, the ALJ found Blandford has not met her burden of proving she sustained a work-related head injury due to the August 15, 2015, MVA:

> After careful review of the medical and lay testimony, the ALJ finds that Plaintiff has not met her burden of proving that she suffered a work-related injury to her head as a result of an August 15, 2015 incident. In so doing, the ALJ found the medical testimony of Dr. Zerga to be more persuasive than the medical testimony of Dr. Gilliland. Dr. Gilliland did not review records from prior to the date of the alleged incident. Dr. Gilliland's report and conclusions were based solely on the history as reported by Plaintiff and treatment records that also strongly relied on plaintiff's reports of non-verifiable symptoms after the date of the alleged incident. Dr. Gilliland concluded that "It is clear" that Plaintiff suffered persistent symptoms from the accident and likely head injury. Dr. Gilliland gave no further explanation of his causation opinion. Dr. Zerga, also reviewed treatment records only dated after the work incident, and concluded "given the degree of trauma documented in the records, one would not expect any permanent sequela from this event." Dr. Zerga also noted that for each of the claimed symptoms no trauma would have resulted in that symptom other than possible headaches for one month.
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> There is scant evidence of a motor vehicle accident; only the report by Plaintiff to the Jewish Hospital Southwest Emergency Department medical providers at 9:25 PM on August 15, 2015, approximately 13 hours after Plaintiff said the motor vehicle accident occurred. The Emergency Department report noted [sic] airbag did not deploy and "no injuries visualized" for face, chest, abdomen, back/neck, "RUE, LUE, RLE and LLE." The Emergency Department report also included, "Patient alerted nursing station w/call light. Stated to myself that she had stepped on something in the room and would like someone to come to her. Upon arrival, patient was sitting on stretcher, right foot up, small puncture wound with scant blood noted. Patient states she thinks it was glass, and that it fell back onto the floor. Excused myself from room, charge nurse, Christy-RN and primary nurse, Lois-RN, and notified." The report

went on to say, "Puncture wound cleansed with multiple alcohol swabs. Searched room for glass debris on floor, no glass noted." The only laceration charted in the Emergency Department record was a laceration to the right foot.

At the Formal Hearing, Plaintiff testified as follows:

Q. Can you tell the judge, briefly, what happened?

A. I was leaving my home on the way to Vevay, Indiana, to meet with one of our clients who had rescheduled, and I got probably five, less than ten minutes from my home, and a truck came at me and was trying to turn in front of my car at pretty high speeds. And he struck my car, but I seen him coming at -- enough time to be able to get over a little bit, but not enough time for him not to hit the driver's side of my car and knock me over the hill and over a cement barrier, which knocked the wheels off of my passenger-side car and ripped the engine out of my car.

(Formal Hearing Transcript, pp. 11-12).

At her deposition, Plaintiff testified as follows:

Q. Okay. Tell me about how the accident occurred.

A. Most of that is a blur, being as I was knocked out, but I was on my way and I saw a truck coming, next thing I know I'm off the road and trying to keep my car from crashing into a building, so I was hit on both sides by the curb and by the truck, and it totaled my car from the bottom and from the outside.

Q. You say you saw a truck coming, so he's coming from the opposite direction?

A. Uh-huh. And he came into my lane, in a turn, he was trying to turn, but he started turning too early.

Q. So he was trying to make a-- his left hand turn?

A. Yes. He would have been turning left as I was going straight.

Q. Do you know what the building was that you're talking about that you try to avoid?

A. All I know is it has a lizard.

Q. A lizard, okay.

A. There's a lizard on the sign. It reminded me of the Geico lizard.

Q. Do you remember anything about the truck at all?

A. It was red with a white bumper, that's all I remember.

Q. Did anybody ever find the truck or do you know?

A. They said it was stolen. I don't know if it was ever recovered, but they said the guy was a bad guy. He was involved in a robbery with two others that day. I only know that because I heard the police talking to each other. Three cop cars came into the area.

Q. So did his vehicle strike your vehicle?

A. Yes.

Q. What part of his vehicle struck your vehicle?

A. I don't know what part struck mine, but I know it transferred paint on to the rear quarter panel of the driver side of my car.

