

Commonwealth of Kentucky
Workers' Compensation Board

OPINION ENTERED: December 3, 2021

CLAIM NO. 201776285

ST. ELIZABETH HOME CARE SERVICES

PETITIONER

VS.

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

MARGARET LEAR and
HON. MONICA RICE-SMITH,
ADMINISTRATIVE LAW JUDGE

RESPONDENTS

OPINION
AFFIRMING

* * * * *

BEFORE: ALVEY, Chairman, STIVERS, Member, and VACANT.

ALVEY, Chairman. St. Elizabeth Home Health Services (“St. Elizabeth”) appeals from the July 29, 2021 Opinion, Order, and Award rendered by Hon. Monica Rice-Smith, Administrative Law Judge (“ALJ”). The ALJ awarded Margaret Lear (“Lear”) temporary total disability (“TTD”) benefits, permanent partial disability (“PPD”) benefits enhanced by the multipliers contained in KRS 342.730(1)(c)1, and

medical benefits for a work-related right knee injury. St. Elizabeth also appeals from the September 13, 2021 Order denying its Petition for Reconsideration.

St. Elizabeth argues the ALJ failed to make specific findings regarding when Lear ceased earning the same or greater wages. St. Elizabeth also argues the ALJ erred in her application of the statutory multipliers contained in KRS 342.730, and did not correctly perform an analysis pursuant to Fawbush v. Gwinn, 201 S.W.3d 5 (Ky. 2003). Finally, St. Elizabeth argues the ALJ erred in finding Lear is unable to earn the same or greater wages into the indefinite future. We find the ALJ performed the appropriate analysis in determining Lear is entitled to an award of PPD benefits based upon the 20% impairment rating, enhanced by the three-multiplier contained in KRS 342.730(1)(c)1, and we therefore affirm.

Lear attempted to settle her claim with St. Elizabeth prior to filing the Form 101. The Form 110-I settlement agreement, signed by Lear and the attorney for St. Elizabeth, was rejected by Hon. Douglas W. Gott, Chief Administrative Law Judge.

Lear, a resident of Louisville, Kentucky, filed a Form 101 on November 4, 2019, alleging she injured her right knee on June 20, 2017 when she stepped into a pothole while performing a home visit to a patient in the course and scope of her employment with St. Elizabeth. Lear has an associate's degree in nursing, and she worked as a nurse for many years.

Lear testified by deposition on January 6, 2021, and at the hearing held May 26, 2021. Lear was born on June 1, 1964. She currently works as a PRN nurse, one day per week, for Bluegrass Surgery & Laser Center ("Bluegrass"). In

June 2017, Lear worked two jobs, alternating weeks. One week she worked for St. Elizabeth, and the next week she worked for Kentuckiana Regional Planning & Development (“KIPDA”) taking care of her two adult handicapped sons.

On June 20, 2017, Lear was on a home visit to a patient in Taylor Mill, Kentucky. After gathering her equipment from her car, Lear turned to walk to the patient’s residence. As she was walking, she stepped into a pothole, and struck her right knee. She testified she experienced immediate right knee pain and swelling. She completed the visit and attempted to see another patient. She was unable to complete the second visit and notified her supervisor of her injury. She was directed to seek treatment at Urgent Care St. Elizabeth in Latonia, Kentucky, where she saw Dr. Meckler (no first name provided). She followed up with KORT Physical Therapy, and was eventually seen by Dr. James Smith, an orthopedic surgeon in Louisville since that is where she resides.

Dr. Smith initially ordered physical therapy and administered an injection to her right knee. She ultimately underwent arthroscopic surgery on her right knee on September 5, 2017. She attempted to return to work for St. Elizabeth afterward, but was only able to work there for six weeks.

Lear continued working for St. Elizabeth until she left to work for Bluegrass in January 2018. She ceased working at St. Elizabeth due to her inability to drive, kneel, squat, and sit. Lear underwent knee replacement surgery in May 2020 and did not work again until August 2020. She also missed a brief period of work due to COVID. She now works only one day per week for Bluegrass due to the limitations stemming from her right knee condition. Lear returned to work after the

initial injury and surgery at the same or higher pay rate, but she was unable to continue in the same position, and she is unable to work a full week. She now earns less than she did prior to the initial injury.

Lear testified she had no knee problems prior to the June 20, 2017 accident. She twisted her knee approximately ten years prior, but any problem she had quickly resolved. Just a few weeks prior to her injury, Lear traveled to Ireland, where she engaged in a lot of hiking.

Lear supported her claim with records from KORT Physical Therapy for treatment she received on June 28, 2017 for problems stemming from stepping in the pothole on June 20, 2017. Those records reflect she experienced pain in the anterior aspect of her knee joint, and she had an antalgic gait. The physical therapist recommended Lear undergo a two-week regimen of physical therapy. She later filed additional records from KORT, including treatment she received on November 16, 2017 and May 15, 2020.

