

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: January 29, 2021

CLAIM NO. 201754911

SHERRY JOHNSON

PETITIONER

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

THE KROGER COMPANY AND
HON. CHRISTINA D. HAJJAR,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

**OPINION
AFFIRMING**

* * * * *

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

BORDERS, Member. Sherry Johnson (“Johnson”) appeals from the October 17, 2020 Opinion, Award, and Order and the November 11, 2020 Order on Petition for Reconsideration rendered by Hon. Christina D. Hajjar, Administrative Law Judge (“ALJ”). The ALJ determined Johnson suffered a work-related cervical spine injury while employed by The Kroger Company (“Kroger”), for which she retained a 5% impairment rating, enhanced by the 3x multiplier. The ALJ further determined

Johnson suffered a psychological injury due to the assault, not resulting in any measurable impairment, but entitling her to medical benefits for the psychiatric condition. Johnson now appeals, arguing the ALJ erred in not awarding permanent partial disability (“PPD”) benefits for her psychological injury and in not adopting the 6% impairment rating for her cervical spine condition. For reasons set forth, we affirm.

Johnson testified by deposition on January 16, 2020 and at the hearing held August 25, 2020. Johnson sustained an injury to her neck on December 6, 2017 while working as a cashier for Kroger. At the time of the incident, she was working approximately 30 hours per week in a cafeteria for the Jefferson County Public Schools, part-time for Kroger, and part-time for News America. On December 6, 2017, she tried to help a co-worker who was being attacked by another employee at the Kroger store. He let go of the co-worker, grabbed Johnson by the hair, and dragged her. Another employee convinced him to let her go. Johnson did not immediately notice anything was hurt. She began having difficulty turning her neck and experienced pain in her neck and back. She eventually developed migraine symptoms. That evening she went to BaptistWorx. The symptoms in her neck, back, and shoulders worsened over the next two days.

Johnson testified she still has problems with her neck. She is also unable to lift as much as she could prior to the incident. She cannot work as a cashier but works in the general merchandise department where she stocks candy bars and other light items. She is still nervous when people are around her. Her job duties include taking boxes off pallets, putting them on four-wheeled carts, pulling

the cart onto the sales floor, and conditioning the shelves. She also works as a cashier for short periods once or twice a week and performs price mark-downs. She takes anxiety medication prescribed by her doctor. She took anxiety medication over 20 years ago when her dad passed away. She testified the medication helps her feel less edgy. She reported she could not return to the cashier job because she is unable to turn her neck back and forth constantly.

At the hearing, Johnson reiterated she continues to have problems with her neck, especially with turning left to right. Although her lifting ability had improved, she was still unable to lift as much as she had previously. Johnson was unable to perform her work for the school district following the injury. Johnson continued to work for Kroger and News America, missing no days after the event despite her physical complaints and psychological complaints. Johnson stated, "I'm nervous still a lot. I still kind of get shaken up when people are around me and stuff like that." Johnson reported she is still very edgy when people are behind her. She testified there were times when she was stocking the general merchandise shelves that she has "jumped", as a result of being nervous when someone approached her from behind and her regular customers are aware of her situation and often times will call out, "I'm coming, I'm behind you." She reported she is currently not having any issues with her lower back. She denied the ability to return to a cashier position because of the turning of her neck, the lifting required if no bagger is available, and because she does not want people close to her.

Norton Healthcare CT scans of the head and neck from December 15, 2017 revealed reversal of the normal lordotic curvature of the cervical spine. There

was severe disk space narrowing and prominent endplate osteophyte formation at the C4-C7 levels.

Dr. J. Rick Lyon evaluated Johnson on August 3, 2018 at Kroger's request. She reported popping and cracking in her neck with range of motion and experiencing intermittent headaches. Dr. Lyon diagnosed cervical spondylosis, cervicalgia, and resolved low back pain. Dr. Lyon opined that Johnson sustained a cervical sprain/strain, and the work event made her underlying cervical spondylosis symptomatic. Johnson had no objective findings of a permanent harmful change due to the work injury. He recommended a home exercise program, a TENS unit, and traction. He acknowledged the loss of the cervical lordosis suggested an acute injury. Dr. Lyon felt Johnson should be restricted to light-duty work with the duration of the restriction dependent upon the response to pain management treatment.

