

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: October 8, 2021

CLAIM NO. 201871199 & 201400777

SHERRY WHALIN

PETITIONER

VS.

APPEAL FROM HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

COTTON WOLFINBARGER & ASSOCIATES;
COTTON & ASSOCIATES, PLLC; and
HON. CHRIS DAVIS,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

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

BORDERS, Member. Sherry Whalin (“Whalin”) appeals from the June 22, 2021 Opinion and Order and the July 3, 2021 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge (“ALJ”). The ALJ found Whalin failed to meet her burden of proving a worsening of her condition. The ALJ

also found contested physical therapy for epicondylitis is not compensable. On appeal, Whalin argues the ALJ erred in failing to find an increase in impairment and in denying medical treatment for epicondylitis. We affirm.

Whalin filed a Form 101 on April 7, 2014, alleging injuries to her hands and wrists on June 11, 2013. By Opinion rendered May 11, 2015, Hon. Udell Levy, Administrative Law Judge (“ALJ Levy”), awarded income and medical benefits for bilateral carpal tunnel syndrome based upon a 3% impairment rating assessed for the left wrist.

Whalin filed a new injury claim (Claim No. 2018-71199) on January 18, 2019, alleging injuries on July 31, 2018, explaining she was “keying and handling files and developed bilateral cubital tunnel.” Whalin also filed a Motion to Reopen Claim No. 2014-00777 alleging a change of disability. Whalin stated she needed cubital tunnel surgery as well as carpal tunnel surgery, but only carpal tunnel surgery was approved. Hon. Richard Neal, Administrative Law Judge, subsequently approved a Form 110 settlement agreement regarding cubital tunnel surgery on January 22, 2020. Whalin never had the surgery.

Whalin testified by deposition on April 18, 2019 and at the hearing held on April 27, 2021. She began working for Cotton & Associates, PLLC in November 2011 preparing documents and filing claim forms. Cotton & Associates, PLLC later became Cotton, Wolfenbarger & Associates. At the time of her deposition, Whalin was also the assistant office manager for Cotton, Wolfenbarger & Associates. At times, she had to prepare time sheets and perform other administrative tasks. She indicated she now has to take more breaks to shake her

hands and rub her arms before typing again. At the hearing, she testified subsequent to the May 2015 decision, she started having symptoms all the way up her arms. She began having problems in the right elbow in early to mid-2017. Dr. Charity Burke suggested an MRI of the right elbow. Whalin stated Dr. Burke was the first physician to inform her of the diagnosis of cubital tunnel in 2018. Whalin continues to have numbness and tingling in her right arm from her shoulder down to her fingertips. Whalin indicated it is not as intense as it was before, stating, "It has calmed down some, and I think that's due to the workload that I have is quite a bit different now." Whalin stated the left carpal tunnel surgery she had several years ago seemed to improve her condition. She indicated Dr. Burke no longer recommends cubital tunnel surgery.

Dr. Burke treated Whalin on January 9, 2018. Dr. Burke noted Whalin previously had a left carpal tunnel release on May 22, 2014, but the numbness and tingling had recently worsened. Whalin used an ergonomic keyboard at work and, after using someone else's keyboard, she noticed numbness in her wrist. She complained of pain, numbness, and tingling in her entire arms bilaterally, left greater than right, which wakes her up at night. An EMG at her last visit was abnormal, suggestive of median nerve neuropathy at the wrist, mild on the left and moderate on the right, consistent with bilateral carpal tunnel syndrome. Additionally, there was left ulnar nerve neuropathy at the elbow consistent with mild cubital tunnel syndrome according to the EMG report. Dr. Burke diagnosed bilateral carpal tunnel syndrome, right worse than left, and mild cubital tunnel syndrome. Since there was still a question of cervical radiculopathy, Dr. Burke

wanted Whalin to have an MRI of her spine. Whalin was seen on February 6, 2018, stating the numbness and tingling had worsened and she had been wearing a brace that did not help. Dr. Burke felt the symptoms did not appear to be caused by neuropathy at the wrist or elbow, and that is why she ordered an MRI. Whalin was also sent for physical therapy for lateral epicondylitis. On February 7, 2020, Dr. Burke noted there were issues with workers' compensation. Whalin complained of pain in the dorsal aspect of the right hand radiating into the forearm and elbow area. Dr. Burke stated Whalin was a candidate for carpal tunnel release based upon her previous nerve study, but her current symptoms did not match carpal tunnel syndrome, and he did not think Whalin needed treatment for that condition. Rather, Whalin needed treatment for lateral epicondylitis, which usually resolves with physical therapy. Dr. Burke ordered physical therapy and directed Whalin to follow-up in two months.