Q. It transferred what now?

A. Paint.

Q. Okay. So on the rear-- where did you say?

A. Quarter panel.

Q. So some part of his vehicle struck your rear quarter panel on the driver side?

A. Uh-huh.

Q. Yes?

A. Yes, I'm sorry.

Q. When you saw him, did you have any time to make any sort of evasive action?

A. I tried to get over but there was no room because there's this concrete barrier on that side because it's turning around that curve, and that's what he ran me into. And that's what tore up the rest of my car, so I got hit on both sides, literally.

Q. So you had some damage on the other side of your car from the concrete barrier?

A. It knocked the wheels off.

Q. Okay.

A. My car had to be flatbedded it [sic] out of there.

Q. Now, you said something about you were knocked out; is that correct?

A. Yeah. I didn't know I was knocked out. It must've been really short, but there was missing pieces. So that is what the ER had told me and a neurologist said that's what had happened.

Mr. Nevitt: I want to object to what people told her.

Q. But you didn't recall being knocked out?

A. Yeah, I didn't know that I was knocked out. I just knew that I had bruises and cuts and stuff like that. (Deposition, pp. 59-62).

In Osborne v. Pepsi-Cola, 816 S.W. 2d 643 (Ky. 1991), the Supreme Court of Kentucky said when a medical opinion is based solely upon history, the trier of fact is not constricted to a myopic view focusing only on the physician's testimony. Because of inconsistencies in Plaintiff's testimony, the ALJ does not find Plaintiff to be a credible witness or historian. The records of Jewish Hospital Southwest Emergency Department charted no visualized injuries (the record did not include contusions or lacerations apart from the right foot that Plaintiff reported was caused by glass on the floor of the Emergency Department). Dr. Zerga, whose medical testimony is more consistent with the medical records of Jewish Hospital Southwest Emergency Department, was critical of the report of Dr. Gilliland. Therefore, the ALJ does not find persuasive the medical testimony of Dr.

> Gilliland as it has been criticized by Dr. Zerga and is primarily based on the report and history of Plaintiff who gave differing accounts of the accident neither of which is consistent with the recorded examination by medical providers at Jewish Hospital Southwest Emergency Department. Additionally, Dr. Gilliland said, "The patient denies any previous accidents or injury." Dr. Gilliland also said, "Per records review there are no direct pre-existing medical conditions." Dr. Gilliland also opined, "I do not believe there is any previous impairment." Multiple 2012 through 2014 treatment records in evidence are relevant to these three statements by Dr. Gilliland. Without those 2012 through 2014 records Dr. Gilliland had to rely on Plaintiff's reports and cannot fully assess the statements himself. Consequently, the ALJ does not find persuasive the report of Dr. Gilliland. Dr. Zerga did not opine that Plaintiff suffered a work-related injury. Therefore, the ALJ finds that Plaintiff has not borne her burden of proving that she sustained a work-related injury on August 15, 2015 and her claim must be dismissed.

Blandford filed a petition for reconsideration requesting additional findings of fact regarding Dr. Zerga's report and pointing out he only performed a records review. Blandford asserted Dr. Zerga seemed to acknowledge that an accident occurred. Blandford also requested additional findings of fact as to whether she sustained a temporary injury for which income and medical benefits may be awarded. Accordingly, as she argued, the ALJ should determine whether Dr. Zerga's report supported a finding of a temporary injury. She also requested additional findings of fact regarding Dr. Lisner's medical records and an explanation for the rejection of his medical records.

As requested, in overruling the petition for reconsideration, the ALJ provided the following additional findings in the November 2, 2018, Order:

> The ALJ reiterates that Plaintiff gave significantly different accounts of a motor vehicle accident which she