Dr. Jeffrey Fadel evaluated Lear on November 9, 2020. He noted the history of Lear sustaining a right knee injury when she stepped into a pothole. He noted she underwent right knee arthroscopic surgery by Dr. Smith on September 5, 2017, and she returned to work in November 2017. Her symptoms worsened after returning to work. She ultimately underwent a total right knee replacement on May 13, 2020, and she returned to work in August 2020. Dr. Fadel diagnosed Lear with right knee osteoarthritis, worsened by the June 20, 2017 fall. He stated she should avoid repetitive stair climbing, ladder climbing, kneeling, carrying more than thirty pounds, and pushing or pulling greater than forty pounds. Dr. Fadel opined Lear is

unable to work two jobs as she did in the past. He also stated she should wear mid-thigh compression hose. Dr. Fadel assessed a 20% impairment rating pursuant to the 5th Edition of the American Medical Association, Guides to the Evaluation of Permanent Impairment (“AMA Guides”). In a supplemental report dated March 31, 2021, Dr. Fadel stated he had reviewed and disagreed with Dr. Thomas Loeb’s opinions, and stated there should be no apportionment of the 20% impairment rating.

Lear also filed Dr. Smith’s records for treatment from July 14, 2017 to August 7, 2020. Dr. Smith initially noted Lear’s fall on the right knee, which produced swelling, pain, limited range of motion, and positive crepitus. He diagnosed right knee effusion with a right quadriceps tear, right parapatellar bursitis, a hematoma, and right knee osteoarthritis. He performed a partial right knee medial meniscectomy on August 10, 2017. On October 18, 2017, he noted Lear complained of joint pain and poor balance. He found she reached maximum medical improvement (“MMI”) on November 10, 2017, and he assessed a 4% impairment rating pursuant to the AMA Guides. On May 13, 2020, Dr. Smith performed a right total knee replacement. On August 7, 2020, he noted Lear demonstrated nearly full range of motion, and he permitted her to return to work with the limitation of no lifting greater than twenty pounds. He indicated he would follow up with her in five to six weeks.

Dr. Loeb evaluated Lear at St. Elizabeth’s request on January 20, 2021. He noted the history of the June 20, 2017 accident. Dr. Loeb stated Lear presumably sustained a medial collateral meniscus tear, but that she had pre-existing

tri-compartmental arthritis. He noted she underwent arthroscopic medial and lateral meniscectomies on September 5, 2017 for which she reached MMI on November 10, 2017. Because Lear had additional knee pain complaints in November 2019, she underwent a right total knee replacement on May 13, 2020. Dr. Loeb noted Lear has “fairly good” range of motion. Lear reported edema toward the end of the workday.

Dr. Loeb stated the initial injury on June 20, 2017 was a contusion with a hematoma of the right knee which aggravated the underlying dormant tri-compartmental arthritis into disabling reality. He stated the meniscus tears most likely existed prior to the injury date and the accident brought her underlying dormant arthritis into disability reality. She exhibited a minimal antalgic gait, but he did not believe it was significant enough to cause her to experience back problems. He opined Lear has a 15% impairment rating pursuant to the AMA Guides, of which only 11% is due to her work injury. He advised Lear to avoid stair climbing, kneeling, crawling, lifting in excess of twenty-five pounds, and pushing or pulling greater than forty pounds. Dr. Loeb stated, “I do not believe she could return to the job at St. Elizabeth Home Care.”

A Benefit Review Conference was held on May 6, 2021. The issues preserved for determination included benefits per KRS 342.730, work-relatedness/causation, exclusion for pre-existing disability, current wages, injury as defined by the Act, post-injury wages, credit for overpayment of TTD benefits, and the proper use of the AMA Guides.

In the Opinion, Order, and Award issued May 26, 2021, the ALJ determined Lear sustained a work-related right knee injury on June 20, 2017. She

noted Lear returned to work after the date of injury to the same or higher wages. The ALJ determined the 20% impairment rating Dr. Fadel assessed was the most appropriate. She declined to apportion any of the impairment to a pre-existing active disability since there was no evidence Lear was symptomatic prior to June 20, 2017 as required by Finley v. DBM Technologies, 217 S.W.3d 261 (Ky. App. 2007). The ALJ determined Lear does not have the ability to return to her work at St. Elizabeth based upon her own testimony, and further based upon Dr. Loeb's opinion. The ALJ performed an analysis pursuant to Fawbush v. Gwinn, *supra*, since she determined both the two and three-multipliers are applicable. The ALJ also determined Lear is unable to continue earning the same or greater wage into the foreseeable future. The ALJ additionally determined St. Elizabeth overpaid TTD benefits at the rate of \$139.87 per week and awarded credit for the overpayment.