Dr. Jules Barefoot evaluated Whalin on April 4, 2019. Dr. Barefoot diagnosed electro-diagnostic evidence of bilateral median nerve neuropathy and left ulnar nerve neuropathy; clinical evidence of a right ulnar nerve neuropathy; and history of a left carpal tunnel release, May 22, 2014. Dr. Barefoot assessed a 7% impairment rating for the left ulnar nerve neuropathy pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment, ("AMA Guides"). Dr. Barefoot stated Whalin had a 3% pre-existing impairment rating. The additional impairment was solely attributable to her work activities. Regarding causation, Dr. Barefoot stated, "It is clear by her medical history and available medical records that the work-related tasks that she was

required to perform and the length of time that she performed them were the sole causative agents in her current, symptomatic, disabling condition.”

Dr. Michael Nicoson evaluated Whalin on May 14, 2019. Dr. Nicoson diagnosed right carpal tunnel and cubital tunnel syndrome, left carpal tunnel syndrome, status-post left open carpal tunnel decompression, and left cubital tunnel syndrome. Dr. Nicoson did not believe the cubital tunnel syndrome was related to Whalin’s work activities. He stated it could have developed because of positioning when she sleeps. He recommended continued conservative management. He felt she should not proceed with the surgery, given the sub-optimal course of improvement after the left carpal tunnel release. Since her current complaints are unrelated to any work activities, there is no reason for further treatment or diagnostic workups.

In an August 1, 2019 report, Dr. Nicoson indicated he had reviewed Dr. Barefoot’s report. Dr. Nicoson noted Dr. Barefoot focused on work exposure as a causative factor and did not adequately address or even discuss the presence of additional risk factors such as diabetes, obesity, and menopause. Dr. Nicoson noted Type II diabetes makes her 5 to 6 times more likely to develop a peripheral neuropathy. Her symptomatology and nerve issues stem from her medical diagnoses rather than her work. Dr. Nicoson assigned a 3% impairment rating pursuant to the AMA Guides based upon EMG findings without any clinical evidence suggesting carpal tunnel syndrome. However, he stated the impairment is not due to any work-related activities. Dr. Nicoson provided a detailed critique of Dr. Barefoot’s assessment of impairment. He explained numerous ways Dr. Barefoot’s assessment

was contrary to the AMA Guides and/or unsupported by the findings on examination.

Dr. Thomas Gabriel performed a physician peer review regarding work-relatedness of the diagnosis of right cubital tunnel syndrome and prepared a report dated December 26, 2018. Dr. Gabriel stated the right carpal tunnel syndrome and suspected right cubital tunnel syndrome are entirely pre-existing and may have worsened over time, resulting entirely from the natural progression of disease. Dr. Gabriel did not relate the diagnoses of right carpal tunnel syndrome or right cubital tunnel syndrome to any recent work activities and found neither condition was compensable. He stated no evidence in the literature supports cubital tunnel syndrome resulting from secretarial duties.

Dr. Gabriel evaluated Whalin on May 22, 2019. Dr. Gabriel diagnosed mild residual left carpal tunnel syndrome and an asymptomatic electro-diagnostically positive mild left cubital tunnel syndrome. On the right, there appeared to be moderate and persistent right carpal tunnel syndrome with symptomatic mild right cubital tunnel syndrome, despite normal electro-diagnostic studies of the ulnar nerve. Dr. Gabriel stated that, regardless of the cause, Whalin does not have a permanent partial impairment rating for the left upper extremity. He stated it is premature to determine any right upper extremity impairment since Whalin has not reached maximum medical improvement. Dr. Gabriel stated Dr. Burke's recommendation to proceed with right carpal tunnel and cubital tunnel releases is medically appropriate based upon electro-diagnostic studies and clinical exam findings.

The ALJ's findings relevant to this appeal are as follows:

FINDINGS OF FACT AND CONCLUSIONS OF
LAW

**I. Work-relatedness/causation of the cubital
tunnel syndrome**

The Plaintiff's original claim against this Defendant was resolved by Judge Udell Levy, on May 15, 2015 and he found that the Plaintiff had work-related bilateral carpal tunnel syndrome. He was not asked to, and did not make, any findings regarding cubital tunnel syndrome. On January 18, 2019, the Plaintiff filed a claim for cubital tunnel syndrome against a subsequent employer. On November 22, 2019, this Defendant filed a Medical Dispute regarding physical therapy for cubital tunnel syndrome. On January 22, 2020, the subsequent employer agreed to pay for cubital tunnel surgery if done within a certain timeframe, which it was not. All of that, not unreasonably, creates some question as to if claim 2014-00777 is responsible for the bilateral cubital tunnel syndrome.