said occurred at approximately 8 AM on August 15, 2015. In her September 15, 2016 deposition, Plaintiff said, "Yeah, I didn't know that I was knocked out. I just knew that I had bruises and cuts and stuff like that." (Deposition, P. 62). Later in the day on August 15, 2015, when Plaintiff first sought treatment at 9:25 PM at Jewish Hospital Southwest emergency department, those medical treatment records noted [sic] airbag did not deploy and "no injuries visualized" for face, chest, abdomen, back/neck, "RUE, LUE, RLE and LLE." The Emergency Department report also included, "Patient alerted nursing station w/call light. Stated to myself that she had stepped on something in the room and would like someone to come to her. Upon arrival, patient was sitting on stretcher, right foot up, small puncture wound with scant blood noted. Patient states she thinks it was glass, and that it fell back onto the floor. Excused myself from room, charge nurse, Christy-RN and primary nurse, Lois-RN, and notified." The report went on to say, "Puncture wound cleansed with multiple alcohol swabs. Searched room for glass debris on floor, no glass noted." The only laceration charted in the Emergency Department record was this laceration to the right foot. The ALJ notes that medical providers who saw Plaintiff after this date, noted the laceration and sometimes attributed it to a motor vehicle accident.

On October 2, 2015, Dr. Lisner saw Plaintiff in follow up to the August 15 and 16, 2015 emergency department visits. In his narrative of chief complaints, Dr. Lisner said, "She was a restrained driver of a motor vehicle that was rear-ended causing her to go off the road into another lane and striking a fixed object." Dr. Lisner noted Plaintiff's August 16, 2015 11:49 AM visit to Norton Hospital. He said, "She had generalized myalgias, nausea and vomiting. The semi-truck that hit her caused her basically to lose control of her vehicle and struck [sic] an object, which may or may not have caused a concussion." He said, "By the time, she went to Norton at least by the notes, the patient had also been seen at Jewish Southwest where she received a CT imaging of the head and neck, which she reports was negative and is confirmed by the evaluation at Jewish, was diagnosed w/concussion." The ALJ notes that after review of records from Norton and at least some portion of information from Jewish Southwest, Dr. Lisner still said a motor vehicle accident

"may or may not have caused a concussion." He listed the diagnosis of concussion, but he also noted that Plaintiff had been treated for migraines. While the first line in the October 2, 2015 treatment record said, "new patient," Dr. Lisner later noted that he treated Plaintiff previously including after a 2012 motor vehicle accident. Then on October 16, 2015, Dr. Lisner charted under "subjective," that "the patient states that there are two types of headaches one, which she consider [sic] the muscle contraction headache with her neck tightening up and another where she sees stars, becomes nauseous some time spots, which may be migrainous or just post-concussive, I am not certain at this time." He noted there was "no evidence of concussion on MRI, although this is difficult to see." He also noted that "she had a CT scan, which was also completely normal. Evaluation of her face, neck, and abdomen is normal." Dr. Lisner's objective findings on examination were all normal.

Dr. Gilliland who reviewed only medical records and diagnostic tests from after the alleged injury date, opined, "It is clear that Mrs. Gillman is suffering persistent symptoms from her MVA and likely head injury." He went on to say, "There are no overt findings on MRI to suggest anatomic brain pathology although MRI will not demonstrate direct correlation with concussive symptomatology. It will also not show injury to olfactory nerve. She has received initial proper care although cessation of care has resulted in a failure to progress further. Dr. Gilliland then diagnosed fascial nerve palsy, mild traumatic brain injury with headache and anxiety, anosmia and dysgeusia. Dr. Gilliland also went on to say per his records review there were no direct pre-existing medical conditions. As noted, Dr. Gilliland did not review records from prior to August 15, 2015.

Dr. Aufox initially diagnosed cervical strain, acute, sequela and closed head injury without loss of consciousness, sequela at the initial visit on August 30, 2015. Then at the next office visit four weeks later, Dr. Aufox diagnosed only whiplash injuries sequala [sic]. The next recorded visit with Dr. Aufox was March 2016 when Dr. Aufox did not mention concussion or whiplash, but charted "Has had head trauma x 3 in the last several months. Was told by a neurologist that she did have a concussion." At this March 2016 visit, Dr. Aufox charted

that Plaintiff was seen for fibromyalgia and diagnosed with breast tenderness.

Dr. Zerga said, "there is no good description of the head trauma or nature of the loss of consciousness in these medical records." Dr. Zerga used the word "if" multiple times in giving his conclusions. He said, "In any event, if she would have had headaches from this head trauma, the duration would have been less than 30 days." He also said, "If she had a Grade 1 concussion, she might be symptomatic for 2 to 3 months." He wrote, "Also she has an extensive past medical history. No one has ever said in the medical records, either positively or negatively, whether she has suffered from headaches even prior to this event." Dr. Zerga did not opine that Plaintiff suffered a work-related injury.