St. Elizabeth filed a Petition for Reconsideration arguing the ALJ erred by awarding the three-multiplier. The ALJ denied the Petition by Order entered September 3, 2021.

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). 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 inadequate 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 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, supra.

In reaching a determination, the ALJ must also provide findings sufficient to inform the parties of the basis for his 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); Big Sandy Community Action Program v. Chafins, 502 S.W.2d 526 (Ky. 1973).

The ALJ relied upon the impairment rating assessed by Dr. Fadel. She determined Dr. Fadel more appropriately calculated the impairment rating based upon Lear's condition. This explanation sufficiently supports the ALJ's reliance upon the 20% impairment rating, which will not be disturbed.

The next issue is whether the ALJ performed the appropriate analysis in applying the three-multiplier contained in KRS 342.730(1)(c)1. The ALJ determined the application of the three-multiplier was appropriate since although Lear had returned to her previous job with St. Elizabeth, she could not continue, and

sought other employment. She also noted even Dr. Loeb indicated Lear could not perform her past work. Additionally, Lear continued to have difficulty after her right knee replacement, requiring her to further limit her job activities and working hours.

Because Lear returned to work, at apparently the same or greater wage, the ALJ was required to perform an analysis pursuant to Fawbush v. Gwinn, supra, requiring a determination of which multiplier contained in KRS 342.730(1)(c) is "more appropriate on the facts" when awarding permanent partial disability benefits. Id. at 12. KRS 342.730(1)(c)1 states, in relevant part, as follows:

If, due to an injury, an employee does not retain the physical capacity to return to the type of work that the employee performed at the time of injury, the benefit for permanent partial disability shall be multiplied by three (3) times the amount otherwise determined under paragraph (b) of this subsection.

KRS 342.730(1)(c)2 further provides:

If an employee returns to work at a weekly wage equal to or greater than the average weekly wage at the time of injury, the weekly benefit for permanent partial disability shall be determined under paragraph (b) of this subsection for each week during which that employment is sustained. During any period of cessation of that employment, temporary or permanent, for any reason, with or without cause, payment of weekly benefits for permanent partial disability during the period of cessation shall be two (2) times the amount otherwise payable under paragraph (b) of this subsection.

When a claimant satisfies the criteria of both (c)1 and (c)2, "the ALJ is authorized to determine which provision is more appropriate on the facts and to calculate the benefit under that provision." Kentucky River Enterprises, Inc. v. Elkins, 107 S.W.3d 206, 211 (Ky. 2003). As a part of this analysis, the ALJ must determine whether "a worker is unlikely to be able to continue earning a wage that

equals or exceeds the wage at the time of injury for the indefinite future." Fawbush v. Gwinn, supra. In other words, is the injured worker faced with a "permanent alteration in the ... ability to earn money due to his injury." Id. "That determination is required by the Fawbush case." Adkins v. Pike County Bd. of Educ., 141 S.W.3d 387, 390 (Ky. App. 2004). If the ALJ determines the worker is unlikely to continue earning a wage that equals or exceeds his or her wage at the time of the injury, the three-multiplier pursuant to KRS 342.730(1)(c)1 is applicable.

Fawbush v. Gwinn, supra, articulated several factors an ALJ can consider when determining whether an injured employee is likely to be able to continue earning the same or greater wage for the indefinite future. Those factors include the claimant's lack of physical capacity to return to the type of work he or she performed, whether the post-injury work is done out of necessity, whether the post-injury work is performed outside of medical restrictions, and if the post-injury work is possible only when the injured worker takes more narcotic pain medication than prescribed. Id. at 12. As the Court in Adkins v. Pike County Bd. of Educ., supra, stated, it is not enough to determine whether an injured employee is able to continue in his or her current job. The Court stated:

Thus, in determining whether a claimant can continue to earn an equal or greater wage, the ALJ must consider a broad range of factors, only one of which is the ability to perform the current job.

Id. at 30.

Lear returned to work for St. Elizabeth earning the same or higher pay. She was unable to continue to perform that job due to residuals from her right knee injury, so she sought other employment. She continued to work the job at

Bluegrass until she underwent the right total knee replacement. Afterward, she was unable to continue in that position, and she began working a lighter duty job. She was ultimately required to reduce working to one day per week. We find the ALJ appropriately performed the analysis pursuant to Fawbush v. Gwinn, supra, and determined the application of the three-multiplier most appropriate under the circumstances. Likewise, because Lear is only able to work one day per week, we find the ALJ did not err in determining she is unable to continue earning the same or higher pay into the indefinite or foreseeable future.

Accordingly, we **AFFIRM** the July 29, 2021 Opinion, Order, and Award, and the September 3, 2021 Order on Petition for Reconsideration rendered by Hon. Monica Rice-Smith, Administrative Law Judge.

STIVERS, MEMBER, CONCURS.

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