Dr. Jeffery Fadel evaluated Johnson on January 9, 2020. Dr. Fadel diagnosed cervical spondylosis aroused into disabling reality by the incident at work. He also stated the incident aroused her lumbar degenerative disk disease. He stated Johnson has reached maximum medical improvement ("MMI") if no further treatment is considered. He determined the date of MMI would have been November 2019, at 11 months post injury. Dr. Fadel assigned restrictions of no repetitive twisting of the cervical spine, no repetitive flexion or extension of the cervical spine, and no lifting more than 35 pounds. Dr. Fadel placed Johnson in DRE category II, and assessed a 6% impairment rating pursuant to the 5th Edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, ("AMA Guides"). He assigned the rating because of persistent spasms,

limitation of motion, and elevated pain levels. Dr. Fadel indicated there is no lumbar impairment. He stated Johnson's work injury aroused pre-existing degenerative changes found both in the cervical and lumbar spine regions. He stated he possessed no medical records nor did he obtain any medical history from Johnson suggesting otherwise. He recommended pain management referral for injection therapy to identify more specifically the location of the pain generators. Dr. Fadel felt the symptoms are related to the cervical facets. He saw no evidence of any associated neurological compromise from either the cervical or lumbar areas, symptoms, or physical examination.

Dr. Amy Trivette performed an independent psychiatric evaluation on January 28, 2020. She reviewed records from psychological counseling performed by Paula Morgan, results of psychological testing, and interviewed Johnson. Johnson reported her depression began shortly after the incident at work. Johnson stated she has no difficulty falling asleep, but has trouble staying asleep. She can sleep only about four hours. Dr. Trivette diagnosed an unspecified depressive disorder and an unspecified anxiety disorder. Dr. Trivette placed Johnson in Class I and noted the 2nd Edition of the AMA Guides allows for a range of impairment rating from 0 to 5%. Dr. Trivette assigned no psychiatric impairment pursuant to the AMA Guides. Dr. Trivette stated Johnson has the intellectual and psychological capacity to perform all work duties that she performed prior to the incident. Dr. Trivette stated Johnson has returned to her pre-existing baseline level of psychological functioning. Dr. Trivette recommended continuation of the current psychiatric medication because she reports and displays benefit from it.

Dr. Lyon performed a second evaluation on February 27, 2020. Johnson stated she experiences intermittent low back, popping and cracking, and occasional headaches. Dr. Lyon again diagnosed cervical spondylosis, cervicalgia, and low back pain, resolved. Dr. Lyon agreed a permanent restriction of no lifting more than 35 pounds is reasonable and opined there is no objective evidence of a permanent injury to the cervical spine due to the work event. He stated there is no evidence of any active cervical condition or injury that existed prior to the work event. He did not believe Johnson requires any additional treatment related to the work event. She reached MMI as of October 8, 2019. Dr. Lyon placed her in DRE Category II with a 5% impairment rating. He stated he chose the lower end of the allowable range based upon her reported functional ability.

At the Benefit Review Conference and Final Hearing, the parties identified the following contested issues: work related injury/causation, benefits per KRS 324.730 including multipliers, AWW, wages on return to work, current wages, ability to return to work, and temporary versus permanent condition (lumbar and psychological claim).

The ALJ rendered the following Findings of Facts and Conclusions of Law relevant to the issues on appeal, *verbatim*:

Cervical Spine

Johnson filed Dr. Jeffrey Fadel's January 9, 2020 report and Dr. Rick Lyon's August 7, 2018 report, and Defendant filed Dr. Lyon's March 6, 2020 supplemental report. Both doctors diagnosed cervical spondylosis aroused by the work injury. The ALJ is convinced that Johnson sustained a permanent work-related injury to her neck.

Dr. Fadel assessed a 6% impairment rating under the 5th Edition of the AMA Guides due to her persistent spasm, limitation of motion, and elevated pain levels. Although Dr. Lyon noted the imaging studies fail to confirm any permanent harmful change to the cervical spine, he stated the loss of cervical lordosis suggested muscle spasms with an acute injury. He stated she had no active impairment at the time of the injury, and she reached maximum medical improvement as of October 8, 2019. He did not think she required any additional treatment, but he assessed a 5% whole person impairment rating. He chose the lower end of the 5-8% DRE Cervical Category 2 range based upon her reported functional ability. The ALJ finds the 5% assessed by Dr. Lyon is most convincing, as she has returned to the workforce and is able to work a full-time job despite her continued neck complaints.