The only basis of diagnosis by medical providers at Jewish Hospital Southwest, Norton or Dr. Lisner are Plaintiff's subjective complaints and Plaintiff's history of a motor vehicle accident. Plaintiff said she had cuts and bruises, but medical providers at Jewish Hospital Southwest emergency Department charted "no injuries visualized" on that day.

Because this claim and the medical opinions rested on Plaintiff's testimony of the facts surrounding a motor vehicle accident and her recitation of subjective complaints, none documented by objective testing or observation, Plaintiff's credibility was essential to the claim. Since Plaintiff was not found by the ALJ to be a credible witness or historian, based on the multiple discrepancies in her testimony, the medical opinions resting on Plaintiff's reports or history are not persuasive to the ALJ.

Dr. Gilliland opined that Plaintiff suffered an injury. As noted above, other medical providers have expressed doubts as to diagnoses or offered varying diagnoses within a short period of time. Dr. Gilleland's [sic] opinion is not persuasive to the ALJ, because it is premised almost exclusively on Plaintiff's statements or on medical records themselves premised entirely on Plaintiff's statements. Dr. Zerga only opined that if Plaintiff had certain injuries symptoms would have resolved by particular time. Dr. Zerga need not opine that Plaintiff did not have a work-related injury.

> The Administrative Law Judge having reviewed Plaintiff's Petition for Reconsideration and Defendant Employer's response thereto as well as the Opinion and Order of October 8, 2018 in the above-referenced claim and being otherwise sufficiently advised, IT IS HEREBY ORDERED:
>
> Based on the foregoing, Plaintiff's Petition for Reconsideration of the Opinion and Order rendered on October 8, 2018 is OVERRULED.

ANALYSIS

As the claimant in a workers' compensation proceeding, Blandford had 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). Since Blandford 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). 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 that 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 discretion to determine 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 an 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, 481 (Ky. 1999). So 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, 708 S.W.2d 641, 643 (Ky. 1986).

In his initial August 17, 2016, letter, Dr. Zerga provided a summary of the August 15, 2015, emergency room medical record of Jewish Hospital and Norton Hospital's August 16, 2015, August 25, 2015, August 31, 2015, and September 30, 2015, medical records. Dr. Zerga also summarized Dr. Lisner's October 2, 2015, and October 16, 2015, medical records and Dr. Gilliland's March 21, 2016, report. In a subsequent August 17, 2016, letter, Dr. Zerga provided the following:

> Regarding her facial palsy. There is certainly no evidence that she suffered any facial trauma that would cause facial palsy. In my opinion, if she did indeed have a facial palsy, and this is not well documented in the records, it would be incidental and not related to the event of August 15, 2015. Similar statements can be made about her taste and smell. People frequently will have disorders of taste or smell on idiopathic version. It is also possible that the same process which caused her facial palsy, i.e.., a virus, caused problems with her taste and smell. Regarding her headache, given the degree of trauma she had, which by review of medical records was mild, she would not have

> headaches for longer than one month from this head trauma. Also, she has an extensive past medical history. No one has ever said in the medical records, either positively or negatively, whether she has suffered from headaches even prior to this event. In any event, if she would have had headaches from this head trauma, the duration would have been less than 30 days. Regarding a complaint of poor concentration and cognitive difficulty. Again, this was minor head trauma. There is no documentation of any major head trauma. If she had a Grade I concussion, she might be symptomatic for two to three months. This is rather presumptive because there is no good description of the head trauma or nature of the loss of consciousness in these medical records. Regarding his assignment of impairment, he didn't even document any facial asymmetry on exam, but only said that she had some mild right-sided nasal labial flattening and a subjective reporting of decreased taste. Again, this is classic for idiopathic Bell's palsy, not for a traumatic facial nerve injury, she would not merit any impairment for any presumed facial nerve injury from this event. Regarding her mild traumatic brain injury, he assigned a 10 percent impairment. Given the degree of trauma documented in the records, one would not expect any permanent sequela from this event. He then tacks on olfactory nerve which, in fact, I am not even sure is involved, and certainly there is no evidence of any head trauma which would have caused an olfactory nerve problem.
>
> To state it another way, these records do not give justification for assigning any permanent impairment in this person.