Frankly, as the Defendant points out in its brief, no doctor ever specifically opines that the cubital tunnel syndrome is related to the June 11, 2013 date of injury. Dr. Barefoot states it is work-related, but again his opinion was rendered with full knowledge of both claims and he does not apportion causation specifically to either claim. One could, possibly, interpret Dr. Burke as assigning causation, but certainly not to a specific date of loss.

Therefore, even as an initial matter the Plaintiff retains the burden of proof and persuasion on work-relatedness/causation. Add the fact that the responsible employer seems unclear to the Plaintiff and there is no specific medical evidence supporting causation against this employer. Frankly, I am genuinely convinced that the cubital tunnel syndrome did not arise while the Plaintiff was employed by the Defendant in claim 2014-00777. This conclusion is supported by Dr. Nicoson.

In reliance on the above analysis and with specific reliance on Dr. Nicoson, the right cubital tunnel syndrome is dismissed as not work-related.

II. Reasonableness and necessity of the cubital tunnel surgery

As noted by the parties this issue is now moot.

III. Medical Dispute (a dispute regarding physical therapy)

In finding the right cubital tunnel syndrome not work-related, the issue of physical therapy for the right cubital tunnel syndrome is resolved in favor of the medical payment obligor.

IV. Benefits per KRS 342.730 and worsening of disability/impairment (PPD)

It is my belief that the Plaintiff continues to have symptoms of numbness, tingling, pain and some cramping, in both of her arms and possibly wrists, as I find her a credible witness. However, I am unconvinced that her current symptoms, at least to the degree any symptoms are worse than they were on May 11, 2015, are related to her June 11, 2013 bilateral carpal tunnel syndrome.

Dr. Burke, who has followed the Plaintiff for almost eight years, did, in 2018, feel that her continued symptoms were at least in part due to carpal tunnel syndrome. However, as she has continued to examine and follow the Plaintiff she increasingly diagnosed either a cervical spine source of the complaints or cubital tunnel syndrome. It is clearly Dr. Burke's opinion no later than February 2020 that the symptoms are not caused by carpal tunnel syndrome, the only work-related condition. In fact, Dr. Burke states the symptoms do not correlate with carpal tunnel syndrome.

While this, of course, is an opinion regarding causation it is helpful when analyzing this claim. If this is a claim for worsening of condition and the work-related condition is carpal tunnel syndrome, and if carpal tunnel syndrome is not the source of the

worsened condition, there is no worsening of the work-related condition.

This conclusion is further supported by Dr. Nicoson, who assigned a 3% impairment rating for the right carpal tunnel syndrome, the same as on May 11, 2015.

In short, I do not think that the Plaintiff's carpal tunnel syndrome has worsened. In reliance on the above analysis and with specific reliance on Dr. Nicoson, the Plaintiff's entire impairment rating for the June 11, 2013 bilateral carpal tunnel syndrome is 3%, which is not a worsening.

V. Order

The right cubital tunnel syndrome is dismissed as not work-related. The Motion to Re-Open is Overruled. The remainder of the May 11, 2015 Opinion remains in effect.

Whalin filed a Petition for Reconsideration seeking additional findings regarding Dr. Barefoot's opinion as to increased impairment related to her employment. The ALJ provided the following findings on reconsideration, *verbatim*:

This matter comes before the undersigned on both parties' Petition for Reconsideration. The Defendant's Petition is SUSTAINED and the name of the Defendant is "Cotton and Associates, LLC." The ALJ sufficiently summarized Dr. Barefoot's opinions and I considered them, regardless of how much they were emphasized. His opinions do not overcome the Plaintiff's basic problem. Her injury in this claim was for bilateral carpal tunnel syndrome and the treating surgeon, Dr. Burke, does not think the Plaintiff's bilateral carpal tunnel syndrome has worsened. Further elaboration regarding Dr. Barefoot's report will not change the outcome. The Plaintiff's Petition is OVERRULED.

On appeal, Whalin argues the ALJ erred in failing to find an increase in impairment and in denying medical treatment for epicondylitis. Whalin asserts