Psychological/Psychiatric Claim

Defendant filed Dr. Amy Trivette's January 28, 2020 psychiatric evaluation. Dr. Trivette stated that "it appears that Ms. Johnson is reporting a variety of medical and psychological symptoms that are not completely accounted for by injuries sustained in the work-related incident on 12/06/2017."

Dr. Trivette stated she complains of depression, anxiety, crying spells, sleep disturbance and distrust of others, but she had improved since the incident and had no impairment in her functioning. Dr. Trivette pointed out that she has continued working in the same environment where the alleged injury occurred with significantly increased hours without apparent problem. She concluded Johnson does not have a current psychiatric impairment. She is at maximum medical improvement and has returned to her preexisting baseline level of psychological functioning. She has no work restrictions secondary to psychological functioning. She rated Johnson as Class I, no psychiatric impairment, under Tale 14.1 of the AMA Guides, 5th Edition, which translates to 0 to 5% impairment due to psychiatric causes under AMA Guides, 2nd Edition, Table 1, page 220.

Dr. Trivette acknowledged the December 6, 2017 incident caused depression, anxiety, crying spells, sleep disturbance and distrust of others, but she had improved since the incident and had no impairment in her functioning. She also noted other factors caused some of the symptoms. However, Johnson was convincing that her current anxiety is related to the injury, as she was not taking anxiety medication prior to the injury, and had not done so for more than 20 years, but she started taking the medication, which contributed to her improved symptoms. Dr. Trivette recommended that Johnson continue her current psychiatric medication because she reports and displays benefit from it, and that she remain on it for at least one year from the start date prior to discontinuation. The medication was prescribed by her doctor in the fall of 2019.

This ALJ finds that although Dr. Trivette assessed Johnson's condition as falling in the range of impairment from 0 to 5%, her opinion was clear that Johnson suffered no impairment. Thus, this ALJ does not find it appropriate to choose a different impairment other than 0%. However, Johnson still has a psychological condition that was aroused by the injury, and she continues to require medication, which has allowed her to return to her baseline functioning. Thus, this ALJ finds her current psychological condition and need for medication is due to the injury, and she is entitled to future medical expenses for her continuing psychological treatment related to the injury.

Medical Expenses

Having found that Johnson sustained an injury to her cervical spine and a psychological injury, this ALJ finds that Defendant is responsible for the reasonable and necessary medical expenses for her cervical spine and psychological injury. KRS 342.020(1) provides that "[i]n addition to all other compensation provided in this chapter, the employer shall pay for the cure and relief from the effects of an injury . . . the medical, surgical, and hospital treatment, including nursing, medical, and surgical supplies and appliances, as may reasonably be required at the time of the injury and thereafter during disability." In *FEI Installation v. Williams*, 214 S.W.3d 313 (Ky. 2007), the Supreme Court instructed that KRS

342.020(1) does not require proof of an impairment rating to obtain future medical benefits and the absence of a functional impairment rating does not necessarily preclude such an award. Instead, liability for medical expenses exists “for so long as the employee is disabled regardless of the duration of the employee’s income benefits.” In this case, the ALJ finds that although Johnson’s psychological injury does not rise to the level sufficient to award permanent disability benefits, Johnson has sustained a work-related psychological injury, and she continues to treat with anti-depressants at this time. Accordingly, the ALJ finds that Defendant is responsible for medical treatment to treat Johnson’s psychological condition for so long as she is disabled as a result of the injury.

Johnson filed a Petition for Reconsideration requesting the ALJ find she has an impairment rating for the psychiatric injury, award benefits for the cervical condition based on the 6% impairment rating, and enhance the PPD benefits by the 3.6 multiplier instead of the 3 multiplier due to her age. The ALJ sustained the Petition to the extent the multiplier was enhanced to 3.6 but overruled the remainder of the Petition.

As the claimant in a workers’ compensation proceeding, Johnson 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 Johnson was not successful 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).

KRS 342.285 grants an ALJ as fact-finder the sole discretion to determine the quality, character, and substance of evidence. Square D Co. v. Tipton, 862 S.W.2d 308 (Ky. 1993). An ALJ may draw reasonable inferences from the evidence, 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. Jackson v. General Refractories Co., 581 S.W.2d 10 (Ky. 1979); Caudill v. Maloney's Discount Stores, 560 S.W.2d 15 (Ky. 1977). Although a party may note evidence supporting a different outcome than 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). Rather, it must be shown there was no evidence of substantial probative value to support the decision. Special Fund v. Francis, 708 S.W.2d 641 (Ky. 1986).