The opinions of Dr. Zerga, based on the medical records generated contemporaneously with and following Blandford's injury, constitute substantial evidence supporting the finding Blandford did not have a permanent injury meriting an impairment rating. Dr. Zerga concluded there was no evidence to support a finding Blandford suffered any facial trauma which would cause facial palsy, and any palsy is unrelated to the event of August 15, 2015. The same was true for Blandford's problems

concerning her claimed problems with her sense of taste and smell. Dr. Zerga stated that given the degree of trauma, which the medical records reflect was mild, Blandford would not have headaches for longer than one month. He noted she had an extensive past medical history, and no one had addressed in the medical records he reviewed whether Blandford suffered from headaches prior to this event. Given the minor trauma, Dr. Zerga did not believe Blandford's poor concentration and cognitive difficulties were related to the August 15, 2015, event. He specifically noted there is no documentation of any major head trauma. Dr. Zerga then noted that if Blandford has a Grade I concussion, she might be symptomatic for two to three months. However, such a conclusion was presumptive, as there is no good description of the head trauma or nature of the loss of consciousness in the medical records. In light of the degree of trauma documented in the medical records, Dr. Zerga did not expect any permanent sequela from the event and saw no need to assess a permanent impairment rating. Thus, we find substantial evidence supports the ALJ's determination that Blandford did not sustain an injury meriting an award of permanent income and medical benefits.

That said, the ultimate question on appeal is whether the record, including Dr. Zerga's last report, supports a finding of a temporary injury. After careful review of the record, we conclude substantial evidence supports the ALJ's determination Blandford did not sustain a work-related injury due to the August 15, 2015, MVA and the dismissal of her claim in total.

In the October 18, 2018, decision, the ALJ noted Dr. Gilliland did not review any medical records pre-dating the August 15, 2015, MVA. Rather, Dr. Gilliland's opinions were based upon a history provided by Blandford and the

treatment records which also relied upon Blandford's report of non-verifiable symptoms, most of which allegedly manifested after the date of injury. Further, we reject Blandford's assertion Dr. Zerga's opinion, at a minimum, supports a finding of a temporary injury. Dr. Zerga noted there was no documentation of major head trauma, and the medical records gave no good description of the head trauma or the nature of the loss of consciousness. Notably, Blandford, an LPN, did not seek medical attention at Jewish Hospital until 9:25 p.m. on August 15, 2015. Thus, the ALJ could reasonably conclude the MVA did not cause an injury as defined by the Act.

As noted by the ALJ, the medical records of Jewish Hospital emergency room indicate Blandford's air bags did not deploy and there was no visual injuries to her face, chest, back, neck, abdomen, or any other body part. Leaving aside Blandford's differing accounts of the MVA during her deposition and at the hearing, the ALJ could reasonably discern from the medical records that the diagnosis of the doctors who saw her after the subject MVA was based upon Blandford's history and not objective medical evidence. In response to the petition for reconsideration, the ALJ again reiterated Blandford's accounts of the MVA differed significantly and referenced the findings contained in Jewish Hospital's records regarding no visual signs of injuries. The ALJ also cited to the records of Drs. Lisner and Aufox which supported her conclusions and once again discussed her reasons for accepting Dr. Zerga's opinions over Dr. Gilliland's opinions.

Significantly, Blandford testified she did not know she had passed out and learned from emergency room personnel and Dr. Lisner that she had passed out. She later testified she told Dr. Lisner she lost consciousness. However, the medical

records from Jewish Hospital only contain a diagnosis of head, neck, and arm pain due to a MVA. Page four of the Summary Report reads as follows: "Loss of Consciousness: No." Furthermore, all of the tests performed on the cervical spine and brain were normal.

Further bolstering the ALJ's ultimate decision is page two of the Summary Report from Jewish Hospital which contains the following: "Is this a workman's comp injury? No." This statement contained within the medical record, standing alone, constitutes substantial evidence supporting the ALJ's determination Blandford was not treated for a work-related injury at Jewish Hospital some thirteen hours following the MVA.