the ALJ's reliance upon Dr. Burke's opinions, there was no increase in impairment, was erroneous. Whalin observes Dr. Burke's February 7, 2020 note shows she complained of pain in the dorsal aspect of the right hand that radiated into the forearm and elbow. Dr. Burke noted Whalin was a candidate for carpal tunnel surgery but, based upon the previous nerve study and her current symptoms that did not match carpal tunnel, treatment was needed for lateral epicondylitis, which usually resolves with physical therapy. These records do not indicate Dr. Burke opined Whalin did not have additional impairment related to her carpal tunnel syndrome. Whalin contends the records merely indicate her symptoms in that visit did not match her carpal tunnel, which had been documented by a nerve conduction study in 2013 (mild bilaterally) and repeat studies in December 2017 showing moderate right carpal tunnel. Whalin notes Dr. Nicoson and Dr. Gabriel did not think the cubital tunnel was work-related, but neither doctor addressed additional impairment. Dr. Barefoot found bilateral nerve neuropathy and left ulnar nerve neuropathy. He also found clinical evidence of a right ulnar nerve neuropathy and noted the history of a left carpal tunnel release on May 22, 2014. With regard to the right upper extremity, he assigned a 14% whole person impairment rating. This is all "new" as there was no previous impairment given for the right upper extremity. With regard to her left upper extremity, he found she now has a 7% impairment rating, with no portion of that impairment related to the left ulnar nerve neuropathy (cubital tunnel). She was previously awarded a 3% impairment rating. Thus, she would now be entitled to a 7% impairment rating on the left.

The burden of proof in a motion to reopen based on a worsening of condition falls on the party seeking to increase the award. Whalin had the burden of proving a change of disability as shown by objective medical evidence of a worsening of impairment due to a condition caused by the injury since the date of the award. *See* KRS 342.125(1)(d); Burton v. Foster Wheeler Corp., 72 S.W.3d 925 (Ky. 2002); Snawder v. Stice, 576 S.W.2d 276 (Ky. App. 1979). Since Whalin was unsuccessful in meeting 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).

In rendering a decision, 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 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). 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).

When reviewing a decision on appeal, the function of the Board is limited to a determination of whether the findings made 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). 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).

In the May 11, 2015 Opinion, Order, and Award, the ALJ Levy determined Whalin sustained bilateral carpal tunnel syndrome resulting in a 3% impairment rating for the left wrist. Carpal tunnel syndrome was the only injury found compensable in the original decision. In the June 22, 2021 Opinion and Order, the ALJ concluded the cubital tunnel condition was not caused by employment with Cotton & Associates, PLLC. The evidence does not compel a finding that Whalin's cubital syndrome was caused by her work for the employer in the 2014 claim. As noted by the ALJ, no doctor specifically opined the cubital tunnel syndrome is related to the June 11, 2013 date of injury. Whalin testified that her additional symptoms began several years after she had been working for the subsequent employer, Cotton, Wolfenbarger & Associates, which is the same history she gave to Dr. Barefoot. Dr. Barefoot stated it is work-related but did not apportion causation specifically to either claim. The ALJ was convinced the cubital tunnel syndrome did not arise while Whalin was employed by Cotton & Associates, PLLC, the employer in Claim No. 2014-00777. This conclusion is supported by Dr.

Nicoson. Dr. Burke opined the symptoms are not caused by carpal tunnel syndrome, the only work-related condition relating to the original claim. On February 6, 2018, Dr. Burke stated the symptoms do not correlate with carpal tunnel syndrome. Thus, the evidence does not compel a finding that any symptoms related to the cubital tunnel syndrome relate to the 2013 injury.

Having failed to prove employment with Cotton & Associates, PLLC caused the cubital tunnel syndrome, Whalin must show the evidence compels a finding of increased impairment related to her carpal tunnel syndrome to succeed on appeal. Because the evidence from Dr. Barefoot falls short of compelling a finding that Whalin has an increase in impairment caused by her employment with Cotton & Associates, PLLC, we affirm. Although Dr. Barefoot assessed a greater impairment rating, Dr. Nicoson assigned a 3% impairment rating for the carpal tunnel syndrome, the same as the determination on May 11, 2015. Further, Dr. Nicoson was critical of Dr. Barefoot's rating, stating it was not in conformity with the AMA Guides and not supported by examination findings. The critique by Dr. Nicoson provided an ample basis for the ALJ to conclude Dr. Barefoot's opinion was not persuasive. Finally, Dr. Barefoot did not state whether the increased impairment he found was the result of work-related trauma sustained in the original claim or a worsening of the carpal tunnel, or whether it was caused by trauma in the subsequent employment with Cotton, Wolfenbarger & Associates.

Because the ALJ determined Whalin failed to prove any elbow condition is related to the 2013 carpal tunnel injury, he appropriately found the medical treatment for epicondylitis is not compensable as part of the 2014 claim.

While Whalin identifies evidence she believes supports a different conclusion, there was substantial evidence presented to the contrary. As such, the ALJ acted within his discretion to determine which evidence to rely upon, and it cannot be said the ALJ's conclusions are so unreasonable as to compel a different result. Ira A. Watson Department Store v. Hamilton, *supra*.

Accordingly, the June 22, 2021 Opinion and Order and the July 3, 2021 Order on Petition for Reconsideration rendered by Hon. Chris Davis, Administrative Law Judge, are hereby **AFFIRMED**.

ALL CONCUR.

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