The function of the Board in reviewing an ALJ's decision is limited to a determination of whether the findings made 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). The Board, as an appellate tribunal, may not usurp the ALJ's role as fact-finder by superimposing its own appraisals as to weight and credibility or by noting other conclusions or reasonable inferences that otherwise could have been drawn from the evidence. Whittaker v. Rowland, 998 S.W.2d 479 (Ky. 1999).

On appeal, Johnson sets forth three arguments. First, she argues the ALJ failed to adequately set forth the basic facts for her ultimate conclusion to properly apprise the parties of the basis of her opinion. Second, she argues the

evidence presented was so compelling that the ALJ's opinion must be reversed. Lastly, she argues the ALJ erred as a matter of law by assessing Johnson the lowest impairment assessed per DRE II cervical category for an employee who lacks the physical capacity to return to work.

Johnson argues the ALJ failed to adequately set forth the basic facts to support her ultimate conclusion and to properly apprise the parties of the basis of her opinion. It is undisputed the ALJ must provide a sufficient basis to support his or her determination. Cornett v. Corbin Materials, Inc., 807 S.W.2d 56 (Ky. 1991). Parties are entitled to findings sufficient to inform them of the basis for the ALJ's decision to allow for meaningful review. Kentland Elkhorn Coal Corp. v. Yates, 743 S.W.2d 47 (Ky. App. 1988); Shields v. Pittsburgh and Midway Coal Mining, Co., 634 S.W.2d 440 (Ky. App. 1982). This Board is cognizant of the fact an ALJ is not required to engage in a detailed discussion of the facts or set forth the minute details of his or her reasoning in reaching a particular result. The only requirement is the decision must adequately set forth the basic facts upon which the ultimate conclusion was drawn so the parties are reasonably apprised of the basis of the decision. Big Sandy Community Action Program v. Chaffins, 502 S.W.2d 526 (Ky. 1973). Here, the ALJ provided summaries of the evidence from Dr. Lyon, Dr. Fadel, and Dr. Trivette as well as summarized and considered the testimony of Johnson. The ALJ specifically noted why she felt the opinions of Dr. Lyon and Dr. Trivette were more persuasive and otherwise properly exercised her discretion as the finder of fact. We determine the ALJ's summary of the records and her stated reliance upon Dr. Lyon

and Dr. Trivett's opinions adequately provided the basis of her decision. We affirm in this regard.

Next, Johnson believes the ALJ erred in not assessing an impairment rating for her psychiatric condition and only awarding medical benefits. She feels her activities of daily living were not adequately considered by the ALJ in rendering her opinion. We disagree. The ALJ clearly set forth that she considered the evidence, both lay and medical, and it indicated Johnson has continued working for Kroger, more hours in fact, without apparent problems. The ALJ noted Dr. Trivette opined Johnson had improved since the work incident and had no impairment in her functioning. The ALJ further noted Dr. Trivette felt continued psychiatric medications were indicated and helpful and accordingly awarded medical benefits. We believe the ALJ properly exercised her discretion as the finder of fact in determining Johnson did not retain an impairment for her psychiatric condition but was entitled to payment of medical benefits. The evidence of record does not compel a contrary result, and we affirm the ALJ in this regard.

Lastly, Johnson argues the ALJ erred in awarding the lowest impairment rating within the DRE II cervical category when she also found Johnson did not retain the physical capacity to return to work. She argues such a finding is erroneous as a matter of law. Once again, we disagree. Johnson has cited no statutory or case law supporting such a proposition, and this Board is unaware of the existence of any such legal mandates. The ALJ was confronted with conflicting evidence, a 5% impairment rating from Dr. Lyon versus a 6% impairment rating from Dr. Fadel. We find she properly exercised her discretion in determining the 5%

impairment rating assessed by Dr. Lyon was the most accurate. In so finding, the ALJ noted Dr. Lyon chose the lower percentage of 5% based upon Johnson's reports of functional ability. The ALJ likewise noted Johnson had returned to full time employment and is able to work despite her continued neck complaints. This, she felt, was an indication that the 5% impairment rating assessed by Dr. Lyon was more accurate. We believe this was a proper exercise of discretion with a sufficient recitation of facts supporting the same. Likewise, we affirm.

Accordingly, the October 17, 2020 Opinion, Award, and Order as well as the November 9, 2020 Order on Petition for Reconsideration are **AFFIRMED**.

ALL CONCUR.

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