Finally, although not referenced by the ALJ, we note that at the hearing, Blandford denied she had previously experienced any of the problems she was currently experiencing. At her September 15, 2018, deposition, Blandford testified the only prior symptoms were headache and neck pain. However, Dr. Lisner's 2012 and 2013 medical records cast doubt upon Blandford's testimony. In multiple September, October, and November 2012 records, Dr. Lisner noted Blandford was experiencing cognitive deficits, headaches, and possible sleep apnea. Specifically, on September 14, 2012, after referencing a June 21, 2012, injury, Dr. Lisner noted Blandford had complained of "headaches in [illegible] region, and eye twitches, and facial pain and cognitive deficits."[2] He noted in his reports of April and June 2013, Blandford still suffered from cognitive deficits, shoulder pain, and facial pain. During the hearing,

[2] The June 21, 2012, injury appears to be referencing the symptoms resulting from the 2012 MVA about which Blandford testified.

Blandford did not recall having any such problems in 2012. Further, although Dr. Aufox's records noted Blandford was recovering from a second concussion within the last year, Blandford did not remember making such a statement in 2015. She also denied telling Dr. Aufox in March 2016 that she experienced three head traumas within the last several months. Dr. Aufox's March 28, 2016, record reflects Blandford provided such a history.

The records of Norton Hospital, the medical records of Drs. Aufox and Lisner, and opinions of Dr. Zerga, as recounted herein, comprise substantial evidence sufficient to support the ALJ's determination that Blandford did not sustain even a temporary injury as a result of the MVA. Thus, we find no merit in Blandford's argument the complete dismissal of her claim was clearly erroneous.

We also find no merit in Blandford's second argument that the ALJ erred in dismissing Dr. Gilliland's report. Leaving aside the fact that Blandford's accounts of the MVA in her deposition and hearing testimony differ vastly, the medical records do not compel a finding Blandford sustained an injury as defined by the Act. The fact some of the medical records contain diagnoses based upon Blandford's subjective complaints which are contrary to the ALJ's conclusions does not compel a different result. As noted by the ALJ, Dr. Gilliland's opinions were based upon the medical records generated after the MVA. The fact that medical records pre-dating August 15, 2015, may have been referenced by Drs. Lisner and Aufox in records following the MVA did not require the ALJ to find Dr. Gilliland was fully apprised of Blandford's prior medical history. Blandford's complaints, as set forth in Dr. Lisner's 2012 and 2013 medical reports, are remarkably similar to her current complaints. These records

were not discussed by Dr. Gilliland in his report, thus reinforcing the ALJ's conclusion that he did not have an accurate history of Blandford's medical problems pre-existing the August 15, 2015, MVA. As such, the diagnoses and opinions of Dr. Gilliland that are contrary to the ALJ's findings do not compel the result Blandford seeks on appeal. Copar, Inc. v. Rogers, 127 S.W.3d 554 (Ky. 2003). As the fact-finder, the ALJ is vested with the discretion to pick and choose whom and what to believe. Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). The fact that Dr. Zerga conducted a records review and did not perform a physical examination does not render his opinions invalid. Rather, that fact goes to the weight to be assigned his opinion, a question solely to be decided by the ALJ in her role as fact-finder. Luttrell v. Cardinal Aluminum Co., 909 S.W.2d 334 (Ky. App. 1995). Because the medical evidence relied upon by the ALJ constitutes substantial evidence supporting the ALJ's decision and a contrary result is not compelled, this Board will not usurp the discretion afforded the ALJ.

We point out the ALJ had the opportunity to observe Blandford during her testimony and determine her credibility. Resolving the credibility of a witness is the sole function of the ALJ and not this Board. The ALJ determined Blandford was not a credible witness and cited to the medical evidence which led her to so conclude. In light of the medical evidence cited by the ALJ, we believe the ALJ could reasonably conclude the treatment records do not support Blandford's claim she sustained a work-related injury due to the August 15, 2015, MVA. Because the outcome selected by the ALJ is supported by substantial evidence and the record does not compel a contrary

result, we are without authority to disturb her decision on appeal. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

Accordingly, the October 8, 2018, Opinion and Order and November 2, 2018, Order overruling the petition for reconsideration are **AFFIRMED**.

ALL CONCUR.

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